GP|Solo Law Trends & News
Practice Area Newsletter

A service of the ABA General Practice, Solo & Small Firm Division

April 2006 **Volume 2, Number 3**

In this issue...

Dear Division Member:

Below is the Spring issue of Law Trends. As with prior issues, this e-newsletter includes articles, checklists, and other valuable practice information and practical tips, all from each of our substantive practice areas in the Division. This issue also includes an article about the differences between "Outlook" and "Practice Management Software as well as an article about the importance of e-discovery as it pertains to Solo and Small Firm Practitioners. This issue also includes articles providing new in-depth analysis of major changes in the bankruptcy law, checklists for domestic relation cases, a checklist for same-sex estate planning and many more. Thus, I am delighted to attach your Spring edition of Law Trends.

Law Trends is almost two years old. Each edition continues to provide meaningful articles for each of you. We hope this publication continues to be helpful to you in your daily practice. I encourage you to take just a few moments to read the list of articles included. Of course, it is yours to download and keep as a reference for the future. And, as in the past, you can either download specific articles or you may download the entire newsletter by clicking the pdf link located below .

There are many Division members integrally involved in putting this e-newsletter together. Their hard work and dedication are certainly present. I thank them for producing this issue for the Division. Special thanks to Jim Schwartz for heading up the effort and to Doug Knapp and the other staff members for their work in getting Law Trends to you.

I hope each of you enjoy this issue of Law Trends. The publication will continue quarterly and we hope you continue to find it as a source of valuable information. If you are interested in either writing an article for the summer issue

or participating in the production of the newsletter or are interested in getting involved in any way, please contact Jim Schwartz, at attyjls@aol.com. Jim can direct you to the proper practice area if you would like to submit an article to be considered for publication in one of these newsletters or help you get involved in publishing it. Also, if you have any questions, comments or suggestions about this issue or other things you would like to see in the future, please contact Jim or me.

I hope to see you at the Division's Spring meeting in Kansas City.

Best regards,

Dwight L. Smith , Chair

Business Law

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Profile: Scott Laufenberg, Business Law Group Coordinator

Scott received his undergraduate degree from the University of Wisconsin – Platteville, and he received his J.D. and a master's degree in public administration from Drake University. After clerking for the Kentucky Court of Appeals upon graduation, he currently practices with the firm of Kerrick, Stivers & Coyle, P.L.C. in Bowling Green, KY. He is also an adjunct professor at Western Kentucky University where he teaches an upper-level course on legal principles to students pursuing degrees in business-related majors.

Estate Planning

How Clients Can Organize Their Affairs

What Can a Client Do With a Trust?

Advising Same-Sex Couples

Profile: Karla Y. Vogel, Estate & Financial Planning Group Newsletter Editor

Karla Y. Vogel, Esq., CLU, ChFC is the founder of the Vogel Law Office and is licensed to practice law in the state of Georgia. Ms. Vogel has over seventeen years experience in the financial services industry, which serves to enhance her law practice in the areas of estate planning and administration, resolution of probate disputes, real estate litigation, and tax controversies. In addition to the practice of law, she arbitrates securities matters as a Panel Arbitrator for the National Association of Securities Dealers – Dispute Resolution. Using her training as a Reconciler from Peacemaker Ministries, Ms. Vogel helps families and businesses resolve interrelational conflicts.

Family Law

The Divorce Client's Notebook

10 Early Signs Your Client's Going To Lose Custody

Temporary Fee Awards

Profile: David Wolfe, Family Law Group Newsletter Editor

Mr. Wolfe is an associate in the litigation department of Skoloff & Wolfe, P.C. in Livingston, New Jersey, where he practices in the real property valuation group, the family law group and in the general litigation group. Mr. Wolfe was formerly an associate in the litigation department at the law firm of Davis Polk and Wardwell in New York.

Mr. Wolfe holds multiple positions in the American Bar Association and the New Jersey State Bar Association. He currently serves as the Editor of the ABA GP Solo Online Newsletter for Family Law, Juvenile Law and Elder law and is a member of the ABA YLD's National Conference Team. He is also the Chair of the New Jersey State Bar Association's Committee on Real Property Tax and Procedure.

Mr. Wolfe received his J.D. from New York University School of Law in 2002 and graduated with honors from Cornell University in 1998.

Litigation

How To Become An Agent For Change In Your Law Firm

Document Spoliation: How To Lose Your Case Before You Get To Court

How to Send Learned Treatises to The Jury Room

How To Rat Out A Client And Live To Tell About It

E-discovery for the Solo or Small Firm Practitioner – what you need to know and why

How Practice Management Software is Different from Outlook

Profile: Henry M. DeWoskin, Litigation Group Coordinator

Henry M. DeWoskin is a partner at the law firm of Alan E. DeWoskin, P.C. in St. Louis, Missouri. His practice consists of wills, estate planning, military law, probate, domestic relations, social security and general civil litigation. Henry holds multiple positions in the GP Solo & Small Firm Division and the YLD of the American Bar Association and the Bar Association of Metropolitan St. Louis. In addition, he is a Major in the Judge Advocate General's Corps in the United States Army Reserves. Henry received his B.A. from Bucknell University in 1992 and his J.D. from Temple University in 1996.

Real Estate

12 Ways to Foul Up a Real Estate Transaction

Don't Be A Victim Of Predatory Lending

What Every Lawyer Needs To Know About Real Estate Leases: A Jargon Glossary

Profile: Evan L. Loeffler, Author

Evan Loeffler is of counsel to the Seattle law firm of Harrison, Benis & Spence, LLP, where his practice emphasizes landlord-tenant relations and real estate litigation. He received his law degree from Gonzaga University School of Law in 1994. He is the author of the chapter on landlord-tenant law and the co-author of the chapter on mobile home landlord-tenant law in the Washington Lawyers Practice Manual. He frequently lectures on the subject on ethics and landlord-tenant law for realtors, lawyers, apartment owners and tenants, and is on the faculty for several CLE programs.

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Individual Chapter 7 and 13 Checklist[1] [2]

Pre-Filing

____ Disclosures to Client – within 3 days of initial meeting (11 U.S.C, §§ 527 and 342(b)(1);

____ Initial Fee Agreement within 5 days of initial meeting (11 U.S.C, § 528(a))

____ Credit Counseling Certificate (11 U.S.C, § 109(h))

Due On Petition Date

____ Voluntary Petition (11 U.S.C. § 301 and Bankruptcy Rule 1002))

____ Statement of Social Security Number (Bankruptcy Rule 1007(c) and (f))

____ Certificate of Credit Counseling (and Debt Repayment Plan, if applicable) - (11 U.S.C, § 109(h), 521(b), and Bankruptcy Rule 1007(b)(3) and (c))

____ Certificate of Notice to Individual Consumer Debtors (11 U.S.C. §521(a)(1)(B)(iii) and 342(b))

____ List of Creditors with Cover Sheet (11 U.S.C. §521(a)(1)(A) and Bankruptcy Rule 1007(a)(1))

Within 15 Days After Filing Petition

____ Schedules A – J and Summary of Schedules (11 U.S.C. §521(a)(1)(B)(i), (ii) and (v), and Bankruptcy Rule 1007(b)(1)(A), (B), (C) and 1007(c)).

____ Statement of Financial Affairs (11 U.S.C. §521(a)(1)(B)(iii) and Bankruptcy Rule 1007(b)(1)(D) and 1007(c))

____ Chapter 13 Statement of Current Monthly Income and Disposable Income Calculation (Chapter 13 Only) (11 U.S.C. §1325(b)(2) and (3), and Bankruptcy Rule 1007(b)(6) and 1007(c))

____ Chapter 13 Plan and Related Motions (Chapter 13 only) (11 U.S.C. §1321 and Bankruptcy Rule 3015(b))

____ Chapter 7 Statement of Current Monthly Income and Means Test (Chapter 7 only – Primarily Consumer Debts Only) (11 U.S.C. § 707(b) and Bankruptcy Rule 1007(b)(4) and 1007(c))

____ Disclosure Statement of Attorney Compensation (Bankruptcy Rule 2106(b)

____ Copies of Pay Stubs (payment advices) for 60 days prior to filing – or statement saying none exist (11 U.S.C. §521(a)(1)(iv) and Bankruptcy Rule 1007(b)(1)(E) and 1007(c))

____ Record of any interest the Debtor has in an Educational IRA, or similar account (11 U.S.C. §521(c) and Bankruptcy Rule 1007(b)(1)(F) and 1007(c))

_____ Statement disclosing reasonably anticipated increases in income or expenses over next 12 months (11 U.S.C. §521(a)(1)(B)(vi))

____ Statistical Summary of Certain Liabilities (28 U.S.C. §159)

Within 30 Days After Filing Petition

____ Statement of Intentions (Chapter 7 only) (within 30 days after petition date or on or before meeting of creditors, whichever is earlier) (11 U.S.C. § 521(a)(2))

____ Commence Chapter 13 Plan Payments (Chapter 13 Only) (11 U.S.C. §1326(a)(1))

____ Pay adequate protection payments (Chapter 13 Only) (11 U.S.C. §1326(a)(1))

At Least 7 Days Before Section 341 Meeting

____ Copy of most recently filed tax year return to the case Trustee (11 U.S.C. §521(e)(2))

At Least One Day Before Section 341 Meeting

____ File all tax returns with taxing authorities for previous 4 years (Chapter 13 Only) (11 U.S.C. §1308)

Within 60 Days After Filing Of Petition

____ Provide proof of insurance to secured creditor (Chapter 13 Only) (11 U.S. C. §1326(a)(4)

Within 45 Days After First Date Set For Meeting Of Creditors

____ Statement regarding completion of Personal Financial Management Course (Chapter 7 Cases Only) (11 U.S.C. §727(a)(11) and Bankruptcy Rule 1007(b)(7) and 1007(c))

Annually

____ Federal Tax Returns when filed with taxing authority (Chapter 13 Only) (11 U.S.C. § 521(f)(1)) (only if requested by court, UST or party in interest)

____ Annual Statement of Income and Expenditures and monthly income of Debtor showing how income, expenditures and monthly income are calculated (Chapter 13 only) (11 U.S.C. §521(f)(4)) (only if requested by court, UST or party in interest (beginning 90 days after end of tax year or 1 year after commencement of case, whichever is later, if plan not confirmed by such later date, and annually after plan confirmed not later than 45 days before anniversary of confirmation of plan)

No Later Than Last Payment Made In Chapter 13 Case

____ Statement regarding completion of Personal Financial Management Course (Chapter 13 Only) (11 U.S.C. §1328(g) and Bankruptcy Rule 1007(b)(7) and 1007(c))

No Earlier Than Date Of Last Payment Under The Plan

____ Statement under 11 U.S.C. §522(q) as to whether proceeding pending in

which debtor might be found guilty for 11 U.S.C. §522(q)(1)(A) debt or liable for 11 U.S.C. §522(q)(1)(B) (Chapter 13 Only) (11 U.S.C. §522(q) and Bankruptcy Rule 1007(b)(8) and 1007(c))

[1] This checklist is for informational purposes only. This checklist reflects the requirements found in the Bankruptcy Act and the Federal Rules of Bankruptcy Procedure [Interim]. Local Rules may require additional filings and/or require that certain documents, such as the Social Security Number Statement, not be filed. Confirm your local requirements.

[2] Prepared by Russell B. Adams III, Chung & Press, P.C., McLean, Virginia.

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Enhancing Your Expert Witness: Impressively Introducing Your Expert

***By Bruce Ridley*[1]**

I. If You Have a Choice

Almost all cases call for expert testimony. Often, it is a doctor or other medical expert. It may be an engineer, an accident reconstruction expert, or a statistician. Usually, the case will turn on which expert the trier of fact finds most convincing. This may mean which expert has the best facts to which to testify. However, this is not always the case.

Some experts never should be placed in the witness chair. They create problems for their attorneys. Some behave in a superior manner and repeatedly use huge, complicated words. Others cannot seem to explain anything in words an impatient, bored jury would have the patience to attempt to understand. Still others speak at the pace of auctioneers or in a deathly monotone. Some can make opinions but not give short, concise reasoning to support those opinions. Some may have poor reputations in their expert communities. Some just are annoyed at having to testify, even though they are being paid for their testimony.

