GP|Solo Law Trends & News
Practice Area Newsletter

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

July 2006 **Volume 2, Number 4**

In this issue...

Dear Division Member:

Below is the Summer 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 highlights some emerging areas such as the new Bankruptcy amendments, some interesting checklists to use in family cases and real estate issues as well as use of e-discovery in medical malpractice issues and many more. Thus, I am delighted to attach your Summer edition of Law Trends.

With this issue, Law Trends is now two years old. We hope you agree that with each edition, Law Trends continues to provide meaningful articles for each of you and continues to improve. We trust that this edition, like the others, 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. Also, I want to personally thank Doug Knapp for his work in getting Law Trends to you. Doug has accepted a new position within the ABA and we wish him good luck in his new position.

I hope each of you enjoy this issue of Law Trends. Next year, 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 annual meeting in Hawaii.

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

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Wills And Estate Planning
"Save Money And Provide For Your Loved Ones"

David Lefton, Estate & Financial Planning Group Coordinator

David H. Lefton is a founding member of Hardin, Lefton, Lazarus & Marks, LLC. He is licensed to practice law in the state of Ohio and concentrates his practice on estate planning and probate.

Mr. Lefton is actively involved in the American Bar Association (ABA) and the Ohio State Bar Association (OSBA). In addition to serving as group coordinator for the Estate and Financial Planning Group, Mr. Lefton is also involved with the Solo Day Annual Meeting and the Financial Management Committee.

In Ohio, Mr. Lefton is the current chair of the Solo, Small Firm and General Practice Section of the OSBA. On this Board, he has served as chair of continuing legal education programs sponsored by the Board, has planned educational programs for the continuing education of lawyers in Ohio and has chaired the Ohio Economic and Technology Survey of attorneys throughout the state.

Mr. Lefton is also one of his county representatives on the Estate Planning, Trust and Probate Board of Governors for the OSBA. This Board reviewsand proposes legislation on topics that effect estate planning and probate in the state of Ohio.

Mr. Lefton has also served as a speaker at numerous CLE seminars on the subject of estate planning and probate. In conjunction with the seminars, he has prepared reference materials for attorneys to use and refer to in their law practice

Family Law

Domestic Violence Trials Conducting the Initial Client Interview

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

A Quick Test To Assess The Legality Of Firing An At-Will Employee

Working With Computer Forensics Experts — Uncovering Data You Didn't Know Existed Can Help Make Your Case

Managing Cooperation While Minimizing Exposure:
As Courts Tighten The Noose On The Selective Waiver Doctrine,
Congress May Extend A Lifeline

How To Implement Electronic Medical Records Retrieval In Your Firm

How To Send Learned Treatises To The Jury Room

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

Checklist for Commercial Leases

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Business Law

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Bankruptcy Debtors: Who Are You?

By Leslie E. Linfield, Esq.

Consumer bankruptcy attorneys everywhere had a pretty clear picture of who their clients were. How much they made, how much they owed and how best to try and help them deal with insufferable debt loads. That was until October 17, 2005.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) radically changed the rules of bankruptcy. The question became, how would this effect consumer filings? Who would still file? Would they somehow look different then they did prior to the law's change?

These questions were taken up by the Institute for Financial Literacy (IFL), a non-profit financial literacy organization based in Portland, Maine and whose mission is to make effective financial literacy education available to all American adults. The Institute expanded its mission with the passage of the BAPCPA by becoming an approved provider of the credit counseling and financial management instructional course (also referred to as "debtor education'.)

The answers may be a bit surprising, but this information may prove valuable to consumer bankruptcy attorneys as they move forward and try to assist an ever growing financial strapped population.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

BAPCPA incorporated a new requirement that individuals must first complete mandatory credit counseling in order to be eligible to file a consumer bankruptcy case under the bankruptcy code[1]. This new section reads as follows; "an individual may not be debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an

approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis[2].”

In addition, the new law requires that certain debtors in the bankruptcy system must complete a mandatory financial management instructional course in order to receive a discharge of their debts.[3] A married couple filing a joint bankruptcy petition must each complete credit counseling prior to filing and a financial management instructional course prior to discharge as a result of the law’s application of these requirements to “individuals.[4]”

It’s worth noting that during the multiple attempts to pass BAPCPA into law, much rhetoric and little comprehensive research was cited with regard to the demographics of consumer debtors. We heard much about ‘abuse’, high income filers and hidden assets with little to back up these claims.

During the development of its credit counseling service the Institute for Financial Literacy incorporated a research component into its delivery platforms to allow large scale data collection and facilitate the establishment of research into the demographics of the consumers considering filing bankruptcy (those seeking credit counseling.) This would allow a meaningful analysis of what changes BAPCPA would have on those consumers seeking bankruptcy protection as well as set baselines for future research.

So What Did We Find?

During the first and half months, five thousand and ninety four (5,094) clients of the Institute volunteered to complete a survey. This compared with nearly 138,000 new bankruptcy cases filed nationally between October 17, 2005 and March 31, 2006 gives us a statistically valid sample. If all of these respondents filed bankruptcy petitions[5], this would represent 4% of all new cases filed for the period.

Gender

There appears to be a gender split with 53.8% indicating that they were female, while 46.2% were male. In comparison, the current ratio of the United States is estimated 51% are female and 49% male.

Age

It is in age that we begin to see some interesting numbers appear. There is a distinct bell curve with potential debtors, starting with the 25-34 year age range (22.7%),

topping out with the 35-44 year age range (28.6%) and slopping back down with the 45-54 year age range (22.4%).

One statistic which may cause concern is the percentage of senior citizens who are considering seeking bankruptcy protection. The Institute's survey found 8.9% of the respondents were over the age of 65 years. Though this is still below their percentage of the U.S. population, in previous research conducted by the United States Trustees Program the percentage of seniors filing bankruptcy protection was found to only be 4.4% of their sample.[6] Attorneys may find themselves dealing with an aging clientele and need to address concerns other then debt elimination.

Table 1: Comparison of Age Group Data

Age Range	Percentage of Debtors IFL	Percentage of US Adults
18-24	3.6	7[7]
25-34	22.7	14
35-44	28.6	15
45-54	22.4	14
55-64	13.8	10
65+	8.9	13

Education

Many who have not suffered financial hardship maybe quick to judge those who have. They may question the intelligence of an individual in financial distress and even wonder "What's so difficult about this? Didn't they learn this in school?" The following looks at the educational levels of respondents and compares them to the U.S. population.

Table 2: Education

Education Level	Percentage of IFL Total	Percentage of US Population
Graduate	4.7	8.9
Bachelors	10.7	15.5
Associates	7.6	6.3
Some College	30.8	21.1

High School/GED	39.7	28.6
Primary School	6.2	17.4
None	.3	2.2

In response to the question of whether or not students do learn basic money management in school, the Jump$tart Coalition for Personal Financial Literacy administers a nationwide biennial survey to measure the financial literacy levels of high school seniors. In the 2005-06 survey, the results revealed an average score of 52.4 percent, a failing grade by most measures.

Income

There wasn't a day that went by during the BAPCPA debates that income levels and means testing (a topic for another day!) didn't come up. So what do post-BAPCPA clients earn? Surprisingly much less then you would think.

Table 3: Self Identified Income of IFL Respondents

Income Level	Percentage of Responses
Less than 20K	44.6
20k-30k	24.4
30k-40k	14.4
40k-50k	7.7
50k-60k	4.2
More than 60k	4.7

Employment

So with income levels so low, did we find that rates of unemployment were high? Almost three times the national unemployment rate! The other number which was of interest was the percentage of respondents who indicated that they were retired, 10.5%. Again this seems to indicate attorneys will be dealing with an aging clientele and may need to adjust their practice to accommodate the needs of these clients.

Table 4: Employment

Employment	Percentage of Responses
Employed	61.8
Unemployed	13.7
Retired	10.5

Self-Employed	7.7
Homemaker	5
Student	1.3

Causes of Financial Distress

Lastly we will examine the common causes for financial difficulty. During the credit counseling process clients were asked to pick from a list of causes of financial distress. Clients were encouraged to choose more than one cause when describing their situations and therefore the percentages will equal more than 100%. The table below shows the results:

Table 5: Causes of Financial Distress

Cause of Financial Distress	**Percentage of IFL Clients**
Overextended on Credit	55.2
Unexpected Expenses	52.3
Reduction of Income	46.3
Job Loss	32.9
Illness/Injury	30.9
Divorce	15.2
Birth/Adoption of Child	7.9
Death of Family Member	7.8
Retirement	4.8
Identity Theft	2.1

Some of the results were not to be unexpected, such as a high percentage indicating that they were “Overextended on Credit” and suffered from “Unexpected Expenses.” Where some interesting results emerged were with the “Illness/Injury” result at 30.9%. Though most attorneys know from experience that many of the clients they have helped suffered financial devastation due to medical bills, to see an actual result of over 30% puts this into perspective.

“Reduction of Income” along with “Job Loss” shows the harsh effects the “changing economy” has had on many. No doubt there will be much to study for economist and sociologists for years to come.

Another somewhat concerning result was the number of respondents who chose “Retirement” as the cause of their financial distress. With 4.8% choosing this, it was one of the lower responses, but this factored in along with the other findings around age

and retirement there begins to be drawn a frightening picture for American senior citizens.

Conclusion

The Institute for Financial Literacy plans to continue its research on consumer bankruptcy demographics and will be publishing another report on the one year anniversary of BAPCPA. The goal being that as ongoing and future policy discussions ensue around bankruptcy there will be meaningful demographic information available about those who are most directly affected, the consumer.

Meanwhile as bankruptcy attorneys adjusts to the changes the new law brings, hopefully the information found here will help them better understand who these clients are and how better to reach out and serve them.

Institute for Financial Literacy
Portland, ME
llinfield@financiallit.org

[1]Title 11 USC

[2]11 USC sec. 109(h)(1)

[3]11 USC sec 727(a)(11) and 1328 (g)(1)

[4]11 USC 302

[5] 97% of credit counseling clients received a recommendation to consult an attorney based upon their financial condition.

[6] *See* Ed Flynn and Gordon Bermant, *A Closer Look at Elderly Chapter 7 Debtors,* 21 ABI Journal 3 (April 2002).

[7] US Census Bureau collects data from ages 15-19 and 20-24, only the 20-24 data was used.

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Welcome To The Blogosphere
A Primer for Business Lawyers

By Patrick Robben

Are you in the dark as to what a "blog" is? The online encyclopedia Wikipedia (http://en.wikipedia.org) defines a "blog" as "a Web site in which journal entries (posts) are posted on a regular basis and generally displayed in reverse chronological order. The term is a shortened form of Weblog or Web log." Authoring, or maintaining a blog is called "blogging." A person engaged in these activities is called a "blogger."

For many, these terms are completely foreign. However, for a growing number of Americans, "blogs" and "blogging" are becoming a part of their regular routine. According to a June 2005 article in USA Today, an estimated 32 million Americans now read blogs. The article noted that two reported surveys have found that more than 8 million American adults have created their own blog. Millions of blogs exist in what is sometimes collectively referred to as the "blogosphere," with thousands more being created every day. These blogs allow everyday citizens to discuss politics, business, sports and hobbies, or an infinite number of other issues (including blogs devoted to legal issues, a/k/a "blawgs").

Should businesses care about blogs? The answer is a resounding "yes." The rise of the blogosphere raises new employee policy issues. It also raises broader challenges for companies faced with the ability of bloggers to anonymously assail them. At the same time, blogging creates opportunities for companies to promote their products and manage their businesses--opportunities that will increase the need for companies to obtain counsel regarding the legal implications of their use of this amazing new technology.

Many employers are just now awakening to the realization that many of their employees are bloggers. Some of these same employee-bloggers are not just discussing the politics of the day, or their favorite hobby. Some bloggers use their personal blog as a forum to

discuss professional issues, including details of their job. These blogs can include discussions about the bloggers' job duties, supervisors, fellow employees, and others. Some bloggers working for larger corporate employers have used their personal blogs to vent their opinions on corporate management and strategy.

Granted, the World Wide Web is not a new medium, and employees have been able prior to the rise of blogging to post unflattering or sensitive information on the Internet for the whole world to (potentially) read. What makes blogging unique is the ease with which it enables individuals to post content on the Web. Blogging requires only the most rudimentary computer skills, and the software needed to set up a blog is freely available. If you can "surf the Web" or read e-mail, you can quickly set up a blog and begin blogging on the topic of your choosing.

The ease with which people can engage in blogging means that it can be easy for people to "engage their keyboard" before considering the consequences of what information or opinions they are posting on the Internet. This can lead to heartburn for employers when current employees or disgruntled employees begin blogging on employment-related matters.

In a growing number of high-profile cases, employers have taken action to terminate employees for what they write on their personal blogs. In a recent incident, a Delta Airlines flight attendant was fired after the company learned of the employee's blog chronicling her job. The employee, author of a blog entitled "Diary of a Flight Attendant" on the site http:// queenofsky.journalspace.com, had posted pictures of herself cavorting in her employee uniform aboard a Delta aircraft. In another example reported last year in the Washington Post, an adjunct journalism professor at Boston University was released from his job after discussing on a sports journalism blog his class and one of his "incredibly hot" students.

The growing spate of incidents in which employers have discovered to their dismay that employees are writing potentially unflattering items has led some employers to begin to consider whether they need to formulate blogging policies for their employees. IBM, which has encouraged its employees to be active in the blogosphere, has reportedly recently issued written blogging policies to employees, and other employers have issued formal or semi-formal guidelines to employees on acceptable employee blogging.

Common features among these blogging policies include reminders for employees to: identify themselves on their blogs and disclose their connection to the company if they blog about company-related matters; make clear in posts that they speak for themselves, and not the company; preserve and maintain trade secrets and the confidentiality of sensitive information possessed by the company; and refrain from discussing customers, clients, suppliers, etc., without their prior approval. Employers that are in high-profile

industries, or deal with sensitive company information, should strongly consider adopting a policy with the elements identified above.

The alternative is for the employer to give the impression to its employees that the employer condones any form of employee blogging. Such an approach increases the risk that employees will engage in inappropriate blogging behavior. It may also make it easier for an aggrieved third party to argue that an employee-blogger was acting within the scope of his or her employment, leaving the employer potentially liable for the employee's blogging.

Beyond setting forth the legal do's and don'ts, corporate blogging policies should offer employees common-sense tips on how to create an effective and nonobjectionable blog. The Sun Microsystems "Policy on Public Discourse" is a good example of such a policy that avoids legalese and offers constructive suggestions. Employee-bloggers are not only advised in plain language of some of the potential legal pitfalls, but reminded to "Write What You Know," "Be Interesting" and generate goodwill with other bloggers by providing links to noteworthy blogs.

Many novice bloggers do not appreciate the potential reach or impact of their typed words in cyberspace. Hence, a brief tutorial on blogging etiquette and issues to avoid may help steer employees out of trouble. In this way, problems can be avoided before they become a human resources and legal headache.

The rise of employee-blogging means that business counsel not only should be helping clients draft blogging policies where appropriate, but will be faced with offering counsel to clients that learn of employees failing to comply with the guidelines for safe blogging summarized in policies such as Sun's. Although private-sector employers generally have broad discretion to discipline or terminate at-will employees, employers should give careful consideration to how issues arising from employee-blogging are addressed. While the legal principles as to how much protection courts will provide employee-bloggers are still being developed, at least a couple of areas in which such activity may be deemed protected are already apparent. Paul S. Gutman, "Say What?: Blogging and Employment Law in Conflict," 27 Colum. J.L. & Arts 145 (Fall 2003).

First, employees who turn to their blog to "blow the whistle" on a suspected violation of the law by the employer may claim to be entitled under the circumstances to protection from retaliation under existing whistleblowing laws. This argument may not have ***47** much merit, depending on the language of a given state's whistleblowing laws. Still, employers should be aware of such laws and consider whether they are applicable before a decision is made to discipline an employee blogger claiming to "blow the whistle" on illegal activities in the workplace.

Second, an employee turning to a blog to discuss union-related matters may also be entitled to protection. The U.S. Court of Appeals for the Ninth Circuit held in the case of Konop v. Hawaiian Airlines, 302 F.3d 868 (9th Cir. 2002), that an airline may have violated the Railway Labor Act when the airline disclosed to one of two labor factions engaged in an internal union debate information it illicitly obtained from a pilot's password-controlled Web site.

The Web site was devoted to discussing union issues and advocating an opposing labor faction. The pilot complained that this action interfered with protected union activities and constituted unlawful coercion and intimidation. The Konop case is a good reminder to employers that although employers generally have discretion to discipline or terminate an at-will employee for what the employee posts on a blog, special considerations must be taken into account in the labor context.

Third, some states may have legal provisions granting employees protection to engage without fear of employer reprisal for certain types of speech. For example, Cal. Labor Code § 1101 has a statute prohibiting employers from "forbidding or preventing employees from engaging or participating in politics" or "controlling or directing, or tending to control or direct the political activities of employees."

New York Labor Law § 201-d is another example of the smattering of states that have statutes protecting employees from discharge or discrimination based on the individual's political or recreational activities outside of working hours. Jonathan A. Seagal, "Off Duty Blogging: What's Work Got To Do With It?" Metropolitan Corporate Counsel 27 (Aug. 2005). Employers and their counsel will therefore be wise to be cautious and think broadly in checking state statutes that arguably may be applicable before making decisions whether to terminate an employee based on the employee's off-duty blogging activities.

The blogosphere poses further hurdles to successful litigation against bloggers--be they disgruntled employees or other corporate critics--that are posting unflattering accusations. One such hurdle that clients will need to be appraised of in this situation when they seek legal action against these blogger-critics is the fact that many blogs allow authors or commentators to post statements anonymously.

In a decision late last year, the Delaware Supreme Court was perhaps the first state supreme court faced with the issue of whether it would allow a plaintiff to compel an Internet Service Provider (ISP) to disclose the identity of someone who made anonymous political criticisms of a public figure on a blog. In its decision in Doe v. Cahill, 884 A.2d 451 (Del. 2005), the Delaware high court grappled with the issue of how easily it should permit a plaintiff to use litigation and the discovery process to unmask an anonymous critic.

Noting the important First Amendment value in anonymous free speech, the court ruled that a public-figure plaintiff had to satisfy a "summary judgment" standard before it could obtain the identify of an anonymous blogger through discovery. Unless the plaintiff could demonstrate that prima facie evidence existed that, among other factors, the statement was actually defamatory, then the blogger's identity could not be unearthed. The Cahill court's reasoning relied in part on its belief that many blog posts by disgruntled individuals will be understood to be "vehicles for the expression of opinions; by their very nature, they are not a source of facts or data on which a reasonable person would rely."

Counsel for businesses that are the subject of anonymous blogger critics should therefore help their clients understand the potential limitations of a litigation response to an unfriendly anonymous blogger. Charging into court to respond to the slightest perceived attack from such a Web site may fail in an effort to unearth the author and only serve to draw unnecessary attention to the Web site. Business counsel should help clients make a nuanced response to such Web sites.

Sometimes litigation to stop a clearly defamatory message may be required; other times the best response may be to do nothing and avoid giving the Web site unnecessary attention. Or, the company may be better off trying to counter the information attack. As the Cahill court noted, one benefit of blogs is that the same features that allows an anonymous commentator to post a derogatory comment permits another commentator to respond in the same forum.

While not everything in the blogosphere can be taken seriously, the Cahill court's description of the blogosphere as a forum generally understood to "not [be] a source of facts or data on which a reasonable person would rely" may have painted the blogosphere with too broad a brush. Granted, many blogs are amateurish endeavors with limited readership or effect. However, certain well-read blogs can rapidly coalesce public opinion against businesses that the collective judgment of the blogosphere ***48** deems are acting inappropriately.

Discourse on public issues can move very quickly on the blogosphere, as the authors of well-known and influential blogs read each other's work. Bloggers can combine their energies rapidly to build a compelling argument for or against a proposition based on their collected ability to research an issue and contribute data to support their arguments.

Blogging has demonstrated this ability to shape public opinion in the last couple of years. The ability was powerfully demonstrated during the 2004 U.S. presidential election. It was during the campaign's frenetic final weeks when a group of bloggers sharing information on their blogs helped discredit a "60 Minutes II" story by Dan

Rather claiming to present documentation relating to President George W. Bush's Texas Air National Guard service. In the "60 Minutes II" example, the blogosphere very rapidly built a convincing argument that the alleged Bush National Guard documents were forgeries. The lead bloggers in this example built grass-roots pressure on the Tiffany network that quickly gained attention for their concerns in the mainstream media.

CBS ended up having to undergo a very humbling, and public, investigation into how it aired a story relying in part on documents that had authenticity questions. This is but one example of a public policy debate that has been shaped by the blogosphere. Therefore, businesses should not underestimate the potential influence that bloggers can have on their customers or public image.

"Blogstorms" or "blog swarms" define the phenomenon that occurs when a large amount of blogging discussion occurs on a given topic, such as with the "60 Minutes II" incident. These blog swarms can have a real effect on businesses when they are the punching bag of the blogosphere's collective judgment. The ability of the blogosphere to rapidly sway public opinion in this context is a power that other businesses might find themselves facing.

Influential political blogger Hugh Hewitt, dubbed by the Wall Street Journal the unofficial historian of the blogosphere, argues in his recent book, Blog: Understanding the Information Reformation That's Changing Your World (2005), that wise corporate executives will have contingency plans in place to help them address these rapid-fire public relations crises before they arise.

Hewitt also suggests that savvy executives of high-profile companies will begin to find positive uses for this new medium by posting their own blogs, and offers an example of the motivating power such an executive might have if he or she used the blog as a forum to publicly recognize on a regular basis specific employees for their contributions.

That is one example of how blogs may begin to transform business by offering convenient public forums for employers to tout their employees and products, market their services or provide a helpful forum for public discussion of industry-related topics. Corporations such as Boeing and General Motors have begun experimenting with having "blogs" sharing information from company executives on new products. The Sun Microsystems "Policy on Public Discourse" explains Sun's belief that employee blogging can be an effective tool for helping the company "do a better of job of telling the world" about Sun's products and services.

It is essential for business lawyers to learn about the "blogosphere" to check out what the buzz is about. Even if you are not a blogger or blog reader, your clients, or their

employees, customers or competitors might be. The advent of the widespread use of the Internet created a new set of legal, human resources, and business issues to consider. Similarly, the continuing evolution of the Internet with the rise of the blogosphere raises new legal issues, challenges and--for the savvy employer--opportunities. Savvy employers and business counsel will stay atop the potential legal and human resources-policy issues raised by blogging while also viewing blogs as a potential resource to use rather than to fear.

One example of these issues is the extent to which business liability insurance will provide coverage to businesses either using corporate blogs or blessing employee participation in blogs relating to their jobs. Judy Greenwald, "Blog liability risks expanding, but coverage takeup limited," Business Insurance (Nov. 28, 2005). Businesses using corporate blogs or encouraging employee blogging should consult their liability insurance policies to determine whether coverage exists, or whether coverage under a separate multimedia policy is available.

Business counsel should consult their clients to find out what blogging activities the company is engaged in or contemplating. In that way, the potential libel, copyright, insurance or other issues can be headed off before the client has unwittingly risked legal liability in an effort to avoid falling behind the blogging trend.

Blogs are a phenomenon that is shaping the way politics, **business** and **law** is **practiced** in America. We are just beginning to understand the potential and pitfalls that this new medium is creating. If you have not done so already, I would encourage you to find out what the blogosphere is all about, and consider how it may affect you, your clients and your **practice**.

Robben is a partner at Rider Bennett, LLP, in Minneapolis. His e-mail is probben@riderlaw.com

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Business Protection Tips (For lawyers, judges and others)
PART 1: The Telephone

By David Zachary Kaufman

This will be the first of a series of articles discussing business and personal protection tips for the lawyer, judge, and other professional who deals with people in emotional crises or with people who are just plain dangerous.

This column is not interested in merely telling the reader to buy a weapon or a dog or whatever. These tips are basic, they work, they are generally not expensive and they usually have a "whack!" factor. (A "whack!" is the sound of your hand hitting your forehead as you say "Why didn't I think of that?")

In this column let's talk about that most ubiquitous of electronic devices, the phone.

First, the cell phone. These little devices (some think of them as the spawn of the devil) are wonderful life-saving tools when properly used (and I don't mean as a weapon a la Rep. Cynthia McKinney (Ga. D)). The first thing anyone should do when they get a phone is to program it. I urge all people to program "9" to speed dial "911". That way you can a push of the button summons help right away. By the way, this same tip should be used for all your home and office phones, especially the receptionist's phone and your phone.

I just love speed-dial on all the phones. That way you can call for help or advice or whatever quickly and easily. But! You have to update your speed-dial numbers regularly to be sure that they are the ones you want to use. I suggest you review your speed-dial list at least every month. That way, you can have already dialed someone you trust and all you have to do is press the "Send" key if you are in distress.

Some cell phones are flip-phones and some are not. Many of us carry the phones with a

locked keyboard. If you are one who carries their phone locked, unlock the keyboard when you are carrying the phone in your hand. A locked phone cannot make quick calls and is just a hand tool--and not a very good one either.

Another tip which is gaining more popularity (or notoriety) came out of the London bombings in July 2005: establish a separate entry in your cell phone "I_C_E" (In Case of Emergency) with a specific cell phone number. The reason for this is that many of us have family members listed as "Mom" or "Dad" but these people are ***not*** the people we would want called if there were an emergency. (I know that my mother, although she is a fit 87, is not the person I would most want first notified if I were injured and unable to communicate. I suspect that I am not the only one who feels that way.) "I_C_E" is the number to use to designate the key contact person in the event that you have been injured and cannot communicate. This convention is becoming a well-established protocol in the emergency responders' lexicon.

Now, let's talk about the office phone.

When you train your staff be sure that they understand what they can and cannot say. You may not want people to know *where* you are. That gives someone hunting you an idea where to look. Good example: Do ***not*** say "Mr. Kaufman is in Washington D.C. Superior Court this morning." That tells people where I will be and (maybe) the route I will use to return to the office. It also tells people (roughly) a schedule of when I can be expected to be in the parking lot near my office. All of these facts are facts that someone who is stalking me would love to know. Because this is how they can identify my car, etc.\ The same applies if someone calls to make an appointment. I have time to meet them or I don't. But do not tell people I am in or out of the office.

Similarly, staff should never give out any other information to anyone without checking with you first. Astonishingly, even in this age of identify theft, people still give out their attorney's schedule, his cell phone number, make and model of his car and all kinds of other personal information. None of this information should be given out to anyone without checking with you first. You simply don't want people to know when you are working late, alone in the office and when the office is empty or any other information like that.

I love Caller ID. In fact I tell clients that I will not take calls that are ID-blocked. Similarly, I love *69--the reverse dial that tells me who or what is calling me. This lets me screen all my calls. Staff should be told to do this and to keep a record of all numbers on the "proscribed list" so that they will know who cannot be put through.

I also love Radio Shack. They have the most amazing stuff there sometimes. For example, did you know that, for about $20.00, you can buy a little device that plugs into

your phone and lets you record conversations on a recorder? This little thing is wonderful if you are prone to getting telephone threats--a call comes in, the threat starts, and you start recording it for evidence. Be sure to obey the law though. Some states, like Maryland, require that *both* sides to the conversation consent to taping. Others do not. Check for yourself before trying this. One easy place to start checking is http://www.rcfp.org/taping/ This site is run by the Lawyers Committee for A Free Press and is about 3 years old. But it will let you start your research with an advantage.

Finally, a word about what to say (or do) with your phone. Establish a code phrase for you to use on the phone in case something happens (kidnaping, break-in, etc.) - something innocuous like, "I'm fine. Take care of yourself". Use it whenever you need to send a message. Depending on your level of paranoia, a 'code phrase' that is NOT used may also be a clue. In other words, if someone is holding you and telling you to read from a script, and you can't say "I'm fine, take care of yourself" then they won't know that you're in trouble. If, on the other hand, your code is, you always end the conversation with "Take care of yourself" and you don't use it, THEN the other party knows you're in trouble.

Anyway, I hope these help. Good luck and be safe.

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Fantasy Meets Reality: Examining Ownership Rights In Player Statistics

By Robert Freeman, Peter Scher

By most estimates, 10 million to 20 million Americans played fantasy sports **games** last year. And, the business of fantasy sports goes far beyond the $19.99 or so that a fantasy player generally must pay to join a league on a site such as SportsLine.com or ESPN.com. Through fantasy sites, advertisers target a highly desirable consumer demographic that (so we have heard) often spends hours a day online following their teams.

Providers and publishers of draft day guides, statistical packages and scouting reports sell to a captive and hungry audience of fantasy players. And, because fantasy sports enthusiasts like to watch their teams and individual players play, media conglomerates create synergistic programming campaigns around their fantasy sports properties. When one finishes tabulating all of the money that exchanges hands in relation to fantasy sports, what you have is a rapidly growing, billion-dollar industry.

Because fantasy sports are fun and lucrative, it comes as no surprise that the major sports leagues -- the real ones that is -- have recently taken steps to ensure and preserve their share of the revenue.

Changing the rules of the game

An example of this trend is the five-year, $50 million deal that Major League Baseball Advanced Media, LP (MLBAM) struck with the Major League Baseball Players Association (MLBPA) last January to acquire exclusive rights to players' names, statistics, likenesses, etc., for the development of online content, including fantasy baseball.

No sooner did MLBAM acquire these rights than it began to enforce them in ways that the MLBPA never had before. Indeed, according to the complaint for declaratory relief in C.B.C. Distribution and Marketing Inc. v. Major League Baseball Advanced Media,

L.P., No. 4:05-cv-00252-MLM (E.D. Mo., complaint filed Feb. 7, 2005), MLBAM, almost immediately after signing the deal, began writing letters to companies that offered online fantasy baseball **games,** stating its position that the unlicensed use of players' names in the operation of fantasy **games** was illegal and that such use must cease immediately.

The plaintiff in C.B.C v. MLBAM -- a fantasy sports provider that had in past years operated under a license from the MLBPA -- seeks a declaration that the unlicensed operation of such games does not constitute a violation of the Lanham Act, copyright, rights of publicity or any state's unfair competition or false advertising laws.

C.B.C. v. MLBAM is still pending and it is being closely followed by the fantasy sports community. Through court papers and public statements, the position of MLBAM (and Major League Baseball as an intervenor) is that fantasy baseball sites have no right to use player names for commercial gain without an authorized license. C.B.C. and its supporters in the fantasy sports community have countered with the proposition that baseball statistics, which fairly include the names associated with those statistics, are not the property of anyone, since they are in the public domain.

The central issue raised by the C.B.C. case is whether, in using sports statistics, the focus should be on the fact that statistics may be in the public domain or on the publicity rights of the players whose names are inextricably linked to those statistics.

C.B.C. v. MLBAM underscores the fact that player statistics are the driving force behind fantasy sports. If issued, a judicial opinion in C.B.C. v. MLBAM could lend guidance regarding the boundaries of what a fantasy sports site can and cannot do with player statistics without a license from the applicable "real-world" league. In this article, we will seek to highlight the major legal issues raised by a fantasy sports site's unlicensed use of player statistics.

Statistics are facts

On a very basic level, sports statistics are facts and facts are not copyrightable unless their selection or arrangement demonstrates sufficient "originality" to merit protection. Feist Publications v. Rural Telephone Service Co. Inc., 499 U.S. 340, 349 (1991).

Shortly after Feist was decided, the Second Circuit considered whether a baseball pitching form that compiled nine different statistics relating to the opposing pitchers in each of a particular day's games was entitled to copyright protection and held that the plaintiff and author of the form was at least entitled to a trial on this issue. Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991). The court noted, however, that even if the pitching form were entitled to protection, a competing form would not be infringing

if its selection of statistics "differ[ed] in more than a trivial degree" from the plaintiff's. Id. at 710.

Based on the teaching of Feist and Kregos, it is highly doubtful that sports leagues could use copyright law, in and of itself, to effectively claim that fantasy sports sites infringed their statistical compilations. Fantasy sports sites rarely select and arrange statistics in the same manner that the leagues do and in fact the more advanced sites allow users to sort and customize a diverse array of obscure, nonstandard statistics.

Motorola and the fantasy gamecast

In the Second Circuit at least, this question appears to have been partially addressed by National Basketball Association v. Motorola Inc., 105 F.3d 841 (2d Cir. 1996), in which the court vacated an injunction against Motorola's transmission to pagers and Internet sites of real-time NBA scores and statistics. Motorola's operation relied on a data feed from reporters who watched live TV and radio broadcasts, but the court distinguished the broadcast of a sporting event -- which is copyrightable under 17 U.S.C. § 101 -- from the **game** itself, which is not an original work of authorship. The court held:

***8** We agree with the district court that the "defendants provide purely factual information which any patron of an NBA **game** could acquire from the arena without any involvement from the director, cameraman or others who contribute to the originality of a broadcast." ... Because the [defendants] reproduce only factual information culled from the broadcasts and none of the copyrightable expression of the games, appellants did not infringe the copyright of the broadcasts. Id. at 847.

The Motorola court also held that the transmissions of real-time scores and statistics did not constitute a misappropriation of "hot news" from the NBA, mainly because Motorola's service was not "free-riding" on the NBA's product in that the defendants expended their own resources to collect and transmit the scores and statistics.

Arguably then, at least insofar as copyright infringement or "hot news" misappropriation claims go, any Web cast of a sports game, no matter how "granular" or realistic, may be legal under a Motorola-type analysis so long as the protectible elements of the league's or team's broadcast are not reproduced. Copyright claims might be even weaker if a Webcaster does not even watch the league's TV broadcast and instead relies solely on an audio or Internet data feed.

Still, it should not be forgotten that the Motorola court was confronted with a real-time statistical service that could hardly be characterized as simulating a true "game experience;" whether a play-by-play "gamecast" that is loaded up with computer-generated graphics infringes the league's television broadcast remains an open question.

It should also be considered that the defendants in Motorola were able to collect all the data they needed just by watching or listening to broadcasts. In this aspect, some sports may be better positioned to protect against real-time gamecasts than others. In Morris Communications Corp. v. PGA Tour Inc., 364 F.3d 1288 (11th Cir. 2004), the court upheld the denial of an antitrust challenge by a news publisher that sought to gather and disseminate real-time golf scores from PGA events. The PGA had implemented an electronic relay system to gather and transmit real-time scores of the entire tournament field to its own Web site, as well as an on-site media center.

PGA rules against wireless devices on the courses prevented the plaintiff from setting up its own system and TV broadcasts did not provide enough individualized information for such a purpose. Thus, the plaintiff was forced to rely on the media center to obtain score information and had to abide by the PGA's restrictions designed to preserve its "first opportunity" to post and syndicate the scores. The court concluded that the PGA's purpose, preventing the plaintiff newspaper publisher from "free-riding" on its proprietary technology, was a valid business justification for the restrictions.

A fair use of trademarks?

Trademark law may offer sports leagues and teams greater protection than copyright law against unauthorized uses of statistics. Most obviously, without a proper license, fantasy sites may not be able to use league or team trademarks, including team names and logos, in connection with statistics. Any displays of marks or logos that suggest an affiliation or sponsorship from the league, such as the NBA logo, would be particularly problematic, but even simpler identification of players by team or division will in all likelihood give rise to claims of trademark infringement or unfair competition.

A counterargument to such trademark claims is that a fantasy site merely uses such trademarks to describe the sports league's product -- not its own -- and that such use is allowable under the doctrine of nominative fair use. As set forth by the Ninth Circuit Court of Appeals, the defense of nominative fair use is available to a commercial defendant if three requirements are met:

First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder. New Kids on the Block v. News America Publishing, 971 F.2d 302, 308 (9th Cir. 1992).

The commercial value of names

Ultimately, it may be the players' rights of publicity that provide the strongest argument for protection against fantasy sites' unauthorized use of statistics. For the last half century, courts have recognized athletes' exclusive rights to exploit the commercial value of their names, likenesses and in some cases, on-field accomplishments. The right of publicity is both a common law right and a statutory right that varies by jurisdiction.

In an early case dealing with player statistics, Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970), the newly founded Major League Baseball Players Association obtained an injunction and judgment against the manufacturers of board games (a less successful version of Strat-O-Matic) that incorporated the names and statistics of hundreds of major league players.

Addressing the plaintiffs' claim of "misappropriation and use for commercial profit of the names of professional major league baseball players without the payment of royalties," the court found it clear that "the use of the baseball players' names and statistical information is intended to and does make defendants' games more salable to the public than otherwise would be the case." Id. at 1278.

Significantly, the Uhlaender court rejected the defendants' contention that because their statistics were already published in newspapers and in the public domain, the players had waived their rights to relief. Id. at 1282- 83. As in the pending C.B.C. case, there is an apparent tension between players' rights to the commercial value of their names on the one hand and the rights of a gamesmaker, if you will, to make use of facts that are in the public domain. In Uhlaender, the former decidedly trumped the latter.

***9** But players' publicity rights may not always trump competing interests. Ironically, in Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307(Cal. Ct. App. 2001), it was Major League Baseball that argued, successfully, that the public's interest in baseball history outweighed the economic interests and statutory rights of old-time baseball players whose names, images, statistics and biographical information were used for MLB publications and Web sites. (In 1947, the standard player contract was revised to define more clearly the MLB's rights to such material.) Ruling for the MLB on First Amendment grounds, the court effused:

Major league baseball is followed by millions of people across this country on a daily basis. Likewise, baseball fans have an abiding interest in the history of the **game**. The public has an enduring fascination in the records set by former players and in memorable moments from previous **games.** Statistics are kept on every aspect of the **game** imaginable. Those statistics and the records set throughout baseball's history are the standards by which the public measures the performance of today's players. The records and statistics remain of interest to the public because they provide context that

allows fans to better appreciate (or deprecate) today's performances. Id. at 315.

Returning to the here and now, the right of publicity is positioned at the center of the dispute between sports leagues and fantasy sports sites. In analyzing publicity rights in the context of fantasy sports, courts may need to take a close look at what it means to use a player's name for commercial gain.

Can it really be said that fantasy sports sites exploit the commercial value or goodwill that players have built up in their names, when the essence of fantasy sports is that a player's worth is exactly measurable by the statistics that he generates? One could argue that fantasy sports are driven by cold, hard statistics, not by the intangibles of players' popularity, fame or market value.

Conclusion

Nevertheless, the immense commercial appeal of professional athletes and their names is undeniable. To those who argue that fantasy **games** are all about the numbers, one may ask why there isn't a fantasy **game** based on the barometric pressure recorded hourly at various weather stations around the world. As long as fantasy sports **games** continue to generate significant revenue, one should expect leagues, teams and athletes to continue to demand a share and, in support of such demands, to rely on a three-headed weapon of intellectual property rights: copyright, trademark and the right of publicity.

Ultimately, it may be the last right -- the right of publicity -- that will force all unlicensed operators of fantasy sites to either obtain a license or significantly alter their operations.

Robert Freeman is a partner in the New York office of Brown Raysman Millstein Felder and Steiner LLP. His e-mail is rfreeman@brownraysman.com. Peter Scher is a litigation associate in the same office.

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Improving Your Work Product: Essential Word Skills for Lawyers

By Adriana Linares

It used to be that the recipient of your very pricey legal documents could not "see" how your documents were fashioned. Fax machines and snail mail kept all “dupe and revise” and real cutting and pasting efforts hidden behind a physical curtain. Not so these days as a simple push of the "Show/Hide" button in any word processor swings the hood of your document wide open for all to see. Every tap of the keyboard is revealed as can potentially dangerous hidden data. Along with what the eye can see, also consider that your client or a co-editor can also gauge how much you or your secretary know – or worse, DON’T know – about creating professional documents. From the moment you send a document out the points you are trying to make, can be lost on the recipient who is struggling to understand the flow of your document via their monitor.