Often, an attorney is bound by the experts his or her client has seen. It may be an attending physician, or it may be an examining physician performing an independent medical examination. It may be an expert accident reconstruction engineer chosen months or years before by one's client. Sometimes, an attorney may have the opportunity to choose among various experts an injured party has seen. If there is a chance to choose, choose carefully.

II. Choose, Avoid, Prepare, Enhance

There is an acronym some attorneys use consciously and most use

subconsciously: *CAPE*. Its letters stand for: ***C**hoose; **A**void; **P**repare; **E**nhance.* Basically, an attorney must **choose** the most effective expert available, often from experts who already are involved in the case. For instance, in workers' compensation law in Washington State, the testimony of an attending physician should receive special consideration.[2] For an attorney with such an expert, giving up the advantage of the special consideration is not something easily done. However, there may be more than one doctor who may fit under the aegis of attending physician, or there may be another reason for choosing not to call an attending physician. Likewise, specialty, timing of examination, and other factors may determine which examining physician an attorney should call. CAPE will increase your chances at hearing, and they may increase the potential for a favorable settlement.

Avoid the types of experts who cause problems for presenting your best case, if possible.

Prepare all experts well. This is not the subject of this article, but it is the key element in presenting any witness. It must be done before trial, when you are organizing your case, and it must be done thoroughly. By the time your expert appears on the stand, he or she must know the exact elements of the case you have to prove, and you must know the exact answers the expert will give to your questions. If there are complicated expert terms your expert will use, such as *patellofemoral chondromalacia*, your expert must be prepared to explain such terms in short, simple sentences the jury can understand and remember.

III. Enhance

This brings us to the last word from the acronym, *Enhance*. This is the focus of this article. The questions you present an expert witness at hearing constitute part of your preparation, but more, it is your effort to introduce your witness to the trier of fact. It is your best introduction of your witness to the jury so as to show the heighth and depth and breadth of your expert's expertise. It is the "WOW factor."

You must be patient and complete. Introduce your expert carefully. For the best result, you must present every aspect of your expert's training, knowledge, and skill to the trier of fact. *Remember, whenever your expert uses a technical term or a term of art in an answer, immediately follow that answer with a request to explain any such term or terms.*

Here is a general format.

1. Name and address. Have the expert spell his or her last name.

2. License or certification in the jurisdiction [and other jurisdictions].

3. Witness' specialty.

4. Witness' explanation of that specialty.

5. Tying the specialty to the specific issue at bar, e.g., tying a doctor's medical training and clinical expertise to include arthritic processes and the results of trauma on the spine in a case involving a claim for a cervical injury. This may require extensive questioning, narrowing down from general expertise to more specific expertise. If so, be patient and do that questioning.

6. The expert's use of his or her specialty in reading, interpreting, and analyzing scientific testing appropriate to that specialty, e.g., a chemist using results from a gas chromatograph or a neurosurgeon using MRI or CT scan findings.

7. Frequency of the expert's use of such scientific testing.

8. The expert's certification in the specialty.

9. The date of certification.

10. The requirements for the certification the expert had to meet.

11. The identity of the certifying entity, and the scope of it [national or international generally are best].

12. Undergraduate study, when the expert graduated, and any honors awarded.

13. Graduate study, when the expert graduated, and any honors awarded.

14. History of practice in the field of expertise, from graduation from graduate school to present. [Note: military affiliation sometimes will affect a jury.]

15, Membership in various expert societies, and which ones.

16. During work as an expert, did the expert routinely review various authoritative texts and journals specific to his or her specialty?

17. Has the expert maintained the license or certification of the expertise with continuing education courses?

18. The number of conferences and meetings the expert has attended dealing with the expert's general and specific expertise, e. g., a neurosurgeon who may attend seminars on neurosurgery or a subspecialty, such as oncological neurosurgery.

19. Any papers presented. Elicit the number.

20. Any publications in the specialty. Elicit the number. If any are relevant to the case at bar, have the expert identify them and their publishers.

21. Active or past privileges recognizing expertise, e.g., the right for an astronomer to use an observatory or a doctor having hospital privileges.

22. Knowledge of specific standards to be applied in the case at bar.

23. Frequency with which the expert has applied those standards in the past.

24. Explanation of the standards and the entity or entities promulgating the standards.

25. In many cases, an expert may only review records or perform a one-time examination of a person or a site of an event. In such cases, you must ask the expert, step-by-step, if his or her analysis of the evidence would have differed in any way from having been involved in issues at the time the relevant events occurred.

26. Emphasize the time and effort the expert expended in analyzing the issues at bar on which he or she is opining.

27. The extent of the records the witness has reviewed concerning the case at bar. This may include records specific to a person, a place, or an event.

28. The extent of any applicable scientific studies the expert has reviewed applicable to the case at bar.

Well, now you should be ready to examine your expert as to what opinions he or she has as to the case at bar, how the expert arrived at those opinions, and why he or she excluded or rejected alternative theories. Remember, CAPE is only the start, the beginning entry to the presentation of your case. If you establish the expertise of your witness, you still must meet every element of proof. To prevail, you must do so better than your adversary. When you have provided a solid foundation for your expert, you have optimized your chances to have the trier of fact adopt your expert's opinions.

Mr. Ridley is an attorney and has been an industrial appeals judge with the Washington Board of Industrial Insurance Appeals since 1986. He is an administrative law judge and generally hears cases involving workers' compensation.

[1] The opinions expressed herein are those of Judge Ridley and not those of the Board of Industrial Insurance Appeals.

[2] *Spalding v. Department of Labor & Indus.*, 29 Wn.2d 115 (1947); *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569 (1988).

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Lawyers To the Rescue

By Tay Robinson

Like an actor after a brilliant performance, sometimes the legal profession deserves to take a bow.

In recent years, an astonishing 43 state legislatures and the federal government have enacted laws to protect tort victims receiving structured settlement payments from abusive practices by companies trying to buy their payments. These state laws collectively complement enactment in 2002 of a tough federal consumer protection law (Public Law No. 107-134, 115 Stat. 2427) that offers further protection for injury victims.

In large part, the federal and state laws came about because attorneys from across the legal spectrum joined together to demand action. As Tyler Thompson, past president of the Kentucky Academy of Trial Attorneys, puts it, “It really didn’t matter whether you worked with the defense or plaintiff. This was a clear-cut matter of the law not adequately protecting vulnerable citizens and everyone recognized that action had to be taken.”

Structured settlements are enjoying a renaissance, with annual funding premiums rising nearly 50 percent since 1998.

The driving force is not hard to see. Terrorism fears and anemic stock market returns have left everyone wondering how to achieve long-term financial security. Structured settlements guarantee it.

That’s why the timing of the state and Federal actions couldn’t be better. In recent years, factoring companies have blitzed the airwaves, enticing tort victims to sell their payments for quick cash. According to government documents, one company alone bought nearly 90,000 television ads during an

18-month period – which helped drive its purchases of structured settlement payment streams to more than $430 million.

Along with this furious growth came major problems: hidden fees, strong-arm sales tactics, one-sided contracts, and discount rates as high as 80 percent (meaning the injury victim received barely 20 cents per dollar of payment).

Robert E. Sanders, a Governor of the Association of Trial Lawyers of America, speaks for many plaintiff attorneys when he says, bluntly, “This was an outrage. We sweat blood to gain a good settlement for these poor people and purposely set the money in a structure for their security. Then some company would entice them to sell their payments for 60 cents on the dollar.”

In 1997, Illinois became the first state to pass a consumer protection law against abusive practices. The next year, Kentucky and Connecticut followed. In 1999 and 2000, the floodgates opened as 27 more states passed laws mandating new protections.

That set the stage for Congress and the White House to act. Under the federal law, a company trying to purchase a victim’s structured settlement payments must first gain state court approval. Otherwise, that company must pay a whopping 40 federal percent excise tax on the difference between the *undiscounted* amount of the payments being acquired and the amount actually paid to the victim.

The word “undiscounted” is crucial. Say a company tries to buy $1000 per month from an accident victim for the next 100 months. Previously that company might have argued that the “present value” of those eight years of payments might be only $80,000 because of the uncertainty that inflation may reappear.

Under the new law, however, the company is legally bound to value those payments at the full $100,000 – even though some payments will not be made until 2012.

The law also mandates full disclosure to the state court of any dependents the victim may have and their welfare. That prevents a parent or guardian from selling payments meant for a minor, without informing the court.

Finally, the federal law instructs that judges may not approve transactions that “contravene… state statutes.” Since nearly every state prohibits the transfer of workers compensation payments, injured workers have a necessary new

financial protection.

Congress, the President and 43 states have done the country a great service. Perhaps equally important, the legal community deserves its well-deserved bow. Congress and the states acted because an unprecedented coalition of lawyers nationwide – both plaintiff and defense – came together to demand action.

“This was a true labor of love,” says attorney Richard D. Lawrence, past president of the Kentucky Academy of Trial Attorneys and ATLA Board of Governors. “No one stood to gain financially from this new law. But they were willing to take action because, deep down, they recognized that it was the right thing to do.”

Since the legal profession has suffered its share of black eyes in recent years, it seems only right to offer kudos for helping enact such strong new consumer protections for structured settlement recipients.

Tay Robinson is the president of Strategic Settlements in Covington, KY.

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Marketing Through Good Business Practices

By Andrea Goldman, Esq.

During a recent visit to the manicurist, a customer approached the owner after her manicure. She said she was not happy with the result, and she wanted her money back. The owner said the service had already been provided, and refused to reimburse her. The customer stormed away, never to return.

As a retailer or provider of services, your reputation and the good will you generate are instrumental in creating and maintaining business. And yet, all businesses experience conflicts with customers from time to time. The manner in which you handle them encourages loyalty.

Networking seminars tell us that it takes five contacts in order to generate new business. Given the amount of time and effort required in order to attract customers, maintaining current relationships has become an important aspect of marketing. Using the skills required for the mediation process is an excellent way of resolving disputes with clients or customers, while further marketing your services. The following are the steps generally followed during mediation:

1. Give the person an opportunity to tell his or her story
2. Summarize his/her version of the story.
3. Discuss what he/she would like to see happen to resolve the disagreement.
4. Generate further ideas for possible solutions.
5. Cooperatively choose amongst these solutions.
6. If necessary, write up an agreement, and have both parties sign the agreement.

One would apply these principles to a problem with a customer or client by first calmly listening. The tendency of most people in these situations is to become defensive. No one likes to be accused of wrongdoing. However, in a business

setting, a defensive response is shortsighted. When people feel “heard,” problems are more easily resolved. In fact, giving someone a chance to tell his or her story goes a long way towards resolving the dispute in many cases.

The next important step is to apologize. Even if you believe that you are in the right, you can still express regret that your client has had a problem. I am constantly amazed in mediations by the effect that an apology has on the “wronged” party. You, as the provider of the product or service, lose nothing by apologizing, but it generally carries a great deal of weight with the customer.

Ask your client how he or she would like to see the matter resolved. You might be surprised to find that his/her solution can be easily implemented. If the solution is impossible, offer another alternative, but explain your reasons for refusing. In addition, enlisting the customer’s help in creating alternatives makes him/ her feel like an active participant in the process, and he/she will feel acknowledged as a result.

If the possible resolution is not accepted, it is time to think about a compromise. Sellers must keep the big picture in mind. A small loss now will buy you good will and potential for more business in the future. Keep in mind that brainstorming and coming up with creative options may result in additional business. A discount on future services, a free item to go along with something that is bought, etc. will be mutually beneficial.

When applying this approach to the situation with the manicure, the owner of the shop had a number of more positive answers to propose to the disgruntled client. She could have offered to re-do the job immediately, or an even better marketing tool would have been to give the client a coupon for a free manicure for the next time. Even if the woman did not use the coupon, she might tell others about the fair treatment she received.

In the second part of this article, I will address what to do when a dispute cannot be resolved, and how to prepare for a lawsuit.