If you must send documents in Word (as opposed to the natural-first-choice-Adobe PDF) then you might consider taking some time to learn how to properly format text in Word. There's a lot to learn so let’s start small and review some basics that every attorney can and should master.

Understand Cut/Copy and Paste Option in Word

If you only learn one thing make it this: understand how to cut, or copy, text from your original document and paste it into the current document you have open in Word (or WordPerfect).

When you paste text from another document, an email, or even a web page; the original formatting is often retained. That is, if you copy a paragraph from an old WordPerfect document that was automatically numbered, is in Courier New, and font size 12 font then paste it into Word; Word will paste it with its auto-number and in Courier New, font size 12. What you usually want is to have the copied/pasted text to blend seamlessly into your current document (such as Times New Roman, 12, justified).

The classic method of pasting text without formatting is to go to **Edit > Paste Special > Unformatted** (or a similar option, like Text). This still works and is great but can be considered The Long Way.

When you paste in Word, you should automatically see a Paste Options icon (pictured right) then you can click on it after executing the paste to see a list of handy *paste options*.

- **Keep original formatting**: Think of "as-is"—and also add this caveat "without guarantee." This is usually the least desired choice as hidden codes or text can often wreak havoc in Word.
- **Match Destination Formatting**: changes the text formatting of the pasted to match that of the surrounding text and paragraph. This option is better than Keep Source Formatting, but not as good as:
- **Keep Text Only**: which strips all previously applied formatting, leaves text good as new as if you had typed it right in yourself.

If you don't see the Paste Options Icon, go to Tools > Options > Edit Tab and place a check in the "Show Past Options Button" box.

Keep it Together: How to Keep phrases from breaking to the next line

A non-breaking space is a special character you can insert between text you don't want split on two lines. All sorts of word-processing acrobatics have been witnessed in an effort to keep a date, a name or a special phrase on the same line - which is, of course, futile as there is no guarantee that your formatting will stick from one computer to the next. But why go through all that when simple brute force will do? Hold *Ctrl + Shift + the Spacebar* to insert the spaces between the text you want to force together.

Why Does Word Do That?

Few law firm trainers will argue that the number one complaint heard from lawyers and staff is:
"I can't control Word. It has a mind of its own."

That comment is often preceded by, "I hate Word"- which makes a trainer's heart hurt. It's important to take control – you can tell Word what is expected and what is not.

For example:

- DO capitalize the first letter of a sentence

- DON'T convert a (c) to a ©
- DO convert a www.something.com to a hyperlink
- DON'T automatically number and indent when I type the number 1

Here are a couple of ways to set these options:

1. Most of the settings to turn features off or on and alter the way Word behaves are under **Tools** > **Options**. Take a few minutes to poke around in there and customize Word to suit your likes and dislikes.
2. Word is programmed to correct things like misspelled words or words you forget to capitalize. To change these settings and some others:

- Go to **Tools** > **AutoCorrect Options**. You will see 5 tabs.
- Click on the **AutoCorrect** and **AutoFormat as you Type** tabs and clear or set the check boxes for the items that you want on or off.

Learn to automate your Word Work Day

If you aren't using Word (or WordPerfect's) automation tools you could be killing yourself. You might as have a typewriter in front of you. Word offers Autotext tools that will store and insert words, sentences, clauses, captions - just about anything you want – on your command. For example, when I type "al" then tap the space bar, Word turns "al" into "Adriana Linares". Have a standard caption or signature block that you use often? Same goes. You'll use it for anything you type often or find tedious to create and format each time. It's very easy to use. Here's how in Word (WP is very similar)

1. Highlight/select the text (you can include a graphic) you want to store as an AutoText entry. Be sure to SELECT EXACTLY what you want.
2. To store paragraph formatting with the entry, include the paragraph mark at the end of the selection.
3. Go to Tools > AutoCorrect Options
4. Select AutoCorrect for anything less than one line in length. Select the AutoText tab for anything longer than one line.
5. You'll see two columns, **Replace** and **With**. If you're creating an entry for your name, "Thomas W. O'Connor, III", you can type "tw" in the Replace column, don't use initials or shortcuts that are actual words such as "to". And don't waste time with too many letters or caps, this is just a shortcut to your real text. For AutoText (remember more than one line), you'll need to use a phrase longer than two words because Word inserts an entry only after four words have been typed.
6. Be sure to click ADD when you're done.
7. Now open a new document and type your shortcut text. If you are using AutoCorrect, the space bar will invoke your text. For AutoText, look for a

yellow box above your cursor, when you see it, hit Enter.

Bonus: If you use Word as your email editor in Outlook then all your entries will work there too!

Think about your Word documents as digital calling cards; they reflect your professionalism and attention to detail. Today, the appearance of a word processing document often reveals as much about an attorney's skills as the contents of the document itself. Document creation and editing skills are critical in today's professional world

Web Resources and Links:

- Microsoft's Word Resources, Tutorials, Tips and Tricks Hompage
- Allan Wyatt's Word Tips
- OfficeUsers.Org
- Word MVP Site
- Great Tips from University of Alberta
- 50 Indispensable Word Tips from TechRepublic
- Word For Lawyers: A Compilation Of Tips, Tools And Training Resources From the Web For Legal Professionals

Adriana Linares of LawTech Partners is a legal technology trainer based in Orlando, Florida. Until launching LawTech Partners, Adriana spent many years in the technology departments of two of Florida's largest law firms. She was charged with establishing firm-wide training programs and leading technology initiatives.

Today, Adriana travels the country delivering "tech therapy" sessions to firms of all shapes and sizes. Using her practical and personal approach to technology she helps law offices make the most of their technology investments. Throughout the year, she can be found speaking at conferences on topics such as productivity through technology, successful training techniques, law office software, mobility, and gadgets. She writes regularly for leading legal magazines and websites and hosts her own advice column on her blog, I ♥ Tech.

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Personal Protection Tips (For lawyers, judges and others)

By David Zachary Kaufman

Part 1: Your Car

I hate to think about how many of us are vulnerable as we go to, come from, or travel in, our cars. These tips will help you avoid trouble as you go to and fro. They should be considered supplemental to the Business Protection Tips also provided.

First, why should you worry about the area around your car? It's simple if you look at it from an attacker's point of view: where else are you guaranteed to be distracted, guaranteed to have at least 1 major asset to steal, and guaranteed to return to? All they have to do is pick you out when you get out of your car and then wait. Recently that's exactly what happened in the D.C. metropolitan area: Some young woman was spotted and followed home by a stalker who then pushed his way into her home. Fortunately for her, her husband was there and subdued the attacker. There's no need to speculate on what might have occurred if he hadn't been home.

So, when you get out of your car, look around. You should do that anyway just to be sure that you know where you parked. (Haven't you ever "lost" your car in a big parking lot?) And when you do look around, pay attention to what you see. Look at the people, the place where you parked, the shadows. Remember them because if, when you return, the same people are there, you should be alert to a possible problem. Which leads to my next point:

When you return to your car, don't permit yourself to be distracted by the bags and baggage you are carrying or the events of the day. Pay Attention! Look around you. Be curious. And listen to your instincts. Don't stop in front of your car and stare pensively into the air.

If, when you approach your car, there is an SUV or van parked next to it, pay attention.

Are there people in it? Is the door open? This is especially true during the Holiday Season when people can be expected to be carrying extra money for presents. But if someone is stalking you this is a prime alert. It is very easy to be pulled into one of these big vehicles.

As you approach your car, walk around it to see if it has been tampered with--look down at tires for nails or other things since a quick way to catch you is to ensure you have a flat tire or, better, 2 flat tires. And while you are at it, look for leaking brake fluid too. It sounds melodramatic, but if someone wants to injure you, tampering with your brakes is an easy thing to do and very popular thanks to Hollywood.

While I think of it (especially since gas prices are so high these days) I suggest you get a locking gas cap. Sugar in the gas tank will ensure that your car will stop running at the most inconvenient time for you and the most convenient time for a potential attacker. Most cars these days have key operated hood locks too. This is a good thing and if your car doesn't have one, you should consider it to avoid someone tampering with your engine.

When you do approach your car, it's a truism but ... always look in back of car before you get in. You never know.

Check under the door handle of your car before grabbing it--if someone *really* doesn't like you they could put razor blades there.

Do not fumble with your car keys after you get to the car--have them easily accessible and don't put them on the same key ring as your house keys. There was a recent story around here about a woman who did that and the guy who valet parked her car took a copy of her house key and got her address by looking at the registration card in the car. They found him under her bed.

If you have a reason to be concerned that someone is actively trying to do you harm, never park in the same place twice. Always park in different places and most certainly in heavily populated areas where there are lots of lights and pedestrian traffic.

If someone does attempt to carjack while you are in the car, get out of the car but watch for seat/shoulder belts. Don't get tangled in them because you can be dragged alongside. The carjacker won't care. If you can, get out on the opposite side from the carjacker.

If you are being attacked outside the car, Never, Ever, get into a car with your attacker--do not let him/them take you away from the scene. Statistics show that the worst possible thing the victim can do is permit themselves to be taken away. The secondary

scene is always worse--harder to escape from, quieter, less witnesses and so on.

Once you get in to your car, you should periodically check your rear view mirrors to observe if people or cars are following you. If you see, or think you see, someone following you, drive in circles and/or pull into a police station and/or use your cell phone to call for help.

By the way, just because -- especially at night -- a car behind you looks like a cop car doesn't make it a cop car. It is not hard to counterfeit a cop car, especially a so-called "undercover" cop car. Believe it or not, here in Virginia there's one undercover car they use--a Dodge Magnum--that they took from a drug dealer. They say the thing will go over 140 mph and it sure doesn't *look* like any cop car I ever saw.

If you are being followed by a car that may or may not be an actual cop car, use your cell phone. Call "911" and tell them where you are and what's going on. Ask them to find out if you really are being followed by a real cop car or if you are about to have a real big problem.

One last point about being followed or stopped by "police": badges that look official (in fact "replica" badges and badge cases) are very cheap and easy to come by. Officially, they are made for collectors. Unofficially, they are a complete license to fool unsuspecting people. The solution: ask for the "credential" the document with a photograph and, again, in case of doubt, call "911" and ask.

Anyway, I hope these tips help you all stay safe. I know they seem scary but you would be surprised how easy it is to incorporate a little situational awareness into your life.

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Salient Points on Tax Treatment Under the Half-Act Code Consumer Provisions
General Categories of New Requirements

How and **Who**: Three things that debtors are required to do with taxes and related documents:

File with the Court
File with the taxing authority
Submit to the Trustee

What:

Tax returns
Tax transcripts (what qualifies as a transcript?)
Statements (what qualifies as a statement?)

When or Why: Triggers for action:

Specific dates in relation to first meeting of creditors or confirmation
Specific dates in relation to due date of returns
Request by specific parties (what is a request? is it a motion?)
Unclear or apparently self-executing

Tax Return Requirements By Case Chronology
(both chapters 7 and 13 as indicated)

§1308(a)

How: File
Who: Taxing Authority
When: Not later than ("NLT") the day before the date first set for 341(a)
What: All returns for taxable years ending during the 4-year ending at petition (does

this move up the due date for the return?)

§1307(e)

Consequence: On request of a party in interest **or** the UST **and** after notice and a hearing, the court **shall** dismiss or convert to chapter 7, whichever is in the best interests of the creditors **and** the estate, if debtors fails to comply with §1308.

§1308(b)(1)

Consequence: If not filed, the trustee **may** hold the §341(a) open for a reasonable period of time that is not longer than:

- If return is tardy, 120 days from first date set for §341(a)
- If return is not yet due, 120 days from first date set for §341(a) or last date the return is due including any automatic extensions actually requested by the debtor (how will trustee know?)

§521(j)(1)

Consequence: If a debtor fails to file any tax return that comes due after commencement of the case **or** to obtain an extension, the taxing authority **may** request that the case be dismissed or converted

§521(j)(2)

If that doesn't motivate the debtor to file or get an extension within 90 days after the request the court **shall** convert or dismiss, whichever is in the best interests of creditors **and** the estate (will conversion or dismissal ever be in the best interests of the estate merely because a tax return wasn't filed?)

§521(e)(2)(A)(i)

How: Provide
Who: The Trustee
What: Returns or transcripts for tax year ending before case file and for which a return was filed
When: NTL 7 days before date first set for 341
Why: Unclear, nothing in the statute

§521(e)(2)(A)(ii)

How: Provide
Who: Any creditor who makes a timely request (*see* Interim Rules and Forms 4002(b)(3) which provides that timely means at least 15 days before the first date set for the §341(a))
What: Returns or transcripts for tax year ending before case file and for which a return was filed
When: At the same time the debtor provides to trustee
Why: n/a

§521(e)(2)(B)

Consequence: If debtor fails to comply the court shall dismiss the case unless debtor demonstrates it was due to circumstances beyond the debtor's control ("DTCBTDC") (how does the court know to dismiss?)

§521(e)(2)(C)

Same as §521(e)(2)(B) but worded slightly different (why redundancy in the law?)

§521(j)(1) & (2)

Consequence: Described on page one above (does "file" mean with the taxing authority or with the court?)

§521(f)(1)-(3) Chapter 7's and Chapter 13's

How: File
Who: The Court
When: At the same time filed with taxing authority (exactly the same time?)
What: Returns or transcripts for

- tax years ending while case pending,
- Ch 13 and 7 returns filed after commencement of case for 3 tax years ending before case file
- Amendments

Why: At the request of the court, the UST or any party in (annual requests? One request?)

§521(f)(4) Chapter 13's w/o confirmed plans

How: File
Who: The Court
When: 90 days after the end of the tax year or 1 year after petition filed (does this change due date?)
What: Statement, under penalty of perjury
- of the income and expenditures of the debtor during the tax year **and**
- of the monthly income of the debtor that shows how income and expenditures are calculated. (*see also* §707(b)(2)(C))
Why: At the request of the court, the UST or any party in (annual requests? One request?)

§521(f)(4) Chapter 13's w/ confirmed plans

How: File
Who: The Court
When: NLT 45 days before the anniversary of confirmation
What: Statement, under penalty of perjury

- of the income and expenditures of the debtor during the tax year **and**
- of the monthly income of the debtor that shows how income and expenditures are calculated. (*see also* §707(b)(2)(C))

Why: At the request of the court, the UST or any party in (annual requests? One request?)

Other Provisions
Availability of Tax Returns For Review:

§521(g)(2)

How: Available for inspecting and copying subject to privacy provisions (AO to promulgate regulations)
Who: From the Trustee with respect to returns provided under §521(e)(2)(A) From the Court with respect to returns filed under §521(f) (is trustee relieved of duty if on file with Court?)
What: Returns or transcripts described in §521(e)(2)(A) and (f)
When: n/a
Why: n/a

Confirmation:

§1325(a)(9) All tax returns must be filed as a pre-requisite to confirmation (filed with

the court or the taxing authority?)

Priority Tax Claims:

§507(a)(8)(A)

The “look back period” of 240 days for priority claims is suspended for any period during which there is a pending offer in compromise or a stay was in effect.

§507(a)(8)(G)

The “otherwise applicable time period” for priority claims is also suspended for any period during which collection was prevented by non-bankruptcy law, by a stay in a prior case, or the existence of a confirmed plan, plus 90 days.

Dischargeability:

§1328(a) Super-discharge is diminished. Certain taxes are now excluded from discharge including those under §507(a)(8)(C) and §523(a)(1)(B) and (C).

Interest Rates:

§511 Tax claims are entitled to interest at the rates determined by non-bankruptcy law, if interest or prevent value is due. Keep in mind that diminished dischargeability means that more tax claims are non-dischargeable and there will be requests to pay interest much like interest has been paid on student loans in the past. But see the limitations included at §1322(b)(10).

Other:

§502(b)(9) Claims bar date for taxing authorities changed to:

- 180 days after the date of the order for relief, or
- if the claims is for a tax based on a return filed under §1308, not later than 60 days after the date on which the return was filed
- may be the later of the two (*see* Interim Rules and Forms 3002(c) which includes two alternative proposals)

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Business Law

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U.S. Resources In International Food Law

By Lynne R. Ostfeld

July, 2006

During the 100th anniversary celebration of the creation of the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS), it is appropriate to point out sources of authority over what we put into our stomachs, particularly when we are referring to imported food.

To help understand how we got to where we are today, know that Upton Sinclair came to Chicago to research and write his novel The Jungle, with the intent of proselytizing readers to supporting socialism and better conditions for workers. Teddy Roosevelt, the then U. S. President and a prolific reader, read the book, was horrified at what he thought was going on in the slaughterhouses, and put in motion the creation of the FSIS. Sinclair was disappointed because he intended to hit us in the heart and he hit us in the stomach instead. To our benefit, he was the catalyst for the passage of the Federal Meat Inspection Act (FMIA).

> To quote information put out by FSIS about the significance of what occurred,
>
> "Today, more than 7,600 FSIS inspection program personnel are assigned to about 6,000 federally inspected meat, poultry and egg products facilities in the United States to ensure products are safe, wholesome and accurately labeled. FSIS also inspects each shipment of imported meat and poultry from qualified countries to ensure U.S. food safety requirements are met.
>
> FSIS incorporates the results of more than 90,000 microbiological tests

annually for E. coli O157:H7, Salmonella and Listeria monocytogenes to further the goal of preventing contamination and protecting public health. The Centers for Disease Control and Prevention has attributed significant declines in rates of illness from foodborne pathogens to the implementation of FSIS food safety regulations."

I. Government Agencies Involved With The Regulation Of The Importation Of Food Products Into The U.S.

A. U.S. Food and Drug Administration (FDA) (www.fda.gov/)

The FDA is part of the U.S. Department of Health and Human Services. With the exception of most meat and poultry, which are regulated by the U.S. Department of Agriculture, all food, drugs, cosmetics, medical devices, and electronic products that emit radiation are subject to examination by FDA when they arrive in the United States. Through its district offices and resident posts, or in coordination with the Customs Service, the FDA is directly or indirectly involved in surveillance of the import of food products at each of the approximately 500 U.S. Customs Service points of entry in the country.

By law, all of these products must meet the same standards as domestic goods. Imported foods must be pure, wholesome, safe to eat, and produced under sanitary conditions; drugs and devices must be safe and effective; cosmetics must be safe and made from approved ingredients; and all labelling and packaging must be informative and truthful.

To import regulated food products, the importer or agent files entry documents with the U.S. Customs Service within five working days of the date of arrival of a shipment at a port of entry. The FDA is notified of the entry through duplicate copies of Customs Entry Documents (CF 3461, CF 3461 ALT, CF 7501 or alternative). Further information can be obtained from:

Food and Drug Administration
Division of Import
Operations and Policy
15800 Crabbs Branch Way
Rockville, Maryland 20855
Tel : 301-443-6553

See, also, information published by the Center for Disease Control (www.

FoodSafety.gov) and**www.FoodSafety.gov**

B. Alcohol and Tobacco Tax and Trade Bureau (TTB) (www.ttb.gov/alcohol/index.htm)

The TTB is part of the Department of the Treasury. It collects excise taxes on aalcohol, tobacco, firearms and ammunition, and ensures that these products are labelled, advertised and marketed in accordance with the law.

Information on the requirements to import wine, beer and distilled spirits from various countries is available on www.ttb.gov/alcohol/info/interre1.htm. These requirements may include licensing, labelling and taxation considerations. A general listing of requirements (including licenses, label approvals, etc.) to import alcohol products (malt beverages, wine, and distilled spirits) into the U.S. is available on www.ttb.gov/international_trade/importing_alcohol.html. Individual states may also have regulations governing the sale of alcohol and tobacco. Their individual regulations should be consulted before importing any of these products.

C. **Animal and Plant Health Inspection Service** (APHIS) (**www.aphis.usda.gov/**)

The Animal and Plant Health inspection Service (APHIS), part of the U. S. Department of Agriculture (USDA), is responsible for protecting and promoting U.S. agricultural health, administering the Animal Welfare Act, and carrying out wildlife damage management activities.

1. APHIS Plant and Protection Quarantine (PPQ)

PPQ concerns the successful flow of healthy commodities into and out of the United States in order to protect agricultural and natural resources from risks associated with the entry, establishment or spread of animal and plant pests and noxious weeds. PPQ does this by regulating the importation of agricultural products with obligatory phytosanitary (plant health) certificates, importation rules, and inspections. A phytosanitary certificate is a document issued by an exporting country, which certifies that the phytosanitary status of the shipment meets the

phytosanitary regulations of the United States. PPQ employees can advise importers on phytosanitary restrictions and provide information (including regulations, policies and procedures) on bringing agricultural commodities into the United States.

Importers may obtain information or import permits by looking at the International Services (**www.aphis.usda.gov/is/**) or by contacting:

USDA-APHIS-PPQ
Permit Unit
4700 River Road, Unit 136
Riverdale, MD 20737
Telephone : (877) 770-5990
Fax : (301) 734-5786

2. National Center for Import and Export (NCIE) Veterinary Services Import/Export (www.aphis.usda.gov/vs/ncie/)

The APHIS Veterinary Services (VS) unit regulates the import and export of live animals, animal products, and biologics. VS monitors the health of these commodities, at the border, in case they are infected with foreign animal diseases, such as avian influenza or foot-and-mouth disease, that could threaten U.S. livestock populations.

Additional information regarding permit applications and information about import requirements and user fees related to importing animals, birds and animal products, can be obtained from:

USDA-APHIS-VS-NCIE
National Center for Import/Export
4700 River Road, unit 40
Riverdale, MD 20737-1231
Telephone : (301) 734-3277/8364
Fax : (301) 734-4704/8226

D. U.S. Customs and Border Protection (www.customs.gov/)

Customs and Border Protection assists the FDA in the execution of the prior notice requirements in 21 U.S.C. § 381(m) and its implementing regulations. It collects samples of products upon FDA request and forwards these samples to the FDA.

E. U.S. Department of Agriculture (www.usda.gov/wps/portal/usdahome)

1. Foreign Agriculture Service (http://www.fas.usda.gov/)

The Foreign Agricultural Service (FAS) is a part of the U. S. Department of Agriculture (USDA). It works to improve foreign market access for U.S. products, build new markets, improve the competitive position of U.S. agriculture in the global marketplace, and provide food aid and technical assistance to foreign countries. Staff are readily available to provide assistance to exporters of food products.

2. Food Safety and Inspection Service (www.fsis.usda.gov/)

As stated above, the FSIS is involved in the inspection of food that is produced both domestically and in other countries. Information about regulations can be obtained at www.fsis.usda.gov/Regulations_&_Policies/index.asp. Additional assistance can be obtained by contacting:

International Policy Division
Food and Safety Inspection Service
U.S. Department of Agriculture
Washington, D.C. 20250
Telephone : 202-720-3473

F. National Marine Fisheries (www.nmfs.noaa.gov/)

NOAA's National Marine Fisheries Service, a division of the Department of Commerce, is the federal agency responsible for the management, conservation and protection of living marine resources within the United States' Exclusive Economic Zone (water three to 200 mile offshore). Receiving its charge and funding under a variety of federal laws, it

protects endangered species, collects data relative to environmental studies, and acts to prohibit transactions which violate state, federal, native American tribal, or foreign laws.

G. U.S. Fish and Wildlife Service (www.fws.gov/)

All imported wildlife products are inspected by the U.S. Fish and Wildlife Service upon entry into the United States. Importers must obtain export permits from the country of origin and U.S. import permits to import the wildlife. Oftentimes, samples will be analyzed by NOAA before full scale importing is allowed. In this case, the importer will have to follow strict procedures in order to ensure that samples arrive safely and legally at NOAA laboratories.

H. **Environmental Protection Agency (EPA) : Pesticide Residue Limits on Food (www.epa.gov/pesticides/food/viewtols.htm)**

EPA sets limits on how much of a pesticide residue can remain on food. These pesticide residue limits are known as tolerances. Inspectors from the Food and Drug Administration and the United States Department of Agriculture monitor food in interstate commerce to ensure that these limits are not exceeded. The tolerance information is found in 40 Code of Federal Regulations (CFR) 180 "Tolerances and Exemptions from Tolerances for Pesticide Chemicals in Food".

II. Treaties Touching On International Commerce Of Agricultural Products And Food

A. World Trade Organization (WTO) (www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm)

One of the major treaties with which the U.S. is involved, and one frequently in the news, is the World Trade Organization. This successor to the General Agreement on Tariffs and Trade (GATT) has been charged with reducing the restrictions on trade among the member countries. Although not the only issue in dispute, it is struggling with a liberalization of member countries' support of their agricultural industries and the balancing of the needs and goals of first world and third world countries.

B. Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement)

(www.wto.org/English/tratop_e/sps_e/spsagr_e.htm)

The SPS Agreement recognizes the fundamental right of countries to protect the health and life of their consumers, animals, and plants against pests, diseases, and other threats to health.

C. Agreement on Technical Barriers to Trade (TBT Agreement)

The TBT Agreement, which applies to agricultural products, helps to ensure that technical regulations and product standards do not create obstacles to trade. It permits technical regulations designed to meet legitimate national objectives, including protection of human health, safety, animal or plant life or health, or the environment. Regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective. When international standards exist, WTO Members should use those standards as the basis for their technical regulations (Arts. 1, 2). The TBT Agreement does not apply to measures governed by the Agreement on the Application of Sanitary and Phytosanitary Measures, which applies to issues of food safety, as well as animal and plant health (Art. 1)

D. The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal 2000) (www.biodiv.org/doc/legal/cartagena-protocol-en.pdf)

This Protocol treats the "transfer, handling and use of living modified organisms (LMOs) resulting from modern biotechnology that may have adverse effects on the conversation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements."

The Protocol provides for adoption of a process for development of international rules governing liability and redress for damage from transboundary movements of LMOs.

Further resources relative to international free trade agreements between the U. S. and other countries are available on www.customs.gov/xp/cgov/import/international_agreements/free_trade/.

Special Trade Programs are available on www.customs.gov/xp/cgov/import/international_agreements/special_

trade_programs/.

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Estate Planning

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Coordinating Retirement Accounts With Estate Planning 101 (What every estate planner needs to know)

By Keith A. Herman

A substantial portion of the wealth possessed by Americans today consists of tax-deferred retirement accounts such as traditional IRAs, 401(k)s, and 403(b)s. In 2002, the IRS issued final regulations under Code § 401(a)(9) clarifying and simplifying many of the rules applicable to retirement accounts. See Treas. Reg. § § 1.401(a)(9)-0 through 1.401(a)(9)-9, and Treas. Reg. § 54.4974-2. These rules apply to 401(k)s, 403(b)s, and IRAs, but not to Roth IRAs.

Retirement Accounts Present Unique Problems

In general, the receipt of inherited property usually is not subject to income tax. The major exception to this rule is retirement accounts because these accounts represent income that the government has not previously subjected to income tax. After a taxpayer's death, the beneficiaries usually will owe income tax on the amount withdrawn from the taxpayer's retirement account. When dealing with retirement accounts, the primary goal is to allow the taxpayer's beneficiaries the opportunity to defer this income tax for as long as possible by postponing withdrawals from the account.

An estate planning attorney must deal with all of the following issues regarding a client's retirement accounts:

- Who will be the primary and contingent beneficiaries?
- How long can the beneficiary defer withdrawals from the account and the attendant income tax liability?
- Is there a compelling reason to name a trust as a beneficiary?
- Do any retirement account proceeds passing to a spouse, in trust, qualify for the marital deduction?

• What is the most tax efficient source of payment for estate taxes on the retirement account?

Basic Distribution Rules

During the Taxpayer's Lifetime. The required minimum distribution (RMD) rules specify how long a taxpayer (and after the taxpayer's death, the beneficiary) may defer withdrawals from a retirement account. Code § 401(a)(9). During life, the taxpayer must generally begin taking withdrawals by April 1 of the year after the taxpayer reaches age 70 1/2 . This date is referred to as the required beginning date (RBD). An IRS table that takes into account the taxpayer's life expectancy sets the RMD amount that the taxpayer must withdraw in each year after the RBD. Treas. Reg. § 1.401(a)(9)-5.

Distributions After Death If the Spouse Is the Beneficiary. A taxpayer can obtain the most favorable income tax results by naming the taxpayer's spouse as the primary beneficiary. A surviving spouse is the only person who has the option of rolling over the retirement account into his or her own IRA. Code § § 402(c)(9) (qualified plans), 408(d)(3)(C)(ii) (IRAs). Often the simplest way to accomplish the rollover is to retitle the account into the surviving spouse's name. By rolling over the account, the surviving spouse can defer withdrawals from the account until the spouse turns 70 1/2 ; any other beneficiary must begin taking withdrawals the year after the taxpayer's death. In addition, the spouse can name his or her own beneficiaries of the IRA. Those beneficiaries may use a life expectancy payout; when other beneficiaries of a retirement account die, the RMD continues to be based on the deceased beneficiary's life expectancy.

Distributions After Death If a Non-spouse Is the Beneficiary. If someone other than the spouse is the beneficiary, the beneficiary's RMD depends on whether there is a "Designated Beneficiary" of the account, as that term is specifically defined in Treas. Reg. § 1.401(a)(9)-5. The term "Designated Beneficiary" does not just refer to the individual or entity named by the taxpayer to inherit the account after death; rather, it is a specific tax concept. Although individuals and certain qualified trusts can be "Designated Beneficiaries," estates, charities, and business entities are not "Designated Beneficiaries." Treas. Reg. § 1.401(a)(9)-4.

If there is a Designated Beneficiary and the taxpayer died before the taxpayer's RBD, then the beneficiary's RMD is based on an IRS table that takes into account the beneficiary's life expectancy. If there is a Designated Beneficiary and the taxpayer died after the taxpayer's RBD, then the beneficiary's RMD is based on an IRS table that takes into account the longer of the (1) beneficiary's life expectancy or (2) taxpayer's life expectancy.

If there is no Designated Beneficiary and the taxpayer died before the taxpayer's RBD, then the beneficiary must withdraw all of the retirement account within five years of the taxpayer's death. If there is no Designated Beneficiary and the taxpayer died after the taxpayer's RBD, then the beneficiary's RMD is based on an IRS table that takes into account the deceased taxpayer's life expectancy.

The beneficiary may withdraw more than the RMD each year, but the beneficiary must withdraw at least the RMD each year in order to avoid a penalty. When a beneficiary takes his RMD based on his own life expectancy, it is often referred to as a "stretch" distribution. Most 401(k) plans do not allow a life expectancy payout option, as they typically require a lump sum distribution on death. Even though life expectancy payout options in IRAs are more common, not all IRA plan documents offer this option. An estate planner should always check with the plan administrator or IRA custodian to determine that specific plan's rules for distributions to the beneficiary after the taxpayer's death.

Separate Accounts and Multiple Beneficiaries

If there are multiple beneficiaries of a retirement account, then the RMD is based on the life expectancy of the oldest beneficiary. Treas. Reg. § 1.401(a)(9)-5, A-7(a)(1). But if separate accounts are "established" for multiple beneficiaries, then the RMD rules will apply separately to each separate account. Treas. Reg. § 1.401(a)(9)-4, A-5(c); Treas. Reg. § 1.401(a)(9)-8, A-2(a)(2). This allows the RMD to be calculated based on the life expectancy of the oldest beneficiary of the separate account. To establish separate accounts, the beneficiaries' interests in the account must be fractional (not pecuniary). In addition, some affirmative act must establish the separate accounts--for example, a physical division of a single account into completely separate accounts or the use of separate account language on the beneficiary designation form. Whenever possible, it is best to create the separate accounts with appropriate language directly on the beneficiary designation form.

Eliminating Unwanted Beneficiaries Before September 30

The deadline for determining who are the initial beneficiaries of a retirement account is the date of the taxpayer's death. Between the taxpayer's death and September 30 of the following year, troublesome beneficiaries, such as beneficiaries that do not qualify as Designated Beneficiaries, may be removed by disclaiming the interest, creating separate accounts, or eliminating them as beneficiaries by distributing their benefits to them. Treas. Reg. § 1.401(a)(9)-4, A-4(a).

Avoiding Trusts as Beneficiaries

Because of the complexity associated with using a trust as a Designated Beneficiary, a revocable trust should be avoided as the beneficiary of retirement accounts in most cases. Before naming a trust as a beneficiary of a retirement account, the attorney and the client should decide that the reasons to name a trust as a beneficiary outweigh the time and costs of establishing a qualified trust. The client may decide that the use of a trust is more important than the lost ability to plan for income tax deferral that often can occur by naming a nontrust as beneficiary. A trust may be more attractive if a life expectancy payout option or spousal rollover is not important or not available.

In a typical first marriage situation, the taxpayer might consider naming the spouse as the primary beneficiary and the adult children as the contingent beneficiaries. If there is a minor child, then a custodian account is a possible alternative if the terms of the retirement account allow a life expectancy payout option. A client might consider the following language:

> The total account assets shall be divided to provide one equal share of the account, as of my date of death, for each of my children who is either living on my date of death or is deceased on my date of death but who has one or more descendants living on my date of death. Any share created for a deceased child of mine shall be divided into separate shares for such deceased child's descendants, per stirpes. Each such share of my IRA account created for a descendant of mine who has not attained the age of twenty-one (21) shall be held by _____, as a custodian for the descendant under the [state of residency] Transfers to Minors Act or similar minor's custodian law of any state where the minor then resides.
>
> Each of my beneficiaries designated above shall have the right (with respect to the death benefits as to which that beneficiary is then the designated beneficiary) to elect any method of payment provided for in the IRA agreement, including any method that was available to me while living.
>
> The assets of my IRA shall be segregated, effective as of the date of my death, into separate subaccounts of my IRA, one for the share representing each beneficiary, so that all post-death IRA investment gains, losses, contributions and forfeitures are determined separately for each sub-account. Each beneficiary shall have the right to direct changes to investments held in his or her separate subaccount.

If the retirement account does not allow a life expectancy payout (or a life expectancy payout does not matter), then the taxpayer's revocable trust can be named directly as the contingent beneficiary of the required lump sum payment.

When Avoiding Trusts Does Not Matter

There are a number of instances when planning for income tax deferral is not a significant consideration. For example, if the IRA or 401(k) plan requires a lump sum distribution at the taxpayer's death, then deferring income taxes by naming a Designated Beneficiary is not an issue. After retirement, a taxpayer may wish to consider a rollover of a 401(k) or IRA that does not offer a life expectancy payout option to an IRA that does offer this option.

In addition, income tax deferral will not be as important if the beneficiary will withdraw the entire account on the taxpayer's death for an immediate need, such as to pay estate taxes or to support minor children. Income tax deferral will not be a major consideration if the size of the account is so small that a withdrawal of the entire amount will not cause a substantial amount of additional income tax to be due.

If the beneficiary's age and the taxpayer's age are close and the taxpayer is over age 70 1/2 , then naming a Designated Beneficiary will not have a significant effect on the RMD. In this case, the account must be withdrawn over basically the same time period whether or not the beneficiary is a Designated Beneficiary. Finally, naming a Designated Beneficiary is not an issue if the taxpayer names only charitable organizations as the beneficiaries, as the income of charitable organizations is not subject to tax.

Trusts as Beneficiary

Qualified trusts also can be Designated Beneficiaries. (The term "qualified trust" is used as a matter of convenience in this article, but is not an IRS-defined, or commonly used, term.) There are a number of reasons to use a trust as a beneficiary of a retirement account. A trust can limit the beneficiary's control over the trust assets. Trusts can provide the beneficiary with creditor protection, including protection from division in the event of the beneficiary's divorce. Finally, a trust can be used to exclude the trust assets from the estate tax at the beneficiary's death. If one of these reasons is more important than allowing the beneficiary to defer withdrawals from the retirement account in order to defer income taxes, then a traditional trust can be named as the beneficiary of the retirement account. The taxpayer should be informed, however, that the beneficiary will lose possible income tax deferral opportunities. If a taxpayer qualifies a trust as a Designated Beneficiary, then the trust may make withdrawals from the account based on the life expectancy of the oldest beneficiary of the trust (that is, the trust's RMD is based on the age of the oldest beneficiary).

When Trusts Are Crucial

Naming a trust is crucial in certain circumstances. For example, if the beneficiary is a special-needs child who relies on government benefits, a trust must be used. Clients often use trusts when the beneficiary is a second spouse and the client wants the spouse to have limited access to the trust principal. A parent may wish to use a trust if the beneficiary is a minor, is a spendthrift, or has substance abuse problems. Finally, retirement account assets can fund a credit shelter trust. In these situations, the client may decide that the reason for the trust may outweigh the lost income tax deferral or may decide that the added cost of a private letter ruling for a custom-designed accumulation trust is justified.

A trust must satisfy five tests to qualify as a Designated Beneficiary: The first four tests are as follows:

1. the trust must be valid under state law;
2. the trust must be irrevocable or become irrevocable at the taxpayer's death;
3. the trust beneficiaries must be identifiable; and
4. certain documentation must be provided to the plan administrator or IRA custodian by October 31 of the year after the taxpayer's death.

Treas. Reg. § 1.401(a)(9)-4, A-5. If these four tests are met, then the trust generally will be treated as a Designated Beneficiary and the RMD will be based on the oldest trust beneficiary's life expectancy. Treas. Reg. § 1.401(a)(9)-5, A-7(a)(1). But there is, in essence, a fifth test for the trust to be a Designated Beneficiary, because all of the beneficiaries of the trust must be individuals the age of whom can be identified. Treas. Reg. § 1.401(a)(9)-4, A-5(c); Treas. Reg. § 1.401(a)(9)-4, A-3. Therefore, the fifth requirement is to draft the trust so that it is possible to determine the identity of the oldest beneficiary and to require that only individuals may be beneficiaries of the trust. This fifth test can create problems, especially with multi-beneficiary common pot trusts or multi-generation dynasty trusts.

It is difficult to draft a trust that only has individual and ascertainable beneficiaries because the IRS has not explained which contingent beneficiaries can be ignored. The regulations provide that if the first four tests above are met, then the IRS will treat the beneficiaries of the trust as the potential Designated Beneficiaries of the retirement account. It then becomes necessary to determine three things: (1) the identity of the beneficiaries of the trust, (2) the identity of any beneficiaries of the trust that are not individuals, and (3) the identity of the oldest beneficiary. In making these determinations, the trust's "contingent beneficiaries" must be taken into account. Treas. Reg. § 1.401(a)(9)-5, A-7(b). The regulations provide that

> [a] person will not be considered a beneficiary for purposes of

> determining who is the beneficiary with the shortest life expectancy under paragraph (a) of this A-7, or whether a person who is not an individual is a beneficiary, merely because the person could become the successor to the interest of one of the employee's beneficiaries after that beneficiary's death. However, the preceding sentence does not apply to a person who has any right (including a contingent right) to an employee's benefit beyond being a mere potential successor to the interest of one of the employee's beneficiaries upon that beneficiary's death.

Treas. Reg. § 1.401(a)(9)-5, A-7(c)(1). This rather unhelpful regulation gives the guidance that a "mere potential successor" beneficiary can be ignored. The regulation also specifically states that one cannot ignore contingent beneficiaries simply because the current beneficiary is entitled to all of the trust income, as is the case with a QTIP trust or QSST:

> [i]f the first beneficiary has a right to all income ... during that beneficiary's life and a second beneficiary has a right to the principal but only after the death of the first income beneficiary ..., both beneficiaries must be taken into account in determining the beneficiary with the shortest life expectancy and whether only individuals are beneficiaries.

Treas. Reg. § 1.401(a)(9)-5, A-7(c)(1). Although the regulation clearly contemplates that some beneficiaries can be ignored, it never really explains the circumstances in which they can be ignored. A recent private letter ruling takes a date-of-death look at then-living trust beneficiaries to determine which contingent remainder beneficiaries can be ignored. PLR 200438044. Under this ruling's analysis, if a trust is to terminate upon a beneficiary's reaching a certain age, then the only remainder beneficiaries that must be counted are the individuals that would receive the trust assets upon termination, provided those individuals are alive on the taxpayer's death and they have already attained the age for termination. This ruling is not helpful to dynasty trusts or lifetime trusts with rights of withdrawal, as the beneficiary is never required to take outright ownership of the trust assets. It will be interesting to see if the analysis of this ruling is consistently applied by the IRS. Until the IRS or Congress clarifies these rules, practitioners in this area must proceed very carefully.

Conduit and Accumulation Trusts

Fortunately, the regulations do set forth a type of safe harbor trust that has beneficiaries that the IRS will treat as Designated Beneficiaries. The qualified trusts are often referred to as "conduit trusts." A conduit trust requires the trustee to distribute all of the retirement account withdrawals by the trust to the beneficiary. PLR 200537044. As the trust may not accumulate any assets withdrawn from the retirement account, the IRS

allows the beneficiary to be treated as the oldest beneficiary. Treas. Reg. § 1.401(a)(9)-5, A-7(c)(3), ex. 2. Although conduit trusts have the advantage of certainty because they are specifically described in the Treasury Regulations, they also have major disadvantages. A conduit trust cannot withdraw retirement account proceeds and accumulate them inside of the trust. This is often contrary to the intent of the client, who is often specifically using a trust to prevent the retirement account assets from being distributed to the beneficiary for one reason or another.

A trust that allows accumulations of retirement account withdrawals (an "accumulation trust") should qualify as a Designated Beneficiary if certain provisions are added to the trust. First, only individuals may be beneficiaries of the accumulation trust. Second, to avoid an argument that the taxpayer's estate is a beneficiary of the trust, because an estate cannot be a Designated Beneficiary, the trust must provide that any debts, taxes, or expenses payable from the trust cannot be paid after September 30 of the year after the calendar year of the taxpayer's death. Third, the trust agreement must prohibit trust distributions to anyone who is older than the person whose life expectancy is used to calculate the RMD, to an estate, or to a charity. Finally, the beneficiaries of the trust must be identifiable. For this purpose, if the remainder beneficiary involves a class capable of expansion or contraction, the beneficiaries will be treated as being identifiable if it is possible to identify the class member with the shortest life expectancy.

Accumulation trusts require very careful drafting to ensure that the trust assets can never pass (under any circumstances) to an older sibling or relative, an estate or charity, nor escheat to the state under the intestacy laws. Typical trusts will always fail these rules, under the typical heirs-at-law contingent beneficiary clause that reverts to state intestacy laws if all of the primary family line die off. Under most state intestacy laws, an older relative may inherit, and the property may escheat to the state. Trusts also typically provide that if a beneficiary dies without descendants, the trust property passes to the beneficiary's siblings (who may be older than the beneficiary). Powers of appointment also cause uncertainty in this area.

If properly drafted, an accumulation trust can help coordinate a taxpayer's retirement accounts with his or her estate plan. Because of uncertainty in this area of the law, a private letter ruling should be obtained before naming such a trust as a beneficiary. Obtaining a private letter ruling can be an expensive and time-consuming procedure, but is well worth it for individuals with large retirement accounts if naming a trust as the beneficiary is crucial.

Separate Accounts for Trusts

Treas. Reg. § 1.401(a)(9)-4, A-5(c) provides that "the separate account rules under A-2 of section 1.401(a)(9)-8 are not available to beneficiaries of a trust with respect to the

trust's interest in the employee's benefit." The IRS takes the position that separate account treatment is not available when a single trust is named as the beneficiary, despite a contrary holding in various private letter rulings. See, e.g., PLR 200432029. Under the IRS's interpretation, if all of the separate trusts created under a revocable trust are qualified trusts, then the RMDs of all such separate trusts will be based on the oldest beneficiary of any of the separate trusts, not the beneficiary of each trust at issue. Therefore, whenever possible, it is best to directly name the separate trusts to be created on the beneficiary designation form, as opposed to naming the funding trust. PLR 200537044. For example, instead of naming the "John T. Smith Revocable Trust" as the beneficiary, one should consider the following language:

> Upon my death the remaining account assets shall be divided into fractional shares so as to provide an undivided equal share for each of the separate trusts created pursuant to Article __ of the John T. Smith Revocable Trust, and so that each such share shall be segregated, effective as of my date of death, into separate subaccounts, one for the share representing each separate trust, so that all postdeath investment gains, losses, contributions and forfeitures, are determined separately for each subaccount. The trustees of each separate trust shall have the right to direct changes to investments held in such separate trust's separate sub-account.

Separate account treatment for trusts is an issue only if each such separate trust is a qualified trust (a conduit trust or an accumulation trust). Otherwise the ages of the trust beneficiaries are irrelevant in determining the trust RMDs, and separate account treatment is not necessary.

Credit Shelter Trust Issues

Retirement accounts are not only subject to income tax when distributed to the beneficiary, but they are also subject to estate tax at the death of the owner. For the year 2005, the combined effect of the 47% estate tax, a top federal income tax rate of 35%, and a possible state income tax can be debilitating. This heavy tax burden makes tax-deferred retirement accounts the best source for charitable bequests at death, as charities are exempt from the income tax.

These taxes may be payable from the taxpayer's probate estate or a trust, or they may need to be paid by a withdrawal from the IRA. A client's estate planning documents should be drafted to ensure, to the extent possible, that any tax due is paid from nonretirement assets, as the withdrawal of retirement assets to pay taxes will cause additional income tax. Drafters should pay close attention to the tax apportionment clauses in the wills and trusts of clients with large retirement accounts.

For estates that are subject to the federal estate tax, one of the most troublesome areas is the use of retirement assets to fund a credit shelter trust. Many of the reasons to use a trust involve nontax issues, which may outweigh any possible income deferral possibilities. When dealing with funding a credit shelter trust, however, the choice is between deferring one tax and avoiding another tax. Often, an advisor must ask the client to choose between competing tax concerns. The uncertainty of the estate tax, combined with an increasing exemption, will often lose out to the more certain income tax liability resulting from the loss of the spousal rollover and life expectancy payout option.

If a conduit credit shelter trust is named as the primary beneficiary of the retirement account, then the entire retirement account will be paid out over the spouse's life expectancy. This will save very few estate tax dollars, as the retirement account assets will be added to the spouse's estate just as if the spouse had been named directly as the beneficiary, but without the income tax advantages of the spousal rollover. A conduit trust is usually a poor alternative when dealing with funding a credit shelter trust.

A better option is to name an accumulation trust as the primary beneficiary of the retirement account, preferably with a favorable private letter ruling from the IRS in hand. The accumulation trust allows the spouse to be treated as the Designated Beneficiary of the retirement plan. Although the spousal rollover may not be available, a life expectancy payout option will allow distributions from the retirement account (and the associated income tax liability) to be gradually withdrawn over the spouse's life expectancy. The accumulation trust will usually be subject to income tax at the highest marginal rate, but amounts actually distributed to the beneficiary are taxed at the beneficiary's presumably lower income tax rate. The accumulation trust's advantage over the conduit trust is that the accumulation trust can retain the distributions in the retirement account inside of the trust. In other words, the trust is not required to distribute the retirement account withdrawals directly to the spouse; the withdrawals accumulate inside of the trust until needed for the support of the spouse or children. This means that all of the retirement account withdrawals not distributed out of the trust will pass estate tax free to the next generation. The disadvantages of the accumulation trust include the high trust income tax rates, the inability to do a spousal rollover, and the added costs and complexity of drafting the trust, educating the client, and obtaining a private letter ruling.

If the expense of obtaining an IRS private letter ruling is not justified, then an alternative is simply to name the spouse directly as the beneficiary. If the spouse will consume a substantial portion of the retirement account during the spouse's lifetime or the increasing estate tax exemption is enough to shield all of the taxpayer's assets, then there may be no future estate tax to worry about. This option also has an advantage over the accumulation trust in that the spousal rollover may allow more income tax deferral.

In addition, the spouse can name new beneficiaries that may use a life expectancy payout after the spouse's death. Obviously, the disadvantage to this option is that the retirement account cannot be used to fund a credit shelter trust and may cause a future estate tax if the assets are not consumed by the surviving spouse.

If the spouse is not expected to consume most of the retirement account before death, then naming a traditional credit shelter trust (as opposed to a conduit trust or accumulation trust) as the primary beneficiary of the retirement account can be the best approach, as the estate tax savings will outweigh the lost income tax deferral. A traditional credit shelter trust is also a wise option if the spouse is not much older than the remainder beneficiaries.

Other Issues

It is often impossible to fit the necessary language on the beneficiary designation form itself. The best approach is to write the words "See Attachment" on the form and place all of the necessary language on an attachment that is submitted along with the preprinted signed form. To ensure a beneficiary designation form is accepted by the IRA custodian or plan administrator, the attorney should always submit the forms to such parties with a receipt (including a complete copy of the signed form attached) that requires the custodian/administrator to sign and date a statement to the effect that the attached beneficiary designation forms were accepted and are now effective. If the attorney does not receive the receipt back, then a simple follow-up phone call can fix a problem that, if left until death, could be catastrophic to the estate plan.

Because of the complexity of this area of law and the ability of a stubborn IRA custodian to frustrate the income tax planning of a testator, an attorney should review the IRA agreement before deciding on a retirement planning course of action. To avoid problems after death, Ted Riseling and Jeff Rhodes in their newsletter, The Riseling Report, suggest sending a letter to the IRA custodian during the client's lifetime asking for a written response to the following questions:

1. Do you honor the designated beneficiary rules, contained in Treas. Reg. § 1.401(a)(9)-4, A-5, when a trust is named beneficiary of an IRA and allow the beneficiaries of the trust to be considered designated beneficiaries of the IRA?
2. Do you permit the beneficiary of an IRA to make investment decisions concerning that beneficiary's portion of the IRA?
3. Will you permit the beneficiary of an IRA to name a successor beneficiary for any undistributed portion of the original beneficiary's share of the IRA?
4. Will you let the IRA beneficiary move the IRA to another IRA

custodian after the account owner's death as permitted by Rev. Rul. 78-406?
5. If an IRA beneficiary elects the five-year payout method, will you permit multiple withdrawals during the five-year period?
6. If an IRA beneficiary elects to receive distributions over the beneficiary's lifetime, will you allow the beneficiary to take more than the required minimum distribution in any year?
7. If (a) a trust is named as the beneficiary of the IRA, (b) the trust qualifies as a beneficiary under the applicable Treasury Regulations, (c) the trust agreement provides for separate shares to be created on the account owner's death, and (d) the beneficiaries comply with all other Treasury Regulations and other tax laws, will you permit the beneficiaries to split the IRA into multiple IRAs in accordance with the trust agreement to create separate shares consistent with the trust agreement?
8. Do you accept customized beneficiary designation forms?

Ted M. Riseling & Jeff K. Rhodes, The Riseling Report, January 2003, located at www.oktrustlaw.com/reports/JANUARY03.doc (for items 1-7). The questions above are not intended to be an exhaustive list and other questions may be appropriate depending on the particular client situation. The taxpayer should consult with his or her attorney if the custodian's response to any of these questions is no.

Conclusion

One of the most important areas of estate planning is dealing with tax-deferred retirement accounts. Unfortunately, this is an extremely complicated area of law. Becoming familiar with the issues discussed in this article is crucial for estate planning attorneys.

Attorneys should consider the following points when dealing with retirement accounts:

- Retirement accounts present unique problems because withdrawals after the owner's death trigger income taxes.
- Be mindful of the reasons why income tax deferral is not at issue.
- Trusts should be avoided as beneficiaries, unless a nontax reason for creating the trust outweighs the lost income tax deferral of using the trust (or income tax deferral is not at issue for some reason).
- If income tax deferral is important and a trust must be used (as when a credit-shelter trust must be funded with retirement benefits), consider whether the expense of a private letter ruling is justified to allow the use of an accumulation trust.
- Draft tax apportionment clauses in wills and trusts to provide for estate

tax payments from funds other than the retirement accounts (if such funds are available).
• Ensure that beneficiary designation forms are drafted to create separate accounts when multiple beneficiaries are being named under a trust and a life expectancy payout option is desired.
• If there are substantial funds in an IRA, then make sure to ask the IRA custodian the questions above to avoid problems after the owner's death.
• Always have written documentation from the retirement account administrator confirming that the beneficiary designation form was accepted.

Keith A. Herman is an associate with the St. Louis, Missouri, firm of Greensfelder, Hemker & Gale, P.C.

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The Durable Power of Attorney

By Kenneth A. Vercammen

A Power of Attorney is a written document in which a competent adult individual (the "principal") appoints another competent adult individual (the "attorney-in-fact") to act on the principal's behalf. In general, an attorney-in-fact may perform any legal function or task which the principal has a legal right to do for him/herself.

The term "durable" in reference to a power of attorney means that the power remains in force for the lifetime of the principal, even if he/she becomes mentally incapacitated. A principal may cancel a power of attorney at any time for any reason. Powers granted on a power of attorney document can be very broad or very narrow in accordance with the needs of the principal.

Why is Power of Attorney so important?

Every adult has day-to-day affairs to manage, such as paying the bills. Many people are under the impression that, in the event of catastrophic illness or injury, a spouse or child can automatically act for them. Unfortunately, this is often wrong, even when joint ownership situations exist.

The lack of properly prepared and executed power of attorney can cause extreme difficulties when an individual is stricken with severe illness or injury rendering him/her unable to make decisions or manage financial and medical affairs. All states have legal procedures, guardianships or conservatorships, to provide for appointment of a Guardian. These normally require formal proceedings and are expensive in court. This means involvement of lawyers to prepare and file the necessary papers and doctors to provide medical testimony regarding the mental incapacity of the subject of the action. The procedures also require the involvement of a temporary guardian to investigate, even intercede, in surrogate proceedings. This can be slow, costly, and very frustrating.

Advance preparation of the power of attorney can avoid the inconvenience and expense

of legal proceedings. This needs to be done while the principal is competent, alert and aware of the consequences of his/her decision. Once a serious problem occurs, it is too late.

The Power of Attorney can be effective immediately upon signing or only upon disability. Some examples of legal powers contained in the Power of Attorney are the following:

1. REAL ESTATE: To execute all contracts, deeds, bonds, mortgages, notes, checks, drafts, money orders, and to lease, collect rents, grant, bargain, sell, or borrow and mortgage, and to manage, compromise, settle, and adjust all matters pertaining to any real estate or lands in which I have an interest, including _____ [real estate]

2. ENDORSEMENT AND PAYMENT OF NOTES, ETC.: To make, execute, endorse, accept, and deliver any and all bills of exchange, checks, drafts, notes and trade acceptances. To pay all sums of money, at any time, or times, that may hereafter be owing by me upon any bill of exchange, check, draft, note, or trade acceptance, made, executed, endorsed, accepted, and delivered by me, or for me, and in my name, by my Agent.

3. MEDICAL RECORDS ACCESS: To be able to access my medical and hospital records under Federal Law HIPAA.

4. STOCKS, BONDS, AND SECURITIES: To sell any and all shares of stocks, bonds, or other securities now or hereafter, belonging to me, that may be issued by an association, trust, or corporation whether private or public, and to make, execute, and deliver any assignment, or assignments, of any such shares of stock, bonds, or other securities.

5. CONTRACTS, AGREEMENTS, ETC.: To enter into safe deposit boxes, and to make, sign, execute, and deliver, acknowledge, and perform any contract, agreement, writing, or thing that may, in the opinion of my Agent, be necessary or proper to be entered into, made or signed, sealed, executed, delivered, acknowledged or performed.

6. BANK ACCOUNTS, CERTIFICATES OF DEPOSIT, MONEY MARKET ACCOUNTS, ETC.: To add to or withdraw any amounts from any of my bank accounts, Certificates of Deposit, Money Market Accounts, etc. on my behalf or for my benefit. To make, execute, endorse, accept and deliver any and all checks and drafts, deposit and withdraw funds, acquire and redeem certificates of deposit, in banks, savings and loan associations and other institutions, execute or release such deeds of trust or other security agreements as may be necessary or proper in the exercise of the rights and powers herein granted; Without in any way being limited by or limiting the foregoing, to conduct banking transactions as set forth in section 2 of P.L. 1991, c. 95 (c. 46:2B-11).

7. TAX RETURNS, INSURANCE AND OTHER DOCUMENTS: To sign all Federal, State, and municipal tax returns, insurance forms and any other documents and to represent me in all matters concerning the foregoing.

8. GIFT GIVING POWERS: To make gifts in amounts which my agent in his sole, absolute and unfettered discretion shall deem appropriate in any given year on my behalf.

You should contact your attorney to have a Power of Attorney Prepared, together with a Will, Living Will and other vital Estate Planning documents.

Kenneth Vercammen is a Litigation Attorney in Edison, NJ, approximately 17 miles north of Princeton. He often lectures for the American Bar Association and New Jersey State Bar Association on personal injury, criminal / municipal court law and practices to improve service to clients. He has published 125 articles in national and New Jersey publications on municipal court and litigation topics. He has served as a Special Acting Prosecutor in seven different cities and towns in New Jersey and also successfully defended hundreds of individuals facing Municipal Court and Criminal Court charges.

In his private practice, he has devoted a substantial portion of his professional time to the preparation and trial of litigated matters. He has appeared in Courts throughout New Jersey several times each week on many personal injury matters, Municipal Court trials, Probate hearings and contested administrative law hearings.

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What Every Estate Planner Must Know About Charitable Transfers

By Mark B. Weinbergs

1. Charitable giving is not restricted to the wealthy. Tax benefits promote charitable transfers, but they are by no means the only incentive, or even the most important. The client need not even have an otherwise taxable estate to derive great benefit from charitable transfers. These benefits include setting a good example for the clients' children and other family members, honoring those things the clients hold dear and giving back for a lifetime of benefit from society. Charity is the dues paid for being a member of the human community.

Food for thought: In the aftermath of the World Trade Center disaster on 9/11, it was reported that some people who were already homeless and destitute contributed what little they had at fire stations around New York City. Also numerous web sites permit contributions to be easily and securely made with credit cards, delivering this service with information about a wide variety of charitable organizations.

2. Charity means different things to different people. What federal and state tax and asset transfer provisions consider to be charity may not square with what the client has in mind. As importantly, what the estate planner thinks is charity may vary widely from the client's view. There is a way to do what the client wants to do, so long as the client has charitable intent in the broadest possible sense.

Food for thought: Every estate planner who practices for any significant length of time encounters a client who wishes to donate or bequeath something to charity but does not trust his or her own judgment. Speaking to clients at length about the ways in which charitable institutions have helped them and their families throughout their lives can help them discover a nexus and greater personal meaning.

3. Do not besmirch the name of charity. Because charity is favored by the tax and property transfer systems, some use its good name as a cover for efforts to feather their

own nests. Avoid this temptation, because it poisons the well from which the entire community drinks.

Food for thought: The history of charity is replete with examples of the ways in which donations to charity have been used for tax avoidance purposes. Charitable split dollar **insurance** and accelerated charitable lead trusts are examples of **tax** schemes that feigned significant benefit to charity while conferring outsized **tax** deductions or exclusions on the true beneficiaries, individual clients of jaded "promoters." For other examples of wrongdoing in which charity and its supporters are exploited, see the excellent article by Marion Fremont-Smith and Andras Kosaras of Harvard's Hauser Center for Nonprofit Organizations, Wrongdoing by Officers and Directors of Charities: A Survey of Press Reports 1995-2003, which appeared in the October 2003 issue of The Exempt Organization Tax Review. This article can be downloaded and an abstract viewed at http://papers.ssm.com/sol3/papers.cfm?abstract_id=451240.

4. Charity is the "Swiss Army knife" of the estate planner. Keep it in your bag of solutions when approaching every problem, and be sure it does not help or fit before discarding it. As the instinct to help one another is widespread, if not universal, so this means to that end is useful more often than most lawyers think.

Food for thought: Aside from providing satisfaction and tax benefits to the donor or testator, planned giving can solve real-world problems faced by them or their families. A charitable remainder trust can provide ongoing support for disabled or spendthrift family members, while protecting the assets from creditors and the beneficiaries' own weaknesses. Charitable gift annuities can permit those of modest means to gain the satisfaction of helping their church build its new home while stabilizing their own retirement portfolio. For extensive free information about the many ways in which charitable transfers can meet client needs, see the Planned Giving Design Center on the Internet at www.pgdc.com or a site sponsored by a charity or practitioner in your local area.

5. Charity is a worldwide phenomenon and possibility. Charity may begin at home, but its reach spans the globe. Direct bequests to foreign charities and lifetime gifts to domestic charities that work around the world are promoted by the tax laws and can reach every human concern across the planet.

Food for thought: Although only domestic U.S. charities can receive gifts that are deductible for federal income tax purposes, those U.S. charities can fund programs and benefits in other countries, so groups in this country can help anyone subject to U.S. income tax obtain tax benefits for money those groups spend to aid those in other lands. But the estate tax charitable deduction is not limited to U.S. charities, and so bequests directly to foreign charities qualify for the federal estate tax deduction. Through

charitable gifts at death, international development and aid programs can be conducted completely by charities in those countries (which may be more effective, being free from outside interference). Review the Treasury Department's Best Practices for International Fund Raising, as well as comments filed with Treasury by the Probate and Trust Division's D-2 Organizational & Operational Issues of Exempt Organizations Committee. These appear at www.abanet.org/rppt/cmtes/pt/d2/2003-29Comments.pdf. Other valuable information about charitable giving can be obtained by subscribing to the committee's free electronic mailing list at www.abanet.org/rppt/cmtes/pt/d2/home.html and addressing questions to the list by e-mail.

6. Potential conflicts of interest are as prevalent in dealing with charity as with any other human activity. **The fact that a client wishes to make a** contribution or bequest to charity should raise as many questions about motives and personal benefit as would an offer from a company's CEO to give his attorney a tip on the company's stock.

Food for thought: Contributions to The Nature Conservancy by insiders have recently raised questions about the contributors' motives, after news accounts reported that these gifts were part of a system of preferential land sales. Although newspapers and magazines often get the facts of a case wrong, the issues raised by the Washington Post articles are instructive.

7. Watchdog groups are the quick and easy way to misjudge a charity. Clients want their contributions to help "worthwhile" charities. Influenced by the mass media's need for facile answers, groups have arisen that develop simplistic standards and apply these to charities. In truth, these groups are no better at determining whether a charity is "worthwhile" than a palm reader is at determining a person's character. If a client wants to support a worthwhile charity, he or she must get involved with that charity, seek and study information about it, and learn its history and current operations. Without this kind of hands-on involvement, there is no way of assessing whether the client would consider it to be "worthwhile."

Food for thought: Artificial limits, such as "percentage of gross receipts that go to administration, overhead, and fund raising," falsely identify these as expenses that are not worth making; but without them an organization will be weak, and limiting them to an artificial number penalizes groups that do very important things. Some watchdog lists treat salaries as administrative, even when they are for staff who do charitable work directly by providing information to the public or by helping patients. Is a secretary who types the order shipping tons of food to the needy unnecessary? Increasing the number of factors increases dependence on the rating group, which after all has its own motive for attracting support by "making the news" with discoveries of impropriety. Without checking more deeply, a donor cannot know whether the watchdogs are serving their own agendas or that of the public. For those having an interest in the contours and varying viewpoints on regulation in this area, a visit to the CharityChannel.com web site

archives for CYB-ACC (short for "Cyber-Accountability") can be exciting.

8. As with all important things in life, the more one puts into charity, the more one gets out of it.To understand how clients can best achieve their charitable goals, volunteer with a local charity and rise through the ranks to a responsible position. The more the estate planner learns about what is most difficult to come by, the better he or she can advise clients on how to make a difference.

Food for thought: Over the past 20 years or more, the stock of buildings in which educational and other charitable activities can be conducted has risen far faster than the funding for programs. This is widely attributed to the fact that major donors seek permanent and tangible memorials to their gifts. Thus there is a premium associated with a long-term program or unrestricted gifts, which the attorney would easily learn about by working at various levels in any charitable organization. This knowledge gives the estate planner insight that will help him or her advise the clients who are most concerned about how to approach the charity of their choice.

9. There is always room for new ways to do charity. There may be nothing new under the sun, but new tools and technologies are constantly being developed, and creativity in their use to benefit the community is a necessary element to keep the charitable spirit alive.

Food for thought: Bill Gates, Larry Ellison, and other commercial entrepreneurs are bringing their creative talents to charitable endeavors and taking on challenges that previously were considered so formidable that only governments would undertake them.

10. Lawyers should be active advocates for charitable transfers (when that isconsistent with ethical considerations), leaving it to the client to select the specific charity or cause that will benefit.Estate planners are the people whotraditionally speak to community members about gifts, donations, and other asset transfers. They should also be the most knowledgeable about the benefits and limitations associated with transfers to charity. There is no better spokesperson for the community at that point, especially when the planner is careful to avoid promoting any given charity or cause. Already legions of others appeal to the individual's selfish side by showing him or her how to keep more money for his or her family, usually by minimizing taxes. The public should have an advocate to seek repayment for all the benefits that the individual has received from society.

Food for thought. Because of a recent ethics opinion, practitioners in Maryland are uncertain to what extent they can participate in advising members of their churches, alumni associations, and other community charities about gifts to those charities. That opinion concludes that there is a nonwaivable conflict of interest for a lawyer who sits

on the fund-raising committee of his church who offers to write wills for members of his congregation for free if they make a bequest to the church. Is this the proper result, and would your answer change if the lawyer (1) were not on the fund-raising committee, (2) charged full price for his services, (3) did not require a contribution to the church, or (4) all of the above?

Mark B. Weinberg is a member of the Rockville, Maryland, firm of Weinberg & Jacobs and vice-chair of Group D, Charitable Planning and Exempt Organizations.

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Practical Considerations in Choosing a Representative

By Jessica Cousineau

Specialized estate planning attorneys aren't the only ones who run into estate planning issues. This article will look at some of the basic issues we should look at when helping clients draw up their will.

There are few clients who don't need at least a simple will. When I talk with a client I remind them that they have a will no matter what they decide to do. The only question is who writes it, the client or the state's intestatcy statute. Talking about estate planning issues can be difficult for clients, even when they sought us out. To ease this discomfort I help my clients look at it as another chance to pass on their life lessons. Finding out about the client's family and the events that helped shape their lives can give us a good idea of what is important to them and who they might want to think about when drafting their documents.

The most important decisions our clients can make regarding their wills involve who they name as personal representative, trustee, and guardian for their children. When naming these positions they need to consider the specific requirements and responsibilities for each of the positions and ensure they are appointing someone who is both capable and comfortable fulfilling those roles. This should include talking with the prospective designee to make sure they are willing to serve in this position. The client should also choose at least one alternate in case when the will comes into effect the person they chose is no longer willing or able to serve.

The personal representative is the most visible person and target for discontent throughout probate proceedings. This person should ideally be someone who understands the clients and their wishes regarding family and property, as they will have to resolve any ambiguities during probate. This should also be someone who will understand the beneficiaries will be hurting and lashing out at any available target. They should not take things said to them personally or get upset themselves. If possible this person should be someone the proposed beneficiaries would view as impartial and

fair. Appointing someone outside of the family (a close friend) or co-personal representatives (possibly both of the client's children) may help. However, the client should understand these choices can also lead to further discontent if there is any disagreement between the co-representatives or the outside representative and family. If they do decide to use either of these options they need to set in place tie-breaking procedures.

The trustee will need to be someone the client has complete confidence in. Not only is this person going to care for the funds entrusted to them, they are also asking this person to decide how they would have spent money in any given situation. The trustee will have to decide what a reasonable standard of living is for the beneficiaries and sometimes weigh the competing interests of several beneficiaries. This will need to be a person who can not only deny a beneficiary funds if warranted, but also clearly articulate to other beneficiaries why they allowed for certain expenses. The more discretion left to a trustee, the better communicator they will need to be. This is another area where appointing more than one person to serve concurrently can be helpful in some situations. If the estate is large enough to warrant an institutional trustee some families have found it helpful to appoint a family member to serve alongside the institutional trustee, giving a personal element to the decisions. Here also, there needs to be a clear dispute resolution mechanism in case of disagreement between the trustees.

Any client with minor or special needs children will also need to think about who they would like to have serve as the guardian of the children. Specific issues they need to consider include:

1. if the potential guardian has similar parenting styles and values;
2. if taking on the children would be either a financial or practical burden;
3. if money left in trust will put the clients children in a significantly different financial position than the guardian's children; and
4. if the guardian is likely to be healthy and able to provide physical and emotional support until after the child is able to move out on their own;

Additionally, if there is a special needs child involved, make sure that the clients evaluate how the proposed guardian would be able to handle those needs and ensure that they will be able to care for that child for the longer period of dependency.

The will also needs to include provisions for passing on property that is held in the client's name at the time of their death. This may include personal property, real property, bank accounts, retirement accounts, and interests in trusts or businesses. When they designate who they would like these assets to be given to, clients need to think about both economic and psychological effect individual gifts will have on both the recipient and others included in their estate plan. Writing a letter outside of the will can be a good way to explain their thinking to their family and friends. By taking a

proactive approach to the explanation, clients can try to avoid some of the probate fights that waste their assets.

For a client with assets totaling less than 2 million (2006-2008) or 3.5 million (2009) there will be no federal estate tax due. (In 2010 the federal estate tax disappears completely, but then reappears at the old level in 2011 if no changes are made. Congress is working on bills now to address that.) For those who will be above those threshold limits or may owe state death taxes there can be some simple alternative planning tools to use. The first is to use pay on death (POD) accounts for bank and retirement accounts. The bypass or credit shelter trust is a common way for married couples to avoid taxes on amounts above the exclusion limit. Life insurance can also be used to pass money on to the next generation without having it included in the decedent's estate at their death. Anyone can also reduce their taxable estate by gifting up to $12,000. per recipient each year.

In closing make sure that the client analyzes what they want to accomplish with their will and how they want to do it, paying special attention to the people they appoint.

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Ten Estate Planning Ideas For A Divorced Or Separated Persons

By Kenneth A. Vercammen, Esq.

Under the law in New Jersey, if a person dies without a Will and without children, their spouse will inherit all assets, even if they are separated from the spouse. In addition, if you have children from a previous marriage, but no Will, your separated spouse will get half your estate. In planning, make sure your assets go to your loved ones or favorite charity. Therefore, you may wish to do the following:

1. Have an Elder Law attorney prepare a Will to distribute your assets to the people you care the most about. If you already have a Will, prepare a new Will and have the old Will revoked. (Your estate planning attorney will explain this to you.)
2. Prepare a Power of Attorney to select someone to handle your finances if you become disabled. Have your old power of attorney revoked.
3. Prepare a Living Will prepared
4. Change your beneficiary on assets you may own, such as stocks, bank accounts, IRA, and other financial assets. Change your beneficiary under your own life insurance, whether whole life insurance or term insurance.
5. Contact your employer's human resources and change the beneficiary on life insurance, pension, stock options or other employee benefits. Note that if you are not yet divorced, your spouse may have to sign a written waiver permitting you to change beneficiaries.
6. Keep your personal papers at a location where family can find them.
7. Have your attorney prepare a prenuptial agreement if you decide to get married.
8. Make sure the trustee for any funds designated for your children is the "right" trustee.
9. In New Jersey, if you are married and living with your spouse, under certain instances the surviving spouse has a right to "elect against the Will" The disinherited spouse may like to elect against the Will and try to

obtain one third of the estate. Your attorney can explain how you can protect yourself and your children.

10. If you have minor children, nominate someone under a Will to serve as guardian to the children. Although the surviving parent obviously has first right of custody of children, they may not even want custody.

Conclusion

Planning can only be done if someone is competent and/or alive. Make sure your assets can be passed directly to your loved ones.

KENNETH VERCAMMEN & ASSOCIATES, PC
ATTORNEY AT LAW
2053 Woodbridge Ave.
Edison, NJ 08817
(Phone) 732-572-0500
(Fax) 732-572-0030
website: www.njlaws.com

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Undue Influence As Defense To Will Or Power Of Attorney (New Jersey)

By Kenneth A. Vercammen, Esq.

One of the major cases dealing with undue influence was *Haynes v. First National State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981). Here, the New Jersey Supreme Court held that the burden of proof establishing undue influence shifts to the proponent when a will benefits a person who stood in a confidential relationship to the decedent and there are suspicious circumstances which need explanation. The suspicious circumstances need only be slight. Id. at 897. Moreover, when the evidence is almost entirely in the possession of one party and the evidence points to the proponent as asserting undue influence, a clear and convincing standard may be applied rather than the normal burden of proof of preponderance of the evidence. Id. at 901.

The *Haynes* analysis was further extended to situations in which there is a transfer of property where the beneficiary of the property and an attorney is on one side and the donor on the other. See *Oachs v. Stanton*, 655 A.2d 965 (N.J.Super.A.D. 1995). The court in *Oachs* determined that under circumstances such as these, the donee bears the burden of proof to establish the validity of the gift, even in situations in which the donee did not dominate the decedent¹s will. Id. at 968. This rule was established to protect a donor from making a decision induced by a confidential relationship the donee possesses with the donor. Id. Again, the burden is a clear and convincing standard. Id.

The New Jersey Supreme Court in *Pascale v. Pascale*, 549 A.2d 782, 787 (N.J.1988), stated that when a donor makes a gift to a donee that he/she is dependent upon, a presumption arises that the donor did not understand the consequences of his/her act. In these situations the donee must demonstrate that the donor had disinterested and competent counsel. Id. Likewise, undue influence is conclusive, when a mentally or physically weakened donor makes a gift without advice or a means of support, to a donee upon whom he/she depends. Id.

A confidential relationship can be found to exist when one is certain that the parties

dealt on unequal terms. *In re Stroming¹s Will*, 79 A.2d 492, 495 (N.J.Super.A.D. 1951). The appropriate inquiry is if a confidential relationship existed, did the parties deal on terms and conditions of equality? *Blake v. Brennan*, 61 A.2d 916, 919 (N.J.Super.Ch. 1948). Suspicious circumstances are not required to create a presumption of undue influence with regard to inter vivos gifts and the presumption of undue influence is more easily raised in an inter vivos transfer. See *Pascale*, supra, 549 A.2d. at 787; *Bronson v. Bronson*, 527 A.2d 943, 945 (N.J.Super.A.D. 1987).

Generally, an adult is presumed to be competent to make an inter vivos gift. *See Conners v. Murphy*, 134 A. 681, 682 (N.J.Err. & App. 1926); *Pascale v. Pascale*, 549 A.2d 782, 786 (N.J.1988). However, when a party alleges undue influence with regard to an inter vivos gift, the contesting party must prove undue influence existed or that a presumption of undue influence should arise. Id. A presumption of undue influence arises when a confidential relationship exists between the donor and donee or where the contestant proves the donee dominated the will of the donor. Id.; see also *Seylaz v. Bennett*, 74 A.2d 309 (N.J. 1950); *In re Dodge*, 234 A.2d 65 (N.J. 1967); *Mott v. Mott*, 22 A. 997 (N.J.Ch. 1891); *Oachs v. Stanton*, 655 A.2d 965 (N.J.Super.A.D. 1995) (holding that where a confidential relationship existed and that the donor did not rely upon the donee, a shifting of the burden was still appropriate); *In re Neuman's Estate*, 32 A.2d 826 (N.J.Err. & App. 1943)(stating in a will context, such burden does not shift merely because of the existence of a confidential relationship, without more, as in the matter of gifts inter vivos.)

The *In re Dodge* court explained why a presumption of undue influence arises in a confidential relationship and stated: "In the application of this rule it is not necessary that the donee occupy such a dominant position toward the donor as to create an inference that the donor was unable to assert his will in opposition to that of the donee." *In Re Dodge*, 234 A.2d 65, 83 (N.J. 1967). The court referenced a much earlier case in explaining the rule's application: "It's purpose is not so much to afford protection to the donor against the consequences of undue influence exercised over him by the donee, as it is to afford him protection against the consequences of voluntary action on his part induced by the existence of the relationship between them, the effect of which upon his own interests he may only partially understand or appreciate." Id., citing *Slack v. Rees*, 47, 59 A. 466, 467 (N.J.Err. & App. 1904).

In sum, once it is proven that a confidential relationship exists the burden shifts to the donee to show by clear and convincing evidence that no undue influence was used. Although the case law indicates suspicious circumstances need not be shown, the donee must show all was fair, open and voluntary, no deception was practiced and that the transaction was well understood. *Pascale*, supra, 549 A.2d at 786. Furthermore, confidential relationships arise in all types of relationships whether legal, natural or conventional in their origin, in which confidence is naturally inspired, or, in fact, reasonably exists. *In re Fulper's Estate*, 132 A. 834 (N.J.Ch. 1926).

It appears confidential relationships exist in all cases in which: "The relations between the [contracting] parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from over-mastering influence; or on the other from weakness, dependence or trust justifiably reposed, unfair advantage is rendered probable." *Pascale*, supra, 549 A.2d. at 788, quoting *In re Fulper*, supra, 133 A. at 838; see *also In re Dodge*, supra, 234 A.2d 65 at 3.

In determining whether the Defendant was the dominant person in the relationship, there is no clear cut rule and instead the court must look to the particular circumstances of the matter. *In re Fulper*, supra, 133 A. at 844; *Giacobbi v. Anselmi*, 87 A.2d 748, 753 (N.J.Super.Ch. 1952). In *Fulper* the court determined that a confidential relationship existed in a father-son relationship in which the father was advanced in age, weak and physically depended upon the son. Moreover, since the father sought the son¹s assistance on business matters, lived with the son during the winter months and gave the son joint and several power over his checking account an actual repose of trust and confidence in the son was demonstrated. *In re Fulper*, supra, 133 A. at 846.

In the *Giacobbi* case, a confidential relationship was determined to exist between a mother and daughter, even though the mother did not suffer from mental or physical infirmity. There the mother was found to be alert, active, and somewhat independent. However, she turned to the daughter for small issues and problems when they occurred. *Giacobbi*, 87 A.2d. at 756. Therefore, the burden can shift to Defendant to prove by clear and convincing evidence the transaction was not unduly influenced.

Furthermore, where a donor makes an “improvident” gift to the donee upon whom she depends that strips the donor of all or virtually all their assets, as here, a presumption arises that the donor did not understand the consequences of their act. *Pascale*, 549 A.2d 782, 787, citing *Vanderbach v. Vollinger*, 64 A.2d 225, 228 (N.J. 1949). Under those circumstances the donee must establish that the donor had the advice of competent and disinterested counsel.

Similarly, when a mentally or physically weakened donor makes a gift to a donee whom the donor is dependent upon, without advice, and the gift leaves the donee without adequate means of support, a conclusive presumption of undue influence arises. However, when a donor is not dependent upon the donee, “independent advice is not a prerequisite to the validity of an improvident gift even though the relationship between the parties is one of trust and confidence.” *Id.* citing *Seylaz*, supra, 74 A.2d at 311. Even though suspicious circumstances are not required to be established in an inter vivos transfer for a presumption of undue influence to exist, thereby shifting the burden of proof, Plaintiff has nevertheless put the matter in issue. *Pascale*, supra, 549 A.2d at 786.