Andrea Goldman is a partner in the law firm of Gately & Goldman, LLP, in Newton, Massachusetts. She focuses on construction/contractor, business, and consumer disputes as well as mediation and arbitration. Ms. Goldman is also fluent in Spanish and French. She can be reached at (617) 969-8555 x201 or agoldman@gately-goldman.com.

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Who Is a Debt Relief Agency Under the Bankruptcy Reform Act

By Corinne Cooper

Excerpt from the book Attorney Liability in Bankruptcy (ABA 2006)

What Is a DRA?

"Debt Relief Agency" is defined in § 101(12A).

> *The term "debt relief agency" means any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under Section 110 . . . .*

This definition has four elements. Let's explore them a step at a time.

• What's a Person?

To be a DRA, you first have to be a "person" under the Code. If you aren't a person, you aren't a DRA. § 101(41):

> *The term "person" includes individual, partnership, and corporation, but does not include governmental unit . . . .*

This one is easy enough to apply to attorneys, if you aren't a governmentalunit. Whether you practice law as an individual, or in a law firm, you qualify as a person.

• What is Bankruptcy Assistance?

Second, you must provide bankruptcy assistance. As noted above, this doesn't mean just assistance in filing a bankruptcy. Under § 101(4A), "bankruptcy assistance" means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing:

- information, advice, counsel, document preparation, or
- filing, or
- attendance at a creditors' meeting, or
- appearing in a case or proceeding on behalf of another, or
- providing legal representation with respect to a case or proceeding under the Bankruptcy Code.

• What's an Assisted Person?

Bankruptcy assistance must be provided to an assisted person. That definition

in turn has three parts:

1. Person (see above)

2. Primarily consumer debts: "Consumer debts" is a defined term in the Code:

> *§ 101(8) The term "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose . . . .*

This definition is used in many state and federal laws in addition to theCode, and its meaning is well established.

3. Non-exempt assets value is less than $150,000

This may be the trickiest part of the definition (see the discussion in the text). If the client has no non-exempt assets, she's an assisted person. If the debtor has non-exempt assets in excess of $150,000, then she is not an AP and, as to that case, the attorney is not a DRA.

• What Is Money or Other Consideration?

On its face, there isn't much controversy here. Bankruptcy clinics that provide free advice to debtors are not DRAs. Any consideration is sufficient, and nothing in the statute says it has to come from the AP.

Could a promise made by a debtor to the attorney as a condition of representation—as in, "I promise to deliver my pay stubs and tax returns to you by next Friday"—constitute consideration? It does under contract law, but surely this wasn't intended by the BRA.

Now let's apply these definitions:

Who May Be a Debt Relief Agency Under the Bankruptcy Reform Act?

1. Suppose a woman goes to an attorney and says, "My ex-husband has just filed for bankruptcy. How will this affect me?" Like most folks, this woman's own debts are primarily consumer obligations, and her non-exempt assets are worth less than $150,000. Now, suppose the attorney:

- looks over the property and debt allocation in the divorce decree and tells the woman which items might be excepted from the ex-husband's discharge,

- attends the ex-husband's § 341 meeting of creditors, or

- files a complaint to determine the dischargeability of any of the divorce debts.

Under the plain language of the statute, the woman is an assisted person and the attorney has rendered bankruptcy assistance. This attorney is a debt relief agency and must comply with all the mandates of Code §§ 526-528.

2. Suppose the attorney says to the woman, "Let me look over the papers and I'll get back to you." That might be enough to become a DRA; the definition of "bankruptcy assistance" includes "services sold or otherwise provided . . . with the express or implied purpose of providing information, advice, [or] counsel."

3. Suppose, instead of the debtor's ex-wife, it's the debtor's mother who shows up at the attorney's office because the trustee served her with a complaint to recover her Mother's Day gift as a fraudulent transfer, or a loan repayment as a

preference. The debt relief agency definition would apply, as long as Mom's debts and assets meet the "assisted person" standard. Informing, advising, or counseling Mom about the complaint is bankruptcy assistance, as is representing her against the trustee!

If no consideration has changed hands yet, the DRA definition hasn't kicked in. If the attorney realizes the problem and declines to represent her, no consideration has been *paid* .

But doesn't the client fit the meaning of a *prospective* assisted person? If "prospective assisted

person" doesn't include potential clients who haven't yet entered into a relationship with the attorney, it's hard to know what the term means. And advising a "prospective assisted person" turns the attorney into a DRA.

4. Some creditors' lawyers are DRAs as well. Lawyers who do no more than fill out a proof of claim form on behalf of their consumer clients could get swept into the definition as well. "Document preparation," without more, appears to be enough to constitute bankruptcy assistance.

5. Plaintiffs' personal injury lawyers are in the same boat. Suppose you represent a person who has been seriously injured by a defendant who then files bankruptcy. When you and the client, who qualifies as an assisted person, begin discussing the impact that this will have on the case, you are giving bankruptcy assistance and are a DRA.

The same is true if the plaintiff has thousands in unpaid medical expenses, his mortgage is in default, and the credit card companies are hounding him. He comes to you to file suit against the person who injured him. But he's worried about his ability to stave off foreclosure during the pendency of the suit. Wouldn't bankruptcy be one of the options on the table for discussion? If so, he's an assisted person, you're giving bankruptcy assistance, and you're a DRA.

6. Just to drive home the point, imagine one last example. The pharmaceutical giant Merck goes into bankruptcy. What becomes of counsel in the individual and class-action suits over Vioxx? What about counsel for the creditors' committee, whose constituents include those individual

and class-action plaintiffs? Again, the definition of "bankruptcy assistance" is broad enough to apply, and the matter comes down to the nature of the

claimants' debts and the value of each claimant's non-exempt assets.

We are not trying to argue that scooping non-bankruptcy attorneys into the law is the right result. This is all patently ridiculous. But that's the problem with the poorly-written language of the statute. It doesn't clearly identify its intended targets and, having failed to name them, it could trap lots of unintended victims.

This excerpt was republished with permission from the GP|Solo Publication: *Attorney Liability In Bankruptcy*; pp. 84-85 and 88-90, by Corinne Cooper, Editor, and Catherine E. Vance, Contributing Editor.

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How Clients Can Organize Their Affairs

By Daniel J. Hoffheimer

Introduction

It is good practice to put one's own financial and personal affairs in good order. Such order will make life much easier and more convenient. Good order will help a client prepare income taxes each year, address one's family's financial needs, and relieve family members of considerable inconvenience if the client should become incapacitated and at death.

The following is a list of separate files that the lawyer might recommend the client keep in the client's personal file cabinet or desk drawer. For items with an asterisk (*), one might keep a separate file for each individual item within that category.

Separate Files

- Safety deposit box location, number, and key.
- Safe combination and computer passwords. (The client might want to code these somehow.)
- Copies of wills and any codicils. (The originals might best be secured with the client's lawyer.)
- Copies of powers of attorney. (The originals might best be secured with the client's lawyer.)
- Living will, durable power of attorney for health care, or other advance health care directive. (The originals might best be secured with the client's lawyer.)
- Copies of trust agreements for any trusts the client has established or under which the client is the beneficiary. (The originals might best be secured with the client's lawyer.)
- Funeral and burial instructions.

- Cemetery deed, contract, or prepaid funeral documents.
- Social security records for every member of the family.
- Marriage certificate.
- Antenuptial or postnuptial agreement.
- Divorce decree and separation agreement (if applicable).
- Military discharge papers (if applicable).
- Naturalization papers (if applicable).
- Adoption papers (if applicable).
- Passports for each member of the family.
- Real estate titles and deeds for property owned. (They should be recorded.)
- Mortgage statements.
- Title insurance.
- Automobile and boat registrations or lease agreements.
- Listing of all credit cards held, including names of creditors, addresses, and account numbers.
- Statements for checking and money market accounts.*
- Savings passbooks and most recent statement of accounts.
- Listing of certificates of deposit with current interest rates and maturity dates.
- Retirement asset statements: (IRA, 401-k, Keogh, company pension plan).*
- Statements of stock brokerage or managed portfolio.*
- Statements of mutual fund accounts.*
- Annuity contracts.*
- Stock option plans.
- Partnership agreements.*
- Federal and state income tax returns. (The client might keep the older ones together in a "retired" file, but should keep separate files for at least the past three years.)
- Gift tax returns.
- Promissory notes and other loan agreements.
- Life and disability insurance policies (with a master list of each policy.)
- Property, casualty, health, and automobile insurance policies.*
- List of information for the client’s lawyer, accountant, financial planner, stockbroker, insurance agent -- with name, address, telephone, email address, and fax numbers.
- List of professional and fraternal organization memberships -- with addresses.

* Again, one should be sure to make a separate file for each one.

If one wishes to be especially careful, one will make copies of original

documents, put the copies in the files, and put the originals or certified copies of some of the documents in a safe deposit box.

As an additional convenience, the client may wish to create and maintain one or more loose-leaf binders for financial statements, bank accounts, mutual funds, and other assets on which there are regular, updated statements. The client may tab each asset for ready reference and put the current statements in the binder as they are received. One should keep permanently at least the cumulative year-end statements for every year. When the statement is cumulative and shows the full year's activity, one may discard all other interim statements after the end of the year. The client may wish to keep a separate "summary" file at the end of each year so that the binder is for the current year only.

Conclusion

This organization may at first seem like a nuisance. However, one’s efforts will pay regular and significant rewards in the many saved hours of the client’s time and of the client’s family's time after the client has died. A great deal of frustration and stress will be eliminated.

Daniel J. Hoffheimer is an attorney for Taft, Stettinius & Hollister LLP in Cincinnati, Ohio.

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What Can a Client Do With a Trust?

By Daniel J. Hoffheimer

Introduction

In counseling clients in estate planning, the lawyer is often called upon to answer many questions clients pose about trusts. A client is often predisposed against them and to ask only for a "simple will." (There is no such thing!) Here is a checklist of most of the major accomplishments a trust can perform and that a so-called "simple will" ordinarily cannot do. This list may help the lawyer in counseling a client, or it may serve as a handout for the client to take and consider.

Summary of Trust Purposes

A trust can include many different provisions to accommodate one or more of these objectives, among others:

- Provide a structured way to administer your personal and financial affairs during your life, especially if you become incapacitated.
- Carry out your choice of trustees and successor trustees to administer your trust.
- Provide a protected way to administer your assets for a surviving spouse, and in a tax-advantaged manner and to protect the assets upon a remarriage.
- Ensure the orderly and private transfer of your property after your death, and after the death or your surviving spouse.
- Protect and manage assets for the benefit of, and provide support for, your children, grandchildren, and other beneficiaries until they reach the ages or meet conditions that you determine for distribution.
- Create incentives for desirable behavior and accomplishments by your beneficiaries—or disincentives for undesirable behavior.

- Ensure the transfer of property in a way that takes advantage of the available federal and state tax exemptions.
- Provide for the support of an elderly surviving spouse, parent, disabled child, or other person with protection from Medicaid disqualification or reimbursement.
- Pay for a loved one's education.
- Pay for a loved one's health and medical care.
- Avoid probate costs and inconvenience.
- Make tax-advantaged gifts to children or others.
- Make tax-advantaged generation-skipping gifts to grandchildren.
- Protect assets from a beneficiary's creditor's claims or from a divorcing spouse of a beneficiary.
- Protect assets from claims of a beneficiary's present, former, or future spouse, including in a divorce.
- Minimize the risk of competition or disagreement among beneficiaries over financial matters.
- Arrange for the cooperative sharing of family assets such as a residence or vacation home.
- Determine the method for decisions regarding stock options and other unusual assets, such as in a family business.
- Make tax-advantaged charitable gifts.
- Arrange for the management and distribution of retirement plans and life insurance proceeds.
- Provide for the continuation of alimony, property division, or child support payments, if necessary, but no more than is legally required.
- Arrange for the management or sale of a family business or save a family business from an untimely liquidation or disadvantageous sale.
- Reduce your gift tax, estate tax, generation-skipping tax, and income tax..

One can modify the terms of a revocable living trust, change beneficiaries, or terminate the trust as one's goals change. One can draft the trust to cease and pay out immediately following death or to have it continue into the future for one's beneficiaries. The flexibility of a trust makes it ideal for a wide range of individuals and purposes when a will alone cannot accomplish the client's goals.

Daniel J. Hoffheimer is an attorney for Taft, Stettinius & Hollister LLP in Cincinnati, Ohio.

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Advising Same-Sex Couples

By Joan M. Burda

Excerpt from the book "Advising Same-Sex Couples" by Joan M. Burda

The issues that must be addressed when advising your lesbian, gay or transgender clients seem to change daily.

Your LGBT clients need your help to minimize the impact of a rapidly changing legal landscape on their lives. A growing number of LGBT couples have children. This situation raises the bar in drafting legal documents that meet the clients' needs.

Among the basic documents are: Wills, Durable Powers of Attorney for Finances, Advance Directives (Living Will and Health Care Power of Attorney) and Designation of Agent.

Include a clause nominating a guardian in the Durable Power of Attorney for Finances. If the principal becomes incapacitated, a guardian may be necessary to care for her. The court has the authority to appoint whomever the judge deems appropriate, however, a nomination clause provides evidence that the prospective ward considered the situation and made her wishes known. This is particularly important in situations where the person is estranged from her family and relatives are trying to control the proceedings. Include language nominating the principal's partner as the guardian of the estate if she is not named guardian of the person and the reasons for the nomination.

Estranged family members are more common when dealing with LGBT clients. Address potential problems with the clients at the outset. Then you will be able to draft legal documents that minimize potential problems from the relatives.

An *In Terrorum* clause in the client's Last Will and Testament may cause the relative to rethink their strategy. However, make sure the penalty is severe enough to prevent a challenge.

Wills prepared for LGBT clients must be carefully drafted and often include language not usually seen in heterosexual wills. This is an area where creativity and ingenuity is warranted.

For example, include language explaining why the testator is leaving his estate to his partner; It is not out of a lack of love or affection for his birth family, but because his partner is his life-long companion, the person he loves and with whom he has shared his life. Acknowledging the possible opposition of the family in the will serves as additional evidence that the testator considered what he did and provided reasons for his actions. It is advisable to NOT refer to either party as a "spouse." That is a legal term and does not apply to unmarried persons.

If the will being drafted is updating earlier wills, do not destroy the earlier documents. It is a paper trail to use if the testator's will is challenged. It is difficult to allege fraud or undue influence if you have previous wills to present showing similar language regarding the same person.

Parties with children should include a guardianship clause in the will of both partners. However, remember that the non-biological parent in a same-sex couple relationship has no legal relationship with the child. Some state courts, most recently, West Virginia's Supreme Court, have adopted the concept of the "psychological parent." This term is applied to someone who has become a "de facto parent" to a child even when there is no legal relationship between the adult and the child.

This is a common situation in same-sex couples. One person is the biological or adoptive parent and the other assumes his role as a parent. If the state in which the clients live allows for second parent adoption, encourage the clients to go that route. Having a court order recognizing their individual parental rights benefits them in myriad ways. Not only after one partner dies but also if they travel or move to a state that does not recognize gay relationships or two parents of the same gender.

In addition to the basic documents, the clients may want a Domestic Partnership Agreement. This agreement, similar to a pre-nuptial agreement, memorializes the relationship and can alleviate the stress should the parties terminate their relationship.

Talk to the clients about avoiding probate. Trusts may be an option for the clients. However, be careful with trusts if you live in a common law state. Joint trusts are rarely helpful to lesbian and gay couples. Individual trusts may be in the client's interests, but the client must understand the advantages and disadvantages before transferring assets into the trust. Jointly held property may pose problems if a trust is established.

The issues that you must consider when representing LGBT clients are broad. However, addressing and resolving them for your client will never be boring.

Joan M. Burda is Program Director of Cleveland Homelessness Legal Assistance Program in Cleveland, Ohio.

This excerpt was republished with permission from the GP|Solo Publication: *Advising Same-Sex Couples*; by Joan M. Burda.

GP|Solo members can purchase this book at a discount through the ABA webstore

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The Divorce Client's Notebook

By jennifer j. rose

You have accepted the new family law client and the client's retainer. Does the client leave your office with nothing more than a lighter wallet, a copy of your retainer agreement, and the expectation that you will win the case?

Why should you be the only one working on the client's case? Enlist the client's efforts by creating a client's divorce notebook. The notebook has a two-fold purpose: to educate your client, to make your client a more effective one, and to create the client's own file mirroring your own. I recommend a three-ring binder, tabbed for:

• Pleadings

• Correspondence

• Proposed exhibits

• Client notes and questions

• The client's journal

• Client education materials

Encourage the client to file everything you send in the client's notebook and to bring the notebook to your office during each appointment. As the client's "home" file grows, the client will take his or case more seriously and reach an understanding and appreciation of the work you have done.

Suggesting that the client jot down questions that arise and save them for the

next appointment not only helps to eliminate those pesky and annoying telephone calls, but it also underscores to the client the importance of your advice. You will be better able to keep track of the advice you give, too.

Divorce is not unlike childbirth, attended by a constellation of concerned, well-intentioned but often meddlesome maiden aunts, friends, barbers and bartenders doling out misinformation and myth. Not only is the client likely to have greater familiarity with the self-appointed experts than with any lawyer, the information's free! Before long, the client's not sure whom to believe, and the most earnest lawyer can find himself or herself spending more time than ever explaining the real story to the client. Make sure your client gets the straight scoop by educating your client, pre-empting the Old Wives' Tales and misperceptions. Even the most sophisticated clients benefit from client education.

Include in the "educational" part of the client notebook:

• Your state's child support guidelines

• A summary of your state's dissolution of marriage law. Omitting the technical points, a brief and succinct synopsis of child custody, visitation, alimony, and property distribution guidelines can be remarkably helpful. (Some clients may appreciate a copy of the state's dissolution statute.)

• A timetable of the process from filing through discovery to trial.

• An explanation of discovery.

• Standard visitation schedules.

• Standard child support payment rules.

• Pointers on client conduct during a dissolution action, e.g. guidelines for a client seeking custody.

• If you find yourself answering the same questions repeatedly, consider developing a Frequently Asked Questions, or FAQ, addressing those queries.

While certain client educational materials can only be homegrown, take advantage of those written by the pros. Among the best bets are:

Divorce Manual: A Client Handbook , published by the American Academy of

Matrimonial Lawyers.

My Parents are Getting Divorced: A Handbook for Kids , published by the ABA Family Law Section.

Your Divorce: A Guide Through the Legal Process, published by the ABA Family Law Section.

The Boys and Girls Book About Divorce (ISBN: 0553276190) and *The Parents Book About Divorce* (ISBN: 0553286323) by Richard Gardner. Both are mass-market paperbacks published by Bantam.

Give yourself credit for what you give the client by displaying prominently on client handouts your name and address. Your client will become one of those self-appointed experts in time, passing along your literature to prospective new clients and marketing your family law practice for you.

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Temporary Fee Awards

By jennifer j. rose

Temporary, or pendente lite, attorney fee awards in divorce cases often take more time to pursue or defend than the amount at stake. Many cases result in the award of a flat fee of perhaps $500 or $1,000, without regard to the complexity of the case, the issues, discovery requirements or even the amount of fees already received from other sources. Some family law judges callously remark “We’ll save those issues for final hearing,” expecting counsel to finance litigation.

An award of temporary fees requires more than merely filing an application supported by the client’s financial statement. As a first step and in an effort to spare the time and expense of a hearing, write a simple demand letter to opposing counsel asking that your client’s spouse contribute a specified, but reasonable amount, to your client’s temporary attorney’s fees by a date certain. Inquire how much opposing counsel has been paid. The worst result is no response.

And when that happens, convince the court that temporary counsel fees really are needed to adequately represent the client. Let the court know that the informal attempt to secure the other spouse’s contribution to temporary fees was unsuccessful. In your application, explain why this is not an ordinary, open-and-shut, divorce case by showing which issues are contested.

Often opposing counsel counterclaim for custody “just to preserve the client’s rights” when no genuine dispute exists. Use the temporary fee hearing as an opportunity to elicit stipulations that custody or other thorny issues are no longer in dispute.

Demonstrate the need for temporary fees by showing the court:

a. A copy of your retainer agreement.
b. How much you've been paid already.
c. How much the opponent has paid his or her attorney.
d. Issues in dispute.
e. Each parties' access to resources to fund litigation.
f. Your client's lack of understanding about the parties' financial resources, lack of access to financial records, and, in your client's own words, exactly what the client doesn't know. Show something more than "Men always pay legal fees in divorce."
g. Whether appraisals, home studies, psychological evaluations, or extensive discovery is anticipated.
h. How representation of this client is clouded by significant difficulties such as the client's lack of education, physical or mental impairment, distance, or other pending legal problems.

Defending against a temporary fee award requires slightly different tactics.

Encourage your client to advance a reasonable amount toward temporary attorney's fees. If an award is imminent, explain to the client how much it will cost to defend against the temporary fee application.

Now may be the time to encourage the client to weigh how seriously he or she wishes to pursue empty threats and weak claims.

Don't wait for formal discovery. Hand over (with your client's assent, of course) those records and documents which would be discoverable anyway without waiting for even a letter demand from opposing counsel.

Find out if there's truly disagreement over valuations, and suggest that the parties mutually select an appraiser, and apportioning costs.

And in your resistance to the temporary fee application, show the spirit of your client's gracious generosity and cooperation, slaying those dragons with kindness.

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10 Early Signs Your Client's Going To Lose Custody

by jennifer j. rose

Clients seeking custody don't always say what they mean. Careful attention to the information volunteered by the client and responses to simple questions during the initial interview often forces real clues to emerge, revealing the client's agenda. The client's motivation for seeking custody may stem from more than a genuine concern for the child's best interest. Does your client really want custody of the child?

The client's life is spinning out of control. Gone will be the social status conferred by marriage, a second income, half of one's domain, and even the object of one's disdain. Elimination of fault as a ground for dissolving the marriage puts a non-negotiable twist upon whether or not the marriage will terminate. Mandatory child support guidelines and statutory factors for property distribution often reduce the task of dividing up the spoils to a matter of simple algebra. Often the only issue remaining for the catharses of debate, name-calling, finger pointing, blame, conjecture, speculation, vituperation, and contest of character is the custody award. Because the criteria for determining custody are subjective, the likelihood of the client's self-deception and manipulation of those criteria is great.

These clues usually will mark the client who is headed for unsuccessful custody litigation:

- The client views the child as chattel, dictating and restricting the other parent's access to the child without good cause. This client usually viewed the spouse as chattel, substituting the child for the departing spouse, expressing extreme bitterness toward the spouse's paramour.
- Usually amid great emotion, the client places undue emphasis upon restoration of the marriage, attaching unrealistic expectations that the departing spouse will return to the fold if custody is disputed.

- The client perceives the threat of custody litigation as a bargaining chip to gain concessions in property and support issues.
- The client doesn't know the child's middle name or date of birth.
- The client refers to the child as "it" instead of by name or gender.
- The client knows that the "goodies," usually possession of the family home and its artifacts, accompany the parent who has physical care of the child.
- The client's reaction to a preliminary estimate of his or her child support obligation is "I can raise the child more cheaply than that" or "If I'm going to have to pay that kind of money, I might as well raise the child myself."
- The client is preoccupied with others' perception of him or her as a "bad parent" who does not have physical care of the child.
- The client insists that "I want my child to know that I fought for him." (Tell the client to invest the money, which would be spent litigating custody toward a sports car for the child's 16 th birthday.)
- When asked to identify the child's physician, teacher, best friend or day care provider, the client faces sudden memory loss. If asked which parent takes the child to the doctor, purchases the child's clothing or performs other routine parental chores, the client's best reply is an equivocal "We both did." Or "I would have."

Like all generalizations, these markers won't identify every client with a weak claim for custody. Some clients are simply not very bright. Others are glib, articulate and sufficiently savvy to spout the right lines, foiling everyone except the judge. Identifying those clients at the outset who aren't likely to win custody can be a valuable reality check for both counsel and the client.