Kenneth Vercammen, Esq. is the principal of Kenneth Vercammen & Associates which represents individuals and businesses in New Jersey.

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Using Trusts To Settle Lawsuits

By Thomas E. Simmons

Special considerations come into play when a plaintiff poised to recover money is a child or an individual with a disability. In the context of settling a lawsuit or receiving judgment proceeds, cash cannot simply be delivered to such a person because of the plaintiff's legal incapacity. Instead, recovered funds must be delivered to a third party for the plaintiff's benefit. This third party can be a trustee, a custodian, or a conservator.

In most circumstances, the use of a trust offers greater flexibility and better protections of the plaintiff/client's interests. Not uncommonly, however, attorneys select a conservator or simply a minor's account to hold settlement funds in the interests of perceived cost savings or out of a desire to avoid delays. These options are viewed as less expensive for the client, easier to self-administer, and a way to avoid the need to consult with a trust attorney.

On closer examination, however, the reasons cited against the use of a trust disappear in nearly every situation. A trust can be more efficient in terms of both costs and the time required for initial implementation. When properly structured, trusts also can offer income tax advantages.

The discussion that follows applies most commonly in connection with the settlement of a personal injury claim involving an injured child or individual with disabilities. Application also could be made, however, to other tort plaintiffs, wrongful death beneficiaries, or minors or disabled persons who receive unanticipated inheritances. The discussion in many cases could apply with equal weight to the ways to manage funds from a verdict or judgment.

Minors

When the injured plaintiff is a minor, he or she is considered legally incompetent

without regard to the individual's actual financial acumen or maturity. Because of this legal incompetency, a minor may not receive funds or proceeds; title must vest in another person for the minor's benefit.

With minors--unlike individuals with disabilities--incompetency will disappear at a predictable point in time. If a settlement occurs any time before this date, however, arrangements must be made to accommodate the incompetency. This is true even if the minor will reach the age of majority in a matter of months or weeks, unless settlement can be delayed until the relevant birthday.

Custodial Account

Attorneys often look to the use of a custodial account at a bank or credit union when the anticipated settlement is relatively small. All but two states have adopted a version of the Uniform Transfers to Minors Act (UTMA). Vermont and South Carolina still retain the uniform act's predecessor, the Uniform Gifts to Minors Act (UGMA). Legislation is pending in Vermont to adopt UTMA. An UTMA account will vest in the minor's control and absolute ownership when the minor attains the age of majority or the age defined in the state's adoption of the Act (generally, age 21, although a few states permit the person creating the account to specify a later age, up to age 25).

While the minor remains a minor, the account is titled in the name of the custodian "as custodian for the beneficiary." The custodian may--but need not necessarily--be the minor's parent or legal guardian. The custodian may be an entity such as a trust company. Joint custodians also may be used.

UTMA accounts are simple and inexpensive. No legal fees are required to set up or administer the account, other than initial court approval and standard account fees or minimum balances that may apply. No bond for the conservator is required except when an interested party has successfully petitioned a court for the requirement of bond. Cash as well as investments, real property, annuities, and life insurance products may be held by a custodian.

UTMA lacks any specific guidance on when and how a custodian should expend funds for the minor's benefit. Spending power is clearly not unrestricted. Any expenditure of funds must be for the benefit of the minor. But what actually constitutes spending for the minor's benefit is distressingly vague and undefined.

UTMA accounts are not court supervised. Because of the absence of statutory guidance and court oversight, selection of a proper custodian is critical. Cases in which a custodian used UTMA account funds for the custodian's own benefit are numerous. To make matters worse, some courts have even held that UTMA assets expended for

purposes other than the minor's benefit become exposed to the creditors of the custodian. Legal malpractice for failing to exercise due care in the selection of a custodian is a real possibility.

If the minor passes away before reaching the age set by statute, the assets in the account pass to his or her estate. In most cases, this will require a probate proceeding and distribution according to the laws of intestacy.

UTMA permits the designation of successor custodians, to plan for the contingency of the first custodian's death or incapacity. When a successor custodian has not been designated, a minor's conservatorship or other court proceeding may be required.

Minor's Conservatorship

A minor's conservatorship is a court proceeding that appoints a person as conservator (or guardian, in some states) with the power to invest, administer, and distribute the minor's funds for the minor's benefit. Individuals as well as corporate trustees often serve as conservators.

Conservatorships benefit from more detailed statutory definitions of the conservator's role and responsibilities. Court oversight on at least an annual basis in the form of statutorily required accountings is an additional advantage, although the result is additional legal fees. One benefit to court oversight takes the form of protections for the minor, as any improper or questionable expenditures or investments are likely to be identified and corrected earlier.

A benefit of court oversight from a conservator's perspective is to permit the conservator to receive res judicata approvals of the conservator's actions during a reported accounting period. A conservator considering an expenditure that could be seen as improper can seek advance judicial guidance before making the expenditure. The purchase of a hot tub for a minor's physical therapy regimen, for example, might be legitimate, but other family members--including possibly the conservator--also may enjoy the tub. In this type of conflict of interest scenario, court approval can give the conservator peace of mind and eliminate the possibility of future litigation.

In cases in which ongoing court supervision is unwarranted, because of the value of the minor's assets in relation to the ongoing legal fees, most states permit the court to waive or reduce ongoing accounting requirements on a showing of good cause. In certain circumstances, the conservator can be required to post a bond in addition to, or in lieu of, future court accountings.

A minor's conservatorship terminates when the minor attains the age of majority unless

a disability qualifies the minor for a continuing conservatorship. Any conservatorship assets remaining on a minor's premature death would be distributed to the minor's estate. Again, intestacy and a probate proceeding would likely result.

Minor's Trust

The third option for a minor who is poised to receive a settlement amount is a trust. Trusts offer a great deal more flexibility than either an UTMA account or a conservatorship. Distribution standards can be clearly articulated. Final distributions to the minor can be delayed beyond age 21 or 25. A bond for the trustee may be required or waived by the trust instrument itself. Professional investment services from an institutional trustee or the use of family members as trust advisors is also possible.

In terms of legal fees, the drafting of a minor's trust is usually on a par with the fees necessary to implement a conservatorship. Court supervision of a minor's trust is available, but optional. The use of a corporate fiduciary, such as a bank trust company, can increase costs in the form of trustee fees but reduce the need for ongoing court proceedings. Although corporate fiduciaries earn their fees through professional investment decision making and experienced fiduciary management, family members may resist the use of corporate fiduciaries from a wish to eliminate trustee fees and retain control of the funds.

Often, final distributions from a minor's trust are staggered. This may be the single greatest advantage to a minor's trust. Rather than dropping a single lump sum on the minor at a relatively young age, lump sums can be fractionalized and spread over time. Not uncommonly, the trust would distribute one-third of the principal to the minor at age 21, half of the remainder at age 25, and the rest at age 30, while continuing to make additional distributions for education, health care, and support as needed.

Whenever a minor's trust is used in these scenarios, it contains detailed provisions regarding contingencies such as the minor's premature death or the trustee's inability to continue to serve. These contingencies can avoid probate costs as well as serve to plan around an intestacy situation.

In almost every situation, a minor's trust will be irrevocable. In some states (Alaska, Delaware, and South Dakota, for example), spendthrift protections can be added that protect the trust assets from most creditors of the minor beneficiary. Spendthrift protections can be especially attractive for young persons who tend to engage in higher risk activities that expose them to a greater likelihood of a lawsuit.

Income Tax Issues

The use of an UTMA or conservatorship to manage a minor's settlement funds is tax neutral. The income in either vehicle is taxed to the child at the child's rate, which is an advantage when the child pays tax at a lower rate than the parent. But the so-called "kiddie tax" eliminates most of this benefit for children under age 14.

Young children are effectively entitled to an $800 standard deduction. Thus, smaller accounts in which the child's investment income is $800 or less annually should owe no taxes. Children under age 14 who have investment income of $1,600 or more will have to pay income taxes based on their parents' highest rates, the unpopular "kiddie tax" rule. Parents may have the option of reporting the income on their own return or filing a separate tax return for the child.

Minor's Trust Tax Advantages

Income tax issues for a minor's trust can be more complicated, but not necessarily less advantageous. Unlike a custodianship or conservatorship, a trust is a separate entity. Thus, a trust will be considered a separate taxpayer and subject to trust income tax rules. Trusts are notorious for their steep marginal rates.

The highest marginal rate of 35% for nongrantor trusts is triggered at just $9,750 in annual income. For trusts with significant income, therefore, higher taxes may result through the use of a trust. This is not the case for trusts with smaller amounts of income, however. A Form 1041 tax return need not be filed for the trust unless its gross annual income exceeds $600. Often, tax-free municipal bonds or other tax-efficient investments like exchange-traded funds or individual common stocks can reduce the effect of steeper graduated rates applicable to trusts.

Trust distributions to minors will result in taxable income to the minor, subject to the kiddie tax rules. The trust itself can deduct distributions it carries out, which can soften or eliminate the effect of income taxes on trust investments. The trust will be entitled to a $300 exemption. The trust can deduct any trustee fees. Trusts, depending on how they are drafted, also do a better job of helping college students qualify for financial aid.

Plaintiffs with Disabilities

When the plaintiff is an adult with a disability, many of the same issues and considerations are present. Costs, flexibility, taxes, and careful selection of the appropriate person or entity to manage the funds are key. UTMA accounts are unavailable options, and, when public benefits are involved, a special needs trust should always be considered.

Conservatorships

Most individuals with disabilities are legally competent to manage their own affairs. When this is the case, the individual can receive funds in his or her own name, just as any other plaintiff.

Under the Uniform Probate Code (adopted in 18 states), a conservator may be appointed for an adult only when the adult's "ability to respond to people, events, and environments is impaired to such an extent that the individual lacks the capacity to manage property or financial affairs ... without the assistance or protection of a conservator." When this standard is met, the individual (a "ward" or "protected person") is eligible for a conservatorship.

Monies in a conservatorship will be considered the individual protected person's funds for purposes of determining eligibility for needs-based programs, such as Medicaid. If the individual with a disability has ongoing medical expenses, the settlement proceeds would need to be exhausted or "spent down" before Medicaid or other programs would become available.

Supplemental Needs Trusts

Whether or not a plaintiff with a disability suffers from a legal incapacity, the use of a supplemental needs trusts is always preferred whenever eligibility for benefits such as Medicaid, Supplemental Security Income (SSI), or public housing is a concern. Medicaid and SSI eligibility are, generally speaking, governed by the same set of rules, although Medicaid is overlaid with a gloss of state statutes and rules. These rules provide that, with very narrow exceptions, amounts in trust are deemed an available resource to the beneficiary, resulting in ineligibility for these public programs.

The idea of a supplemental needs trust (SNT) is to carefully restrict the authority of the trustee to make distributions so that public benefit eligibility will be preserved. The trustee is permitted to make distributions that supplement, but do not replace, the benefits the beneficiary receives. This restriction results in preserved eligibility because the terms of the trust do not permit the trustee to pay for expenses that public benefits are already supplying.

When the settlement proceeds are essentially the property of the individual with a disability, any trust that would be created would be "self-settled." Either the individual plaintiff or the court would fund the trust. In these circumstances, only two supplemental needs trust options can be considered: a "(d)(4)(A) payback trust" or a "(d)(4)(C) pooled trust." These trusts are defined by federal law at 42 U.S.C. § 1396p(d)(4)(A), (C), as well as by state statutes and regulations implementing the Medicaid program on a state-by-state basis.

A (d)(4)(A) payback trust requires that, when the beneficiary dies, all amounts remaining in the trust will be paid to the individual's state of residence up to an amount equal to the total Medicaid benefits paid during his or her lifetime. The trustee may be an individual or a corporate fiduciary. A payback trust cannot be established for individuals over age 65.

A (d)(4)(C) pooled trust must be managed by a nonprofit association that pools investments but that maintains separate accounts for each beneficiary. When a beneficiary of a pooled trust dies, the trust need only "pay back" the state Medicaid program to the extent that amounts are not "retained by the trust."

Various interpretations have been advanced for what the "retained by the trust" requirement for pooled trusts means. Some trusts retain amounts for the benefit of other surviving trust beneficiaries, but others use funds to benefit nonprofit or charitable agencies. No federal statute restricts pooled trusts to beneficiaries under age 65, but pooled trusts are not available in every state. One of the premier examples of a pooled trust is the ARC of Texas pooled trust, but availability is restricted to residents of Texas.

With either a pooled trust or a payback trust, any remaining funds will not pass to a deceased beneficiary's heirs. This can be a major issue for parents of an injured adult child with a reduced life expectancy because unspent funds may remain at death that might pass to the parents if a conservatorship were used instead. A supplemental needs trust, on the other hand, will help make sure funds are available for a longer period of time to enrich the injured person's life. Duties of loyalty and client identification come to the forefront in recommending the trust option versus a conservatorship.

Income Tax Issues

If funds for an individual with a disability are held in a conservatorship, no unique income tax rules are triggered. As with conservatorships for minors, tax neutrality is achieved. Investment income will be taxed to the individual and reported on a 1040 form.

SNT Tax Advantages

If funds for an individual with a disability are held in a supplemental needs trust, the tax treatment will vary greatly depending on the way in which the trust is drafted and administered.

Trusts are considered independent persons and therefore independent taxpayers by the IRS. Because supplemental needs trusts generally pay income tax on income in excess of a $100 exemption, the trusts are also entitled to deduct "distributable net income,"

which is distributed to the beneficiary to avoid double taxation. The beneficiary will report any distributions he or she receives as income on his or her 1040 form.

An additional tax option became available for supplemental needs trusts in 2001. An SNT that meets the requirements of a "qualified disability trust" will result in an increased exemption from $100 to $3,100 (in 2004, indexed for inflation). Code § 643 (b)(2)(C). Thus, a qualified disability trust can retain up to $3,100 in income, adding it to principal free from federal income tax, as well as most state income taxes. Because the beneficiary also is entitled to an additional personal exemption for income distributed to him or her, the use of a qualified disability trust can achieve significant tax savings as compared to a conservatorship.

A qualified disability trust, as defined by the Internal Revenue Code, means a trust that is established "solely for the benefit" of the individual under 65 years of age with a disability. The trust must otherwise meet the requirements of a (d)(4)(A) payback trust or a (d)(4)(C) pooled trust.

Conclusion

With only a few exceptions, trusts are the preferred vehicles for settlement funds for children or individuals with disabilities because of greater flexibility and protections for the individual beneficiaries. Often, trusts are overlooked by plaintiff's attorneys because of the perceived costs or delays in waiting for a busy trust attorney to complete the drafting process. On closer examination, these perceived disadvantages disappear in most situations.

Thomas E. Simmons is an associate with the Rapid City, South Dakota, law firm of Gunderson, Palmer, Goodsell & Nelson, LLP, and is the president and founder of Pooled Advocate Trust, Inc., a nonprofit 501(c)(3) corporation that manages the first (d)(4)(C) pooled trust for South Dakota residents with disabilities.

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Wills And Estate Planning "Save Money And Provide For Your Loved Ones"

By Kenneth A. Vercammen, Esq.

As average Americans, we work 80,000 hours in a lifetime, or 45 to 55 years. In spite of all the resources and assets we earn, the vast majority of us do not take the time to create a will.

National statistics indicate that 80% of Americans die without leaving a will. There are several reasons for this: fear of death; procrastination; and misinformation (people presume that only the rich need to have wills). Whatever the excuse, it is clear that people would benefit from having a will.

In the absence of a will or other legal arrangement to distribute property at death, the state must step in to administer the estate. The result can be lengthy delays before the rightful heirs receive their property. And because the state has no instructions from the deceased, no charitable gifts will be made.

If You Have No Will:

If you leave no Will or your Will is declared invalid because it was improperly prepared or is not admissible to probate:

- State law determines who gets assets, not you
- Additional expenses will be incurred and extra work will be required to qualify an administrator
- Judge determines who gets custody of your children
- Possible additional State inheritance taxes and Federal estate taxes
- If you have no spouse or close relatives the State may take your property
- The procedure to distribute assets becomes more complicated-and the law makes no exceptions for persons in unusual need or for your own wishes.
- It may also cause fights and lawsuits within your family
  When loved ones are grieving and dealing with death, they shouldn't be

overwhelmed with Financial concerns. Careful estate planning helps take care of that.

The following is a sample of a variety of clauses and items which should be included in a will:

1st: debts and taxes
2nd: specific bequests
3rd: disposition to spouse
4th: disposition of remainder of estate
5th: creation of trusts for spouse
6th: creation of trust for children
7th: other beneficiaries under 21
8th: executors
9th: trustees
10th: guardians
11th: surety or bond
12th: powers
13th: afterborn children
14th: principal and income
15th: no assignment of bequests
16th: gender
17th: construction of will
18th: no contest clause

A will must not only be prepared within the legal requirements of the New Jersey Statutes but should also be prepared so it leaves no questions regarding your intentions.

Why Periodic Review Is Essential

Even if you have an existing Will, there are many events that occur which may necessitate changes in your Will. Some of these are:

- Marriage, death, birth, divorce or separation affecting either you or anyone named in your Will
- Significant changes in the value of your total assets or in any particular assets which you own
- A change in your domicile
- Death or incapacity of a beneficiary, or death, incapacity or change in residence of a named executor, trustee or guardian of infants, or of one of the witnesses to the execution of the Will
- Annual changes in tax law

- May I Change My Will?

Yes. A Will may be modified, added to, or entirely changed at any time before your death provided you are mentally and physically competent and desire to change your Will. You should consider revising your Will whenever there are changes in the size of your estate. For example, when your children are young, you may think it best to have a trust for them so they do not come into absolute ownership of property until they are mature. Beware, if you draw lines through items, erase or write over, or add notations to the original Will, it can be destroyed as a legal document. Either a new Will should be legally prepared or a codicil signed to legally change portions of the Will.

Save Money

Your estate will be subject to probate whether or not you have a Will and in most cases, a Will reduces the cost by eliminating the requirements of a bond. With a well-drawn Will, you may also reduce death taxes and other expenses. Don't pinch pennies now to the detriment of your beneficiaries. We have attempted to briefly explain in this article some of the issues, techniques, and decisions involved in Wills, Estate Planning, and Administration of an Estate. Because the matters covered are complicated and the Federal and New Jersey laws frequently change, this article can only outline some of the many legal issues you should consider.

The proper preparation of a Will should involve a careful analysis of the client's assets, family and his/her desires.

Estate Planning is the process of examining what will happen to your property when you die and arranging for its distribution in such a manner as will accomplish your objectives.

The cost of a Will depends on the size and the complexity of the estate and the plans of the person who makes the Will.

A properly drawn Simple Will without Trust costs approximately $100.00 to $500.00. It is one of the most important documents you will ever sign, and may be one of the best bargains you will ever have.

Be sure your Will takes into account the 1997 Federal Tax changes and all New Jersey Inheritance Tax changes. Also, ascertain if your Will is self-proving, which would dispense with having to find the Will's witnesses after death.

What Is A Will? A Will is a Legal written document which, after your death, directs how your individually owned property will be distributed, who will be in charge of your property until it is distributed and who will take care of your minor children if the

other parent should die ". You should remember that the term ³property² under the law includes "real estate as well as other possessions and rights to receive money or items of value.² Everyone who has at least $3,000 in assets should have a Will. You do not have to be wealthy, married, or near death to do some serious thinking about your Will.

Administration Of An Estate

Kenneth A. Vercammen is a Middlesex County trial attorney who has published 125 articles in national and New Jersey publications on litigation topics. He has been selected to lecture to trial lawyers by the American Bar Association, New Jersey State Bar Association and Middlesex County Bar Association.

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Domestic Violence Trials Conducting the Initial Client Interview

By Richard A. DeMichele, Jr.

Introduction

Domestic Violence is a pattern of behavior in which one intimate partner uses physical violence, coercion, threats, intimidation, isolation and emotional, sexual or economic abuse to control the other partner in the relationship. According to the American Bar Association Commission on Domestic Violence, nearly one in three women in the United States will be a victim of domestic violence in her lifetime. This results in between three and ten million children being exposed to the ill effects of domestic violence every year. Unfortunately, domestic violence is known as the silent epidemic and far too many cases go unreported. Hopefully, with education and training, the legal profession will take strides to be an improved resource for victims.

The Initial Client Interview – the birthplace of your "discovery"

Whether you represent the victim or the defendant the initial client interview is the single most import part of your case preparation. In most states Domestic Violence trials are "summary actions" and the parties are not entitled to discovery as of right. This does not mean that the well prepared attorney will go to trial with out evidence! Lawyers are conditioned to get trial evidence though discovery. They are trained to take depositions, propound interrogatories, serve requests to produce, and serve requests to admit. None of these techniques are available in most domestic violence cases. "No discovery" means the lawyer will need to obtain evidence "informally". The client is the single best source of information and evidence about the case. Even if the client does not have the needed evidence they usually can help their attorney learn where to look.

Some things to consider when interviewing the client (victim or defendant) for the first time:

1. Explain confidentially.
    a. Lawyer – client privilege.
    b. Need for the client to be open and honest.
    c. Embarrassing information not shared with anyone.
2. Client's mental and emotional state.
    a. Determine client's ability to effectively communicate.
    b. Mental health issues.
    c. Post traumatic stress disorder.
    d. Be patient.
3. Define the relationship between your client and the other party.
    a. Household member.
    b. Child in common.
    c. Expectant child in common.
    d. Dating relationship (heterosexual or same sex).
    e. Married
    f. Formerly married
    g. Family like setting
4. Determine where the incident occurred.
    a. Public place
    b. Private residence
    c. The parties home
5. Phone/ e-mail Records
    a. Was a telephone used? With what frequency?
    b. Are there any saved voice mails?
    c. Was email used? With what frequency?
    d. Subpoena phone records.
    e. Gather copies of e-mails.
    f. What do the e-mails say?
6. Determine who was a witness.
    a. Neighbors
    b. Patrons
    c. Children
    d. Police
    e. Medical personnel
7. Did the police respond?
    a. Which township?
    b. Is a report available?
    c. How many officers responded?
    d. Did the police request an ambulance?
8. Does the defendant have Weapons?
    a. Was a weapon involved in the incident?
9. Did the police seize the defendant's weapons?

    a. did a different township police seize the weapons (defendant lives in a different town from the victim)
    b. Do you have a police report for the weapons seizure?
10. Did the victim require medical treatment?
    a. Medical records. Including diagnostic tests.
    b. Photographs of injuries.
11. Was any personal property destroyed? Can it be presented as evidence?
    a. Furniture (broken chair, dishes, electronics, etc.)
    b. Fixtures (i.e. hole in the wall, broken window, broken lock etc)
    c. Torn or damaged clothing
    d. Injured pets
    e. Repairs made

The above items are just a list of items to consider in addition to the specifics for prohibited conduct as defined by your states domestic violence statute. As your client conveys to you what happened be mindful of obtaining supportive evidence to corroborate his or her testimony. In many domestic violence cases the only evidence is the testimony of the parties and the case is decided solely on credibility. Having even a small amount of corroborating evidence can mean the difference between your client prevailing or not.

Richard A. DeMichele, Jr.
DeMichele & DeMichele, P.C.
800 N. Kings Highway
Cherry Hill, NJ 08034
(856) 755-3660

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A Quick Test To Assess The Legality Of Firing An At-Will Employee

By Arthur D. Rutkowski JD and Barbara Lang Rutkowski Ed., RN

The **checklist** that follows may be used to determine whether the discharge of an at-will company employee would be lawful. It applies to the discharge of both nonunion and union employees. A key to the answers appears at the end of the **checklist.**

1. Will the employee be discharged for any of the following reasons?

   a. race
   b. religion
   c. sex
   d. age(over 40)
   e. national origin
   f. children or childbirth
   g. pregnancy
   h. disability
   i. FMLA Leave

2. Will the employee be discharged for acting in concert with other employees to:

   a. organize collectively?
   b. push for a raise or shorter hours?
   c. ask for changes in other working conditions?
   d. support another employee in his/her protesting?

3. Will the discharge violate any type of implied contract or your own Employee Handbook?

   a. does the company employee handbook provide that warnings must be given before an employee may be discharged or that an employee may be discharged

only "for cause"?
b. does the company have written employee policies that promise "fair treatment"?
c. is there a written, signed employment contract?

4. Will the discharge constitute a tort?

a. has the company committed the tort of outrage, by being abusive during the discharge through either high-handed interrogation methods or flagrant misrepresentations to the employee as to the reason for discharge?
b. has the company been negligent or inconsistent by failing to follow its own policies, which failure resulted in the employee's discharge?

5. Will the employee be discharged for any of the following acts or omissions?

a. refusing to do an illegal act
b. filing a worker's compensation claim
c. reporting violations of EEO, OSHA, or ERISA regulations or
d. "whistle-blowing" on the company's possible violations of laws.

6. Will the employee be discharged for refusing to do a job he or she considers unsafe (if objective facts back up that the job is unsafe, this gives rise to a possible OSHA violation)?

a. Would doing the job reasonably place the employee in imminent danger?
b. Has the job been performed safely numerous times in the past? If so, why does the employee now consider it unsafe? Has there been an accident on the job shortly before the refusal so that the employee has reason for concern?

7. Will the company deny a hearing (with witnesses present) to provide the employee an opportunity to admit or deny the reasons for discharge?

8. Has the company failed to give the employee an oral or written warning to correct the conduct?

9. Has the company let other employees get away with what the employee is to be discharged for?

10. Did the company promise the employee, at the time of hire or subsequently, that "the job will be yours for as long as you want it?" Was the employee promised an "annual salary"?

11. Will the employee be discharged for a physical condition (for example, high blood

pressure, diabetes, or a back condition) in violation of federal and state statutes prohibiting discrimination on the basis of disability or FMLA leave? Has the company tried to make reasonable accommodations for the employee to work at some other job?

12. Is there no written documentation (for example, prior reprimands) of the conduct leading to the employee's discharge?

13. Did the employee give up a job and/or home in another city to work at the company? Were promises made to induce the employee to do so that were not kept?

14. Will the company call the discharge one motivated by a need for reduction in force when in fact the reason is unsatisfactory work performance?

15. If the company plans to hold an investigatory interview prior to the discharge, will the employee be denied a union or coworker representative, despite his or her request?

16. Ask yourself "Am I retaliating in any way 'against an Employee's protected rights?"'

Key: each of these questions states the facts of a state or federal case litigating an employer's right to discharge an at-will employee. In each case, the employer answered "yes" - and lost. Still, the answer to any particular questions does not necessarily determine whether the discharge contemplated would be lawful. It is the process of asking and answering these questions - with the help of counsel - that can alert a company to potential liability and thereby help it avoid liability. - Arthur D. Rutkowski, J.D., partner, Bowers Harrison, LLP, Evansville, IN.

A monthly publication edited by Arthur D. Rutkowski JD, a partner in the law firm of Bowers, Harrison, Kent and Miller and Barbara Lang Rutkowski Ed.D., RN. Mr. Rutkowski has represented management in labor and employment law for over 25 years and has successfully directed hundreds of union organizing campaigns for management in the USA and Canada. He is also a management member of the American Bar Association Labor Law Committee on Labor Arbitration and Collective Bargaining Agreements. Dr. Rutkowski, is president of Nurse Consultation Services and specializes in management consulting and educational seminars. Her 20 year career includes a faculty position at the University of Florida, a hospital administrative position, and her current job of being the Quality Coordinator, St. Mary's Managed Care Services, Evansville, IN

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Working With Computer Forensics Experts — Uncovering Data You Didn't Know Existed Can Help Make Your Case

By Jiyun Cameron Lee, Esq.

Attorney Jiyun Cameron Lee discusses the steps that attorneys should take to discover and preserve electronic evidence.

In this electronic age, the significance of electronic discovery is well known. Most lawyers understand that discovery of paper documents is not enough. E-mails, typed in haste and without much thought, have dealt devastating blows in many court battles.

The field of computer forensics, however, remains a mystery to many. The phrase conjures up visions of white-coated lab technicians huddled around a deceased desktop PC.

The field of computer forensics is a mixture of science and art. On the one hand, it involves the investigation and extraction of computer-related data using specialized tools. On the other hand, it involves creative sleuthing to resurrect lost evidence, sometimes with little or no knowledge of what you are looking for.

Used correctly, computer forensics can be a highly efficient -- and often cost-effective -- means of uncovering critical electronic evidence.

Active vs. Ambient Data

Electronic discovery typically involves "active" computer files -- e-mails, word processing documents, spreadsheets, databases and design schematics -- that have not been deleted and are easily accessible to the ordinary computer user. Most users do not know, however, that large volumes of potentially critical evidence exist in hidden areas of computer storage devices.

This hidden information -- "ambient" data -- exists in areas of electronic media (computer hard drives, floppies, optical discs, etc.) that are not accessible to average users. Ambient data may consist of fragments of deleted e-mails, back-up copies of word processing files, deleted directory structures and hidden files reflecting the Internet history of the computer. A careful examination of such ambient data may tell a very compelling story about document destruction or theft of intellectual property.

A Case in Point

Imagine the following scenario: Mr. Smith, a longtime employee of ABC Company, resigns from ABC to join its direct competitor, XYZ Company. At XYZ, Mr. Smith assumes responsibilities identical to those he had at ABC.

XYZ's product is suddenly transformed to resemble ABC's product. ABC suspects that Mr. Smith has taken its trade secrets to XYZ, but cannot prove it. In discovery, Mr. Smith denies having taken anything belonging to ABC.

My firm faced this very familiar scenario in a recent case involving the misappropriation of trade secrets. Using computer forensics, we were able to show not only that Mr. Smith had lied under oath but had destroyed documents to avoid getting caught.

In our case, the forensic evidence came from Mr. Smith's home computer. (Names and details have been changed.) Based on our prior experience in similar cases, we knew that computer forensics may provide the evidence we needed to establish our case. We hired New Technologies Inc. (www.dataforensics.com), based in Gresham, Ore., to conduct the forensic analysis.

The forensic analysis yielded a treasure trove of information, including the following:

- Two weeks before his resignation from ABC, Mr. Smith created a new directory on his home computer called "Business Strategy." The directory contained ABC's business plan and its proprietary market analysis;
- The "Business Strategy" directory was deleted from Mr. Smith's home computer three months after his resignation from ABC, just days after ABC filed suit against XYZ and Mr. Smith;
- Registry information (information contained in a special operating system file) found on Mr. Smith's home computer showed that the "Business Strategy" directory had been unzipped from a floppy disk. The floppy disk had never been produced; and
- Three days before his resignation, Mr. Smith downloaded an extensive database from ABC's server onto his home computer.

The forensic evidence destroyed Mr. Smith's credibility and transformed the case.

Not Hocus-Pocus, But Teamwork

There is no doubt that the evidence against Mr. Smith could not have been found without sophisticated software tools used by our computer forensics expert. However, it is also true that the evidence against Mr. Smith would not have been found in the absence of collaborative teamwork between counsel and expert.

Teamwork is key in computer forensics because typically, neither counsel nor the expert knows what he or she is looking for. This was true in the case of Mr. Smith.

We did not know what Mr. Smith did before he left ABC. Mr. Smith had been a 15-year employee with ABC and had access to documents, databases, plans and source code. For all we knew, Mr. Smith had done nothing. But his rapid transition to his new duties at XYZ -- which mirrored his duties at ABC -- suggested that he was using ABC's information.

The fact that we found ABC documents on Mr. Smith's home computer, moreover, told us nothing. Even though we were finding deleted fragments of ABC documents, that fact alone was easily refuted by Mr. Smith's claim that he sometimes used his home computer to do ABC work and deleted from his computer those documents he no longer needed.

We clearly needed more. The expert, who was skilled at the science of computer forensics but did not know the detailed facts of the case, was hampered by the volume of information available to him on the computer hard drive.

The lawyers, on the other hand, were hampered by the fact that we could not simply flip through documents to look for kernels of facts that may lead to more intriguing evidence, as we would have done in a typical case. We bridged this gap through extensive collaboration.

The lawyers reviewed the fragments of deleted documents provided by the expert to identify those that were potentially "of interest." The expert attempted to resurrect every documentary fragment so identified, and to trace the document back to determine, where possible, when and how it was created on the computer and when it was deleted. Such collaboration ultimately allowed us to retrace Mr. Smith's steps.

Working With Computer Forensics

If you are faced with a situation in which a computer may contain potentially relevant evidence, consider the following.

Prepare for discovery of not just "documents," but of original media. If you are representing the party seeking the discovery of electronic media, craft a discovery plan that targets the media, for example, a computer hard drive. Remember that in addition to "active" data in the form of word processing documents, spreadsheets and the like, "ambient" data may reveal relevant evidence.

If you are representing the party who is the target of such discovery, keep in mind that most judges in most situations will be reluctant to order a forensic examination of electronic media unless there is some established evidence of evasion or wrongdoing. Work closely with your client to minimize your opponent's ability to levy such charges.

Preserve the original hard drive. As soon as you are on notice that a computer may contain potentially discoverable evidence, preserve the original hard drive and do not allow anyone to use or access the hard drive. If the computer is in the possession of the opposing party, ask for preservation as soon as possible. This is because each time the computer is turned on, the mere operation of the computer can overwrite potential evidence. The prohibition on use and access should be extended to information management specialists employed by your client.

Know your expert. As in any field, the range of skill and expertise varies greatly among those who work in computer forensics. Most computer forensic "experts," for instance, know **how to** retrieve deleted documents and e-mails. Many, however, do not possess the knowledge or tools to do more. Carefully interview the expert and check references to determine whether the expert has the skills and the tools to conduct the type of forensic analysis you need.

Carefully craft the terms of the order allowing a forensic investigation. If a forensic investigation is allowed, you will need a stipulation or court order setting out the process for conducting such investigation. Regardless of whether you represent the party who is seeking to do the forensic examination or the party who is the target of such examination, propose terms that will give you, not your opponent, maximum control over the process. Understand how each provision in the stipulation or order will help or impair your ability to direct a forensic review by consulting with your expert.

Recognize the limits of computer forensics. I have heard computer forensics experts proclaim that they can find information on a computer storage device (e.g., a floppy disk or hard drive) even if the information has been deleted and overwritten up to seven times with other data. This may sound good, but be aware that:

- In order to find it, you have to know what you are looking for;
- In order to know that it has been overwritten, you have to know where the information is buried; and
- The astronomically expensive tools that you will need to dig through the seven layers of data are probably not available to you.

There is no guarantee that by simply hiring a computer forensics expert, you will unearth that smoking gun. However, used appropriately in the right case, computer forensics can be a cost-effective discovery tool.

Jiyun Cameron Lee is a partner in the San Francisco office of Folger Levin & Kahn. She can be reached at jlee@flk.com.

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Managing Cooperation While Minimizing Exposure: As Courts Tighten The Noose On The Selective Waiver Doctrine, Congress May Extend A Lifeline

By Matthew M. Oliver

Relying on the "selective waiver" doctrine has always been a risky strategy. Faced with a request from the government to disclose otherwise privileged documents and information resulting from an internal investigation, corporate counsel faced the difficult choice between full cooperation with the government and arming plaintiffs' lawyers with a roadmap to the conduct at issue. The selective waiver doctrine provided a potential way out of this dilemma, allowing corporations in some limited circumstances to argue that providing information to the government furthered societal interests to such a degree that any waiver of the attorney-client privilege or work product protection should not extend to plaintiffs in private litigation. Although this argument met with some initial success, it never was fully embraced by the courts on a scale wide enough to give corporate counsel substantial comfort.

The selective waiver debate took on increased significance as the government increased its focus on prosecuting corporate crime in the wake of numerous, well-publicized corporate scandals. The Department of Justice's 1999 Holder Memorandum and 2003 Thompson Memorandum formalized the requirements for corporate cooperation, and included as a factor a corporation's willingness to waive privilege. Changes to the U.S. Sentencing Guidelines in 2004 applicable to the sentencing of organizations provided similar incentives for corporations to waive privilege in order to qualify for a reduction in sentence[1]. Paradoxically, as government requests to waive privilege became the norm, the courts became increasingly reluctant to embrace the selective waiver doctrine. Thus, corporate counsel were once again faced with the stark choice of being perceived by the government as uncooperative or potentially placing the corporation at a disadvantage in civil litigation, with little room to navigate between these two extremes.

Most recently, the trend of judicial hostility towards the selective waiver doctrine has continued, with the Tenth Circuit joining the majority of Courts of Appeal that have

rejected the selective waiver concept in the context of disclosures made to the government. The recent appellate decision in the Qwest Communications Securities Litigation[2] found the company's selective waiver arguments unpersuasive, holding that class action plaintiffs were entitled to discovery of otherwise privileged documents disclosed by the company to the Department of Justice and the Securities and Exchange Commission in response to subpoenas. While certain courts in the past had reasoned that selective waiver could be available when the disclosure to the government was made pursuant to a confidentiality agreement, the Tenth Circuit in Qwest found the terms of the confidentiality agreements between Qwest and the SEC and the DOJ insufficiently restrictive of the government's ability to use the information at issue.[3]

Despite the negative trend, hope is on the horizon. At its April meeting, the Advisory Committee on Evidence Rules approved for publication and comment proposed new Federal Rule of Evidence 502, which, if ultimately approved and codified, would supplant the Qwest decision and its predecessors and cement the selective waiver doctrine as the law in the federal courts. The proposed rule provides, in relevant part, that "[a] voluntary disclosure [of privileged information] does not operate as a waiver if . . . (3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation." Under this rule, corporations would have much greater ability to protect themselves in civil litigation, while maintaining the ability to cooperate as fully as desirable with government investigations.

Not all corporate counsel are thrilled with the protections afforded under the proposed rule, however. Concerns have been expressed that the new rule will only exacerbate what many perceive to be the problematic trend of government prosecutors and regulators routinely demanding privilege waivers. Indeed, by eliminating one of the primary arguments that corporations have relied upon to justify a refusal to waive privilege, the proposed rule may only embolden prosecutors who no longer will be receptive to the argument that privilege cannot be waived due to potential repercussions in civil litigation. On balance, the freedom that the new rule will provide to corporations dealing with governmental investigations should outweigh the potential burdens, but only time will tell whether it is a panacea or simply another step in the erosion of corporate privilege.

Matthew M. Oliver is Counsel in the Litigation Department of Lowenstein Sandler PC, and a member of the firm's White Collar Criminal Defense and Securities Litigation and Enforcement Practice Groups.

[1]Earlier this spring, the Sentencing Commission voted to delete the language at issue from the Application Note to the Guidelines because of criticism and concerns that it could be misinterpreted to require privilege waivers.

[2] In re Qwest Communications Int'l, Inc. Sec. Litig., -- F.3d --, 2006 WL 1668246 (10th Cir. June 19, 2006).

[3] As a practical matter, merely convincing the government to enter into any confidentiality agreement was a coup for the corporate defense bar; an expectation that defense lawyers can dictate the terms of such agreements and prohibit the government from using information in ways critical to its investigative functions misperceives the parties' relative bargaining power.

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How To Implement Electronic Medical Records Retrieval In Your Firm

By W. Roger Smith, III, J.D.

Can you remember when your secretary typed your brief on an electronic typewriter? Can you remember when Westlaw or Lexis wasn't available for legal research? Without a doubt, the advent of the personal computer and the internet has pushed the legal profession – sometimes kicking and screaming - quickly into the age of automation. Although many lawyers are averse to change, most have now embraced the "computer age." From electronically filing lawsuits to communicating with opposing counsel or clients via e-mail, from electronic legal research to document management systems, most firms now utilize some form of computer system to handle day-to-day legal functions. In fact, many larger firms now employ IT staff to manage the complex computer software necessary to operate today's law office efficiently.

A fairly recent option available to lawyers is the electronic retrieval and management of client medical records. For firms involved in medical-related litigation, this type of system is essential, as it can save significant amounts of time, cost, and liability for missed deadlines. It certainly did for our firm! Additionally, some firms are finding expanded revenue opportunities through undertaking larger or more complex cases without significantly increasing support infrastructure.

Case Study

A quick review of the decision process in my own firm may be instructive on how an automated medical record retrieval and management system solved our problem with medical record overload.

We are a firm of 40 attorneys focused on personal injury, consumer fraud, toxic tort and mass tort pharmaceutical cases. We average about 1,350 medical record requests per month. Generally, we obtain a limited set of medical records at the initiation of a case to determine merit and fit. Statute of limitations deadlines require fast turnaround of

records requests. Cases we ultimately pursue require a large number of detailed records from numerous sources to complete trial preparation.

Our Problem

Initially, we handled all medical records requests internally. This presented a number of serious challenges, including:

- Volume: the sheer volume of medical record requests was overwhelming, even after adding additional staff to assist in the process. For each record, there was the initial contact with the provider (after tracking down appropriate contact information) and, frequently, a number of follow-up calls.
- Accounting issues: payment logistics became burdensome, as checks had to be cut for individual invoices to each provider before records would be released.
- Tracking: when attorneys needed to know the status of a records request, the information was rarely available, and a separate call had to be made to the provider.
- Time: turnaround time suffered as many records languished in the request cycle.

We investigated different ways of improving the system, including building up our in-house capabilities. But, as we looked into it, we realized that to build an efficient system would require a much larger staff than we currently had or wanted to bring on.

Our Decision

After studying many of the problems we were facing, and after researching the options we had available to us, our solution was to automate the retrieval and management of our clients' medical records. We realized relatively quickly that our solution was the right one!

Is Automated Retrieval and Management of Medical Records Right for Your Firm?

Any legal practice that regularly orders medical records should consider it. Based upon our own hands-on experience with these systems and input from a variety of other firms, we've put together this list of essential questions to consider:

> ***Is your current staff able to quickly retrieve the records you need?***
> Firms that order large amounts of medical records for multiple clients, such as the firms involved in mass tort or pharmaceutical litigation, must typically employ large numbers of staff to order, follow-up on, and process medical records requests. By utilizing an electronic retrieval and

management system, these firms can employ fewer people and save precious time and space.

Are you getting the records you ordered quickly? It is critical to get medical records back as quickly as possible. Electronic retrieval and management of medical records can shed weeks, or even months, off the lengthy process of obtaining client medical records.

Are you out of space, or is space at a premium? "Paperless" offices are becoming essential to an efficient law practice. Paper copies of medical records can easily consume most, if not all, of your office storage space. The maintenance of electronic client files, including electronically scanned medical records, saves time and space.

Is your medical record staff constantly getting pulled to help on other projects? Moving to an automated system can free up staff to work on other important areas of your case.

Are you interested in saving money? Automation provides another area for bottom line-focused firms to realize additional cost savings and profitability improvement.

Moving Ahead – Inside or Out?

So you think an electronic system of retrieving and managing medical records may be right for your firm? Your next decision is whether you want to implement an internal system with in-house managed software and hardware systems, or whether you want to completely outsource this function to an online medical record retrieval supplier.

While it is often tempting to keep the process in-house, there are a number of key considerations in this decision:

Headcount. Behind the automated tracking systems, records retrieval can be fairly labor intensive. Outsourced suppliers specialize in this type of work and are able to spread their expertise and provider contact experience across many clients. An internal solution also increases the load on IT resources.

System Cost and Expertise. An internal solution requires the acquisition and maintenance of an automated system, including software, software maintenance and upgrades, and depending on your current setup, some additional hardware (e.g. high-speed scanners, servers for databases, etc..)

Outsourcing eliminates this need entirely as the expertise in operating the system and the associated costs are included in the retrieval fees.

Training and Turnover. Another consideration for an internal solution is ramp-up, training and turnover of personnel. Again, with an outsourced solution, these headaches are, well, outsourced.

In the final analysis, these additional costs and challenges must be weighed against the outsource supplier's per-transaction fee, and their ability to deliver records in a timely manner.

Because of the expense and administrative issues involving with handling this function in-house, my firm chose to outsource the entire medical record retrieval and management function.

What Should You Look For in an Outsourced Provider?

Like anything else, there are the "Must Have's" and the "Nice to Have's".

Must Have's Short List

- Reputable supplier
- Fast turnaround
- On-line, web-based
- Simple, intuitive interface
- Real-time status tracking
- Cost controls
- National/international reach

Must Have's

Reputable Company. Not only do you need an easy-to-use system, which I discuss below, you need to use a company that is 100% behind your goal, which is the quick and efficient retrieval of client medical records.

Fast Turnaround. Typically, in moving from a manual to an electronic system, you should expect turnaround times to drop from one to three months to about three weeks. Suppliers should be able to document their performance over time and across a sampling of firms.

On-line, Web-based System. The company should provide an on-line, web-based system for ordering records. Delivery and management of the records, including storage and backup, should also be through the same web-based interface, available 24 hours a day, 7 days a week, 365 days a year.

Simple, Intuitive Interface. A simple user-interface is crucial to ensure that the initiation of records requests is quick and easy, and that status

tracking and reporting are routine and intelligible.

Real-Time Status Tracking. With a few clicks of your mouse, you should be able to determine the date of an initial medical record request, see dates and detailed call logs of conversations with medical providers, and determine the current status of a request and the estimated date of delivery.

Dedicated Account Management. The company should provide to your firm a dedicated account manager available during your normal business hours. The account manager should assist your firm with implementation and training needs regarding their system, and should quickly address your questions and solve any concerns or problems.

National/International Reach. The best outsource suppliers have developed a vast network and capability to quickly access records from virtually any medical provider in the U.S. and increasingly, overseas if necessary.

Nice To Have

Searchable Documents. OCR (optical character recognition) technology can turn medical record images (scanned copies which are not searchable) into searchable documents with annotation capabilities.

Record Consolidation. Multiple records for a client can be consolidated and indexed into one complete indexed record for easier review and case preparation.

Provider Cost Controls. Suppliers now help control costs by requiring that provider fees stay within appropriate state statutes, and by setting limits on provider fees by flagging any request that may exceed that limit *before* the request is approved for payment.

Online, Individual Client Billing Detail. Access to online tracking and invoicing data for all transactions and retrieved records related to a particular client. This feature can be an enormous time saver in approving fees and reconciling with your own accounting systems.

Interface to Case Management Systems. Ready-made interface capabilities with your own proprietary or popular off-the-shelf case management system can provide the ability to order and receive medical

records without ever leaving your electronic case files.

Customized Controls and System Flexibility. Has the ability to quickly customize the system to fit your firm's needs and is flexible enough to modify or enhance based on your user experience and feedback.

Expanded Cost Control Options. A simple interface which allows managers to review status and reasons for over-limit charges and take appropriate action.

Specialized Services. Additional services often offered include:

- Page and bates stamping
- Record sorting and indexing
- Medical reports and summaries
- Document coding
- Missing provider searches
- Records backup and storage

Nice To Have's Short List

- Searchable documents
- Specialized services
- Record Consolidation
- Provider cost controls
- Online, individual client billing detail
- Interface to case management systems
- Customized controls and system flexibility
- Expanded cost control options

The Outcome

Ultimately, Beasley, Allen selected an online, outsourced solution from MediConnect. A key factor in that decision was MediConnect's RapidRetrieve™ web interface. From any Internet-connected computer, our staff can quickly and easily manage all aspects of medical records retrieval, from initiating new requests, to tracking pending or past request status, to downloading completed records. They can also order additional services without leaving the system.

A crucial piece of the solution for us was MediConnect's willingness to work with us in designing an internal system which allows medical provider information to be collected from each client's electronic file and imported directly into MediConnect's web-based system, eliminating the need to manually enter the information into the system.

Our firm has realized significant time and cost savings with the outsourced

MediConnect solution. Turnaround times have improved dramatically, and we are more productive at lower staffing levels. Not only did we avoid hiring more people, we were able to move several employees who had been involved in requesting and tracking records to more productive work.

Conclusion

Automated medical records retrieval gives attorneys today one more good option for streamlining their practices. While there are many options and questions to consider, using an objective checklist to carefully select an outsourced supplier will help keep your firm profitably at the cutting edge.

W. Roger Smith, III, is a Shareholder at Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., a personal injury, consumer fraud, mass/toxic tort-focused law firm based in Montgomery, Alabama.

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Litigation

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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.

Kirby T. Griffis is a partner at Spriggs & Hollingsworth and works primarily in the area of pharmaceutical products liability defense. He practices in federal and state jurisdictions at both the trial and appellate levels. He has coordinated massive multinational discovery efforts, and he has spoken and written on various issues relevant to pharmaceutical litigation, including scientific evidence and punitive damages.

Originally published in LJN’s Product Liability Law & Strategy, May, 2005

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Real Estate

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Use Legal Description
Include Required Easement Rights

Retail Stores - In Shopping Center
Set Out Easements
Specify Square Footage
Identify Common Areas
Identify Store Location by Number & Location

Retail Stores - In building
Attach Drawing
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Appurtenant Rights
Identify Store Location
Specify Square Footage
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Signs

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Restrict to One Use
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Zoning - use restrictions
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Time for Making Tenant Improvements
Allowance for tenant improvements
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Retail Space
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Delivery area for trucks
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(Dorothy Stein Shops, Inc. Case, 59 Misc. 2d 122)
Restrictions on signs - name on Pylon sign

Term of Lease

1. Interim Term
2. Fixed Term
3. Be Specific As to:

    a. Termination Date
    b. Commencement Date
    c. Basis for Determining Dates

4. Statute of Frauds
5. Must Tenant Take Possession Before Commencement
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Options

To Renew or Extend Lease
Except Exercised Options
Agreement to Agree - Not Enforceable
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(Or Specific Formula to Determine Amount)

Option to Lease Additional Space
Designate Space
Time Option May Be Exercised

a. Definite Time
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File Memo, Re: Option

Option to Terminate
By Landlord if No Percentage Rent Paid
By Tenant:

a. After Certain Period
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To Purchase Landlord's Fee Interest
Notice Required
Specific Purchase Price
Set Forth Terms of Contract
Time to Exercise

Right of First Refusal
Landlord Can't Sell for Less, or 5% or 10% Less, Than Offer
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All Terms Must Be Set Forth

Right To Match Offer
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Based on:
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Need Floor Amount
a. Natural (Rent Capitalized)
b. Negotiated

Define Terms
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b. Gross Sales
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Requirements
Conduct Business in Full Space
Store Adequately Stocked
Hours Open for Business
Maximize Gross Sales
Monthly Report of Sales

Payment Dates
Monthly
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Annually
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Recapture Space
If False Statements Received
If % Rent Not Paid for Set Time

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Landlord’s Default

Landlords's Obligations

Free Standing structure
Structural repairs but exclude

a. doors
b. docks
c. skylights
d. windows

Multi-tenant building
Structural repairs
Painting after certain period
Electrical, plumbing and HVAC systems

Obligations of Tenants
Maintain Leased Premises
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If Silent, Tenant May Assign
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a. Not to Be Unreasonably Withheld
b. In Landlord’s Sole Discretion

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Original Tenant Remains Liable
Right to Terminate if Assigned by Operation of Law
Right to Assign to Parent, Subsidiary or Affiliates

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Consent of Landlord
All or Part of Premises
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To Development and Operating Agreements
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Cut-off States

a. Mortgagee Has Right to Have Mortgage Subordinate to Lease

Lease Ahead of Mortgage

a . Except Insurance Provisions

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From Tenant

a. For Mortgagee
b. For Potential Purchaser
c. Each Lease Year for Update on Status

From Landlord

a. For Assignment
b. Leasehold Financing
c. Each Lease Year for Update on Status

Limit Number of Estoppels Per Year

Miscellaneous
Notices
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Holding Over
Partial Invalidity
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Binding Effect
Memorandum of Lease
Integrated Agreement
Choice of Law
Waiver
Counterpart Signatures
Litigation Expenses
Pronouns

Did you find this checklist helpful? Do you think more information like this would help you? More information is available - *This checklist was republished with permission from the GP/Solo Publication: Commercial Real Estate Law Practice Manual; pp327-331, by James P. McAndrews* ***GP/Solo members can purchase this book, which includes electronic forms, at a discount through the GP/Solo bookstore website: http://www.abanet.org/genpractice/books/index.html .***

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GP|Solo Law Trends & News
Practice Area Newsletter

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

July 2006 **Volume 2, Number 4**

In this issue...

Dear Division Member:

Below is the Summer 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 highlights some emerging areas such as the new Bankruptcy amendments, some interesting checklists to use in family cases and real estate issues as well as use of e-discovery in medical malpractice issues and many more. Thus, I am delighted to attach your Summer edition of Law Trends.

With this issue, Law Trends is now two years old. We hope you agree that with each edition, Law Trends continues to provide meaningful articles for each of you and continues to improve. We trust that this edition, like the others, 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. Also, I want to personally thank Doug Knapp for his work in getting Law Trends to you. Doug has accepted a new position within the ABA and we wish him good luck in his new position.

I hope each of you enjoy this issue of Law Trends. Next year, 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 annual meeting in Hawaii.

Best regards,

Dwight L. Smith , Chair

Business Law

Bankruptcy Debtors: Who Are You?

Welcome To The Blogosphere
A Primer for Business Lawyers

Business Protection Tips (For lawyers, judges and others)
PART 1: The Telephone

Fantasy Meets Reality: Examining Ownership Rights In Player Statistics

Improving Your Work Product: Essential Word Skills for Lawyers

Personal Protection Tips (For lawyers, judges and others)

Salient Points on Tax Treatment Under the Half-Act Code Consumer Provisions
General Categories of New Requirements

U.S. Resources In International Food Law

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

Coordinating Retirement Accounts With Estate Planning 101
(What every estate planner needs to know)

The Durable Power of Attorney

What Every Estate Planner Must Know About Charitable Transfers

Practical Considerations in Choosing a Representative

Ten Estate Planning Ideas For A Divorced Or Separated Persons

Undue Influence As Defense To Will Or Power Of Attorney (New Jersey)

Using Trusts To Settle Lawsuits

Wills And Estate Planning
"Save Money And Provide For Your Loved Ones"

David Lefton, Estate & Financial Planning Group Coordinator

David H. Lefton is a founding member of Hardin, Lefton, Lazarus & Marks, LLC. He is licensed to practice law in the state of Ohio and concentrates his practice on estate planning and probate.

Mr. Lefton is actively involved in the American Bar Association (ABA) and the Ohio State Bar Association (OSBA). In addition to serving as group coordinator for the Estate and Financial Planning Group, Mr. Lefton is also involved with the Solo Day Annual Meeting and the Financial Management Committee.

In Ohio, Mr. Lefton is the current chair of the Solo, Small Firm and General Practice Section of the OSBA. On this Board, he has served as chair of continuing legal education programs sponsored by the Board, has planned educational programs for the continuing education of lawyers in Ohio and has chaired the Ohio Economic and Technology Survey of attorneys throughout the state.

Mr. Lefton is also one of his county representatives on the Estate Planning, Trust and Probate Board of Governors for the OSBA. This Board reviewsand proposes legislation on topics that effect estate planning and probate in the state of Ohio.

Mr. Lefton has also served as a speaker at numerous CLE seminars on the subject of estate planning and probate. In conjunction with the seminars, he has prepared reference materials for attorneys to use and refer to in their law practice

Family Law

Domestic Violence Trials Conducting the Initial Client Interview

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

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

Checklist for Commercial Leases

Download the entire issue in PDF (499 KB, 77 pages)

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GP|Solo Law Trends & News
Business Law

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Bankruptcy Debtors: Who Are You?

By Leslie E. Linfield, Esq.

Consumer bankruptcy attorneys everywhere had a pretty clear picture of who their clients were. How much they made, how much they owed and how best to try and help them deal with insufferable debt loads. That was until October 17, 2005.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) radically changed the rules of bankruptcy. The question became, how would this effect consumer filings? Who would still file? Would they somehow look different then they did prior to the law's change?

These questions were taken up by the Institute for Financial Literacy (IFL), a non-profit financial literacy organization based in Portland, Maine and whose mission is to make effective financial literacy education available to all American adults. The Institute expanded its mission with the passage of the BAPCPA by becoming an approved provider of the credit counseling and financial management instructional course (also referred to as "debtor education'.)

The answers may be a bit surprising, but this information may prove valuable to consumer bankruptcy attorneys as they move forward and try to assist an ever growing financial strapped population.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

BAPCPA incorporated a new requirement that individuals must first complete mandatory credit counseling in order to be eligible to file a consumer bankruptcy case under the bankruptcy code[1]. This new section reads as follows; "an individual may not be debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an

approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis[2]."

In addition, the new law requires that certain debtors in the bankruptcy system must complete a mandatory financial management instructional course in order to receive a discharge of their debts.[3] A married couple filing a joint bankruptcy petition must each complete credit counseling prior to filing and a financial management instructional course prior to discharge as a result of the law's application of these requirements to "individuals.[4]"

It's worth noting that during the multiple attempts to pass BAPCPA into law, much rhetoric and little comprehensive research was cited with regard to the demographics of consumer debtors. We heard much about 'abuse', high income filers and hidden assets with little to back up these claims.

During the development of its credit counseling service the Institute for Financial Literacy incorporated a research component into its delivery platforms to allow large scale data collection and facilitate the establishment of research into the demographics of the consumers considering filing bankruptcy (those seeking credit counseling.) This would allow a meaningful analysis of what changes BAPCPA would have on those consumers seeking bankruptcy protection as well as set baselines for future research.

So What Did We Find?

During the first and half months, five thousand and ninety four (5,094) clients of the Institute volunteered to complete a survey. This compared with nearly 138,000 new bankruptcy cases filed nationally between October 17, 2005 and March 31, 2006 gives us a statistically valid sample. If all of these respondents filed bankruptcy petitions[5], this would represent 4% of all new cases filed for the period.

Gender

There appears to be a gender split with 53.8% indicating that they were female, while 46.2% were male. In comparison, the current ratio of the United States is estimated 51% are female and 49% male.

Age

It is in age that we begin to see some interesting numbers appear. There is a distinct bell curve with potential debtors, starting with the 25-34 year age range (22.7%),

topping out with the 35-44 year age range (28.6%) and slopping back down with the 45-54 year age range (22.4%).

One statistic which may cause concern is the percentage of senior citizens who are considering seeking bankruptcy protection. The Institute's survey found 8.9% of the respondents were over the age of 65 years. Though this is still below their percentage of the U.S. population, in previous research conducted by the United States Trustees Program the percentage of seniors filing bankruptcy protection was found to only be 4.4% of their sample.[6] Attorneys may find themselves dealing with an aging clientele and need to address concerns other then debt elimination.

Table 1: Comparison of Age Group Data

Age Range	Percentage of Debtors IFL	Percentage of US Adults
18-24	3.6	7[7]
25-34	22.7	14
35-44	28.6	15
45-54	22.4	14
55-64	13.8	10
65+	8.9	13

Education

Many who have not suffered financial hardship maybe quick to judge those who have. They may question the intelligence of an individual in financial distress and even wonder "What's so difficult about this? Didn't they learn this in school?" The following looks at the educational levels of respondents and compares them to the U.S. population.

Table 2: Education

Education Level	Percentage of IFL Total	Percentage of US Population
Graduate	4.7	8.9
Bachelors	10.7	15.5
Associates	7.6	6.3
Some College	30.8	21.1

High School/GED	39.7	28.6
Primary School	6.2	17.4
None	.3	2.2

In response to the question of whether or not students do learn basic money management in school, the Jump$tart Coalition for Personal Financial Literacy administers a nationwide biennial survey to measure the financial literacy levels of high school seniors. In the 2005-06 survey, the results revealed an average score of 52.4 percent, a failing grade by most measures.

Income

There wasn't a day that went by during the BAPCPA debates that income levels and means testing (a topic for another day!) didn't come up. So what do post-BAPCPA clients earn? Surprisingly much less then you would think.

Table 3: Self Identified Income of IFL Respondents

Income Level	Percentage of Responses
Less than 20K	44.6
20k-30k	24.4
30k-40k	14.4
40k-50k	7.7
50k-60k	4.2
More than 60k	4.7

Employment

So with income levels so low, did we find that rates of unemployment were high? Almost three times the national unemployment rate! The other number which was of interest was the percentage of respondents who indicated that they were retired, 10.5%. Again this seems to indicate attorneys will be dealing with an aging clientele and may need to adjust their practice to accommodate the needs of these clients.

Table 4: Employment

Employment	Percentage of Responses
Employed	61.8
Unemployed	13.7
Retired	10.5

Self-Employed	7.7
Homemaker	5
Student	1.3

Causes of Financial Distress

Lastly we will examine the common causes for financial difficulty. During the credit counseling process clients were asked to pick from a list of causes of financial distress. Clients were encouraged to choose more than one cause when describing their situations and therefore the percentages will equal more than 100%. The table below shows the results:

Table 5: Causes of Financial Distress

Cause of Financial Distress	**Percentage of IFL Clients**
Overextended on Credit	55.2
Unexpected Expenses	52.3
Reduction of Income	46.3
Job Loss	32.9
Illness/Injury	30.9
Divorce	15.2
Birth/Adoption of Child	7.9
Death of Family Member	7.8
Retirement	4.8
Identity Theft	2.1

Some of the results were not to be unexpected, such as a high percentage indicating that they were “Overextended on Credit” and suffered from “Unexpected Expenses.” Where some interesting results emerged were with the “Illness/Injury” result at 30.9%. Though most attorneys know from experience that many of the clients they have helped suffered financial devastation due to medical bills, to see an actual result of over 30% puts this into perspective.

“Reduction of Income” along with “Job Loss” shows the harsh effects the “changing economy” has had on many. No doubt there will be much to study for economist and sociologists for years to come.

Another somewhat concerning result was the number of respondents who chose “Retirement” as the cause of their financial distress. With 4.8% choosing this, it was one of the lower responses, but this factored in along with the other findings around age

and retirement there begins to be drawn a frightening picture for American senior citizens.

Conclusion

The Institute for Financial Literacy plans to continue its research on consumer bankruptcy demographics and will be publishing another report on the one year anniversary of BAPCPA. The goal being that as ongoing and future policy discussions ensue around bankruptcy there will be meaningful demographic information available about those who are most directly affected, the consumer.

Meanwhile as bankruptcy attorneys adjusts to the changes the new law brings, hopefully the information found here will help them better understand who these clients are and how better to reach out and serve them.

Institute for Financial Literacy
Portland, ME
llinfield@financiallit.org

[1]Title 11 USC

[2]11 USC sec. 109(h)(1)

[3]11 USC sec 727(a)(11) and 1328 (g)(1)

[4]11 USC 302

[5] 97% of credit counseling clients received a recommendation to consult an attorney based upon their financial condition.

[6] *See* Ed Flynn and Gordon Bermant, *A Closer Look at Elderly Chapter 7 Debtors,* 21 ABI Journal 3 (April 2002).

[7] US Census Bureau collects data from ages 15-19 and 20-24, only the 20-24 data was used.

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GP|Solo Law Trends & News
Business Law

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Welcome To The Blogosphere
A Primer for Business Lawyers

By Patrick Robben

Are you in the dark as to what a "blog" is? The online encyclopedia Wikipedia (http://en.wikipedia.org) defines a "blog" as "a Web site in which journal entries (posts) are posted on a regular basis and generally displayed in reverse chronological order. The term is a shortened form of Weblog or Web log." Authoring, or maintaining a blog is called "blogging." A person engaged in these activities is called a "blogger."

For many, these terms are completely foreign. However, for a growing number of Americans, "blogs" and "blogging" are becoming a part of their regular routine. According to a June 2005 article in USA Today, an estimated 32 million Americans now read blogs. The article noted that two reported surveys have found that more than 8 million American adults have created their own blog. Millions of blogs exist in what is sometimes collectively referred to as the "blogosphere," with thousands more being created every day. These blogs allow everyday citizens to discuss politics, business, sports and hobbies, or an infinite number of other issues (including blogs devoted to legal issues, a/k/a "blawgs").

Should businesses care about blogs? The answer is a resounding "yes." The rise of the blogosphere raises new employee policy issues. It also raises broader challenges for companies faced with the ability of bloggers to anonymously assail them. At the same time, blogging creates opportunities for companies to promote their products and manage their businesses--opportunities that will increase the need for companies to obtain counsel regarding the legal implications of their use of this amazing new technology.

Many employers are just now awakening to the realization that many of their employees are bloggers. Some of these same employee-bloggers are not just discussing the politics of the day, or their favorite hobby. Some bloggers use their personal blog as a forum to

discuss professional issues, including details of their job. These blogs can include discussions about the bloggers' job duties, supervisors, fellow employees, and others. Some bloggers working for larger corporate employers have used their personal blogs to vent their opinions on corporate management and strategy.

Granted, the World Wide Web is not a new medium, and employees have been able prior to the rise of blogging to post unflattering or sensitive information on the Internet for the whole world to (potentially) read. What makes blogging unique is the ease with which it enables individuals to post content on the Web. Blogging requires only the most rudimentary computer skills, and the software needed to set up a blog is freely available. If you can "surf the Web" or read e-mail, you can quickly set up a blog and begin blogging on the topic of your choosing.

The ease with which people can engage in blogging means that it can be easy for people to "engage their keyboard" before considering the consequences of what information or opinions they are posting on the Internet. This can lead to heartburn for employers when current employees or disgruntled employees begin blogging on employment-related matters.

In a growing number of high-profile cases, employers have taken action to terminate employees for what they write on their personal blogs. In a recent incident, a Delta Airlines flight attendant was fired after the company learned of the employee's blog chronicling her job. The employee, author of a blog entitled "Diary of a Flight Attendant" on the site http:// queenofsky.journalspace.com, had posted pictures of herself cavorting in her employee uniform aboard a Delta aircraft. In another example reported last year in the Washington Post, an adjunct journalism professor at Boston University was released from his job after discussing on a sports journalism blog his class and one of his "incredibly hot" students.

The growing spate of incidents in which employers have discovered to their dismay that employees are writing potentially unflattering items has led some employers to begin to consider whether they need to formulate blogging policies for their employees. IBM, which has encouraged its employees to be active in the blogosphere, has reportedly recently issued written blogging policies to employees, and other employers have issued formal or semi-formal guidelines to employees on acceptable employee blogging.

Common features among these blogging policies include reminders for employees to: identify themselves on their blogs and disclose their connection to the company if they blog about company-related matters; make clear in posts that they speak for themselves, and not the company; preserve and maintain trade secrets and the confidentiality of sensitive information possessed by the company; and refrain from discussing customers, clients, suppliers, etc., without their prior approval. Employers that are in high-profile

industries, or deal with sensitive company information, should strongly consider adopting a policy with the elements identified above.

The alternative is for the employer to give the impression to its employees that the employer condones any form of employee blogging. Such an approach increases the risk that employees will engage in inappropriate blogging behavior. It may also make it easier for an aggrieved third party to argue that an employee-blogger was acting within the scope of his or her employment, leaving the employer potentially liable for the employee's blogging.

Beyond setting forth the legal do's and don'ts, corporate blogging policies should offer employees common-sense tips on how to create an effective and nonobjectionable blog. The Sun Microsystems "Policy on Public Discourse" is a good example of such a policy that avoids legalese and offers constructive suggestions. Employee-bloggers are not only advised in plain language of some of the potential legal pitfalls, but reminded to "Write What You Know," "Be Interesting" and generate goodwill with other bloggers by providing links to noteworthy blogs.

Many novice bloggers do not appreciate the potential reach or impact of their typed words in cyberspace. Hence, a brief tutorial on blogging etiquette and issues to avoid may help steer employees out of trouble. In this way, problems can be avoided before they become a human resources and legal headache.

The rise of employee-blogging means that business counsel not only should be helping clients draft blogging policies where appropriate, but will be faced with offering counsel to clients that learn of employees failing to comply with the guidelines for safe blogging summarized in policies such as Sun's. Although private-sector employers generally have broad discretion to discipline or terminate at-will employees, employers should give careful consideration to how issues arising from employee-blogging are addressed. While the legal principles as to how much protection courts will provide employee-bloggers are still being developed, at least a couple of areas in which such activity may be deemed protected are already apparent. Paul S. Gutman, "Say What?: Blogging and Employment Law in Conflict," 27 Colum. J.L. & Arts 145 (Fall 2003).

First, employees who turn to their blog to "blow the whistle" on a suspected violation of the law by the employer may claim to be entitled under the circumstances to protection from retaliation under existing whistleblowing laws. This argument may not have ***47** much merit, depending on the language of a given state's whistleblowing laws. Still, employers should be aware of such laws and consider whether they are applicable before a decision is made to discipline an employee blogger claiming to "blow the whistle" on illegal activities in the workplace.

Second, an employee turning to a blog to discuss union-related matters may also be entitled to protection. The U.S. Court of Appeals for the Ninth Circuit held in the case of Konop v. Hawaiian Airlines, 302 F.3d 868 (9th Cir. 2002), that an airline may have violated the Railway Labor Act when the airline disclosed to one of two labor factions engaged in an internal union debate information it illicitly obtained from a pilot's password-controlled Web site.

The Web site was devoted to discussing union issues and advocating an opposing labor faction. The pilot complained that this action interfered with protected union activities and constituted unlawful coercion and intimidation. The Konop case is a good reminder to employers that although employers generally have discretion to discipline or terminate an at-will employee for what the employee posts on a blog, special considerations must be taken into account in the labor context.

Third, some states may have legal provisions granting employees protection to engage without fear of employer reprisal for certain types of speech. For example, Cal. Labor Code § 1101 has a statute prohibiting employers from "forbidding or preventing employees from engaging or participating in politics" or "controlling or directing, or tending to control or direct the political activities of employees."

New York Labor Law § 201-d is another example of the smattering of states that have statutes protecting employees from discharge or discrimination based on the individual's political or recreational activities outside of working hours. Jonathan A. Seagal, "Off Duty Blogging: What's Work Got To Do With It?" Metropolitan Corporate Counsel 27 (Aug. 2005). Employers and their counsel will therefore be wise to be cautious and think broadly in checking state statutes that arguably may be applicable before making decisions whether to terminate an employee based on the employee's off-duty blogging activities.

The blogosphere poses further hurdles to successful litigation against bloggers--be they disgruntled employees or other corporate critics--that are posting unflattering accusations. One such hurdle that clients will need to be appraised of in this situation when they seek legal action against these blogger-critics is the fact that many blogs allow authors or commentators to post statements anonymously.

In a decision late last year, the Delaware Supreme Court was perhaps the first state supreme court faced with the issue of whether it would allow a plaintiff to compel an Internet Service Provider (ISP) to disclose the identity of someone who made anonymous political criticisms of a public figure on a blog. In its decision in Doe v. Cahill, 884 A.2d 451 (Del. 2005), the Delaware high court grappled with the issue of how easily it should permit a plaintiff to use litigation and the discovery process to unmask an anonymous critic.

Noting the important First Amendment value in anonymous free speech, the court ruled that a public-figure plaintiff had to satisfy a "summary judgment" standard before it could obtain the identify of an anonymous blogger through discovery. Unless the plaintiff could demonstrate that prima facie evidence existed that, among other factors, the statement was actually defamatory, then the blogger's identity could not be unearthed. The Cahill court's reasoning relied in part on its belief that many blog posts by disgruntled individuals will be understood to be "vehicles for the expression of opinions; by their very nature, they are not a source of facts or data on which a reasonable person would rely."

Counsel for businesses that are the subject of anonymous blogger critics should therefore help their clients understand the potential limitations of a litigation response to an unfriendly anonymous blogger. Charging into court to respond to the slightest perceived attack from such a Web site may fail in an effort to unearth the author and only serve to draw unnecessary attention to the Web site. Business counsel should help clients make a nuanced response to such Web sites.

Sometimes litigation to stop a clearly defamatory message may be required; other times the best response may be to do nothing and avoid giving the Web site unnecessary attention. Or, the company may be better off trying to counter the information attack. As the Cahill court noted, one benefit of blogs is that the same features that allows an anonymous commentator to post a derogatory comment permits another commentator to respond in the same forum.

While not everything in the blogosphere can be taken seriously, the Cahill court's description of the blogosphere as a forum generally understood to "not [be] a source of facts or data on which a reasonable person would rely" may have painted the blogosphere with too broad a brush. Granted, many blogs are amateurish endeavors with limited readership or effect. However, certain well-read blogs can rapidly coalesce public opinion against businesses that the collective judgment of the blogosphere ***48** deems are acting inappropriately.

Discourse on public issues can move very quickly on the blogosphere, as the authors of well-known and influential blogs read each other's work. Bloggers can combine their energies rapidly to build a compelling argument for or against a proposition based on their collected ability to research an issue and contribute data to support their arguments.

Blogging has demonstrated this ability to shape public opinion in the last couple of years. The ability was powerfully demonstrated during the 2004 U.S. presidential election. It was during the campaign's frenetic final weeks when a group of bloggers sharing information on their blogs helped discredit a "60 Minutes II" story by Dan

Rather claiming to present documentation relating to President George W. Bush's Texas Air National Guard service. In the "60 Minutes II" example, the blogosphere very rapidly built a convincing argument that the alleged Bush National Guard documents were forgeries. The lead bloggers in this example built grass-roots pressure on the Tiffany network that quickly gained attention for their concerns in the mainstream media.

CBS ended up having to undergo a very humbling, and public, investigation into how it aired a story relying in part on documents that had authenticity questions. This is but one example of a public policy debate that has been shaped by the blogosphere. Therefore, businesses should not underestimate the potential influence that bloggers can have on their customers or public image.

"Blogstorms" or "blog swarms" define the phenomenon that occurs when a large amount of blogging discussion occurs on a given topic, such as with the "60 Minutes II" incident. These blog swarms can have a real effect on businesses when they are the punching bag of the blogosphere's collective judgment. The ability of the blogosphere to rapidly sway public opinion in this context is a power that other businesses might find themselves facing.

Influential political blogger Hugh Hewitt, dubbed by the Wall Street Journal the unofficial historian of the blogosphere, argues in his recent book, Blog: Understanding the Information Reformation That's Changing Your World (2005), that wise corporate executives will have contingency plans in place to help them address these rapid-fire public relations crises before they arise.

Hewitt also suggests that savvy executives of high-profile companies will begin to find positive uses for this new medium by posting their own blogs, and offers an example of the motivating power such an executive might have if he or she used the blog as a forum to publicly recognize on a regular basis specific employees for their contributions.

That is one example of how blogs may begin to transform business by offering convenient public forums for employers to tout their employees and products, market their services or provide a helpful forum for public discussion of industry-related topics. Corporations such as Boeing and General Motors have begun experimenting with having "blogs" sharing information from company executives on new products. The Sun Microsystems "Policy on Public Discourse" explains Sun's belief that employee blogging can be an effective tool for helping the company "do a better of job of telling the world" about Sun's products and services.

It is essential for business lawyers to learn about the "blogosphere" to check out what the buzz is about. Even if you are not a blogger or blog reader, your clients, or their

employees, customers or competitors might be. The advent of the widespread use of the Internet created a new set of legal, human resources, and business issues to consider. Similarly, the continuing evolution of the Internet with the rise of the blogosphere raises new legal issues, challenges and--for the savvy employer--opportunities. Savvy employers and business counsel will stay atop the potential legal and human resources-policy issues raised by blogging while also viewing blogs as a potential resource to use rather than to fear.

One example of these issues is the extent to which business liability insurance will provide coverage to businesses either using corporate blogs or blessing employee participation in blogs relating to their jobs. Judy Greenwald, "Blog liability risks expanding, but coverage takeup limited," Business Insurance (Nov. 28, 2005). Businesses using corporate blogs or encouraging employee blogging should consult their liability insurance policies to determine whether coverage exists, or whether coverage under a separate multimedia policy is available.

Business counsel should consult their clients to find out what blogging activities the company is engaged in or contemplating. In that way, the potential libel, copyright, insurance or other issues can be headed off before the client has unwittingly risked legal liability in an effort to avoid falling behind the blogging trend.

Blogs are a phenomenon that is shaping the way politics, **business** and **law** is **practiced** in America. We are just beginning to understand the potential and pitfalls that this new medium is creating. If you have not done so already, I would encourage you to find out what the blogosphere is all about, and consider how it may affect you, your clients and your **practice**.

Robben is a partner at Rider Bennett, LLP, in Minneapolis. His e-mail is probben@riderlaw.com

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Business Protection Tips (For lawyers, judges and others) PART 1: The Telephone

By David Zachary Kaufman

This will be the first of a series of articles discussing business and personal protection tips for the lawyer, judge, and other professional who deals with people in emotional crises or with people who are just plain dangerous.

This column is not interested in merely telling the reader to buy a weapon or a dog or whatever. These tips are basic, they work, they are generally not expensive and they usually have a "whack!" factor. (A "whack!" is the sound of your hand hitting your forehead as you say "Why didn't I think of that?")

In this column let's talk about that most ubiquitous of electronic devices, the phone.

First, the cell phone. These little devices (some think of them as the spawn of the devil) are wonderful life-saving tools when properly used (and I don't mean as a weapon a la Rep. Cynthia McKinney (Ga. D)). The first thing anyone should do when they get a phone is to program it. I urge all people to program "9" to speed dial "911". That way you can a push of the button summons help right away. By the way, this same tip should be used for all your home and office phones, especially the receptionist's phone and your phone.

I just love speed-dial on all the phones. That way you can call for help or advice or whatever quickly and easily. But! You have to update your speed-dial numbers regularly to be sure that they are the ones you want to use. I suggest you review your speed-dial list at least every month. That way, you can have already dialed someone you trust and all you have to do is press the "Send" key if you are in distress.

Some cell phones are flip-phones and some are not. Many of us carry the phones with a

locked keyboard. If you are one who carries their phone locked, unlock the keyboard when you are carrying the phone in your hand. A locked phone cannot make quick calls and is just a hand tool--and not a very good one either.

Another tip which is gaining more popularity (or notoriety) came out of the London bombings in July 2005: establish a separate entry in your cell phone "I_C_E" (In Case of Emergency) with a specific cell phone number. The reason for this is that many of us have family members listed as "Mom" or "Dad" but these people are ***not*** the people we would want called if there were an emergency. (I know that my mother, although she is a fit 87, is not the person I would most want first notified if I were injured and unable to communicate. I suspect that I am not the only one who feels that way.) "I_C_E" is the number to use to designate the key contact person in the event that you have been injured and cannot communicate. This convention is becoming a well-established protocol in the emergency responders' lexicon.

Now, let's talk about the office phone.

When you train your staff be sure that they understand what they can and cannot say. You may not want people to know *where* you are. That gives someone hunting you an idea where to look. Good example: Do ***not*** say "Mr. Kaufman is in Washington D.C. Superior Court this morning." That tells people where I will be and (maybe) the route I will use to return to the office. It also tells people (roughly) a schedule of when I can be expected to be in the parking lot near my office. All of these facts are facts that someone who is stalking me would love to know. Because this is how they can identify my car, etc.\ The same applies if someone calls to make an appointment. I have time to meet them or I don't. But do not tell people I am in or out of the office.