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How To Become An Agent For Change In Your Law Firm

Change is definitely not easy. In many instances, fear of the unknown and a perceived loss of control trigger a visceral response that makes change difficult to handle. As Tracy LaLonde, associate development administrator for Chicago's Mayer Brown Rowe & Maw, explained at NALP's 2005 annual meeting in Chicago, such fear is why data suggests that 70% of all change initiatives fail to meet their expected outcomes.

Why change efforts fail. According to LaLonde, the following issues are usually at play:

1. Lack of top management commitment to and support for change initiatives. In this instance, partners may pay lip service to your ideas for change or their support wanes over time because they get distracted by something else. The issue: Keeping key decision makers engaged throughout the entire process.

2. Employees don't completely embrace the change. If you don't inculcate into their hearts and minds that change is good, then your efforts won't transform the culture and reverberate for the long haul. The issue: Too much focus on the change itself and not enough time devoted to bringing those affected by the change into the fold.

3. Individuals don't receive enough feedback, coaching, or reinforcement. Even changes that seem rational and logical can instill fear. The issue: People are presented with a change and expected to "suck it up."

How to cushion the blow for imminent change. LaLonde recommends the change model created by Kurt Lewin, a German psychologist and one of the pioneers of social psychology. Under Lewin's model, she explains, you "unfreeze what was there before by giving folks a reason to change their beliefs

or buy into your beliefs." In short, you must: (1) Mitigate the reasons against change; (2) Move people into the new initiative; and (3) "Refreeze" those affected by the change by providing the systems, supports, rationale, incentives, and rewards to keep them where they have been moved. It's a simple model that goes a long way toward helping you think about the change process, LaLonde adds.

Another model, presented by John Cotter, a Harvard leadership professor and author of Leading Change, asserts that when hoping to generate support for change, it's necessary to think about it in two ways: individual support and management support.

In the law firm context, a comprehensive approach requires that you:

• Secure management support. Focus on high-ranking management (managing partner) and middle management (practice leader heads). While these leaders can hand down the edict for change, middle management makes the change happen, LaLonde told attendees. Here are three suggestions to consider:

-- Create an advisory board to champion your efforts and position power. In the best-case scenario, she says, you can get a member of top management to sit on your committee along with the middle managers who will be responsible for implementing the change.

-- Aim to include your biggest naysayer on the board, LaLonde recommends, adding that the goal is to field his or her objections in order to win over everyone else.

-- Include those who have the greatest level of expertise in your law firm, people with an understanding of the systems involved, someone admired for their strong credibility in the firm, and other influential leaders who are willing to stick around for the duration.

• Develop a vision and strategy. A vision, LaLonde told attendees, outlines why it's necessary to strive and create your picture of the future. It's the "what" part of the equation. Consider: What makes your future picture so good?

A vision also serves three important purposes: (1) It shows where you're going and simplifies decision making; (2) It motivates people, even if the steps are painful; and (3) It helps coordinate the actions of people in a fast and efficient manner.

In addition, the vision needs to convey a picture, and seem reasonable, feasible, realistic, and attainable. A vision of "We want to make more money," for instance, has no direction, whereas "We want to be on the top-10 list of highest revenue firms" is focused in that it gives people something to work toward. Strategy, on the other hand, relates to the "how," and a number of strategies can support your vision.

According to LaLonde, "Top management leadership for your advisory board often creates the vision and strategies, and middle management picks up with the plans and does the activities."

• Communicate and keep your vision simple, meaning you can convey it in five minutes or less by using metaphors, analogies, and other descriptive examples (e.g., "We want our firm to be the hare, instead of the tortoise"). Use multiple forums as well, like e-mail, meetings, flyers, small tokens of appreciation, and any other approach that can help you create buzz and easily repeat your message.

• Seek and offer leadership by example (for more on this point, see the accompanying sidebar). Know, too, that partner acceptance is critical, LaLonde says, noting that if your change imposes hard rules, be sure the partners are willing to make sacrifices as well. The point: Remove all impressions that your changes apply to everyone except your firm's upper-level members.

• Provide ample opportunities for those managing the change to meet and talk with the rank-and-file.

The pointers below, LaLonde told attendees, should help you think about how to communicate with individuals on a variety of levels. Her suggestions:

• Provide forums for discussion. Some people will want information in writing so they can think through your proposed changes while others prefer a step-by-step outline of what will happen now and in the future.

• Lawyers typically want to apply logic, so any change initiative that deals with your attorneys must include clear and concise statements explaining "why," LaLonde says. Consider the individual's motivation, too, by providing insight on personal recognition. And offer milestones so people know when they're advancing. The point: Think about your communication efforts and give enough chances for people to react to your change in a variety of ways.

• Empower people so they're able, willing, and ready to go along with the

change. Empowering actions deal with attitude and capability. In an ideal scenario, everyone is eager and open to change, but this happens only 5% of the time, LaLonde says. In another scenario, people are able to change-they have the skills, knowledge, systems, etc.-yet they resist. This, she contends, is the most difficult to overcome since attitude is so personal.

In some instances, people are willing to change, but unable to do so. Here, training and systems go a long way. And in the final scenario, people are unwilling and unable to change-the toughest situation to diagnose.

The point: Take care and assess the readiness of your audience. In circumstances where people aren't ready, your change may likely not be as successful as you'd like. Full empowerment requires your firm to have structures in place to support your change.

• Train regularly and with intensity. LaLonde offers the example of organizations that are downsizing, which inevitably leads to defections as people get nervous about their futures and leave for more predictable and stable work environments. In such instances, training can ease fears, stem attrition, and even provide assistance with the transition, says LaLonde.

• Revisit your firm's systems, including those relating to performance evaluations, bonus structures, and the like to ensure existing systems support your new approach.

• Empower your supervisors. Middle managers, like department heads, often get sandwiched. People who work for them wonder why things need to change and firm leaders just want to get it done, so the goal is to empower them with information and resources.

• Show evidence of success and perseverance. Revel in your short-term wins or milestones; they provide evidence that the changes in behavior and sacrifices are worth it in the long-run, says LaLonde. They also provide you with a moment to relax and celebrate. "Milestones are also great because they are so visible, unambiguous, and clearly related to the change effort."

• Remember, nothing changes unless you transform your culture. LaLonde recommends thinking of culture like a city sewer system: "You know it's there running under the streets; you sometimes smell it, but often it's invisible. Until you get deep down within the organization and make changes-which takes a long time-changes won't stick."

How to Lead Your Law Firm Through Change

In their book, Leading with Authenticity in Times of Transition authors Kerry Bunker and Michael Wakefield offer five actions that can earn your followers' trust when leading the firm through disruptive changes:

1. Be authentic. Maintaining trust is critical to a successful transition. In difficult times, leaders are often tempted to offer canned answers and to keep communication impersonal resulting from their own stress and sense of responsibility to management. But these practices are two of the fastest ways to lose the trust of members of your firm. Cut to the chase with honest answers and real feelings.

2. Be empathetic and honest. Leaders naturally feel the need to keep their people focused on the bottom line at any cost. But the cost is often loss of trust from an excellent employee.

3. Give employees time to digest change. It's a mistake to make longstanding judgments about an employee based on an initial response to change. People commonly need time to sort it out. Once an employee has navigated the emotions connected with change, he or she may turn out to be your greatest asset.

4. Give yourself time to digest the change. When leaders show reservations or other emotions spurred by change, they compromise their ability to lead with authenticity and to help others cope. Take time to adjust.

5. Keep your doors open. Show people they can talk to you. Let them know you understand their concerns. With empathy comes trust.

(Source: Michael Wakefield and Kerry Bunker, Center for Creative Leadership)

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Document Spoliation: How To Lose Your Case Before You Get To Court

- In every sport, there are rules designed to ensure that the game proceeds fairly. In many respects, the same need for fairness applies to the parties in a contested employment matter. Read on to learn about the duties both you and your legal counsel have to avoid destruction of relevant documents before a case is resolved.

What is document spoliation?

Document spoliation is simply the improper destruction or loss of documents potentially relevant to litigation before trial and before the opposing party has had an opportunity to review the requested information. Seems simple enough, doesn't it? Hidden beneath that simple concept, however, are several issues that govern your duties and those of your legal counsel to ensure that document spoliation doesn't take place. Understanding and complying with those legal obligations isn't as simple as the basic rule prohibiting spoliation.

Initially, in every employment case, the duty to preserve relevant records or documentation arises even before the opposing party has made a request for particular documents. For example, under federal and state civil rights regulations, the filing of a discrimination charge against an employer triggers the employer's obligation to preserve any documentation deemed relevant during the agency's processing of the charge. Rules in the state or federal courts also demand retention of pertinent documentation during any subsequent litigation on the claim.

So what's relevant documentation? The term "relevant" generally includes information that tends to support or prove a significant issue in the case. Obviously, the factual circumstances of any given case will control what's relevant to that particular claim. If you're hit with a civil rights claim, however,

you should consult with your counsel immediately to identify the potential categories of documents that might be deemed relevant to the charge. It's wise to err on the side of caution by preserving any information that might arguably need to be examined in processing the charge or the litigation, including personnel files of the complaining employee and similarly situated employees.

So what are considered records or documentation? Think broadly because the question encompasses far more than information on paper. Obviously, hard-copy documents, often clearly identifiable and segregated in files, are subject to preservation and potential discovery (pretrial exchange of evidence) if they're relevant to the claims and defenses asserted. On an increasing basis, however, employment litigation also entails the discovery of electronically stored information, including company e-mails and other electronic records, such as backup files or archival tapes generated by your computer system.

As our society has grown more computer-dependent, businesses, both small and large, increasingly use computers not only to store important business-related information but also as a communication tool used even more prevalently than the telephone. E-mail, of course, produces a record that can later be recovered and used in employment litigation. As a consequence, employers today are required to recognize that network servers, laptop computers, e-mails, instant messaging, and use of the Internet for their business communications and transactions may create litigation challenges and costs during the course of an employment dispute.

Document preservation sanctions

Under cases rendered by the federal courts, you clearly have a duty to preserve information that may become evidence in employment litigation. If you fail to do so, you're subject to sanctions ranging from court-ordered relief prohibiting the removal or destruction of files to the imposition of penalties and costs, including exclusion of relevant evidence and even the dismissal of defenses that might be available to you had you not deleted or destroyed information deemed potentially relevant to the litigation. In an action involving Phillip Morris in Washington, D.C., a district court found that the corporation had failed to abide by a court order designed to ensure preservation of computer e-mails. The court imposed sanctions that precluded the company from calling a key employee at trial, and it ordered the corporation to pay spoliation costs and over $2 million in monetary sanctions.

How do you avoid such harsh spoliation penalties? Immediately after you become aware of an employment charge, work with your legal counsel to

assess the scope of information retained by the company that might be implicated in the employment dispute. Issue an e-mail alert to all document custodians to preserve information, and provide a broad description listing the specific types of records to be preserved. To ensure that your alert has been "heard," consider face-to-face meetings with those responsible for electronic document retention. Stress the critical need to retain all identified files, including backup and archival tapes that arguably could be relevant to the litigation.

Employers with automatic destruction policies often fail to clearly inform the appropriate department personnel that normal company procedures mandating periodic destruction of computer files must give way to the employer's obligation to avoid spoliation of electronic documents that could be subject to production in litigation. Many of the reported decisions in which sanctions are imposed against employers are cases involving negligent destruction of electronic information as opposed to willful or malicious spoliation of evidence. As a consequence, you should create litigation policies and procedures designed to protect not only hard-copy information but also electronic data.

Costs of electronic production

The courts have recognized that the costs associated with accessing, analyzing, and using computer data in employment litigation can be substantial. For example, it's common for an employer to receive broad requests such as "Produce all documents, including electronic documents, concerning any communication by or between company employees concerning the complaining employee." Obviously, retaining and producing archival records responsive to such a request could be burdensome. In response, one of the leading cases concerning the costs associated with computer record production has identified a seven-factor test addressing cost-sharing for electronic production:

- the extent to which the request is specifically tailored to discover relevant information;

- the availability of such information from other sources;

- the total cost of production compared to the amount in controversy (at stake in the litigation);

- the total cost of production compared to the resources available to each party;

- the relative ability of each party to control costs and its incentive to do so;

- the importance of the issue at stake in the litigation; and

- the relative benefits to the parties of obtaining the information.