Similarly, staff should never give out any other information to anyone without checking with you first. Astonishingly, even in this age of identify theft, people still give out their attorney's schedule, his cell phone number, make and model of his car and all kinds of other personal information. None of this information should be given out to anyone without checking with you first. You simply don't want people to know when you are working late, alone in the office and when the office is empty or any other information like that.

I love Caller ID. In fact I tell clients that I will not take calls that are ID-blocked. Similarly, I love *69--the reverse dial that tells me who or what is calling me. This lets me screen all my calls. Staff should be told to do this and to keep a record of all numbers on the "proscribed list" so that they will know who cannot be put through.

I also love Radio Shack. They have the most amazing stuff there sometimes. For example, did you know that, for about $20.00, you can buy a little device that plugs into

your phone and lets you record conversations on a recorder? This little thing is wonderful if you are prone to getting telephone threats--a call comes in, the threat starts, and you start recording it for evidence. Be sure to obey the law though. Some states, like Maryland, require that *both* sides to the conversation consent to taping. Others do not. Check for yourself before trying this. One easy place to start checking is http://www.rcfp.org/taping/ This site is run by the Lawyers Committee for A Free Press and is about 3 years old. But it will let you start your research with an advantage.

Finally, a word about what to say (or do) with your phone. Establish a code phrase for you to use on the phone in case something happens (kidnaping, break-in, etc.) - something innocuous like, "I'm fine. Take care of yourself". Use it whenever you need to send a message. Depending on your level of paranoia, a 'code phrase' that is NOT used may also be a clue. In other words, if someone is holding you and telling you to read from a script, and you can't say "I'm fine, take care of yourself" then they won't know that you're in trouble. If, on the other hand, your code is, you always end the conversation with "Take care of yourself" and you don't use it, THEN the other party knows you're in trouble.

Anyway, I hope these help. Good luck and be safe.

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Fantasy Meets Reality: Examining Ownership Rights In Player Statistics

By Robert Freeman, Peter Scher

By most estimates, 10 million to 20 million Americans played fantasy sports **games** last year. And, the business of fantasy sports goes far beyond the $19.99 or so that a fantasy player generally must pay to join a league on a site such as SportsLine.com or ESPN.com. Through fantasy sites, advertisers target a highly desirable consumer demographic that (so we have heard) often spends hours a day online following their teams.

Providers and publishers of draft day guides, statistical packages and scouting reports sell to a captive and hungry audience of fantasy players. And, because fantasy sports enthusiasts like to watch their teams and individual players play, media conglomerates create synergistic programming campaigns around their fantasy sports properties. When one finishes tabulating all of the money that exchanges hands in relation to fantasy sports, what you have is a rapidly growing, billion-dollar industry.

Because fantasy sports are fun and lucrative, it comes as no surprise that the major sports leagues -- the real ones that is -- have recently taken steps to ensure and preserve their share of the revenue.

Changing the rules of the game

An example of this trend is the five-year, $50 million deal that Major League Baseball Advanced Media, LP (MLBAM) struck with the Major League Baseball Players Association (MLBPA) last January to acquire exclusive rights to players' names, statistics, likenesses, etc., for the development of online content, including fantasy baseball.

No sooner did MLBAM acquire these rights than it began to enforce them in ways that the MLBPA never had before. Indeed, according to the complaint for declaratory relief in C.B.C. Distribution and Marketing Inc. v. Major League Baseball Advanced Media,

L.P., No. 4:05-cv-00252-MLM (E.D. Mo., complaint filed Feb. 7, 2005), MLBAM, almost immediately after signing the deal, began writing letters to companies that offered online fantasy baseball **games,** stating its position that the unlicensed use of players' names in the operation of fantasy **games** was illegal and that such use must cease immediately.

The plaintiff in C.B.C v. MLBAM -- a fantasy sports provider that had in past years operated under a license from the MLBPA -- seeks a declaration that the unlicensed operation of such games does not constitute a violation of the Lanham Act, copyright, rights of publicity or any state's unfair competition or false advertising laws.

C.B.C. v. MLBAM is still pending and it is being closely followed by the fantasy sports community. Through court papers and public statements, the position of MLBAM (and Major League Baseball as an intervenor) is that fantasy baseball sites have no right to use player names for commercial gain without an authorized license. C.B.C. and its supporters in the fantasy sports community have countered with the proposition that baseball statistics, which fairly include the names associated with those statistics, are not the property of anyone, since they are in the public domain.

The central issue raised by the C.B.C. case is whether, in using sports statistics, the focus should be on the fact that statistics may be in the public domain or on the publicity rights of the players whose names are inextricably linked to those statistics.

C.B.C. v. MLBAM underscores the fact that player statistics are the driving force behind fantasy sports. If issued, a judicial opinion in C.B.C. v. MLBAM could lend guidance regarding the boundaries of what a fantasy sports site can and cannot do with player statistics without a license from the applicable "real-world" league. In this article, we will seek to highlight the major legal issues raised by a fantasy sports site's unlicensed use of player statistics.

Statistics are facts

On a very basic level, sports statistics are facts and facts are not copyrightable unless their selection or arrangement demonstrates sufficient "originality" to merit protection. Feist Publications v. Rural Telephone Service Co. Inc., 499 U.S. 340, 349 (1991).

Shortly after Feist was decided, the Second Circuit considered whether a baseball pitching form that compiled nine different statistics relating to the opposing pitchers in each of a particular day's games was entitled to copyright protection and held that the plaintiff and author of the form was at least entitled to a trial on this issue. Kregos v. Associated Press, 937 F.2d 700 (2d Cir. 1991). The court noted, however, that even if the pitching form were entitled to protection, a competing form would not be infringing

if its selection of statistics "differ[ed] in more than a trivial degree" from the plaintiff's. Id. at 710.

Based on the teaching of Feist and Kregos, it is highly doubtful that sports leagues could use copyright law, in and of itself, to effectively claim that fantasy sports sites infringed their statistical compilations. Fantasy sports sites rarely select and arrange statistics in the same manner that the leagues do and in fact the more advanced sites allow users to sort and customize a diverse array of obscure, nonstandard statistics.

Motorola and the fantasy gamecast

In the Second Circuit at least, this question appears to have been partially addressed by National Basketball Association v. Motorola Inc., 105 F.3d 841 (2d Cir. 1996), in which the court vacated an injunction against Motorola's transmission to pagers and Internet sites of real-time NBA scores and statistics. Motorola's operation relied on a data feed from reporters who watched live TV and radio broadcasts, but the court distinguished the broadcast of a sporting event -- which is copyrightable under 17 U.S.C. § 101 -- from the **game** itself, which is not an original work of authorship. The court held:

***8** We agree with the district court that the "defendants provide purely factual information which any patron of an NBA **game** could acquire from the arena without any involvement from the director, cameraman or others who contribute to the originality of a broadcast." ... Because the [defendants] reproduce only factual information culled from the broadcasts and none of the copyrightable expression of the games, appellants did not infringe the copyright of the broadcasts. Id. at 847.

The Motorola court also held that the transmissions of real-time scores and statistics did not constitute a misappropriation of "hot news" from the NBA, mainly because Motorola's service was not "free-riding" on the NBA's product in that the defendants expended their own resources to collect and transmit the scores and statistics.

Arguably then, at least insofar as copyright infringement or "hot news" misappropriation claims go, any Web cast of a sports game, no matter how "granular" or realistic, may be legal under a Motorola-type analysis so long as the protectible elements of the league's or team's broadcast are not reproduced. Copyright claims might be even weaker if a Webcaster does not even watch the league's TV broadcast and instead relies solely on an audio or Internet data feed.

Still, it should not be forgotten that the Motorola court was confronted with a real-time statistical service that could hardly be characterized as simulating a true "game experience;" whether a play-by-play "gamecast" that is loaded up with computer-generated graphics infringes the league's television broadcast remains an open question.

It should also be considered that the defendants in Motorola were able to collect all the data they needed just by watching or listening to broadcasts. In this aspect, some sports may be better positioned to protect against real-time gamecasts than others. In Morris Communications Corp. v. PGA Tour Inc., 364 F.3d 1288 (11th Cir. 2004), the court upheld the denial of an antitrust challenge by a news publisher that sought to gather and disseminate real-time golf scores from PGA events. The PGA had implemented an electronic relay system to gather and transmit real-time scores of the entire tournament field to its own Web site, as well as an on-site media center.

PGA rules against wireless devices on the courses prevented the plaintiff from setting up its own system and TV broadcasts did not provide enough individualized information for such a purpose. Thus, the plaintiff was forced to rely on the media center to obtain score information and had to abide by the PGA's restrictions designed to preserve its "first opportunity" to post and syndicate the scores. The court concluded that the PGA's purpose, preventing the plaintiff newspaper publisher from "free-riding" on its proprietary technology, was a valid business justification for the restrictions.

A fair use of trademarks?

Trademark law may offer sports leagues and teams greater protection than copyright law against unauthorized uses of statistics. Most obviously, without a proper license, fantasy sites may not be able to use league or team trademarks, including team names and logos, in connection with statistics. Any displays of marks or logos that suggest an affiliation or sponsorship from the league, such as the NBA logo, would be particularly problematic, but even simpler identification of players by team or division will in all likelihood give rise to claims of trademark infringement or unfair competition.

A counterargument to such trademark claims is that a fantasy site merely uses such trademarks to describe the sports league's product -- not its own -- and that such use is allowable under the doctrine of nominative fair use. As set forth by the Ninth Circuit Court of Appeals, the defense of nominative fair use is available to a commercial defendant if three requirements are met:

First, the product or service in question must be one not readily identifiable without use of the trademark; second, only so much of the mark or marks may be used as is reasonably necessary to identify the product or service; and third, the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder. New Kids on the Block v. News America Publishing, 971 F.2d 302, 308 (9th Cir. 1992).

The commercial value of names

Ultimately, it may be the players' rights of publicity that provide the strongest argument for protection against fantasy sites' unauthorized use of statistics. For the last half century, courts have recognized athletes' exclusive rights to exploit the commercial value of their names, likenesses and in some cases, on-field accomplishments. The right of publicity is both a common law right and a statutory right that varies by jurisdiction.

In an early case dealing with player statistics, Uhlaender v. Henricksen, 316 F. Supp. 1277 (D. Minn. 1970), the newly founded Major League Baseball Players Association obtained an injunction and judgment against the manufacturers of board games (a less successful version of Strat-O-Matic) that incorporated the names and statistics of hundreds of major league players.

Addressing the plaintiffs' claim of "misappropriation and use for commercial profit of the names of professional major league baseball players without the payment of royalties," the court found it clear that "the use of the baseball players' names and statistical information is intended to and does make defendants' games more salable to the public than otherwise would be the case." Id. at 1278.

Significantly, the Uhlaender court rejected the defendants' contention that because their statistics were already published in newspapers and in the public domain, the players had waived their rights to relief. Id. at 1282- 83. As in the pending C.B.C. case, there is an apparent tension between players' rights to the commercial value of their names on the one hand and the rights of a gamesmaker, if you will, to make use of facts that are in the public domain. In Uhlaender, the former decidedly trumped the latter.

***9** But players' publicity rights may not always trump competing interests. Ironically, in Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307(Cal. Ct. App. 2001), it was Major League Baseball that argued, successfully, that the public's interest in baseball history outweighed the economic interests and statutory rights of old-time baseball players whose names, images, statistics and biographical information were used for MLB publications and Web sites. (In 1947, the standard player contract was revised to define more clearly the MLB's rights to such material.) Ruling for the MLB on First Amendment grounds, the court effused:

Major league baseball is followed by millions of people across this country on a daily basis. Likewise, baseball fans have an abiding interest in the history of the **game**. The public has an enduring fascination in the records set by former players and in memorable moments from previous **games.** Statistics are kept on every aspect of the **game** imaginable. Those statistics and the records set throughout baseball's history are the standards by which the public measures the performance of today's players. The records and statistics remain of interest to the public because they provide context that

allows fans to better appreciate (or deprecate) today's performances. Id. at 315.

Returning to the here and now, the right of publicity is positioned at the center of the dispute between sports leagues and fantasy sports sites. In analyzing publicity rights in the context of fantasy sports, courts may need to take a close look at what it means to use a player's name for commercial gain.

Can it really be said that fantasy sports sites exploit the commercial value or goodwill that players have built up in their names, when the essence of fantasy sports is that a player's worth is exactly measurable by the statistics that he generates? One could argue that fantasy sports are driven by cold, hard statistics, not by the intangibles of players' popularity, fame or market value.

Conclusion

Nevertheless, the immense commercial appeal of professional athletes and their names is undeniable. To those who argue that fantasy **games** are all about the numbers, one may ask why there isn't a fantasy **game** based on the barometric pressure recorded hourly at various weather stations around the world. As long as fantasy sports **games** continue to generate significant revenue, one should expect leagues, teams and athletes to continue to demand a share and, in support of such demands, to rely on a three-headed weapon of intellectual property rights: copyright, trademark and the right of publicity.

Ultimately, it may be the last right -- the right of publicity -- that will force all unlicensed operators of fantasy sites to either obtain a license or significantly alter their operations.

Robert Freeman is a partner in the New York office of Brown Raysman Millstein Felder and Steiner LLP. His e-mail is rfreeman@brownraysman.com. Peter Scher is a litigation associate in the same office.

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Improving Your Work Product: Essential Word Skills for Lawyers

By Adriana Linares

It used to be that the recipient of your very pricey legal documents could not "see" how your documents were fashioned. Fax machines and snail mail kept all “dupe and revise” and real cutting and pasting efforts hidden behind a physical curtain. Not so these days as a simple push of the "Show/Hide" button in any word processor swings the hood of your document wide open for all to see. Every tap of the keyboard is revealed as can potentially dangerous hidden data. Along with what the eye can see, also consider that your client or a co-editor can also gauge how much you or your secretary know – or worse, DON’T know – about creating professional documents. From the moment you send a document out the points you are trying to make, can be lost on the recipient who is struggling to understand the flow of your document via their monitor.

If you must send documents in Word (as opposed to the natural-first-choice-Adobe PDF) then you might consider taking some time to learn how to properly format text in Word. There's a lot to learn so let’s start small and review some basics that every attorney can and should master.

Understand Cut/Copy and Paste Option in Word

If you only learn one thing make it this: understand how to cut, or copy, text from your original document and paste it into the current document you have open in Word (or WordPerfect).

When you paste text from another document, an email, or even a web page; the original formatting is often retained. That is, if you copy a paragraph from an old WordPerfect document that was automatically numbered, is in Courier New, and font size 12 font then paste it into Word; Word will paste it with its auto-number and in Courier New, font size 12. What you usually want is to have the copied/pasted text to blend seamlessly into your current document (such as Times New Roman, 12, justified).

The classic method of pasting text without formatting is to go to **Edit > Paste Special > Unformatted** (or a similar option, like Text). This still works and is great but can be considered The Long Way.

When you paste in Word, you should automatically see a Paste Options icon (pictured right) then you can click on it after executing the paste to see a list of handy *paste options*.

- **Keep original formatting**: Think of "as-is"—and also add this caveat "without guarantee." This is usually the least desired choice as hidden codes or text can often wreak havoc in Word.
- **Match Destination Formatting**: changes the text formatting of the pasted to match that of the surrounding text and paragraph. This option is better than Keep Source Formatting, but not as good as:
- **Keep Text Only**: which strips all previously applied formatting, leaves text good as new as if you had typed it right in yourself.

If you don't see the Paste Options Icon, go to Tools > Options > Edit Tab and place a check in the "Show Past Options Button" box.

Keep it Together: How to Keep phrases from breaking to the next line

A non-breaking space is a special character you can insert between text you don't want split on two lines. All sorts of word-processing acrobatics have been witnessed in an effort to keep a date, a name or a special phrase on the same line - which is, of course, futile as there is no guarantee that your formatting will stick from one computer to the next. But why go through all that when simple brute force will do? Hold *Ctrl + Shift + the Spacebar* to insert the spaces between the text you want to force together.

Why Does Word Do That?

Few law firm trainers will argue that the number one complaint heard from lawyers and staff is:
"I can't control Word. It has a mind of its own."

That comment is often preceded by, "I hate Word"- which makes a trainer's heart hurt. It's important to take control – you can tell Word what is expected and what is not.

For example:

- DO capitalize the first letter of a sentence

- DON'T convert a (c) to a ©
- DO convert a www.something.com to a hyperlink
- DON'T automatically number and indent when I type the number 1

Here are a couple of ways to set these options:

1. Most of the settings to turn features off or on and alter the way Word behaves are under **Tools** > **Options**. Take a few minutes to poke around in there and customize Word to suit your likes and dislikes.
2. Word is programmed to correct things like misspelled words or words you forget to capitalize. To change these settings and some others:

- Go to **Tools** > **AutoCorrect Options**. You will see 5 tabs.
- Click on the **AutoCorrect** and **AutoFormat as you Type** tabs and clear or set the check boxes for the items that you want on or off.

Learn to automate your Word Work Day

If you aren't using Word (or WordPerfect's) automation tools you could be killing yourself. You might as have a typewriter in front of you. Word offers Autotext tools that will store and insert words, sentences, clauses, captions - just about anything you want – on your command. For example, when I type "al" then tap the space bar, Word turns "al" into "Adriana Linares". Have a standard caption or signature block that you use often? Same goes. You'll use it for anything you type often or find tedious to create and format each time. It's very easy to use. Here's how in Word (WP is very similar)

1. Highlight/select the text (you can include a graphic) you want to store as an AutoText entry. Be sure to SELECT EXACTLY what you want.
2. To store paragraph formatting with the entry, include the paragraph mark at the end of the selection.
3. Go to Tools > AutoCorrect Options
4. Select AutoCorrect for anything less than one line in length. Select the AutoText tab for anything longer than one line.
5. You'll see two columns, **Replace** and **With**. If you're creating an entry for your name, "Thomas W. O'Connor, III", you can type "tw" in the Replace column, don't use initials or shortcuts that are actual words such as "to". And don't waste time with too many letters or caps, this is just a shortcut to your real text. For AutoText (remember more than one line), you'll need to use a phrase longer than two words because Word inserts an entry only after four words have been typed.
6. Be sure to click ADD when you're done.
7. Now open a new document and type your shortcut text. If you are using AutoCorrect, the space bar will invoke your text. For AutoText, look for a

yellow box above your cursor, when you see it, hit Enter.

Bonus: If you use Word as your email editor in Outlook then all your entries will work there too!

Think about your Word documents as digital calling cards; they reflect your professionalism and attention to detail. Today, the appearance of a word processing document often reveals as much about an attorney's skills as the contents of the document itself. Document creation and editing skills are critical in today's professional world

Web Resources and Links:

- Microsoft's Word Resources, Tutorials, Tips and Tricks Hompage
- Allan Wyatt's Word Tips
- OfficeUsers.Org
- Word MVP Site
- Great Tips from University of Alberta
- 50 Indispensable Word Tips from TechRepublic
- Word For Lawyers: A Compilation Of Tips, Tools And Training Resources From the Web For Legal Professionals

Adriana Linares of LawTech Partners is a legal technology trainer based in Orlando, Florida. Until launching LawTech Partners, Adriana spent many years in the technology departments of two of Florida's largest law firms. She was charged with establishing firm-wide training programs and leading technology initiatives.

Today, Adriana travels the country delivering "tech therapy" sessions to firms of all shapes and sizes. Using her practical and personal approach to technology she helps law offices make the most of their technology investments. Throughout the year, she can be found speaking at conferences on topics such as productivity through technology, successful training techniques, law office software, mobility, and gadgets. She writes regularly for leading legal magazines and websites and hosts her own advice column on her blog, I ♥ Tech.

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Personal Protection Tips (For lawyers, judges and others)

By David Zachary Kaufman

Part 1: Your Car

I hate to think about how many of us are vulnerable as we go to, come from, or travel in, our cars. These tips will help you avoid trouble as you go to and fro. They should be considered supplemental to the Business Protection Tips also provided.

First, why should you worry about the area around your car? It's simple if you look at it from an attacker's point of view: where else are you guaranteed to be distracted, guaranteed to have at least 1 major asset to steal, and guaranteed to return to? All they have to do is pick you out when you get out of your car and then wait. Recently that's exactly what happened in the D.C. metropolitan area: Some young woman was spotted and followed home by a stalker who then pushed his way into her home. Fortunately for her, her husband was there and subdued the attacker. There's no need to speculate on what might have occurred if he hadn't been home.

So, when you get out of your car, look around. You should do that anyway just to be sure that you know where you parked. (Haven't you ever "lost" your car in a big parking lot?) And when you do look around, pay attention to what you see. Look at the people, the place where you parked, the shadows. Remember them because if, when you return, the same people are there, you should be alert to a possible problem. Which leads to my next point:

When you return to your car, don't permit yourself to be distracted by the bags and baggage you are carrying or the events of the day. Pay Attention! Look around you. Be curious. And listen to your instincts. Don't stop in front of your car and stare pensively into the air.

If, when you approach your car, there is an SUV or van parked next to it, pay attention.

Are there people in it? Is the door open? This is especially true during the Holiday Season when people can be expected to be carrying extra money for presents. But if someone is stalking you this is a prime alert. It is very easy to be pulled into one of these big vehicles.

As you approach your car, walk around it to see if it has been tampered with--look down at tires for nails or other things since a quick way to catch you is to ensure you have a flat tire or, better, 2 flat tires. And while you are at it, look for leaking brake fluid too. It sounds melodramatic, but if someone wants to injure you, tampering with your brakes is an easy thing to do and very popular thanks to Hollywood.

While I think of it (especially since gas prices are so high these days) I suggest you get a locking gas cap. Sugar in the gas tank will ensure that your car will stop running at the most inconvenient time for you and the most convenient time for a potential attacker. Most cars these days have key operated hood locks too. This is a good thing and if your car doesn't have one, you should consider it to avoid someone tampering with your engine.

When you do approach your car, it's a truism but ... always look in back of car before you get in. You never know.

Check under the door handle of your car before grabbing it--if someone *really* doesn't like you they could put razor blades there.

Do not fumble with your car keys after you get to the car--have them easily accessible and don't put them on the same key ring as your house keys. There was a recent story around here about a woman who did that and the guy who valet parked her car took a copy of her house key and got her address by looking at the registration card in the car. They found him under her bed.

If you have a reason to be concerned that someone is actively trying to do you harm, never park in the same place twice. Always park in different places and most certainly in heavily populated areas where there are lots of lights and pedestrian traffic.

If someone does attempt to carjack while you are in the car, get out of the car but watch for seat/shoulder belts. Don't get tangled in them because you can be dragged alongside. The carjacker won't care. If you can, get out on the opposite side from the carjacker.

If you are being attacked outside the car, Never, Ever, get into a car with your attacker--do not let him/them take you away from the scene. Statistics show that the worst possible thing the victim can do is permit themselves to be taken away. The secondary

scene is always worse--harder to escape from, quieter, less witnesses and so on.

Once you get in to your car, you should periodically check your rear view mirrors to observe if people or cars are following you. If you see, or think you see, someone following you, drive in circles and/or pull into a police station and/or use your cell phone to call for help.

By the way, just because -- especially at night -- a car behind you looks like a cop car doesn't make it a cop car. It is not hard to counterfeit a cop car, especially a so-called "undercover" cop car. Believe it or not, here in Virginia there's one undercover car they use--a Dodge Magnum--that they took from a drug dealer. They say the thing will go over 140 mph and it sure doesn't *look* like any cop car I ever saw.

If you are being followed by a car that may or may not be an actual cop car, use your cell phone. Call "911" and tell them where you are and what's going on. Ask them to find out if you really are being followed by a real cop car or if you are about to have a real big problem.

One last point about being followed or stopped by "police": badges that look official (in fact "replica" badges and badge cases) are very cheap and easy to come by. Officially, they are made for collectors. Unofficially, they are a complete license to fool unsuspecting people. The solution: ask for the "credential" the document with a photograph and, again, in case of doubt, call "911" and ask.

Anyway, I hope these tips help you all stay safe. I know they seem scary but you would be surprised how easy it is to incorporate a little situational awareness into your life.

KAUFMAN LAW, A Professional Corporation; www.karatelaw.com and **Qui Custodes,** the Personal Protection Blog at www.quicustodes.typepad.com.

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Salient Points on Tax Treatment Under the Half-Act Code Consumer Provisions
General Categories of New Requirements

How and **Who**: Three things that debtors are required to do with taxes and related documents:

File with the Court
File with the taxing authority
Submit to the Trustee

What:

Tax returns
Tax transcripts (what qualifies as a transcript?)
Statements (what qualifies as a statement?)

When or Why: Triggers for action:

Specific dates in relation to first meeting of creditors or confirmation
Specific dates in relation to due date of returns
Request by specific parties (what is a request? is it a motion?)
Unclear or apparently self-executing

Tax Return Requirements By Case Chronology
(both chapters 7 and 13 as indicated)

§1308(a)

How: File
Who: Taxing Authority
When: Not later than ("NLT") the day before the date first set for 341(a)
What: All returns for taxable years ending during the 4-year ending at petition (does

this move up the due date for the return?)

§1307(e)

Consequence: On request of a party in interest **or** the UST **and** after notice and a hearing, the court **shall** dismiss or convert to chapter 7, whichever is in the best interests of the creditors **and** the estate, if debtors fails to comply with §1308.

§1308(b)(1)

Consequence: If not filed, the trustee **may** hold the §341(a) open for a reasonable period of time that is not longer than:

- If return is tardy, 120 days from first date set for §341(a)
- If return is not yet due, 120 days from first date set for §341(a) or last date the return is due including any automatic extensions actually requested by the debtor (how will trustee know?)

§521(j)(1)

Consequence: If a debtor fails to file any tax return that comes due after commencement of the case **or** to obtain an extension, the taxing authority **may** request that the case be dismissed or converted

§521(j)(2)

If that doesn't motivate the debtor to file or get an extension within 90 days after the request the court **shall** convert or dismiss, whichever is in the best interests of creditors **and** the estate (will conversion or dismissal ever be in the best interests of the estate merely because a tax return wasn't filed?)

§521(e)(2)(A)(i)

How: Provide
Who: The Trustee
What: Returns or transcripts for tax year ending before case file and for which a return was filed
When: NTL 7 days before date first set for 341
Why: Unclear, nothing in the statute

§521(e)(2)(A)(ii)

How: Provide
Who: Any creditor who makes a timely request (*see* Interim Rules and Forms 4002(b)(3) which provides that timely means at least 15 days before the first date set for the §341(a))
What: Returns or transcripts for tax year ending before case file and for which a return was filed
When: At the same time the debtor provides to trustee
Why: n/a

§521(e)(2)(B)

Consequence: If debtor fails to comply the court shall dismiss the case unless debtor demonstrates it was due to circumstances beyond the debtor's control ("DTCBTDC") (how does the court know to dismiss?)

§521(e)(2)(C)

Same as §521(e)(2)(B) but worded slightly different (why redundancy in the law?)

§521(j)(1) & (2)

Consequence: Described on page one above (does "file" mean with the taxing authority or with the court?)

§521(f)(1)-(3) Chapter 7's and Chapter 13's

How: File
Who: The Court
When: At the same time filed with taxing authority (exactly the same time?)
What: Returns or transcripts for

- tax years ending while case pending,
- Ch 13 and 7 returns filed after commencement of case for 3 tax years ending before case file
- Amendments

Why: At the request of the court, the UST or any party in (annual requests? One request?)

§521(f)(4) Chapter 13's w/o confirmed plans

How: File
Who: The Court
When: 90 days after the end of the tax year or 1 year after petition filed (does this change due date?)
What: Statement, under penalty of perjury
- of the income and expenditures of the debtor during the tax year **and**
- of the monthly income of the debtor that shows how income and expenditures are calculated. (*see also* §707(b)(2)(C))
Why: At the request of the court, the UST or any party in (annual requests? One request?)

§521(f)(4) Chapter 13's w/ confirmed plans

How: File
Who: The Court
When: NLT 45 days before the anniversary of confirmation
What: Statement, under penalty of perjury

- of the income and expenditures of the debtor during the tax year **and**
- of the monthly income of the debtor that shows how income and expenditures are calculated. (*see also* §707(b)(2)(C))

Why: At the request of the court, the UST or any party in (annual requests? One request?)

Other Provisions
Availability of Tax Returns For Review:

§521(g)(2)

How: Available for inspecting and copying subject to privacy provisions (AO to promulgate regulations)
Who: From the Trustee with respect to returns provided under §521(e)(2)(A) From the Court with respect to returns filed under §521(f) (is trustee relieved of duty if on file with Court?)
What: Returns or transcripts described in §521(e)(2)(A) and (f)
When: n/a
Why: n/a

Confirmation:

§1325(a)(9) All tax returns must be filed as a pre-requisite to confirmation (filed with

the court or the taxing authority?)

Priority Tax Claims:

§507(a)(8)(A)

The "look back period" of 240 days for priority claims is suspended for any period during which there is a pending offer in compromise or a stay was in effect.

§507(a)(8)(G)

The "otherwise applicable time period" for priority claims is also suspended for any period during which collection was prevented by non-bankruptcy law, by a stay in a prior case, or the existence of a confirmed plan, plus 90 days.

Dischargeability:

§1328(a) Super-discharge is diminished. Certain taxes are now excluded from discharge including those under §507(a)(8)(C) and §523(a)(1)(B) and (C).

Interest Rates:

§511 Tax claims are entitled to interest at the rates determined by non-bankruptcy law, if interest or prevent value is due. Keep in mind that diminished dischargeability means that more tax claims are non-dischargeable and there will be requests to pay interest much like interest has been paid on student loans in the past. But see the limitations included at §1322(b)(10).

Other:

§502(b)(9) Claims bar date for taxing authorities changed to:

- 180 days after the date of the order for relief, or
- if the claims is for a tax based on a return filed under §1308, not later than 60 days after the date on which the return was filed
- may be the later of the two (*see* Interim Rules and Forms 3002(c) which includes two alternative proposals)

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U.S. Resources In International Food Law

By Lynne R. Ostfeld

July, 2006

During the 100th anniversary celebration of the creation of the U.S. Department of Agriculture's Food Safety and Inspection Service (FSIS), it is appropriate to point out sources of authority over what we put into our stomachs, particularly when we are referring to imported food.

To help understand how we got to where we are today, know that Upton Sinclair came to Chicago to research and write his novel The Jungle, with the intent of proselytizing readers to supporting socialism and better conditions for workers. Teddy Roosevelt, the then U. S. President and a prolific reader, read the book, was horrified at what he thought was going on in the slaughterhouses, and put in motion the creation of the FSIS. Sinclair was disappointed because he intended to hit us in the heart and he hit us in the stomach instead. To our benefit, he was the catalyst for the passage of the Federal Meat Inspection Act (FMIA).

> To quote information put out by FSIS about the significance of what occurred,
>
> "Today, more than 7,600 FSIS inspection program personnel are assigned to about 6,000 federally inspected meat, poultry and egg products facilities in the United States to ensure products are safe, wholesome and accurately labeled. FSIS also inspects each shipment of imported meat and poultry from qualified countries to ensure U.S. food safety requirements are met.
>
> FSIS incorporates the results of more than 90,000 microbiological tests

annually for E. coli O157:H7, Salmonella and Listeria monocytogenes to further the goal of preventing contamination and protecting public health. The Centers for Disease Control and Prevention has attributed significant declines in rates of illness from foodborne pathogens to the implementation of FSIS food safety regulations."

I. Government Agencies Involved With The Regulation Of The Importation Of Food Products Into The U.S.

A. U.S. Food and Drug Administration (FDA) (www.fda.gov/)

The FDA is part of the U.S. Department of Health and Human Services. With the exception of most meat and poultry, which are regulated by the U.S. Department of Agriculture, all food, drugs, cosmetics, medical devices, and electronic products that emit radiation are subject to examination by FDA when they arrive in the United States. Through its district offices and resident posts, or in coordination with the Customs Service, the FDA is directly or indirectly involved in surveillance of the import of food products at each of the approximately 500 U.S. Customs Service points of entry in the country.

By law, all of these products must meet the same standards as domestic goods. Imported foods must be pure, wholesome, safe to eat, and produced under sanitary conditions; drugs and devices must be safe and effective; cosmetics must be safe and made from approved ingredients; and all labelling and packaging must be informative and truthful.

To import regulated food products, the importer or agent files entry documents with the U.S. Customs Service within five working days of the date of arrival of a shipment at a port of entry. The FDA is notified of the entry through duplicate copies of Customs Entry Documents (CF 3461, CF 3461 ALT, CF 7501 or alternative). Further information can be obtained from:

Food and Drug Administration
Division of Import
Operations and Policy
15800 Crabbs Branch Way
Rockville, Maryland 20855
Tel : 301-443-6553

See, also, information published by the Center for Disease Control (www.

FoodSafety.gov) and**www.FoodSafety.gov**

B. Alcohol and Tobacco Tax and Trade Bureau (TTB) (www.ttb.gov/alcohol/index.htm)

The TTB is part of the Department of the Treasury. It collects excise taxes on aalcohol, tobacco, firearms and ammunition, and ensures that these products are labelled, advertised and marketed in accordance with the law.

Information on the requirements to import wine, beer and distilled spirits from various countries is available on www.ttb.gov/alcohol/info/interre1.htm. These requirements may include licensing, labelling and taxation considerations. A general listing of requirements (including licenses, label approvals, etc.) to import alcohol products (malt beverages, wine, and distilled spirits) into the U.S. is available on www.ttb.gov/international_trade/importing_alcohol.html. Individual states may also have regulations governing the sale of alcohol and tobacco. Their individual regulations should be consulted before importing any of these products.

C. **Animal and Plant Health Inspection Service** (APHIS) (**www.aphis.usda.gov/**)

The Animal and Plant Health inspection Service (APHIS), part of the U. S. Department of Agriculture (USDA), is responsible for protecting and promoting U.S. agricultural health, administering the Animal Welfare Act, and carrying out wildlife damage management activities.

1. APHIS Plant and Protection Quarantine (PPQ)

PPQ concerns the successful flow of healthy commodities into and out of the United States in order to protect agricultural and natural resources from risks associated with the entry, establishment or spread of animal and plant pests and noxious weeds. PPQ does this by regulating the importation of agricultural products with obligatory phytosanitary (plant health) certificates, importation rules, and inspections. A phytosanitary certificate is a document issued by an exporting country, which certifies that the phytosanitary status of the shipment meets the

phytosanitary regulations of the United States. PPQ employees can advise importers on phytosanitary restrictions and provide information (including regulations, policies and procedures) on bringing agricultural commodities into the United States.

Importers may obtain information or import permits by looking at the International Services (**www.aphis.usda.gov/is/**) or by contacting:

USDA-APHIS-PPQ
Permit Unit
4700 River Road, Unit 136
Riverdale, MD 20737
Telephone : (877) 770-5990
Fax : (301) 734-5786

2. National Center for Import and Export (NCIE) Veterinary Services Import/Export (www.aphis.usda.gov/vs/ncie/)

The APHIS Veterinary Services (VS) unit regulates the import and export of live animals, animal products, and biologics. VS monitors the health of these commodities, at the border, in case they are infected with foreign animal diseases, such as avian influenza or foot-and-mouth disease, that could threaten U.S. livestock populations.

Additional information regarding permit applications and information about import requirements and user fees related to importing animals, birds and animal products, can be obtained from:

USDA-APHIS-VS-NCIE
National Center for Import/Export
4700 River Road, unit 40
Riverdale, MD 20737-1231
Telephone : (301) 734-3277/8364
Fax : (301) 734-4704/8226

D. U.S. Customs and Border Protection (www.customs.gov/)

Customs and Border Protection assists the FDA in the execution of the prior notice requirements in 21 U.S.C. § 381(m) and its implementing regulations. It collects samples of products upon FDA request and forwards these samples to the FDA.

E. U.S. Department of Agriculture (www.usda.gov/wps/portal/usdahome)

1. Foreign Agriculture Service (http://www.fas.usda.gov/)

The Foreign Agricultural Service (FAS) is a part of the U. S. Department of Agriculture (USDA). It works to improve foreign market access for U.S. products, build new markets, improve the competitive position of U.S. agriculture in the global marketplace, and provide food aid and technical assistance to foreign countries. Staff are readily available to provide assistance to exporters of food products.

2. Food Safety and Inspection Service (www.fsis.usda.gov/)

As stated above, the FSIS is involved in the inspection of food that is produced both domestically and in other countries. Information about regulations can be obtained at www.fsis.usda.gov/Regulations_&_Policies/index.asp. Additional assistance can be obtained by contacting:

International Policy Division
Food and Safety Inspection Service
U.S. Department of Agriculture
Washington, D.C. 20250
Telephone : 202-720-3473

F. National Marine Fisheries (www.nmfs.noaa.gov/)

NOAA's National Marine Fisheries Service, a division of the Department of Commerce, is the federal agency responsible for the management, conservation and protection of living marine resources within the United States' Exclusive Economic Zone (water three to 200 mile offshore). Receiving its charge and funding under a variety of federal laws, it

protects endangered species, collects data relative to environmental studies, and acts to prohibit transactions which violate state, federal, native American tribal, or foreign laws.

G. U.S. Fish and Wildlife Service (www.fws.gov/)

All imported wildlife products are inspected by the U.S. Fish and Wildlife Service upon entry into the United States. Importers must obtain export permits from the country of origin and U.S. import permits to import the wildlife. Oftentimes, samples will be analyzed by NOAA before full scale importing is allowed. In this case, the importer will have to follow strict procedures in order to ensure that samples arrive safely and legally at NOAA laboratories.

H. **Environmental Protection Agency (EPA) : Pesticide Residue Limits on Food (www.epa.gov/pesticides/food/viewtols.htm)**

EPA sets limits on how much of a pesticide residue can remain on food. These pesticide residue limits are known as tolerances. Inspectors from the Food and Drug Administration and the United States Department of Agriculture monitor food in interstate commerce to ensure that these limits are not exceeded. The tolerance information is found in 40 Code of Federal Regulations (CFR) 180 "Tolerances and Exemptions from Tolerances for Pesticide Chemicals in Food".

II. Treaties Touching On International Commerce Of Agricultural Products And Food

A. World Trade Organization (WTO) (www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm)

One of the major treaties with which the U.S. is involved, and one frequently in the news, is the World Trade Organization. This successor to the General Agreement on Tariffs and Trade (GATT) has been charged with reducing the restrictions on trade among the member countries. Although not the only issue in dispute, it is struggling with a liberalization of member countries' support of their agricultural industries and the balancing of the needs and goals of first world and third world countries.

B. Agreement on Application of Sanitary and Phytosanitary Measures (SPS Agreement)

(www.wto.org/English/tratop_e/sps_e/spsagr_e.htm)

The SPS Agreement recognizes the fundamental right of countries to protect the health and life of their consumers, animals, and plants against pests, diseases, and other threats to health.

C. Agreement on Technical Barriers to Trade (TBT Agreement)

The TBT Agreement, which applies to agricultural products, helps to ensure that technical regulations and product standards do not create obstacles to trade. It permits technical regulations designed to meet legitimate national objectives, including protection of human health, safety, animal or plant life or health, or the environment. Regulations must not be more trade-restrictive than necessary to fulfil a legitimate objective. When international standards exist, WTO Members should use those standards as the basis for their technical regulations (Arts. 1, 2). The TBT Agreement does not apply to measures governed by the Agreement on the Application of Sanitary and Phytosanitary Measures, which applies to issues of food safety, as well as animal and plant health (Art. 1)

D. The Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal 2000) (www.biodiv.org/doc/legal/cartagena-protocol-en.pdf)

This Protocol treats the "transfer, handling and use of living modified organisms (LMOs) resulting from modern biotechnology that may have adverse effects on the conversation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements."

The Protocol provides for adoption of a process for development of international rules governing liability and redress for damage from transboundary movements of LMOs.

Further resources relative to international free trade agreements between the U. S. and other countries are available on www.customs.gov/xp/cgov/import/international_agreements/free_trade/.

Special Trade Programs are available on www.customs.gov/xp/cgov/import/international_agreements/special_

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Coordinating Retirement Accounts With Estate Planning 101 (What every estate planner needs to know)

By Keith A. Herman

A substantial portion of the wealth possessed by Americans today consists of tax-deferred retirement accounts such as traditional IRAs, 401(k)s, and 403(b)s. In 2002, the IRS issued final regulations under Code § 401(a)(9) clarifying and simplifying many of the rules applicable to retirement accounts. See Treas. Reg. § § 1.401(a)(9)-0 through 1.401(a)(9)-9, and Treas. Reg. § 54.4974-2. These rules apply to 401(k)s, 403(b)s, and IRAs, but not to Roth IRAs.

Retirement Accounts Present Unique Problems

In general, the receipt of inherited property usually is not subject to income tax. The major exception to this rule is retirement accounts because these accounts represent income that the government has not previously subjected to income tax. After a taxpayer's death, the beneficiaries usually will owe income tax on the amount withdrawn from the taxpayer's retirement account. When dealing with retirement accounts, the primary goal is to allow the taxpayer's beneficiaries the opportunity to defer this income tax for as long as possible by postponing withdrawals from the account.

An estate planning attorney must deal with all of the following issues regarding a client's retirement accounts:

- Who will be the primary and contingent beneficiaries?
- How long can the beneficiary defer withdrawals from the account and the attendant income tax liability?
- Is there a compelling reason to name a trust as a beneficiary?
- Do any retirement account proceeds passing to a spouse, in trust, qualify for the marital deduction?

• What is the most tax efficient source of payment for estate taxes on the retirement account?

Basic Distribution Rules

During the Taxpayer's Lifetime. The required minimum distribution (RMD) rules specify how long a taxpayer (and after the taxpayer's death, the beneficiary) may defer withdrawals from a retirement account. Code § 401(a)(9). During life, the taxpayer must generally begin taking withdrawals by April 1 of the year after the taxpayer reaches age 70 1/2 . This date is referred to as the required beginning date (RBD). An IRS table that takes into account the taxpayer's life expectancy sets the RMD amount that the taxpayer must withdraw in each year after the RBD. Treas. Reg. § 1.401(a)(9)-5.

Distributions After Death If the Spouse Is the Beneficiary. A taxpayer can obtain the most favorable income tax results by naming the taxpayer's spouse as the primary beneficiary. A surviving spouse is the only person who has the option of rolling over the retirement account into his or her own IRA. Code § § 402(c)(9) (qualified plans), 408(d)(3)(C)(ii) (IRAs). Often the simplest way to accomplish the rollover is to retitle the account into the surviving spouse's name. By rolling over the account, the surviving spouse can defer withdrawals from the account until the spouse turns 70 1/2 ; any other beneficiary must begin taking withdrawals the year after the taxpayer's death. In addition, the spouse can name his or her own beneficiaries of the IRA. Those beneficiaries may use a life expectancy payout; when other beneficiaries of a retirement account die, the RMD continues to be based on the deceased beneficiary's life expectancy.

Distributions After Death If a Non-spouse Is the Beneficiary. If someone other than the spouse is the beneficiary, the beneficiary's RMD depends on whether there is a "Designated Beneficiary" of the account, as that term is specifically defined in Treas. Reg. § 1.401(a)(9)-5. The term "Designated Beneficiary" does not just refer to the individual or entity named by the taxpayer to inherit the account after death; rather, it is a specific tax concept. Although individuals and certain qualified trusts can be "Designated Beneficiaries," estates, charities, and business entities are not "Designated Beneficiaries." Treas. Reg. § 1.401(a)(9)-4.

If there is a Designated Beneficiary and the taxpayer died before the taxpayer's RBD, then the beneficiary's RMD is based on an IRS table that takes into account the beneficiary's life expectancy. If there is a Designated Beneficiary and the taxpayer died after the taxpayer's RBD, then the beneficiary's RMD is based on an IRS table that takes into account the longer of the (1) beneficiary's life expectancy or (2) taxpayer's life expectancy.

If there is no Designated Beneficiary and the taxpayer died before the taxpayer's RBD, then the beneficiary must withdraw all of the retirement account within five years of the taxpayer's death. If there is no Designated Beneficiary and the taxpayer died after the taxpayer's RBD, then the beneficiary's RMD is based on an IRS table that takes into account the deceased taxpayer's life expectancy.

The beneficiary may withdraw more than the RMD each year, but the beneficiary must withdraw at least the RMD each year in order to avoid a penalty. When a beneficiary takes his RMD based on his own life expectancy, it is often referred to as a "stretch" distribution. Most 401(k) plans do not allow a life expectancy payout option, as they typically require a lump sum distribution on death. Even though life expectancy payout options in IRAs are more common, not all IRA plan documents offer this option. An estate planner should always check with the plan administrator or IRA custodian to determine that specific plan's rules for distributions to the beneficiary after the taxpayer's death.

Separate Accounts and Multiple Beneficiaries

If there are multiple beneficiaries of a retirement account, then the RMD is based on the life expectancy of the oldest beneficiary. Treas. Reg. § 1.401(a)(9)-5, A-7(a)(1). But if separate accounts are "established" for multiple beneficiaries, then the RMD rules will apply separately to each separate account. Treas. Reg. § 1.401(a)(9)-4, A-5(c); Treas. Reg. § 1.401(a)(9)-8, A-2(a)(2). This allows the RMD to be calculated based on the life expectancy of the oldest beneficiary of the separate account. To establish separate accounts, the beneficiaries' interests in the account must be fractional (not pecuniary). In addition, some affirmative act must establish the separate accounts--for example, a physical division of a single account into completely separate accounts or the use of separate account language on the beneficiary designation form. Whenever possible, it is best to create the separate accounts with appropriate language directly on the beneficiary designation form.

Eliminating Unwanted Beneficiaries Before September 30

The deadline for determining who are the initial beneficiaries of a retirement account is the date of the taxpayer's death. Between the taxpayer's death and September 30 of the following year, troublesome beneficiaries, such as beneficiaries that do not qualify as Designated Beneficiaries, may be removed by disclaiming the interest, creating separate accounts, or eliminating them as beneficiaries by distributing their benefits to them. Treas. Reg. § 1.401(a)(9)-4, A-4(a).

Avoiding Trusts as Beneficiaries

Because of the complexity associated with using a trust as a Designated Beneficiary, a revocable trust should be avoided as the beneficiary of retirement accounts in most cases. Before naming a trust as a beneficiary of a retirement account, the attorney and the client should decide that the reasons to name a trust as a beneficiary outweigh the time and costs of establishing a qualified trust. The client may decide that the use of a trust is more important than the lost ability to plan for income tax deferral that often can occur by naming a nontrust as beneficiary. A trust may be more attractive if a life expectancy payout option or spousal rollover is not important or not available.

In a typical first marriage situation, the taxpayer might consider naming the spouse as the primary beneficiary and the adult children as the contingent beneficiaries. If there is a minor child, then a custodian account is a possible alternative if the terms of the retirement account allow a life expectancy payout option. A client might consider the following language:

> The total account assets shall be divided to provide one equal share of the account, as of my date of death, for each of my children who is either living on my date of death or is deceased on my date of death but who has one or more descendants living on my date of death. Any share created for a deceased child of mine shall be divided into separate shares for such deceased child's descendants, per stirpes. Each such share of my IRA account created for a descendant of mine who has not attained the age of twenty-one (21) shall be held by _____, as a custodian for the descendant under the [state of residency] Transfers to Minors Act or similar minor's custodian law of any state where the minor then resides.
>
> Each of my beneficiaries designated above shall have the right (with respect to the death benefits as to which that beneficiary is then the designated beneficiary) to elect any method of payment provided for in the IRA agreement, including any method that was available to me while living.
>
> The assets of my IRA shall be segregated, effective as of the date of my death, into separate subaccounts of my IRA, one for the share representing each beneficiary, so that all post-death IRA investment gains, losses, contributions and forfeitures are determined separately for each sub-account. Each beneficiary shall have the right to direct changes to investments held in his or her separate subaccount.

If the retirement account does not allow a life expectancy payout (or a life expectancy payout does not matter), then the taxpayer's revocable trust can be named directly as the contingent beneficiary of the required lump sum payment.

When Avoiding Trusts Does Not Matter

There are a number of instances when planning for income tax deferral is not a significant consideration. For example, if the IRA or 401(k) plan requires a lump sum distribution at the taxpayer's death, then deferring income taxes by naming a Designated Beneficiary is not an issue. After retirement, a taxpayer may wish to consider a rollover of a 401(k) or IRA that does not offer a life expectancy payout option to an IRA that does offer this option.

In addition, income tax deferral will not be as important if the beneficiary will withdraw the entire account on the taxpayer's death for an immediate need, such as to pay estate taxes or to support minor children. Income tax deferral will not be a major consideration if the size of the account is so small that a withdrawal of the entire amount will not cause a substantial amount of additional income tax to be due.

If the beneficiary's age and the taxpayer's age are close and the taxpayer is over age 70 1/2 , then naming a Designated Beneficiary will not have a significant effect on the RMD. In this case, the account must be withdrawn over basically the same time period whether or not the beneficiary is a Designated Beneficiary. Finally, naming a Designated Beneficiary is not an issue if the taxpayer names only charitable organizations as the beneficiaries, as the income of charitable organizations is not subject to tax.

Trusts as Beneficiary

Qualified trusts also can be Designated Beneficiaries. (The term "qualified trust" is used as a matter of convenience in this article, but is not an IRS-defined, or commonly used, term.) There are a number of reasons to use a trust as a beneficiary of a retirement account. A trust can limit the beneficiary's control over the trust assets. Trusts can provide the beneficiary with creditor protection, including protection from division in the event of the beneficiary's divorce. Finally, a trust can be used to exclude the trust assets from the estate tax at the beneficiary's death. If one of these reasons is more important than allowing the beneficiary to defer withdrawals from the retirement account in order to defer income taxes, then a traditional trust can be named as the beneficiary of the retirement account. The taxpayer should be informed, however, that the beneficiary will lose possible income tax deferral opportunities. If a taxpayer qualifies a trust as a Designated Beneficiary, then the trust may make withdrawals from the account based on the life expectancy of the oldest beneficiary of the trust (that is, the trust's RMD is based on the age of the oldest beneficiary).

When Trusts Are Crucial

Naming a trust is crucial in certain circumstances. For example, if the beneficiary is a special-needs child who relies on government benefits, a trust must be used. Clients often use trusts when the beneficiary is a second spouse and the client wants the spouse to have limited access to the trust principal. A parent may wish to use a trust if the beneficiary is a minor, is a spendthrift, or has substance abuse problems. Finally, retirement account assets can fund a credit shelter trust. In these situations, the client may decide that the reason for the trust may outweigh the lost income tax deferral or may decide that the added cost of a private letter ruling for a custom-designed accumulation trust is justified.

A trust must satisfy five tests to qualify as a Designated Beneficiary: The first four tests are as follows:

1. the trust must be valid under state law;
2. the trust must be irrevocable or become irrevocable at the taxpayer's death;
3. the trust beneficiaries must be identifiable; and
4. certain documentation must be provided to the plan administrator or IRA custodian by October 31 of the year after the taxpayer's death.

Treas. Reg. § 1.401(a)(9)-4, A-5. If these four tests are met, then the trust generally will be treated as a Designated Beneficiary and the RMD will be based on the oldest trust beneficiary's life expectancy. Treas. Reg. § 1.401(a)(9)-5, A-7(a)(1). But there is, in essence, a fifth test for the trust to be a Designated Beneficiary, because all of the beneficiaries of the trust must be individuals the age of whom can be identified. Treas. Reg. § 1.401(a)(9)-4, A-5(c); Treas. Reg. § 1.401(a)(9)-4, A-3. Therefore, the fifth requirement is to draft the trust so that it is possible to determine the identity of the oldest beneficiary and to require that only individuals may be beneficiaries of the trust. This fifth test can create problems, especially with multi-beneficiary common pot trusts or multi-generation dynasty trusts.

It is difficult to draft a trust that only has individual and ascertainable beneficiaries because the IRS has not explained which contingent beneficiaries can be ignored. The regulations provide that if the first four tests above are met, then the IRS will treat the beneficiaries of the trust as the potential Designated Beneficiaries of the retirement account. It then becomes necessary to determine three things: (1) the identity of the beneficiaries of the trust, (2) the identity of any beneficiaries of the trust that are not individuals, and (3) the identity of the oldest beneficiary. In making these determinations, the trust's "contingent beneficiaries" must be taken into account. Treas. Reg. § 1.401(a)(9)-5, A-7(b). The regulations provide that

> [a] person will not be considered a beneficiary for purposes of

> determining who is the beneficiary with the shortest life expectancy under paragraph (a) of this A-7, or whether a person who is not an individual is a beneficiary, merely because the person could become the successor to the interest of one of the employee's beneficiaries after that beneficiary's death. However, the preceding sentence does not apply to a person who has any right (including a contingent right) to an employee's benefit beyond being a mere potential successor to the interest of one of the employee's beneficiaries upon that beneficiary's death.

Treas. Reg. § 1.401(a)(9)-5, A-7(c)(1). This rather unhelpful regulation gives the guidance that a "mere potential successor" beneficiary can be ignored. The regulation also specifically states that one cannot ignore contingent beneficiaries simply because the current beneficiary is entitled to all of the trust income, as is the case with a QTIP trust or QSST:

> [i]f the first beneficiary has a right to all income ... during that beneficiary's life and a second beneficiary has a right to the principal but only after the death of the first income beneficiary ..., both beneficiaries must be taken into account in determining the beneficiary with the shortest life expectancy and whether only individuals are beneficiaries.

Treas. Reg. § 1.401(a)(9)-5, A-7(c)(1). Although the regulation clearly contemplates that some beneficiaries can be ignored, it never really explains the circumstances in which they can be ignored. A recent private letter ruling takes a date-of-death look at then-living trust beneficiaries to determine which contingent remainder beneficiaries can be ignored. PLR 200438044. Under this ruling's analysis, if a trust is to terminate upon a beneficiary's reaching a certain age, then the only remainder beneficiaries that must be counted are the individuals that would receive the trust assets upon termination, provided those individuals are alive on the taxpayer's death and they have already attained the age for termination. This ruling is not helpful to dynasty trusts or lifetime trusts with rights of withdrawal, as the beneficiary is never required to take outright ownership of the trust assets. It will be interesting to see if the analysis of this ruling is consistently applied by the IRS. Until the IRS or Congress clarifies these rules, practitioners in this area must proceed very carefully.

Conduit and Accumulation Trusts

Fortunately, the regulations do set forth a type of safe harbor trust that has beneficiaries that the IRS will treat as Designated Beneficiaries. The qualified trusts are often referred to as "conduit trusts." A conduit trust requires the trustee to distribute all of the retirement account withdrawals by the trust to the beneficiary. PLR 200537044. As the trust may not accumulate any assets withdrawn from the retirement account, the IRS

allows the beneficiary to be treated as the oldest beneficiary. Treas. Reg. § 1.401(a)(9)-5, A-7(c)(3), ex. 2. Although conduit trusts have the advantage of certainty because they are specifically described in the Treasury Regulations, they also have major disadvantages. A conduit trust cannot withdraw retirement account proceeds and accumulate them inside of the trust. This is often contrary to the intent of the client, who is often specifically using a trust to prevent the retirement account assets from being distributed to the beneficiary for one reason or another.

A trust that allows accumulations of retirement account withdrawals (an "accumulation trust") should qualify as a Designated Beneficiary if certain provisions are added to the trust. First, only individuals may be beneficiaries of the accumulation trust. Second, to avoid an argument that the taxpayer's estate is a beneficiary of the trust, because an estate cannot be a Designated Beneficiary, the trust must provide that any debts, taxes, or expenses payable from the trust cannot be paid after September 30 of the year after the calendar year of the taxpayer's death. Third, the trust agreement must prohibit trust distributions to anyone who is older than the person whose life expectancy is used to calculate the RMD, to an estate, or to a charity. Finally, the beneficiaries of the trust must be identifiable. For this purpose, if the remainder beneficiary involves a class capable of expansion or contraction, the beneficiaries will be treated as being identifiable if it is possible to identify the class member with the shortest life expectancy.

Accumulation trusts require very careful drafting to ensure that the trust assets can never pass (under any circumstances) to an older sibling or relative, an estate or charity, nor escheat to the state under the intestacy laws. Typical trusts will always fail these rules, under the typical heirs-at-law contingent beneficiary clause that reverts to state intestacy laws if all of the primary family line die off. Under most state intestacy laws, an older relative may inherit, and the property may escheat to the state. Trusts also typically provide that if a beneficiary dies without descendants, the trust property passes to the beneficiary's siblings (who may be older than the beneficiary). Powers of appointment also cause uncertainty in this area.

If properly drafted, an accumulation trust can help coordinate a taxpayer's retirement accounts with his or her estate plan. Because of uncertainty in this area of the law, a private letter ruling should be obtained before naming such a trust as a beneficiary. Obtaining a private letter ruling can be an expensive and time-consuming procedure, but is well worth it for individuals with large retirement accounts if naming a trust as the beneficiary is crucial.

Separate Accounts for Trusts

Treas. Reg. § 1.401(a)(9)-4, A-5(c) provides that "the separate account rules under A-2 of section 1.401(a)(9)-8 are not available to beneficiaries of a trust with respect to the

trust's interest in the employee's benefit." The IRS takes the position that separate account treatment is not available when a single trust is named as the beneficiary, despite a contrary holding in various private letter rulings. See, e.g., PLR 200432029. Under the IRS's interpretation, if all of the separate trusts created under a revocable trust are qualified trusts, then the RMDs of all such separate trusts will be based on the oldest beneficiary of any of the separate trusts, not the beneficiary of each trust at issue. Therefore, whenever possible, it is best to directly name the separate trusts to be created on the beneficiary designation form, as opposed to naming the funding trust. PLR 200537044. For example, instead of naming the "John T. Smith Revocable Trust" as the beneficiary, one should consider the following language:

> Upon my death the remaining account assets shall be divided into fractional shares so as to provide an undivided equal share for each of the separate trusts created pursuant to Article __ of the John T. Smith Revocable Trust, and so that each such share shall be segregated, effective as of my date of death, into separate subaccounts, one for the share representing each separate trust, so that all postdeath investment gains, losses, contributions and forfeitures, are determined separately for each subaccount. The trustees of each separate trust shall have the right to direct changes to investments held in such separate trust's separate sub-account.

Separate account treatment for trusts is an issue only if each such separate trust is a qualified trust (a conduit trust or an accumulation trust). Otherwise the ages of the trust beneficiaries are irrelevant in determining the trust RMDs, and separate account treatment is not necessary.

Credit Shelter Trust Issues

Retirement accounts are not only subject to income tax when distributed to the beneficiary, but they are also subject to estate tax at the death of the owner. For the year 2005, the combined effect of the 47% estate tax, a top federal income tax rate of 35%, and a possible state income tax can be debilitating. This heavy tax burden makes tax-deferred retirement accounts the best source for charitable bequests at death, as charities are exempt from the income tax.

These taxes may be payable from the taxpayer's probate estate or a trust, or they may need to be paid by a withdrawal from the IRA. A client's estate planning documents should be drafted to ensure, to the extent possible, that any tax due is paid from nonretirement assets, as the withdrawal of retirement assets to pay taxes will cause additional income tax. Drafters should pay close attention to the tax apportionment clauses in the wills and trusts of clients with large retirement accounts.

For estates that are subject to the federal estate tax, one of the most troublesome areas is the use of retirement assets to fund a credit shelter trust. Many of the reasons to use a trust involve nontax issues, which may outweigh any possible income deferral possibilities. When dealing with funding a credit shelter trust, however, the choice is between deferring one tax and avoiding another tax. Often, an advisor must ask the client to choose between competing tax concerns. The uncertainty of the estate tax, combined with an increasing exemption, will often lose out to the more certain income tax liability resulting from the loss of the spousal rollover and life expectancy payout option.

If a conduit credit shelter trust is named as the primary beneficiary of the retirement account, then the entire retirement account will be paid out over the spouse's life expectancy. This will save very few estate tax dollars, as the retirement account assets will be added to the spouse's estate just as if the spouse had been named directly as the beneficiary, but without the income tax advantages of the spousal rollover. A conduit trust is usually a poor alternative when dealing with funding a credit shelter trust.

A better option is to name an accumulation trust as the primary beneficiary of the retirement account, preferably with a favorable private letter ruling from the IRS in hand. The accumulation trust allows the spouse to be treated as the Designated Beneficiary of the retirement plan. Although the spousal rollover may not be available, a life expectancy payout option will allow distributions from the retirement account (and the associated income tax liability) to be gradually withdrawn over the spouse's life expectancy. The accumulation trust will usually be subject to income tax at the highest marginal rate, but amounts actually distributed to the beneficiary are taxed at the beneficiary's presumably lower income tax rate. The accumulation trust's advantage over the conduit trust is that the accumulation trust can retain the distributions in the retirement account inside of the trust. In other words, the trust is not required to distribute the retirement account withdrawals directly to the spouse; the withdrawals accumulate inside of the trust until needed for the support of the spouse or children. This means that all of the retirement account withdrawals not distributed out of the trust will pass estate tax free to the next generation. The disadvantages of the accumulation trust include the high trust income tax rates, the inability to do a spousal rollover, and the added costs and complexity of drafting the trust, educating the client, and obtaining a private letter ruling.

If the expense of obtaining an IRS private letter ruling is not justified, then an alternative is simply to name the spouse directly as the beneficiary. If the spouse will consume a substantial portion of the retirement account during the spouse's lifetime or the increasing estate tax exemption is enough to shield all of the taxpayer's assets, then there may be no future estate tax to worry about. This option also has an advantage over the accumulation trust in that the spousal rollover may allow more income tax deferral.

In addition, the spouse can name new beneficiaries that may use a life expectancy payout after the spouse's death. Obviously, the disadvantage to this option is that the retirement account cannot be used to fund a credit shelter trust and may cause a future estate tax if the assets are not consumed by the surviving spouse.

If the spouse is not expected to consume most of the retirement account before death, then naming a traditional credit shelter trust (as opposed to a conduit trust or accumulation trust) as the primary beneficiary of the retirement account can be the best approach, as the estate tax savings will outweigh the lost income tax deferral. A traditional credit shelter trust is also a wise option if the spouse is not much older than the remainder beneficiaries.

Other Issues

It is often impossible to fit the necessary language on the beneficiary designation form itself. The best approach is to write the words "See Attachment" on the form and place all of the necessary language on an attachment that is submitted along with the preprinted signed form. To ensure a beneficiary designation form is accepted by the IRA custodian or plan administrator, the attorney should always submit the forms to such parties with a receipt (including a complete copy of the signed form attached) that requires the custodian/administrator to sign and date a statement to the effect that the attached beneficiary designation forms were accepted and are now effective. If the attorney does not receive the receipt back, then a simple follow-up phone call can fix a problem that, if left until death, could be catastrophic to the estate plan.

Because of the complexity of this area of law and the ability of a stubborn IRA custodian to frustrate the income tax planning of a testator, an attorney should review the IRA agreement before deciding on a retirement planning course of action. To avoid problems after death, Ted Riseling and Jeff Rhodes in their newsletter, The Riseling Report, suggest sending a letter to the IRA custodian during the client's lifetime asking for a written response to the following questions:

1. Do you honor the designated beneficiary rules, contained in Treas. Reg. § 1.401(a)(9)-4, A-5, when a trust is named beneficiary of an IRA and allow the beneficiaries of the trust to be considered designated beneficiaries of the IRA?
2. Do you permit the beneficiary of an IRA to make investment decisions concerning that beneficiary's portion of the IRA?
3. Will you permit the beneficiary of an IRA to name a successor beneficiary for any undistributed portion of the original beneficiary's share of the IRA?
4. Will you let the IRA beneficiary move the IRA to another IRA

custodian after the account owner's death as permitted by Rev. Rul. 78-406?
5. If an IRA beneficiary elects the five-year payout method, will you permit multiple withdrawals during the five-year period?
6. If an IRA beneficiary elects to receive distributions over the beneficiary's lifetime, will you allow the beneficiary to take more than the required minimum distribution in any year?
7. If (a) a trust is named as the beneficiary of the IRA, (b) the trust qualifies as a beneficiary under the applicable Treasury Regulations, (c) the trust agreement provides for separate shares to be created on the account owner's death, and (d) the beneficiaries comply with all other Treasury Regulations and other tax laws, will you permit the beneficiaries to split the IRA into multiple IRAs in accordance with the trust agreement to create separate shares consistent with the trust agreement?
8. Do you accept customized beneficiary designation forms?

Ted M. Riseling & Jeff K. Rhodes, The Riseling Report, January 2003, located at www.oktrustlaw.com/reports/JANUARY03.doc (for items 1-7). The questions above are not intended to be an exhaustive list and other questions may be appropriate depending on the particular client situation. The taxpayer should consult with his or her attorney if the custodian's response to any of these questions is no.

Conclusion

One of the most important areas of estate planning is dealing with tax-deferred retirement accounts. Unfortunately, this is an extremely complicated area of law. Becoming familiar with the issues discussed in this article is crucial for estate planning attorneys.

Attorneys should consider the following points when dealing with retirement accounts:

- Retirement accounts present unique problems because withdrawals after the owner's death trigger income taxes.
- Be mindful of the reasons why income tax deferral is not at issue.
- Trusts should be avoided as beneficiaries, unless a nontax reason for creating the trust outweighs the lost income tax deferral of using the trust (or income tax deferral is not at issue for some reason).
- If income tax deferral is important and a trust must be used (as when a credit-shelter trust must be funded with retirement benefits), consider whether the expense of a private letter ruling is justified to allow the use of an accumulation trust.
- Draft tax apportionment clauses in wills and trusts to provide for estate

tax payments from funds other than the retirement accounts (if such funds are available).
• Ensure that beneficiary designation forms are drafted to create separate accounts when multiple beneficiaries are being named under a trust and a life expectancy payout option is desired.
• If there are substantial funds in an IRA, then make sure to ask the IRA custodian the questions above to avoid problems after the owner's death.
• Always have written documentation from the retirement account administrator confirming that the beneficiary designation form was accepted.

Keith A. Herman is an associate with the St. Louis, Missouri, firm of Greensfelder, Hemker & Gale, P.C.

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The Durable Power of Attorney

By Kenneth A. Vercammen

A Power of Attorney is a written document in which a competent adult individual (the "principal") appoints another competent adult individual (the "attorney-in-fact") to act on the principal's behalf. In general, an attorney-in-fact may perform any legal function or task which the principal has a legal right to do for him/herself.

The term "durable" in reference to a power of attorney means that the power remains in force for the lifetime of the principal, even if he/she becomes mentally incapacitated. A principal may cancel a power of attorney at any time for any reason. Powers granted on a power of attorney document can be very broad or very narrow in accordance with the needs of the principal.

Why is Power of Attorney so important?

Every adult has day-to-day affairs to manage, such as paying the bills. Many people are under the impression that, in the event of catastrophic illness or injury, a spouse or child can automatically act for them. Unfortunately, this is often wrong, even when joint ownership situations exist.

The lack of properly prepared and executed power of attorney can cause extreme difficulties when an individual is stricken with severe illness or injury rendering him/her unable to make decisions or manage financial and medical affairs. All states have legal procedures, guardianships or conservatorships, to provide for appointment of a Guardian. These normally require formal proceedings and are expensive in court. This means involvement of lawyers to prepare and file the necessary papers and doctors to provide medical testimony regarding the mental incapacity of the subject of the action. The procedures also require the involvement of a temporary guardian to investigate, even intercede, in surrogate proceedings. This can be slow, costly, and very frustrating.

Advance preparation of the power of attorney can avoid the inconvenience and expense

of legal proceedings. This needs to be done while the principal is competent, alert and aware of the consequences of his/her decision. Once a serious problem occurs, it is too late.

The Power of Attorney can be effective immediately upon signing or only upon disability. Some examples of legal powers contained in the Power of Attorney are the following:

1. REAL ESTATE: To execute all contracts, deeds, bonds, mortgages, notes, checks, drafts, money orders, and to lease, collect rents, grant, bargain, sell, or borrow and mortgage, and to manage, compromise, settle, and adjust all matters pertaining to any real estate or lands in which I have an interest, including _____ [real estate]

2. ENDORSEMENT AND PAYMENT OF NOTES, ETC.: To make, execute, endorse, accept, and deliver any and all bills of exchange, checks, drafts, notes and trade acceptances. To pay all sums of money, at any time, or times, that may hereafter be owing by me upon any bill of exchange, check, draft, note, or trade acceptance, made, executed, endorsed, accepted, and delivered by me, or for me, and in my name, by my Agent.

3. MEDICAL RECORDS ACCESS: To be able to access my medical and hospital records under Federal Law HIPAA.

4. STOCKS, BONDS, AND SECURITIES: To sell any and all shares of stocks, bonds, or other securities now or hereafter, belonging to me, that may be issued by an association, trust, or corporation whether private or public, and to make, execute, and deliver any assignment, or assignments, of any such shares of stock, bonds, or other securities.

5. CONTRACTS, AGREEMENTS, ETC.: To enter into safe deposit boxes, and to make, sign, execute, and deliver, acknowledge, and perform any contract, agreement, writing, or thing that may, in the opinion of my Agent, be necessary or proper to be entered into, made or signed, sealed, executed, delivered, acknowledged or performed.

6. BANK ACCOUNTS, CERTIFICATES OF DEPOSIT, MONEY MARKET ACCOUNTS, ETC.: To add to or withdraw any amounts from any of my bank accounts, Certificates of Deposit, Money Market Accounts, etc. on my behalf or for my benefit. To make, execute, endorse, accept and deliver any and all checks and drafts, deposit and withdraw funds, acquire and redeem certificates of deposit, in banks, savings and loan associations and other institutions, execute or release such deeds of trust or other security agreements as may be necessary or proper in the exercise of the rights and powers herein granted; Without in any way being limited by or limiting the foregoing, to conduct banking transactions as set forth in section 2 of P.L. 1991, c. 95 (c. 46:2B-11).

7. TAX RETURNS, INSURANCE AND OTHER DOCUMENTS: To sign all Federal, State, and municipal tax returns, insurance forms and any other documents and to represent me in all matters concerning the foregoing.

8. GIFT GIVING POWERS: To make gifts in amounts which my agent in his sole, absolute and unfettered discretion shall deem appropriate in any given year on my behalf.

You should contact your attorney to have a Power of Attorney Prepared, together with a Will, Living Will and other vital Estate Planning documents.

Kenneth Vercammen is a Litigation Attorney in Edison, NJ, approximately 17 miles north of Princeton. He often lectures for the American Bar Association and New Jersey State Bar Association on personal injury, criminal / municipal court law and practices to improve service to clients. He has published 125 articles in national and New Jersey publications on municipal court and litigation topics. He has served as a Special Acting Prosecutor in seven different cities and towns in New Jersey and also successfully defended hundreds of individuals facing Municipal Court and Criminal Court charges.

In his private practice, he has devoted a substantial portion of his professional time to the preparation and trial of litigated matters. He has appeared in Courts throughout New Jersey several times each week on many personal injury matters, Municipal Court trials, Probate hearings and contested administrative law hearings.

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What Every Estate Planner Must Know About Charitable Transfers

By Mark B. Weinbergs

1. Charitable giving is not restricted to the wealthy. Tax benefits promote charitable transfers, but they are by no means the only incentive, or even the most important. The client need not even have an otherwise taxable estate to derive great benefit from charitable transfers. These benefits include setting a good example for the clients' children and other family members, honoring those things the clients hold dear and giving back for a lifetime of benefit from society. Charity is the dues paid for being a member of the human community.

Food for thought: In the aftermath of the World Trade Center disaster on 9/11, it was reported that some people who were already homeless and destitute contributed what little they had at fire stations around New York City. Also numerous web sites permit contributions to be easily and securely made with credit cards, delivering this service with information about a wide variety of charitable organizations.

2. Charity means different things to different people. What federal and state tax and asset transfer provisions consider to be charity may not square with what the client has in mind. As importantly, what the estate planner thinks is charity may vary widely from the client's view. There is a way to do what the client wants to do, so long as the client has charitable intent in the broadest possible sense.

Food for thought: Every estate planner who practices for any significant length of time encounters a client who wishes to donate or bequeath something to charity but does not trust his or her own judgment. Speaking to clients at length about the ways in which charitable institutions have helped them and their families throughout their lives can help them discover a nexus and greater personal meaning.

3. Do not besmirch the name of charity. Because charity is favored by the tax and property transfer systems, some use its good name as a cover for efforts to feather their

own nests. Avoid this temptation, because it poisons the well from which the entire community drinks.

Food for thought: The history of charity is replete with examples of the ways in which donations to charity have been used for tax avoidance purposes. Charitable split dollar **insurance** and accelerated charitable lead trusts are examples of **tax** schemes that feigned significant benefit to charity while conferring outsized **tax** deductions or exclusions on the true beneficiaries, individual clients of jaded "promoters." For other examples of wrongdoing in which charity and its supporters are exploited, see the excellent article by Marion Fremont-Smith and Andras Kosaras of Harvard's Hauser Center for Nonprofit Organizations, Wrongdoing by Officers and Directors of Charities: A Survey of Press Reports 1995-2003, which appeared in the October 2003 issue of The Exempt Organization Tax Review. This article can be downloaded and an abstract viewed at http://papers.ssm.com/sol3/papers.cfm?abstract_id=451240.

4. Charity is the "Swiss Army knife" of the estate planner. Keep it in your bag of solutions when approaching every problem, and be sure it does not help or fit before discarding it. As the instinct to help one another is widespread, if not universal, so this means to that end is useful more often than most lawyers think.

Food for thought: Aside from providing satisfaction and tax benefits to the donor or testator, planned giving can solve real-world problems faced by them or their families. A charitable remainder trust can provide ongoing support for disabled or spendthrift family members, while protecting the assets from creditors and the beneficiaries' own weaknesses. Charitable gift annuities can permit those of modest means to gain the satisfaction of helping their church build its new home while stabilizing their own retirement portfolio. For extensive free information about the many ways in which charitable transfers can meet client needs, see the Planned Giving Design Center on the Internet at www.pgdc.com or a site sponsored by a charity or practitioner in your local area.

5. Charity is a worldwide phenomenon and possibility. Charity may begin at home, but its reach spans the globe. Direct bequests to foreign charities and lifetime gifts to domestic charities that work around the world are promoted by the tax laws and can reach every human concern across the planet.

Food for thought: Although only domestic U.S. charities can receive gifts that are deductible for federal income tax purposes, those U.S. charities can fund programs and benefits in other countries, so groups in this country can help anyone subject to U.S. income tax obtain tax benefits for money those groups spend to aid those in other lands. But the estate tax charitable deduction is not limited to U.S. charities, and so bequests directly to foreign charities qualify for the federal estate tax deduction. Through

charitable gifts at death, international development and aid programs can be conducted completely by charities in those countries (which may be more effective, being free from outside interference). Review the Treasury Department's Best Practices for International Fund Raising, as well as comments filed with Treasury by the Probate and Trust Division's D-2 Organizational & Operational Issues of Exempt Organizations Committee. These appear at www.abanet.org/rppt/cmtes/pt/d2/2003-29Comments.pdf. Other valuable information about charitable giving can be obtained by subscribing to the committee's free electronic mailing list at www.abanet.org/rppt/cmtes/pt/d2/home.html and addressing questions to the list by e-mail.

6. Potential conflicts of interest are as prevalent in dealing with charity as with any other human activity. **The fact that a client wishes to make a** contribution or bequest to charity should raise as many questions about motives and personal benefit as would an offer from a company's CEO to give his attorney a tip on the company's stock.

Food for thought: Contributions to The Nature Conservancy by insiders have recently raised questions about the contributors' motives, after news accounts reported that these gifts were part of a system of preferential land sales. Although newspapers and magazines often get the facts of a case wrong, the issues raised by the Washington Post articles are instructive.

7. Watchdog groups are the quick and easy way to misjudge a charity. Clients want their contributions to help "worthwhile" charities. Influenced by the mass media's need for facile answers, groups have arisen that develop simplistic standards and apply these to charities. In truth, these groups are no better at determining whether a charity is "worthwhile" than a palm reader is at determining a person's character. If a client wants to support a worthwhile charity, he or she must get involved with that charity, seek and study information about it, and learn its history and current operations. Without this kind of hands-on involvement, there is no way of assessing whether the client would consider it to be "worthwhile."

Food for thought: Artificial limits, such as "percentage of gross receipts that go to administration, overhead, and fund raising," falsely identify these as expenses that are not worth making; but without them an organization will be weak, and limiting them to an artificial number penalizes groups that do very important things. Some watchdog lists treat salaries as administrative, even when they are for staff who do charitable work directly by providing information to the public or by helping patients. Is a secretary who types the order shipping tons of food to the needy unnecessary? Increasing the number of factors increases dependence on the rating group, which after all has its own motive for attracting support by "making the news" with discoveries of impropriety. Without checking more deeply, a donor cannot know whether the watchdogs are serving their own agendas or that of the public. For those having an interest in the contours and varying viewpoints on regulation in this area, a visit to the CharityChannel.com web site

archives for CYB-ACC (short for "Cyber-Accountability") can be exciting.

8. As with all important things in life, the more one puts into charity, the more one gets out of it.To understand how clients can best achieve their charitable goals, volunteer with a local charity and rise through the ranks to a responsible position. The more the estate planner learns about what is most difficult to come by, the better he or she can advise clients on how to make a difference.

Food for thought: Over the past 20 years or more, the stock of buildings in which educational and other charitable activities can be conducted has risen far faster than the funding for programs. This is widely attributed to the fact that major donors seek permanent and tangible memorials to their gifts. Thus there is a premium associated with a long-term program or unrestricted gifts, which the attorney would easily learn about by working at various levels in any charitable organization. This knowledge gives the estate planner insight that will help him or her advise the clients who are most concerned about how to approach the charity of their choice.

9. There is always room for new ways to do charity. There may be nothing new under the sun, but new tools and technologies are constantly being developed, and creativity in their use to benefit the community is a necessary element to keep the charitable spirit alive.

Food for thought: Bill Gates, Larry Ellison, and other commercial entrepreneurs are bringing their creative talents to charitable endeavors and taking on challenges that previously were considered so formidable that only governments would undertake them.

10. Lawyers should be active advocates for charitable transfers (when that isconsistent with ethical considerations), leaving it to the client to select the specific charity or cause that will benefit.Estate planners are the people whotraditionally speak to community members about gifts, donations, and other asset transfers. They should also be the most knowledgeable about the benefits and limitations associated with transfers to charity. There is no better spokesperson for the community at that point, especially when the planner is careful to avoid promoting any given charity or cause. Already legions of others appeal to the individual's selfish side by showing him or her how to keep more money for his or her family, usually by minimizing taxes. The public should have an advocate to seek repayment for all the benefits that the individual has received from society.