After assessing those factors, the court will determine how the parties should share the cost of producing and analyzing the electronic data sought by the employee in the litigation. Often, computer experts for both the employer and the employee must become involved in the production process not only to assess what requests are appropriate but also to analyze the data preserved and produced.

Bottom line

Document spoliation is a serious issue in employment litigation. Further, the importance of the rule of fairness has expanded with the growth of computer-generated records. Be aware of your organization's duty to preserve key documents and take steps to ensure that your document custodians thoroughly understand the legal obligation to avoid spoliation of evidence.

This article first appeared in Iowa Employment Law Letter, July 2005

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How to Send Learned Treatises to The Jury Room

By Kirby T. Griffis

In product liability, toxic tort, and even medical malpractice litigation, the science in the relevant field is often a crucial battleground, and expert witnesses will do battle over treatises, journal articles, and the like. As every law student knows, scientific publications are inadmissible hearsay. Under the learned treatise rule, an expert witness may testify about scientific publications that have been qualified as learned treatises, but they do not come into evidence and so may not be published to the jury.

Many practitioners and judges are so used to the learned treatise rule that they treat it as an automatic rule for the evidentiary treatment of learned treatises, not thinking about the fact that it is an exception to the hearsay rule. As such, the rule, and the underlying exclusion of learned treatises from evidence, applies only when they are being offered to prove the truth of the matters asserted therein -- as, of course, they ordinarily are in a clash between experts.

When offered for a non-hearsay purpose, learned treatises should be admissible into evidence. Most notably, learned treatises are often probative of a party's state of mind, as for example when the plaintiff accuses a corporate defendant of negligently, recklessly, or maliciously selling a product while it knew or should have known that the product was dangerous. The defendant should be able to present to the jury the publications and treatises that were available at the relevant time upon which it relied in forming its opinion that its product was safe. The argument to the court is, for example, that the proffered scientific study is not being offered to prove the matter asserted (eg, that Product X is not associated with cancer), but to demonstrate the innocence of the defendant's state of mind in relying on the study and continuing to market Product X. The study is admissible not with regard to causation, but liability.

It will be essential to be able to point to deposition testimony or other evidence

that the company actually was aware of and relied on the studies that the party seeks to put into evidence, and so the lawyer who is planning ahead to trial will be careful to elicit such testimony during discovery.

Perhaps the most effective response to an attempt to place learned treatises into evidence is Fed. R. Evid. Rule 403 : The jury will be overwhelmed by the science, will be unable to appreciate the purpose for which the learned treatises are provided, and will be unduly swayed on causation. In this Rule 403 battle, the more powerfully the plaintiff has pitched the liability case, the weaker the argument for exclusion of this evidence. In a case seeking millions in punitive damages on the ground that the company knowingly marketed a lethal product to make money, studies that the company relied upon, which show that the product is not dangerous, become substantially more probative and less prejudicial.

Because an attempt to publish treatises to the jury is fairly likely to be met with a reflexive denial under the learned treatise rule, it is often wise to raise the issue and brief it in motions in limine before trial. This will give a judge, who might not be used to the idea, time to analyze it, and may increase the chance of a favorable ruling.

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How To Rat Out A Client And Live To Tell About It

The most sacrosanct relationships in life are those to which privileges of confidentiality attach: husband-wife, doctor-patient, clergy-laity and group of kids who throw firecrackers in the neighbor's swimming pool (at least it should have been one when the CC needed it to be back in the day). Almost forgot, attorney-client. That's one of the first things anyone learns in law school-- you don't have to rat out your clients. Except...

In fact, some of the most difficult questions on any ethics exam involve those situations when a lawyer is not only entitled, but required, to turn-in a wayward client, be it for plans to lie, cheat, steal or murder. And as the SEC has been struggling for what seems to be ages to determine when a lawyer should have to report corporate wrongdoing up-the-ladder and eventually out the window to authorities, well it's easy to forget that there are 50 states with ethical codes already telling you, in no uncertain terms, what to do with clients who harbor a certain mens rea. In an economic world where business and practice relationships transcend geographical borders routinely and where many lawyers hold practice licenses in several states, it can get confusing to know whom you have to rat out where and why. So let's assume you're holding a license in California and New York and you have a client who is committing or about to commit a crime in both states, do you have an idea what you're up against?

Lest you think that the CC's choice of New York and California shows a somewhat coastal bias, the reason for that choice is most practical, as demonstrated by this week's download "State-by-State Comparison on Disclosure to Prevent Crime or Fraud," ably compiled by Nell Hennessy (Aon Fiduciary Counselors, Inc.). If you flip to California, you will find that it is the only state with no provision permitting disclosure of crime or fraud (that is sooooo L. A.), but if you turn to New York, you will find that New York allows a lawyer to disclose any crime: "A lawyer may reveal...the intention of a client to commit a crime and the information necessary to prevent the crime." Even that is not so harsh, as it is a permissive statute. If the same attorney holds a license in New

Jersey, and the same client's crime were to occur in New Jersey and California, then things really get dicey. Under New Jersey Court Rules, a lawyer "shall" reveal crimes involving death or bodily harm or financial fraud. What's a compliant counselor to do? You snitch in Jersey, but keep your lip zipped out in the land of Arnold? That's quite a conundrum; please don't blame the messenger.

Of course, all of this stems from ABA Model Rule 1.6, which permits a lawyer to reveal crimes involving death and bodily harm. But Rule 1.6 stops there. The states have figured their own comfort-levels on this issue. And there are myriad configurations. North Dakota presents the CC's favorite. First, the Peace Garden State (you can check, that really is North Dakota's nickname; kind of outdoes New Jersey, which is just the Garden State--then again, nobody ever argues that New Jersey is peaceful) uses the word "revelation" instead of "reveal," in regard to waiver of attorney-client confidences, and that's just begging for a bad Mel Gibson joke, on which the CC passes. Second, North Dakota gives an attorney a lot of wiggle room:

• [R]evelation or use is: Required to the extent the lawyer believes necessary to prevent the client from committing an act that the lawyer believes is likely to result in imminent death or imminent bodily harm...; Permitted to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely as a result in non-imminent death, non-imminent substantial bodily harm, or substantial injury or harm to the financial interests or property of another.

So if you're a skeptic and don't tend to believe much that you hear around the water cooler, then consider packing your bags and moving to Fargo. If your lack of belief is reasonable, you're off the hook.

On a more serious note, the interesting part will be when and how the SEC finally acts on those reporting out proposals. Then if you find yourself and your client in California or North Dakota, all bets may be off.

This article first appeared in PLI's Compliance Counselor, May 10, 2004

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E-discovery for the Solo or Small Firm Practitioner – what you need to know and why

By Jennifer Wojciechowski

Despite the fact that more than 93% of information is created electronically, discovery of electronic data during civil litigation is one topic that may be new to many general, solo and small law firm practitioners. While issues relating to electronic data have traditionally surfaced in larger and more complex cases, the integration of technology in nearly every aspect of daily life requires solo and small firm litigants to understand the role electronic data may play in their next case and to develop strategies for seamlessly managing digital data throughout the lawsuit.

What is electronic discovery?

In today's information age, conducting paper-exclusive discovery during litigation leads to the recovery of a mere fraction of the information available in most cases. Thus, w hen a lawsuit ensues, attorneys are routinely requesting access to and courts are ordering production of electronically stored information.

In any given case involving an electronic discovery request, a variety of electronic media types may be involved – from individual desktops and laptops to network hard disks, removable media (e.g., floppy disks, tapes, USB drives, CDs, DVDs, etc.), cell phones and personal digital assistants (e.g., Palm Pilots, Blackberries, etc.). Digital evidence contained on these media types can exist in a variety of formats including word processing documents, spreadsheets, e-mails and attachments, instant messages, Web content, metadata and other sophisticated data formats.

If deemed responsive to a discovery request, electronic information must be preserved, collected, processed, reviewed and produced to the opposing party.

Electronic discovery is simply the process of handling such requested electronic data pursuant to the discovery requirements set forth in governing federal, state and local civil procedure rules.

What are lawmakers and the judiciary saying about electronic evidence?

The Federal Rules of Civil Procedure make it clear that parties can obtain discovery of all data relevant to the claim or defense of any party. In fact, changes are being made to the Rules clarifying this extends to any electronic data relevant to the claims or defenses being made in a lawsuit. In April 2006, the United States Supreme Court unanimously approved proposed amendments to Federal Rules of Civil Procedure 16, 26, 33, 34, 37 and 45 that specifically address the handling of electronically stored information during discovery. Unless Congress takes steps to prevent their enactment, the new Rules will become effective December 1, 2006.

In interpreting discovery rules, courts have routinely concluded electronic data is discoverable. As noted by a New York court more then a decade ago, “The law is clear that data in computerized form is discoverable even if paper ‘hard copies’ of the information have been produced…[T]oday it is black letter law that computerized data is discoverable if relevant.” *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995). Other noteworthy e-discovery decisions practitioners should be aware of include the following cases:

- **Deleted Data can be Discoverable**: Deleted electronic evidence is fully discoverable. *Dodge, Warren, & Peters Ins. Servs. v. Riley,* 2003 WL 245586 (Cal. Ct. App. Feb. 5, 2003).
- **Duty to Preserve E-Evidence**: There is a duty to preserve evidence that parties know, or should know, is relevant to the ongoing litigation, including preservation of electronic data. *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003).
- **Spoliation Sanctions Defined**: Failure to preserve e-mail and electronic documents (whether intentional or inadvertent) is sanctionable as spoliation of evidence. *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.,* 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005).

What should solo and small law firm practitioners know about e-discovery?

As illustrated by the federal and state civil procedure rules and emerging case law, all attorneys – regardless of firm size – are obligated to determine if electronic data is a legitimate part of their case. Complying with this obligation

involves developing strategies for identifying, locating, retrieving, preserving and authenticating electronic evidence. Lawyers are also responsible for developing, implementing and ensuring compliance with data preservation plans and for producing responsive documents to the opposing party, court or agency.

As evidence continues to be created and stored electronically, s olo practitioners and small law firms must understand the unique challenges posed by digital data and adopt strategies for handling electronic information in the most efficient and accurate manner during litigation. Litigants with a comprehensive understanding of the e-discovery process will be in the best position to advocate for their clients and deliver a case-winning discovery plan of attack.

Jennifer Wojciechowski is a Legal Consultant for the Chicago office of Kroll Ontrack, where she advises law firms and corporate law departments on legal technology issues regarding electronic discovery, computer forensics and the incorporation of traditional paper discovery into a unified electronic document review platform. Kroll Ontrack Inc. (www.krollontrack.com) provides large scale electronic and paper-based discovery, computer forensics, and data recovery solutions to help companies, law firms, and government agencies quickly and cost-effectively review, manage and produce relevant evidence. Kroll Ontrack, based in Eden Prairie, Minn., is a wholly owned subsidiary of Kroll Inc., the world's leading risk consulting company.

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How Practice Management Software is Different from Outlook

By Dan Berlin

The best way to think about the difference between Outlook and practice management software is the old expression, “Jack of all trades, and master of none”. Microsoft designs Outlook to be general enough that absolutely anyone can use it. Most likely your doctor, your child’s principal and the owner of your favorite restaurant all use Outlook. It is the jack of all trades. Conversely, legal practice management software focuses on one trade – attorneys. You will find every feature of the software designed for law firms. The difference can save you time, make it easier to organize your practice and help you capture more of your billable time. Here are some differences between the two.

Business Card v. Client File

Contacts in Outlook are designed to keep track of someone’s personal information – the information on a business card. In contrast, practice management software is designed to track contact information for individuals, but it also tracks client files. Outlook is set up to track information like “Nicknames”, “Birthdays” and “Spouses”. While client files in practice management software organizes information about jurisdiction, area of practice, documents related to a case, meeting notes, research and e-mail (see the chart below for other examples).

Conflict of Interest Search

Outlook can search your computer for e-mails, appointments and contact information for signs of a conflict. Practice management software can search the records of everyone in your firm for e-mails, appointments, contacts, meeting notes, notes on fee, cost entries, research and other client file

information. Your conflict search includes the entire office, no matter who is out of the office that day, and the search only takes a few seconds.

Tracking Time

Because practice management products were designed for law firms, most are designed to work with billing software. That means you can easily turn your appointments, e-mails, research and time spent writing documents into billing entries. Tracking your time becomes much more efficient when you can turn any appointment on your calendar into a billing entry.

Document Assembly

Outlook and Word integrate through “mail merge” functionality. This lets you insert fields from a contact into a standard letter, but your options are limited to the personal information tracked in Outlook e.g. name, address, etc. In practice management software you can do the same thing, and much more with document assembly functionality. You can insert into a document any information from a case file (e.g. insurance carrier, opposing counsel, etc.). The document assembly process can also automatically create a billing entry for the time you spend on the document. It can automatically schedule a follow up task for you x number of days after you create the document, for example, to follow up with opposing counsel regarding the letter you are sending them. You can even have the document assembly process prompt you to fill in a few blanks for information that you may not have in the practice management software case file – for example the date that a document was signed,

Sharing Information

Practice management software makes it easier to work with a team of people in your law firm. You can view appointments for your team members to see when someone is free for a meeting. When you pull up a client file, you can see all of the information for a case - that means every e-mail that anyone has sent or received, as well as all documents, research and notes that anyone has for a matter. This helps you save time that you would otherwise spend keeping track of the work other people in the office have or have not done.

Chain of Events and Court Rules

Outlook lets you create recurring events. For example, you can schedule a regular staff meeting each Tuesday at 9am. Practice management software can do that, but it also can automatically create a series of appointments and tasks

that you can reuse –Calendar Plans. This can be helpful if, for example, there are a series of things you need to do each time you open a new case file. It can also be helpful to track court rules or the tasks that you need to complete prior to a trial. The items in your calendar plan can be automatically created and scheduled based on a reference date, for example the date of the trial. Once created, each task will appear on your calendar or task list.

Cost to Customize

You can get around some of Outlook's limitations through customization (which can be expensive). For a law firm, Outlook cannot approach the level of usefulness that practice management software can offer. Do not try to stuff your case file into a rolodex. If you want software that helps you manage your practice, you should be using practice management software.

Outlook and PracticeMaster Practice Management Software

What They Offer Without Customization:

	Outlook	PracticeMaster
Fields		
Nickname	•	•
Spouse's Name	•	•
Birthday	•	•
Name	•	•
Address	•	•
Phone	•	•
E-mail	•	•
Area of Practice		•
Time Keeper		•
Tax ID		•
Client Number		•
Date of Fee Agreement		•
Verdict / Outcome		•
Statute of Limitations		•
Opposing Attorney		•
County of Filing		•
Jurisdiction		•
Judge		•
Track fees		•
Track costs		•
Track multiple matters for a client		•

Automatically associate e-mails with a matter		•
View a calendar for everyone in your firm	Exchange required	•
Share contacts across your firm	Exchange required	•
Share matter information (notes, e-mails, etc.) across your firm	Exchange required	•

Dan Berlin is President of Software Technology, Inc. - the maker of Tabs3 Billing Software and PracticeMaster Practice Management Software. Tabs3 is one of the most widely used time and billing products in the United States and has been an industry leader since its introduction in 1979. Tabs3 is designed to integrate with PracticeMaster practice management software. Among its many features, PracticeMaster provides an easy way for firms to create a firm-wide calendar, search for conflicts of interest, and organize case and contact information. There are over 425,000 active user licenses of Tabs3 and PracticeMaster software combined. For more information call: (402) 423-1440 or e-mail sales@tabs3.com.

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12 Ways to Foul Up a Real Estate Transaction

By Evan L. Loeffler

One would think that the transfer of ownership of real estate from one party to another should not be much more difficult than buying golf clubs at a garage sale. The seller puts a price tag on the goods to be sold, the buyer identifies the goods to be purchased, the parties dicker over price and, eventually, agree on a price. Money changes hands and both parties walk away happy.

Unfortunately, it is not that simple when dealing with real estate. Each jurisdiction has special rules, regulations, taxes, forms, and procedures that must be followed not only to effectuate a sale, but to protect the parties involved from litigation later. Further, most sales of real estate involve a mortgage, which requires an additional raft of paperwork in order to effect the sale.

There are a number of publications and periodicals dedicated to educating the reader how to successfully close a real estate transaction. Since it is not possible to summarize all those publications into a small article, it seemed that it would be of more utility to identify for the reader the more common mistakes made in real estate transactions. The following, admittedly incomplete, list discusses a few situations that one would think obvious, but still occur with startling frequency.

#1. The seller does not have authority to sell the property.

Most lawyers will recall learning in Contracts that one cannot sell what one does not own. A simple enough concept, but it is not uncommon that an owner transfers ownership of the family home into a trust, a limited liability company (that may or may not still exist), or pursuant to a community property agreement. Possibly the seller has authority to sell the home pursuant to an expired power of attorney. The parties are then unpleasantly surprised to learn that the seller who negotiated and entered into a real estate purchase and sale

agreement in his personal capacity did not have the authority, or sole authority, to do so. It is usually a matter of an Internet search or a phone call to a title company to determine the legal owner of the property. It would be wise to make that call early on.

#2. The purchase and sale agreement contains an incomplete or inadequate legal description.

The property to be sold must be adequately described in the purchase and sale agreement. The mailing address is *not* an adequate description of the property. The purpose of a legal description is to describe a particular parcel of land in a unique and unambiguous manner that will survive forever. In the United States, this is done by reference to lots and blocks in a subdivision map, by metes and bounds, by aliquot (using the nomenclature of the U.S. Public Land Survey System, or by a combination of the above. Thus, it is necessary to include or attach the entire lengthy and convoluted legal description on the purchase and sale agreement for it to be enforceable.

#3. Zoning is Inconsistent with Intended Use

One might think this is strictly a “let the buyer beware” issue, but it is not uncommon that a party purchases property with the stated intent of building a duplex only to discover that the property has been zoned only for single family use. Or a party purchases an existing restaurant only to learn that the liquor license was “grandfathered” to the former owner and will not transfer. Sellers should know the zoned status of the property to be sold and disclose this information to prospective buyers. Buyers (and their attorneys) should perform a due diligence inquiry regardless of what the seller says long before closing.

#4. Failure to pay earnest money or follow earnest money provisions

Earnest money is money the buyer gives the seller to show good faith when making an offer to purchase the property. Sometimes, however, while there is a contractual provision that the earnest money must be paid by a certain date, it is not paid, not paid on time, or paid by a check that is dishonored. Buyers must understand that it is a breach of the real estate contract to fail to pay the earnest money. Sellers who do not insist on the strict performance of the buyer in this regard may be damaging their position if they turn down completing offers to purchase the property due to the mistaken belief that they already have a buyer.

#5. No meeting of the minds in the purchase and sale agreement

The failure to recognize whether or not there has been a true acceptance of the real estate contract is another issue that bogs down or fouls up a real estate transaction. If one party makes a written offer to enter into a purchase and sale agreement, and the other party makes changes to that offer there is no contract unless the first party expressly accepts and initializes those changes. What has occurred instead is that the second party rejected the offer and made a counteroffer. It is therefore important for a party reviewing a purchase and sale agreement to be sure that any handwritten changes that may appear in the purchase and sale agreement have been agreed to.

#6. Balance of the loan will be paid off with promissory note and deed of trust and then the note and deed of the trust are not attached

Unless the buyer intends to show up for the closing ceremony with a wheelbarrow of money, the purchase and sale agreement will be financed by a promissory note and secured with a deed of trust. The terms of these documents, including principal, payment terms and interests, should be made a part of the purchase and sale agreement. There is potentially no contract if all the terms of the agreement are not attached, and this is a classic method of voiding a sale. The basic form can be attached as an exhibit or an addendum and referenced using language such as, “payment for the property will be made pursuant to the terms of a promissory note and deed of trust the terms of which will be substantially similar to the forms attached hereto as exhibit A.”

#7. Everything must be in writing

Communicate everything in writing pending a closing. This should go without saying in any transaction. For example, if the seller agrees to make repairs prior to closing, put down the substance of the repairs to be made in an addendum to the purchase and sale agreement and have all parties sign it. Do not telephone the seller and indicate the repairs are OK (or that they are not OK), *write it down*. Include an integration clause in the lease, that the purchase and sale agreement is the entire agreement and any changes must be in writing and signed by both parties.

#8. Confirm that seller disclosure form is filled out correctly

It is a legal requirement in most jurisdictions that the seller of real estate certify that any existing defects in the property have been disclosed and any prior defects have been properly repaired. This includes cracks in the foundation, leaks in the ceiling, electrical defects and plumbing problems. In Washington State, for example, there is a statute that requires a particular checklist to be

filled out and provided to the buyer. Frequently, sellers massage the facts, or indicate that they "don't know" if there have ever been any defects. Generally, the test is whether a seller knew or *should have* known of defect in the ordinary course of events. If the seller's answers on a disclosure appear to be vague or unresponsive, it is a good idea to wonder why.

#9. Allowing seller to stay in possession after closing without an airtight possession agreement

The inclusion of a "possession due on sale" clause is highly advisable. Sometimes the seller is willing to sell the house but not willing to move out in a timely manner. If the buyer is willing to allow the seller to remain in possession for a short period of time after the sale closes, it is necessary to execute an occupancy agreement that clearly spells out the dates of occupancy, the consequences of failed to abide by the dates, and any remuneration or consideration for the buyer allowing the seller to remain in occupancy after closing. Further, the buyer should seriously consider liability and insurance issues relating to the seller's occupancy. If the seller is injured moving out due to a faulty step, can the seller sue the buyer? If the house burns down during the seller's post-closing occupancy, whose insurance will cover the loss?

#10. Failure to clearly indicate what the seller takes with her

Much time and money has been spent in litigation over whether the seller was entitled to take her chandelier, washer, dryer, range, oven, or refrigerator with her when she moved. The parties should execute a written addendum to the purchase and sale agreement clearly indicating what fixtures stay and go.

#11. Buyers fail to get an environmental audit if property is commercial or if the property has ever had an underground oil tank

Few things upset a buyer more than learning the home he just bought is contaminated. If the home has an oil furnace—or has ever had an oil furnace—there is almost certainly a tank somewhere leaking oil. The sellers should provide an environmental audit indicating the property is clean, that the tank is in good working order, not leaking, has been removed, or has been filled.

#12. The parties neglect to include a merger clause in the purchase and sale agreement

Post-closing obligations may not survive closing unless there is language in the purchase and sale agreement indicating they will. If the sellers agree to be

responsible for removing the pile of trash after they vacate the premises, there had best be language that establishes their continuing obligation to do so.

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Don’t Be A Victim Of Predatory Lending

By Aurora Abella-Austriaco, Esq

In a robust estate market, the rate of refinancing and times that ownership of real estate changes hands is at its highest. In Chicago particularly, where real estate is one of the few stable investments left for investors and homeowners of every income bracket. But with the good comes the bad as well. It is in these times where most of the flurry of abusive lender practices occur against the unwary homeowners. This article will cover some of the types of predatory lending practices that are perpetrated against homeowners, minorities and elders alike. The list is by no means exhaustive but will at least give you a framework of the types of abuses occurring in the market place and hopefully help one avoid them should one cross his/her path.

I. What Is Predatory Lending?

Predatory lending is any unfair credit practice that harms the borrower and eventually affect the credit or ownership interest of the borrower. It is a broad definition but there really is not one accepted definition of predatory lending. There are many different types of predatory lending practices that not one definition captures it all.

A predatory loan is one that is lent based on the borrower’s equity in the property, and not on the borrower’s ability to repay the loan. For example if a borrower has a high equity in the home but does not have the ability to repay that loan based on his low income the lender will lend the loan anyway since the intent is to seize the equity in the home possibly through foreclosure or some other dramatic way.

II. Prime V. Subprime Loans

Most predatory lending occurs in the subprime lending market. Subprime markets involve borrowers that have less than perfect credit, have low FICO scores and are individuals lenders consider as risky borrowers.

In most situations, these borrowers, because of their less than perfect credit, have limited choices in terms of loan packages. Most packages offered to them contain terms that are pretty high as compared to prime borrowers and are forced to take them.

III Types Of Predatory Lending Practices

Although not an exhaustive list, I will focus on 5 of the more common predatory lending practices that any borrower/homeowner should be aware of:

1. Loan flipping or excessive refinancing;
2. Equity skimming
3. Bait and Switch Tactics
4. Charge of Servicer
5. Credit insurance packing

Loan Flipping/Excessive Refinancing

“Loan Flipping” involves repeated refinancing of a loan by a homeowner thereby repeatedly rolling the existing loan into a new loan instead of paying off the existing loan and making a new mortgage. As a result of the successive and repeated refinancing of the property, refinance closing costs and additional lender charges on fees and points are also rolled into the new amount thereby increasing the principal amount owed. Loan flipping normally occurs within a short period of time.

Equity Skimming

Equity skimming is another abusive practice that comes in various forms. The most common practice and scenario involve one where the property is in foreclosure. The homeowner the property is in foreclosure. The homeowner is approached by B who promises to help him/her out of the foreclosure. B asks homeowner to convey the property to B as security for his/her loan to be used to payoff the existing mortgage. B promises that when the homeowner pays off B, B will convey the property back to homeowner. Invariably, what happens is that B gets the title in his/her name and refinances the property, taking out all of the equity in the property. Once B refinances, he skips out, does not pay the new mortgage leaving homeowner with a new foreclosure suit. The other

scenario is that B takes out the new mortgage and once the homeowner fails to pay B, B evicts the tenant from his home. Hence, the coined term equity skimming: The homeowner’s equity has been skimmed off.

Bait And Switch

Throughout the whole loan application process, lender represents to borrower the terms of the loan, the APR, closing costs and finance charges. However at closing, the terms of the loan are different from that which was disclosed. Since the parties are already at closing the borrowers are left with two choices whether to proceed or cancel the loan and go through the whole application process again. When dealing with subprime borrowers, the bait and switch occur more frequently since borrowers in this category are believed to have less than perfect credit and are given very limited choices in terms of loan packages. Most of the time, these borrowers resign to closing the deal despite the higher rates and fees.

Change Of Servicer/Unaccounted Payments

It is not uncommon that lenders transfer their servicing rights to the loan to another lender. More often, the loan gets transferred to two or three servicers during its lifetime. It could very well be that the homeowner makes a mortgage payment to the old servicer during the transfer period but the old servicer fails to turn the payment over to the new servicer. The new lender now will continue to charge the borrower for late fees for the alleged missed payment.

This perpetuates until such time that the late fees become substantial. Not only that, but this scenario will severely affect one’s credit rating since the late payments will always be reported to the credit agency until cleared.

Credit Insurance Packing

Predatory lenders market and sell credit insurance as part of their loan package services, mostly without the knowledge of the borrower. Most of the time, lenders automatically order the insurance and charge the borrowers exorbitant premiums which are then financed into the cost of the loan. Not only are the premiums exorbitant but they are not even based on any loss experience. Most often than not, the insurance company is either an affiliate or a subsidiary of the lender or has a lucrative commission arrangement with the lender based on the premium paid.

Conclusion

Although, there are many more types of predatory lending practice that abound in the real estate market and the ones listed above are certainly not exhaustive, it is the author’s hope that by identifying some of them, readers may well avoid being embroiled in such instances. This is why having a qualified real estate lawyer represent you in what is the largest financial investment in your lifetime is so important. Your lawyer can help identify these predatory lending practices and protect your interest. Your lawyer can also assist you in pursuing claims against the predatory lenders for violations of various consumer protection laws such as the Truth In Lending Act (TILA), Home Owner’s Protection Act of 1994 (HOEPA), Real Estate Settlement Procedures Act (RESPA), Equal Credit Opportunity Act (ECOA) and various state consumer fraud remedies such as the Illinois Consumer Fraud and Deceptive Business Practice Act.

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What Every Lawyer Needs To Know About Real Estate Leases: A Jargon Glossary

By Kathleen Hopkins

attornment: An agreement to recognize a new owner as the landlord/other party to the lease.

BOMA: Building Owners and Managers Association. BOMA established methods are frequently used and cited for measuring commercial office building space. See their webpage: www.BOMA.org

base rent: This is the minimum rent, usually denoted in monthly, annual and by square foot. The square foot number is based upon an annual rental. For instance, a 2,000 sf premises could have a $1,000 per month, $12,000 per year and $6.00 per rental square foot rent. In addition to base rent, tenants in retail may also pay percentage rent, and all tenants may or may not pay other costs (e.g. “triple nets” aka NNN), depending upon whether their lease is a net lease, gross lease or full service lease with a base year (terms defined below).

base year: Certain leases are a hybrid of a net lease and a gross lease. For these leases, the first year’s rent includes the NNNs, but each year after that the tenant’s proportionate share of the amount of increase in the NNNs is collected as additional rent. The base year is the year used to establish the initial NNNs which are included in the base rent. BE CAREFUL if this is new construction, as it might not be advantageous to use the first lease year as the base year.

build-out: This means the work initially does to customize the premises for the tenant; in other words any work beyond the “vanilla shell” which the tenant

wants for the space; frequently the build out is done by the landlord, or there is an allowance given to the tenant for that work (a “tenant improvement allowance”.

build-to-suit : This term is used when a new building is being constructed for a single tenant and it is being built specifically according to the tenant’s requirements. Usually the landlord and tenant will sign a lease before any construction is commenced and there is a process included in the lease for how the construction will be done and the approval rights and responsibilities during the construction process. This is often seen in “big box” single building retail tenants.

capitalization rate (or “cap rate”): This is simply the owner’s return on investment calculation. When an investor is considering purchasing tenanted buildings, they will be looking to recover a certain cap rate and will compare this to similar projects.

common area: Generally, this means any portion of a project outside the 4 walls of the tenants’ premises, which are available for the tenants’ use. The common area is used as part of the load factor calculation (see below). It is also referred to in collecting the NNNs from the tenants: the landlord usually wants to control its use and configuration of the common area, and also wants to be reimbursed from the tenants for all the costs of maintaining, repairing and replacing common area elements (aka CAM charges).

common area maintenance charges(CAM): Usually considered a component of NNNs, these are the charges landlords impose on tenants to recover the landlords’ costs for maintaining, repairing and replacing common area elements.

covenant of quiet enjoyment: This is sometimes referred to in “modern” leases as the "**warranty of possession.**" It is essentially a covenant (or warranty) that the Landlord has title to the leasehold it is granting to the tenant and the right to so convey it, and that the landlord will defend against any claims made by someone else claiming it has a right to possess the property. These are often limited to persons claiming they got the right to possess from the landlord, although many tenants try and make it broader to require the landlord to make a claim on its title insurance.

escalation clause: This is just a fancy term to reference how increases in the base rent or NNNs will be calculated and/or assessed; and whether there are limitations (aka caps, expense stops, dollar stops) on such increases.

estoppel certificate: The tenant is often required to sign estoppel certificates within a certain number of days from the landlord’s request (although there is no reason this cannot be bilateral). These are often required when the property is being sold or financed, although some landlords use them to hem in tenants on litigation claims. It is a statement of certain facts regarding the status of the lease; for example whether there are any landlord defaults, how much rent is being paid, when rent is paid through, what documents constitute the lease, etc. The certificate also recites that the addressee is relying upon the certificate to take certain action and that tenant is, therefore, estopped from later claiming anything which would contradict the statements made in the certificate.

expense stop: This is the amount of a certain NNN expense which the landlord agrees is its responsibility, and the tenant agrees to pay its pro-rata share of any excess above the stop amount.

first refusal right or right of first refusal (Purchase or Lease): A lease clause giving a tenant the first opportunity to buy or lease a property at the same price and on the same terms and conditions as those contained in a third party offer that the owner has expressed a willingness to accept. To be distinguished from right of first opportunity or right of first offer, which are simply rights to be the first to negotiate with the landlord for the additional space or purchase of the property. Also distinguished from an option to purchase or lease, which would outline the specific terms for a tenant to be able to purchase or lease – regardless of the deal the landlord might be able to reach with a third party.

full service rent: This usually means a base rent which includes all NNNs for the first year (or up through the base year); although the tenant would be liable for increases in the NNNs above the base year.

go-dark: a term frequently used in retail leases to refer to tenant closing its doors to retail sales. Many retail leases denote going dark as a default, some give the landlord the right to collect extra rent, eliminate any exclusive rights granted to the tenant and/or terminate the lease early and collect damages if the tenant goes dark.

gross lease: A lease where the base rent includes all NNNs and the tenant never pays any extra costs.

HVAC: This means the heating, ventilation and air conditioning systems in a premises or building.

hold over tenant: This refers to a tenant who stays on after the lease is terminated or expires. A hold over section in the lease will define the tenant’s status if it “holds over,” whether the lease terms still apply and the rent rates during the hold over period.

leasehold improvements: See build out.

load factor, aka core factor, aka building factor: In many leases, the rent is calculated based upon the “rentable square feet” in the premises. This means more than just the actual interior of the premises (aka the usable square feet), but also includes a pro-rata portion of the common areas and other building areas (like janitorial closets, elevators, stairwells, etc). The load factor is a calculation of how much of the non-premises space is included in a tenant’s base rent. It is calculated by dividing the rentable square feet by the usable square feet.

NNN: See triple-net below.

net lease: This is a lease where the tenant pays base rent plus a proportionate (usually pro-rata) share of the NNNs.

net rentable area: This is a BOMA term, which refers to the floor area of the premises or building after deducting for vertical penetrations (e.g. elevator shafts); this is a hybrid number, however, because no deductions are made for mechanical rooms, necessary columns and the like.

non-compete: A clause granting the tenant in a retail property the exclusive right to sell certain products (e.g. Mexican food, or a coffee shop). There are usually di minimus carve outs for other tenants to sell a small amount of those products. See also radius restriction.

operating expenses: Part of, or sometimes the term is used instead of NNNs. This refers to landlord’s costs in operating the building and could include CAM charges, taxes, insurance, utilities, certain repairs and replacements, reserves, and the like.

pass-through expense: This is a generic term for landlord’s expenses which are “passed through” to a tenant or all tenants for reimbursement, either as an additional rent item or as part of NNNs.

percentage rent: Provides for a rent to be paid as a percentage of retail sales, usually quarterly or annually. This usually applies after a threshold in sales have

been reached, referred to as the “breakpoint.” Only should apply in retail leases.

radius restriction: an agreement that a retail tenant will not open a competing business within a certain radius from the premises and/or an agreement from the landlord that for all property it owns and/or controls within a certain radius of the premises, that landlord will not lease to a competitor. For the landlord, be sure the restriction ends when the lease terminates; or even better when the tenant goes dark.

recapture: When a tenant requests landlord’s consent to an assignment or sublet of the premises, and landlord’ has reserved the right to terminate (“recapture”) the lease either in whole or as to the portion of the premises which is the subject of the request. Also used for other instances where landlord has reserved the right to terminate all or a portion of the lease before the term’s expiration date for other reason (e.g. serial tenant defaults).

rentable square footage: This is the sum of usable square feet plus the tenant’s pro rata share of the Building Common Areas.

subordination agreement: An agreement by which the tenant agrees to the priority of a mortgage over the leasehold interest, or other claim held by the tenant on the property, when combined with an **attornment agreement** referred to as an **SNDA** and **SAND** agreement.

tenant improvements: Improvements made to the leased premises by or for a tenant, see also “build out” above. **tenant improvement (“TI”) allowance:** Defines the fixed amount of money contributed by the landlord toward tenant improvements.

Triple Net (NNN) Rent: A lease in which the tenant pays, in addition to rent, certain costs associated with a leased property, which may include property taxes, insurance premiums, repairs, utilities, maintenance and the like.

usable square feet: A BOMA measurement of how much of the premises or building are actually usable as tenant space.

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