Food for thought. Because of a recent ethics opinion, practitioners in Maryland are uncertain to what extent they can participate in advising members of their churches, alumni associations, and other community charities about gifts to those charities. That opinion concludes that there is a nonwaivable conflict of interest for a lawyer who sits

on the fund-raising committee of his church who offers to write wills for members of his congregation for free if they make a bequest to the church. Is this the proper result, and would your answer change if the lawyer (1) were not on the fund-raising committee, (2) charged full price for his services, (3) did not require a contribution to the church, or (4) all of the above?

Mark B. Weinberg is a member of the Rockville, Maryland, firm of Weinberg & Jacobs and vice-chair of Group D, Charitable Planning and Exempt Organizations.

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Practical Considerations in Choosing a Representative

By Jessica Cousineau

Specialized estate planning attorneys aren't the only ones who run into estate planning issues. This article will look at some of the basic issues we should look at when helping clients draw up their will.

There are few clients who don't need at least a simple will. When I talk with a client I remind them that they have a will no matter what they decide to do. The only question is who writes it, the client or the state's intestatcy statute. Talking about estate planning issues can be difficult for clients, even when they sought us out. To ease this discomfort I help my clients look at it as another chance to pass on their life lessons. Finding out about the client's family and the events that helped shape their lives can give us a good idea of what is important to them and who they might want to think about when drafting their documents.

The most important decisions our clients can make regarding their wills involve who they name as personal representative, trustee, and guardian for their children. When naming these positions they need to consider the specific requirements and responsibilities for each of the positions and ensure they are appointing someone who is both capable and comfortable fulfilling those roles. This should include talking with the prospective designee to make sure they are willing to serve in this position. The client should also choose at least one alternate in case when the will comes into effect the person they chose is no longer willing or able to serve.

The personal representative is the most visible person and target for discontent throughout probate proceedings. This person should ideally be someone who understands the clients and their wishes regarding family and property, as they will have to resolve any ambiguities during probate. This should also be someone who will understand the beneficiaries will be hurting and lashing out at any available target. They should not take things said to them personally or get upset themselves. If possible this person should be someone the proposed beneficiaries would view as impartial and

fair. Appointing someone outside of the family (a close friend) or co-personal representatives (possibly both of the client's children) may help. However, the client should understand these choices can also lead to further discontent if there is any disagreement between the co-representatives or the outside representative and family. If they do decide to use either of these options they need to set in place tie-breaking procedures.

The trustee will need to be someone the client has complete confidence in. Not only is this person going to care for the funds entrusted to them, they are also asking this person to decide how they would have spent money in any given situation. The trustee will have to decide what a reasonable standard of living is for the beneficiaries and sometimes weigh the competing interests of several beneficiaries. This will need to be a person who can not only deny a beneficiary funds if warranted, but also clearly articulate to other beneficiaries why they allowed for certain expenses. The more discretion left to a trustee, the better communicator they will need to be. This is another area where appointing more than one person to serve concurrently can be helpful in some situations. If the estate is large enough to warrant an institutional trustee some families have found it helpful to appoint a family member to serve alongside the institutional trustee, giving a personal element to the decisions. Here also, there needs to be a clear dispute resolution mechanism in case of disagreement between the trustees.

Any client with minor or special needs children will also need to think about who they would like to have serve as the guardian of the children. Specific issues they need to consider include:

1. if the potential guardian has similar parenting styles and values;
2. if taking on the children would be either a financial or practical burden;
3. if money left in trust will put the clients children in a significantly different financial position than the guardian's children; and
4. if the guardian is likely to be healthy and able to provide physical and emotional support until after the child is able to move out on their own;

Additionally, if there is a special needs child involved, make sure that the clients evaluate how the proposed guardian would be able to handle those needs and ensure that they will be able to care for that child for the longer period of dependency.

The will also needs to include provisions for passing on property that is held in the client's name at the time of their death. This may include personal property, real property, bank accounts, retirement accounts, and interests in trusts or businesses. When they designate who they would like these assets to be given to, clients need to think about both economic and psychological effect individual gifts will have on both the recipient and others included in their estate plan. Writing a letter outside of the will can be a good way to explain their thinking to their family and friends. By taking a

proactive approach to the explanation, clients can try to avoid some of the probate fights that waste their assets.

For a client with assets totaling less than 2 million (2006-2008) or 3.5 million (2009) there will be no federal estate tax due. (In 2010 the federal estate tax disappears completely, but then reappears at the old level in 2011 if no changes are made. Congress is working on bills now to address that.) For those who will be above those threshold limits or may owe state death taxes there can be some simple alternative planning tools to use. The first is to use pay on death (POD) accounts for bank and retirement accounts. The bypass or credit shelter trust is a common way for married couples to avoid taxes on amounts above the exclusion limit. Life insurance can also be used to pass money on to the next generation without having it included in the decedent's estate at their death. Anyone can also reduce their taxable estate by gifting up to $12,000. per recipient each year.

In closing make sure that the client analyzes what they want to accomplish with their will and how they want to do it, paying special attention to the people they appoint.

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Ten Estate Planning Ideas For A Divorced Or Separated Persons

By Kenneth A. Vercammen, Esq.

Under the law in New Jersey, if a person dies without a Will and without children, their spouse will inherit all assets, even if they are separated from the spouse. In addition, if you have children from a previous marriage, but no Will, your separated spouse will get half your estate. In planning, make sure your assets go to your loved ones or favorite charity. Therefore, you may wish to do the following:

1. Have an Elder Law attorney prepare a Will to distribute your assets to the people you care the most about. If you already have a Will, prepare a new Will and have the old Will revoked. (Your estate planning attorney will explain this to you.)
2. Prepare a Power of Attorney to select someone to handle your finances if you become disabled. Have your old power of attorney revoked.
3. Prepare a Living Will prepared
4. Change your beneficiary on assets you may own, such as stocks, bank accounts, IRA, and other financial assets. Change your beneficiary under your own life insurance, whether whole life insurance or term insurance.
5. Contact your employer's human resources and change the beneficiary on life insurance, pension, stock options or other employee benefits. Note that if you are not yet divorced, your spouse may have to sign a written waiver permitting you to change beneficiaries.
6. Keep your personal papers at a location where family can find them.
7. Have your attorney prepare a prenuptial agreement if you decide to get married.
8. Make sure the trustee for any funds designated for your children is the "right" trustee.
9. In New Jersey, if you are married and living with your spouse, under certain instances the surviving spouse has a right to "elect against the Will" The disinherited spouse may like to elect against the Will and try to

obtain one third of the estate. Your attorney can explain how you can protect yourself and your children.

10. If you have minor children, nominate someone under a Will to serve as guardian to the children. Although the surviving parent obviously has first right of custody of children, they may not even want custody.

Conclusion

Planning can only be done if someone is competent and/or alive. Make sure your assets can be passed directly to your loved ones.

KENNETH VERCAMMEN & ASSOCIATES, PC
ATTORNEY AT LAW
2053 Woodbridge Ave.
Edison, NJ 08817
(Phone) 732-572-0500
(Fax) 732-572-0030
website: www.njlaws.com

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Undue Influence As Defense To Will Or Power Of Attorney (New Jersey)

By Kenneth A. Vercammen, Esq.

One of the major cases dealing with undue influence was *Haynes v. First National State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981). Here, the New Jersey Supreme Court held that the burden of proof establishing undue influence shifts to the proponent when a will benefits a person who stood in a confidential relationship to the decedent and there are suspicious circumstances which need explanation. The suspicious circumstances need only be slight. Id. at 897. Moreover, when the evidence is almost entirely in the possession of one party and the evidence points to the proponent as asserting undue influence, a clear and convincing standard may be applied rather than the normal burden of proof of preponderance of the evidence. Id. at 901.

The *Haynes* analysis was further extended to situations in which there is a transfer of property where the beneficiary of the property and an attorney is on one side and the donor on the other. See *Oachs v. Stanton*, 655 A.2d 965 (N.J.Super.A.D. 1995). The court in *Oachs* determined that under circumstances such as these, the donee bears the burden of proof to establish the validity of the gift, even in situations in which the donee did not dominate the decedent¹s will. Id. at 968. This rule was established to protect a donor from making a decision induced by a confidential relationship the donee possesses with the donor. Id. Again, the burden is a clear and convincing standard. Id.

The New Jersey Supreme Court in *Pascale v. Pascale*, 549 A.2d 782, 787 (N.J.1988), stated that when a donor makes a gift to a donee that he/she is dependent upon, a presumption arises that the donor did not understand the consequences of his/her act. In these situations the donee must demonstrate that the donor had disinterested and competent counsel. Id. Likewise, undue influence is conclusive, when a mentally or physically weakened donor makes a gift without advice or a means of support, to a donee upon whom he/she depends. Id.

A confidential relationship can be found to exist when one is certain that the parties

dealt on unequal terms. *In re Stroming¹s Will*, 79 A.2d 492, 495 (N.J.Super.A.D. 1951). The appropriate inquiry is if a confidential relationship existed, did the parties deal on terms and conditions of equality? *Blake v. Brennan*, 61 A.2d 916, 919 (N.J.Super.Ch. 1948). Suspicious circumstances are not required to create a presumption of undue influence with regard to inter vivos gifts and the presumption of undue influence is more easily raised in an inter vivos transfer. See *Pascale*, supra, 549 A.2d. at 787; *Bronson v. Bronson*, 527 A.2d 943, 945 (N.J.Super.A.D. 1987).

Generally, an adult is presumed to be competent to make an inter vivos gift. *See Conners v. Murphy*, 134 A. 681, 682 (N.J.Err. & App. 1926); *Pascale v. Pascale*, 549 A.2d 782, 786 (N.J.1988). However, when a party alleges undue influence with regard to an inter vivos gift, the contesting party must prove undue influence existed or that a presumption of undue influence should arise. Id. A presumption of undue influence arises when a confidential relationship exists between the donor and donee or where the contestant proves the donee dominated the will of the donor. Id.; see also *Seylaz v. Bennett*, 74 A.2d 309 (N.J. 1950); *In re Dodge*, 234 A.2d 65 (N.J. 1967); *Mott v. Mott*, 22 A. 997 (N.J.Ch. 1891); *Oachs v. Stanton*, 655 A.2d 965 (N.J.Super.A.D. 1995) (holding that where a confidential relationship existed and that the donor did not rely upon the donee, a shifting of the burden was still appropriate); *In re Neuman's Estate*, 32 A.2d 826 (N.J.Err. & App. 1943)(stating in a will context, such burden does not shift merely because of the existence of a confidential relationship, without more, as in the matter of gifts inter vivos.)

The *In re Dodge* court explained why a presumption of undue influence arises in a confidential relationship and stated: "In the application of this rule it is not necessary that the donee occupy such a dominant position toward the donor as to create an inference that the donor was unable to assert his will in opposition to that of the donee." *In Re Dodge*, 234 A.2d 65, 83 (N.J. 1967). The court referenced a much earlier case in explaining the rule's application: "It's purpose is not so much to afford protection to the donor against the consequences of undue influence exercised over him by the donee, as it is to afford him protection against the consequences of voluntary action on his part induced by the existence of the relationship between them, the effect of which upon his own interests he may only partially understand or appreciate." Id., citing *Slack v. Rees*, 47, 59 A. 466, 467 (N.J.Err. & App. 1904).

In sum, once it is proven that a confidential relationship exists the burden shifts to the donee to show by clear and convincing evidence that no undue influence was used. Although the case law indicates suspicious circumstances need not be shown, the donee must show all was fair, open and voluntary, no deception was practiced and that the transaction was well understood. *Pascale*, supra, 549 A.2d at 786. Furthermore, confidential relationships arise in all types of relationships whether legal, natural or conventional in their origin, in which confidence is naturally inspired, or, in fact, reasonably exists. *In re Fulper's Estate*, 132 A. 834 (N.J.Ch. 1926).

It appears confidential relationships exist in all cases in which: "The relations between the [contracting] parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from over-mastering influence; or on the other from weakness, dependence or trust justifiably reposed, unfair advantage is rendered probable." *Pascale*, supra, 549 A.2d. at 788, quoting *In re Fulper*, supra, 133 A. at 838; see *also In re Dodge*, supra, 234 A.2d 65 at 3.

In determining whether the Defendant was the dominant person in the relationship, there is no clear cut rule and instead the court must look to the particular circumstances of the matter. *In re Fulper*, supra, 133 A. at 844; *Giacobbi v. Anselmi*, 87 A.2d 748, 753 (N.J.Super.Ch. 1952). In *Fulper* the court determined that a confidential relationship existed in a father-son relationship in which the father was advanced in age, weak and physically depended upon the son. Moreover, since the father sought the son¹s assistance on business matters, lived with the son during the winter months and gave the son joint and several power over his checking account an actual repose of trust and confidence in the son was demonstrated. *In re Fulper*, supra, 133 A. at 846.

In the *Giacobbi* case, a confidential relationship was determined to exist between a mother and daughter, even though the mother did not suffer from mental or physical infirmity. There the mother was found to be alert, active, and somewhat independent. However, she turned to the daughter for small issues and problems when they occurred. *Giacobbi*, 87 A.2d. at 756. Therefore, the burden can shift to Defendant to prove by clear and convincing evidence the transaction was not unduly influenced.

Furthermore, where a donor makes an “improvident” gift to the donee upon whom she depends that strips the donor of all or virtually all their assets, as here, a presumption arises that the donor did not understand the consequences of their act. *Pascale*, 549 A.2d 782, 787, citing *Vanderbach v. Vollinger*, 64 A.2d 225, 228 (N.J. 1949). Under those circumstances the donee must establish that the donor had the advice of competent and disinterested counsel.

Similarly, when a mentally or physically weakened donor makes a gift to a donee whom the donor is dependent upon, without advice, and the gift leaves the donee without adequate means of support, a conclusive presumption of undue influence arises. However, when a donor is not dependent upon the donee, “independent advice is not a prerequisite to the validity of an improvident gift even though the relationship between the parties is one of trust and confidence.” *Id.* citing *Seylaz*, supra, 74 A.2d at 311. Even though suspicious circumstances are not required to be established in an inter vivos transfer for a presumption of undue influence to exist, thereby shifting the burden of proof, Plaintiff has nevertheless put the matter in issue. *Pascale*, supra, 549 A.2d at 786.

Kenneth Vercammen, Esq. is the principal of Kenneth Vercammen & Associates which represents individuals and businesses in New Jersey.

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Using Trusts To Settle Lawsuits

By Thomas E. Simmons

Special considerations come into play when a plaintiff poised to recover money is a child or an individual with a disability. In the context of settling a lawsuit or receiving judgment proceeds, cash cannot simply be delivered to such a person because of the plaintiff's legal incapacity. Instead, recovered funds must be delivered to a third party for the plaintiff's benefit. This third party can be a trustee, a custodian, or a conservator.

In most circumstances, the use of a trust offers greater flexibility and better protections of the plaintiff/client's interests. Not uncommonly, however, attorneys select a conservator or simply a minor's account to hold settlement funds in the interests of perceived cost savings or out of a desire to avoid delays. These options are viewed as less expensive for the client, easier to self-administer, and a way to avoid the need to consult with a trust attorney.

On closer examination, however, the reasons cited against the use of a trust disappear in nearly every situation. A trust can be more efficient in terms of both costs and the time required for initial implementation. When properly structured, trusts also can offer income tax advantages.

The discussion that follows applies most commonly in connection with the settlement of a personal injury claim involving an injured child or individual with disabilities. Application also could be made, however, to other tort plaintiffs, wrongful death beneficiaries, or minors or disabled persons who receive unanticipated inheritances. The discussion in many cases could apply with equal weight to the ways to manage funds from a verdict or judgment.

Minors

When the injured plaintiff is a minor, he or she is considered legally incompetent

without regard to the individual's actual financial acumen or maturity. Because of this legal incompetency, a minor may not receive funds or proceeds; title must vest in another person for the minor's benefit.

With minors--unlike individuals with disabilities--incompetency will disappear at a predictable point in time. If a settlement occurs any time before this date, however, arrangements must be made to accommodate the incompetency. This is true even if the minor will reach the age of majority in a matter of months or weeks, unless settlement can be delayed until the relevant birthday.

Custodial Account

Attorneys often look to the use of a custodial account at a bank or credit union when the anticipated settlement is relatively small. All but two states have adopted a version of the Uniform Transfers to Minors Act (UTMA). Vermont and South Carolina still retain the uniform act's predecessor, the Uniform Gifts to Minors Act (UGMA). Legislation is pending in Vermont to adopt UTMA. An UTMA account will vest in the minor's control and absolute ownership when the minor attains the age of majority or the age defined in the state's adoption of the Act (generally, age 21, although a few states permit the person creating the account to specify a later age, up to age 25).

While the minor remains a minor, the account is titled in the name of the custodian "as custodian for the beneficiary." The custodian may--but need not necessarily--be the minor's parent or legal guardian. The custodian may be an entity such as a trust company. Joint custodians also may be used.

UTMA accounts are simple and inexpensive. No legal fees are required to set up or administer the account, other than initial court approval and standard account fees or minimum balances that may apply. No bond for the conservator is required except when an interested party has successfully petitioned a court for the requirement of bond. Cash as well as investments, real property, annuities, and life insurance products may be held by a custodian.

UTMA lacks any specific guidance on when and how a custodian should expend funds for the minor's benefit. Spending power is clearly not unrestricted. Any expenditure of funds must be for the benefit of the minor. But what actually constitutes spending for the minor's benefit is distressingly vague and undefined.

UTMA accounts are not court supervised. Because of the absence of statutory guidance and court oversight, selection of a proper custodian is critical. Cases in which a custodian used UTMA account funds for the custodian's own benefit are numerous. To make matters worse, some courts have even held that UTMA assets expended for

purposes other than the minor's benefit become exposed to the creditors of the custodian. Legal malpractice for failing to exercise due care in the selection of a custodian is a real possibility.

If the minor passes away before reaching the age set by statute, the assets in the account pass to his or her estate. In most cases, this will require a probate proceeding and distribution according to the laws of intestacy.

UTMA permits the designation of successor custodians, to plan for the contingency of the first custodian's death or incapacity. When a successor custodian has not been designated, a minor's conservatorship or other court proceeding may be required.

Minor's Conservatorship

A minor's conservatorship is a court proceeding that appoints a person as conservator (or guardian, in some states) with the power to invest, administer, and distribute the minor's funds for the minor's benefit. Individuals as well as corporate trustees often serve as conservators.

Conservatorships benefit from more detailed statutory definitions of the conservator's role and responsibilities. Court oversight on at least an annual basis in the form of statutorily required accountings is an additional advantage, although the result is additional legal fees. One benefit to court oversight takes the form of protections for the minor, as any improper or questionable expenditures or investments are likely to be identified and corrected earlier.

A benefit of court oversight from a conservator's perspective is to permit the conservator to receive res judicata approvals of the conservator's actions during a reported accounting period. A conservator considering an expenditure that could be seen as improper can seek advance judicial guidance before making the expenditure. The purchase of a hot tub for a minor's physical therapy regimen, for example, might be legitimate, but other family members--including possibly the conservator--also may enjoy the tub. In this type of conflict of interest scenario, court approval can give the conservator peace of mind and eliminate the possibility of future litigation.

In cases in which ongoing court supervision is unwarranted, because of the value of the minor's assets in relation to the ongoing legal fees, most states permit the court to waive or reduce ongoing accounting requirements on a showing of good cause. In certain circumstances, the conservator can be required to post a bond in addition to, or in lieu of, future court accountings.

A minor's conservatorship terminates when the minor attains the age of majority unless

a disability qualifies the minor for a continuing conservatorship. Any conservatorship assets remaining on a minor's premature death would be distributed to the minor's estate. Again, intestacy and a probate proceeding would likely result.

Minor's Trust

The third option for a minor who is poised to receive a settlement amount is a trust. Trusts offer a great deal more flexibility than either an UTMA account or a conservatorship. Distribution standards can be clearly articulated. Final distributions to the minor can be delayed beyond age 21 or 25. A bond for the trustee may be required or waived by the trust instrument itself. Professional investment services from an institutional trustee or the use of family members as trust advisors is also possible.

In terms of legal fees, the drafting of a minor's trust is usually on a par with the fees necessary to implement a conservatorship. Court supervision of a minor's trust is available, but optional. The use of a corporate fiduciary, such as a bank trust company, can increase costs in the form of trustee fees but reduce the need for ongoing court proceedings. Although corporate fiduciaries earn their fees through professional investment decision making and experienced fiduciary management, family members may resist the use of corporate fiduciaries from a wish to eliminate trustee fees and retain control of the funds.

Often, final distributions from a minor's trust are staggered. This may be the single greatest advantage to a minor's trust. Rather than dropping a single lump sum on the minor at a relatively young age, lump sums can be fractionalized and spread over time. Not uncommonly, the trust would distribute one-third of the principal to the minor at age 21, half of the remainder at age 25, and the rest at age 30, while continuing to make additional distributions for education, health care, and support as needed.

Whenever a minor's trust is used in these scenarios, it contains detailed provisions regarding contingencies such as the minor's premature death or the trustee's inability to continue to serve. These contingencies can avoid probate costs as well as serve to plan around an intestacy situation.

In almost every situation, a minor's trust will be irrevocable. In some states (Alaska, Delaware, and South Dakota, for example), spendthrift protections can be added that protect the trust assets from most creditors of the minor beneficiary. Spendthrift protections can be especially attractive for young persons who tend to engage in higher risk activities that expose them to a greater likelihood of a lawsuit.

Income Tax Issues

The use of an UTMA or conservatorship to manage a minor's settlement funds is tax neutral. The income in either vehicle is taxed to the child at the child's rate, which is an advantage when the child pays tax at a lower rate than the parent. But the so-called "kiddie tax" eliminates most of this benefit for children under age 14.

Young children are effectively entitled to an $800 standard deduction. Thus, smaller accounts in which the child's investment income is $800 or less annually should owe no taxes. Children under age 14 who have investment income of $1,600 or more will have to pay income taxes based on their parents' highest rates, the unpopular "kiddie tax" rule. Parents may have the option of reporting the income on their own return or filing a separate tax return for the child.

Minor's Trust Tax Advantages

Income tax issues for a minor's trust can be more complicated, but not necessarily less advantageous. Unlike a custodianship or conservatorship, a trust is a separate entity. Thus, a trust will be considered a separate taxpayer and subject to trust income tax rules. Trusts are notorious for their steep marginal rates.

The highest marginal rate of 35% for nongrantor trusts is triggered at just $9,750 in annual income. For trusts with significant income, therefore, higher taxes may result through the use of a trust. This is not the case for trusts with smaller amounts of income, however. A Form 1041 tax return need not be filed for the trust unless its gross annual income exceeds $600. Often, tax-free municipal bonds or other tax-efficient investments like exchange-traded funds or individual common stocks can reduce the effect of steeper graduated rates applicable to trusts.

Trust distributions to minors will result in taxable income to the minor, subject to the kiddie tax rules. The trust itself can deduct distributions it carries out, which can soften or eliminate the effect of income taxes on trust investments. The trust will be entitled to a $300 exemption. The trust can deduct any trustee fees. Trusts, depending on how they are drafted, also do a better job of helping college students qualify for financial aid.

Plaintiffs with Disabilities

When the plaintiff is an adult with a disability, many of the same issues and considerations are present. Costs, flexibility, taxes, and careful selection of the appropriate person or entity to manage the funds are key. UTMA accounts are unavailable options, and, when public benefits are involved, a special needs trust should always be considered.

Conservatorships

Most individuals with disabilities are legally competent to manage their own affairs. When this is the case, the individual can receive funds in his or her own name, just as any other plaintiff.

Under the Uniform Probate Code (adopted in 18 states), a conservator may be appointed for an adult only when the adult's "ability to respond to people, events, and environments is impaired to such an extent that the individual lacks the capacity to manage property or financial affairs ... without the assistance or protection of a conservator." When this standard is met, the individual (a "ward" or "protected person") is eligible for a conservatorship.

Monies in a conservatorship will be considered the individual protected person's funds for purposes of determining eligibility for needs-based programs, such as Medicaid. If the individual with a disability has ongoing medical expenses, the settlement proceeds would need to be exhausted or "spent down" before Medicaid or other programs would become available.

Supplemental Needs Trusts

Whether or not a plaintiff with a disability suffers from a legal incapacity, the use of a supplemental needs trusts is always preferred whenever eligibility for benefits such as Medicaid, Supplemental Security Income (SSI), or public housing is a concern. Medicaid and SSI eligibility are, generally speaking, governed by the same set of rules, although Medicaid is overlaid with a gloss of state statutes and rules. These rules provide that, with very narrow exceptions, amounts in trust are deemed an available resource to the beneficiary, resulting in ineligibility for these public programs.

The idea of a supplemental needs trust (SNT) is to carefully restrict the authority of the trustee to make distributions so that public benefit eligibility will be preserved. The trustee is permitted to make distributions that supplement, but do not replace, the benefits the beneficiary receives. This restriction results in preserved eligibility because the terms of the trust do not permit the trustee to pay for expenses that public benefits are already supplying.

When the settlement proceeds are essentially the property of the individual with a disability, any trust that would be created would be "self-settled." Either the individual plaintiff or the court would fund the trust. In these circumstances, only two supplemental needs trust options can be considered: a "(d)(4)(A) payback trust" or a "(d)(4)(C) pooled trust." These trusts are defined by federal law at 42 U.S.C. § 1396p(d)(4)(A), (C), as well as by state statutes and regulations implementing the Medicaid program on a state-by-state basis.

A (d)(4)(A) payback trust requires that, when the beneficiary dies, all amounts remaining in the trust will be paid to the individual's state of residence up to an amount equal to the total Medicaid benefits paid during his or her lifetime. The trustee may be an individual or a corporate fiduciary. A payback trust cannot be established for individuals over age 65.

A (d)(4)(C) pooled trust must be managed by a nonprofit association that pools investments but that maintains separate accounts for each beneficiary. When a beneficiary of a pooled trust dies, the trust need only "pay back" the state Medicaid program to the extent that amounts are not "retained by the trust."

Various interpretations have been advanced for what the "retained by the trust" requirement for pooled trusts means. Some trusts retain amounts for the benefit of other surviving trust beneficiaries, but others use funds to benefit nonprofit or charitable agencies. No federal statute restricts pooled trusts to beneficiaries under age 65, but pooled trusts are not available in every state. One of the premier examples of a pooled trust is the ARC of Texas pooled trust, but availability is restricted to residents of Texas.

With either a pooled trust or a payback trust, any remaining funds will not pass to a deceased beneficiary's heirs. This can be a major issue for parents of an injured adult child with a reduced life expectancy because unspent funds may remain at death that might pass to the parents if a conservatorship were used instead. A supplemental needs trust, on the other hand, will help make sure funds are available for a longer period of time to enrich the injured person's life. Duties of loyalty and client identification come to the forefront in recommending the trust option versus a conservatorship.

Income Tax Issues

If funds for an individual with a disability are held in a conservatorship, no unique income tax rules are triggered. As with conservatorships for minors, tax neutrality is achieved. Investment income will be taxed to the individual and reported on a 1040 form.

SNT Tax Advantages

If funds for an individual with a disability are held in a supplemental needs trust, the tax treatment will vary greatly depending on the way in which the trust is drafted and administered.

Trusts are considered independent persons and therefore independent taxpayers by the IRS. Because supplemental needs trusts generally pay income tax on income in excess of a $100 exemption, the trusts are also entitled to deduct "distributable net income,"

which is distributed to the beneficiary to avoid double taxation. The beneficiary will report any distributions he or she receives as income on his or her 1040 form.

An additional tax option became available for supplemental needs trusts in 2001. An SNT that meets the requirements of a "qualified disability trust" will result in an increased exemption from $100 to $3,100 (in 2004, indexed for inflation). Code § 643 (b)(2)(C). Thus, a qualified disability trust can retain up to $3,100 in income, adding it to principal free from federal income tax, as well as most state income taxes. Because the beneficiary also is entitled to an additional personal exemption for income distributed to him or her, the use of a qualified disability trust can achieve significant tax savings as compared to a conservatorship.

A qualified disability trust, as defined by the Internal Revenue Code, means a trust that is established "solely for the benefit" of the individual under 65 years of age with a disability. The trust must otherwise meet the requirements of a (d)(4)(A) payback trust or a (d)(4)(C) pooled trust.

Conclusion

With only a few exceptions, trusts are the preferred vehicles for settlement funds for children or individuals with disabilities because of greater flexibility and protections for the individual beneficiaries. Often, trusts are overlooked by plaintiff's attorneys because of the perceived costs or delays in waiting for a busy trust attorney to complete the drafting process. On closer examination, these perceived disadvantages disappear in most situations.

Thomas E. Simmons is an associate with the Rapid City, South Dakota, law firm of Gunderson, Palmer, Goodsell & Nelson, LLP, and is the president and founder of Pooled Advocate Trust, Inc., a nonprofit 501(c)(3) corporation that manages the first (d)(4)(C) pooled trust for South Dakota residents with disabilities.

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Estate Planning

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Wills And Estate Planning "Save Money And Provide For Your Loved Ones"

By Kenneth A. Vercammen, Esq.

As average Americans, we work 80,000 hours in a lifetime, or 45 to 55 years. In spite of all the resources and assets we earn, the vast majority of us do not take the time to create a will.

National statistics indicate that 80% of Americans die without leaving a will. There are several reasons for this: fear of death; procrastination; and misinformation (people presume that only the rich need to have wills). Whatever the excuse, it is clear that people would benefit from having a will.

In the absence of a will or other legal arrangement to distribute property at death, the state must step in to administer the estate. The result can be lengthy delays before the rightful heirs receive their property. And because the state has no instructions from the deceased, no charitable gifts will be made.

If You Have No Will:

If you leave no Will or your Will is declared invalid because it was improperly prepared or is not admissible to probate:

- State law determines who gets assets, not you
- Additional expenses will be incurred and extra work will be required to qualify an administrator
- Judge determines who gets custody of your children
- Possible additional State inheritance taxes and Federal estate taxes
- If you have no spouse or close relatives the State may take your property
- The procedure to distribute assets becomes more complicated-and the law makes no exceptions for persons in unusual need or for your own wishes.
- It may also cause fights and lawsuits within your family
  When loved ones are grieving and dealing with death, they shouldn't be

overwhelmed with Financial concerns. Careful estate planning helps take care of that.

The following is a sample of a variety of clauses and items which should be included in a will:

1st: debts and taxes
2nd: specific bequests
3rd: disposition to spouse
4th: disposition of remainder of estate
5th: creation of trusts for spouse
6th: creation of trust for children
7th: other beneficiaries under 21
8th: executors
9th: trustees
10th: guardians
11th: surety or bond
12th: powers
13th: afterborn children
14th: principal and income
15th: no assignment of bequests
16th: gender
17th: construction of will
18th: no contest clause

A will must not only be prepared within the legal requirements of the New Jersey Statutes but should also be prepared so it leaves no questions regarding your intentions.

Why Periodic Review Is Essential

Even if you have an existing Will, there are many events that occur which may necessitate changes in your Will. Some of these are:

- Marriage, death, birth, divorce or separation affecting either you or anyone named in your Will
- Significant changes in the value of your total assets or in any particular assets which you own
- A change in your domicile
- Death or incapacity of a beneficiary, or death, incapacity or change in residence of a named executor, trustee or guardian of infants, or of one of the witnesses to the execution of the Will
- Annual changes in tax law

- May I Change My Will?

Yes. A Will may be modified, added to, or entirely changed at any time before your death provided you are mentally and physically competent and desire to change your Will. You should consider revising your Will whenever there are changes in the size of your estate. For example, when your children are young, you may think it best to have a trust for them so they do not come into absolute ownership of property until they are mature. Beware, if you draw lines through items, erase or write over, or add notations to the original Will, it can be destroyed as a legal document. Either a new Will should be legally prepared or a codicil signed to legally change portions of the Will.

Save Money

Your estate will be subject to probate whether or not you have a Will and in most cases, a Will reduces the cost by eliminating the requirements of a bond. With a well-drawn Will, you may also reduce death taxes and other expenses. Don't pinch pennies now to the detriment of your beneficiaries. We have attempted to briefly explain in this article some of the issues, techniques, and decisions involved in Wills, Estate Planning, and Administration of an Estate. Because the matters covered are complicated and the Federal and New Jersey laws frequently change, this article can only outline some of the many legal issues you should consider.

The proper preparation of a Will should involve a careful analysis of the client's assets, family and his/her desires.

Estate Planning is the process of examining what will happen to your property when you die and arranging for its distribution in such a manner as will accomplish your objectives.

The cost of a Will depends on the size and the complexity of the estate and the plans of the person who makes the Will.

A properly drawn Simple Will without Trust costs approximately $100.00 to $500.00. It is one of the most important documents you will ever sign, and may be one of the best bargains you will ever have.

Be sure your Will takes into account the 1997 Federal Tax changes and all New Jersey Inheritance Tax changes. Also, ascertain if your Will is self-proving, which would dispense with having to find the Will's witnesses after death.

What Is A Will? A Will is a Legal written document which, after your death, directs how your individually owned property will be distributed, who will be in charge of your property until it is distributed and who will take care of your minor children if the

other parent should die ". You should remember that the term ³property² under the law includes "real estate as well as other possessions and rights to receive money or items of value.² Everyone who has at least $3,000 in assets should have a Will. You do not have to be wealthy, married, or near death to do some serious thinking about your Will.

Administration Of An Estate

Kenneth A. Vercammen is a Middlesex County trial attorney who has published 125 articles in national and New Jersey publications on litigation topics. He has been selected to lecture to trial lawyers by the American Bar Association, New Jersey State Bar Association and Middlesex County Bar Association.

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Family Law

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Domestic Violence Trials Conducting the Initial Client Interview

By Richard A. DeMichele, Jr.

Introduction

Domestic Violence is a pattern of behavior in which one intimate partner uses physical violence, coercion, threats, intimidation, isolation and emotional, sexual or economic abuse to control the other partner in the relationship. According to the American Bar Association Commission on Domestic Violence, nearly one in three women in the United States will be a victim of domestic violence in her lifetime. This results in between three and ten million children being exposed to the ill effects of domestic violence every year. Unfortunately, domestic violence is known as the silent epidemic and far too many cases go unreported. Hopefully, with education and training, the legal profession will take strides to be an improved resource for victims.

The Initial Client Interview – the birthplace of your "discovery"

Whether you represent the victim or the defendant the initial client interview is the single most import part of your case preparation. In most states Domestic Violence trials are "summary actions" and the parties are not entitled to discovery as of right. This does not mean that the well prepared attorney will go to trial with out evidence! Lawyers are conditioned to get trial evidence though discovery. They are trained to take depositions, propound interrogatories, serve requests to produce, and serve requests to admit. None of these techniques are available in most domestic violence cases. "No discovery" means the lawyer will need to obtain evidence "informally". The client is the single best source of information and evidence about the case. Even if the client does not have the needed evidence they usually can help their attorney learn where to look.

Some things to consider when interviewing the client (victim or defendant) for the first time:

1. Explain confidentially.
    a. Lawyer – client privilege.
    b. Need for the client to be open and honest.
    c. Embarrassing information not shared with anyone.
2. Client's mental and emotional state.
    a. Determine client's ability to effectively communicate.
    b. Mental health issues.
    c. Post traumatic stress disorder.
    d. Be patient.
3. Define the relationship between your client and the other party.
    a. Household member.
    b. Child in common.
    c. Expectant child in common.
    d. Dating relationship (heterosexual or same sex).
    e. Married
    f. Formerly married
    g. Family like setting
4. Determine where the incident occurred.
    a. Public place
    b. Private residence
    c. The parties home
5. Phone/ e-mail Records
    a. Was a telephone used? With what frequency?
    b. Are there any saved voice mails?
    c. Was email used? With what frequency?
    d. Subpoena phone records.
    e. Gather copies of e-mails.
    f. What do the e-mails say?
6. Determine who was a witness.
    a. Neighbors
    b. Patrons
    c. Children
    d. Police
    e. Medical personnel
7. Did the police respond?
    a. Which township?
    b. Is a report available?
    c. How many officers responded?
    d. Did the police request an ambulance?
8. Does the defendant have Weapons?
    a. Was a weapon involved in the incident?
9. Did the police seize the defendant's weapons?

   a. did a different township police seize the weapons (defendant lives in a different town from the victim)
   b. Do you have a police report for the weapons seizure?
10. Did the victim require medical treatment?
   a. Medical records. Including diagnostic tests.
   b. Photographs of injuries.
11. Was any personal property destroyed? Can it be presented as evidence?
   a. Furniture (broken chair, dishes, electronics, etc.)
   b. Fixtures (i.e. hole in the wall, broken window, broken lock etc)
   c. Torn or damaged clothing
   d. Injured pets
   e. Repairs made

The above items are just a list of items to consider in addition to the specifics for prohibited conduct as defined by your states domestic violence statute. As your client conveys to you what happened be mindful of obtaining supportive evidence to corroborate his or her testimony. In many domestic violence cases the only evidence is the testimony of the parties and the case is decided solely on credibility. Having even a small amount of corroborating evidence can mean the difference between your client prevailing or not.

Richard A. DeMichele, Jr.
DeMichele & DeMichele, P.C.
800 N. Kings Highway
Cherry Hill, NJ 08034
(856) 755-3660

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Litigation

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A Quick Test To Assess The Legality Of Firing An At-Will Employee

By Arthur D. Rutkowski JD and Barbara Lang Rutkowski Ed., RN

The **checklist** that follows may be used to determine whether the discharge of an at-will company employee would be lawful. It applies to the discharge of both nonunion and union employees. A key to the answers appears at the end of the **checklist.**

1. Will the employee be discharged for any of the following reasons?

   a. race
   b. religion
   c. sex
   d. age(over 40)
   e. national origin
   f. children or childbirth
   g. pregnancy
   h. disability
   i. FMLA Leave

2. Will the employee be discharged for acting in concert with other employees to:

   a. organize collectively?
   b. push for a raise or shorter hours?
   c. ask for changes in other working conditions?
   d. support another employee in his/her protesting?

3. Will the discharge violate any type of implied contract or your own Employee Handbook?

   a. does the company employee handbook provide that warnings must be given before an employee may be discharged or that an employee may be discharged

only "for cause"?
b. does the company have written employee policies that promise "fair treatment"?
c. is there a written, signed employment contract?

4. Will the discharge constitute a tort?

a. has the company committed the tort of outrage, by being abusive during the discharge through either high-handed interrogation methods or flagrant misrepresentations to the employee as to the reason for discharge?
b. has the company been negligent or inconsistent by failing to follow its own policies, which failure resulted in the employee's discharge?

5. Will the employee be discharged for any of the following acts or omissions?

a. refusing to do an illegal act
b. filing a worker's compensation claim
c. reporting violations of EEO, OSHA, or ERISA regulations or
d. "whistle-blowing" on the company's possible violations of laws.

6. Will the employee be discharged for refusing to do a job he or she considers unsafe (if objective facts back up that the job is unsafe, this gives rise to a possible OSHA violation)?

a. Would doing the job reasonably place the employee in imminent danger?
b. Has the job been performed safely numerous times in the past? If so, why does the employee now consider it unsafe? Has there been an accident on the job shortly before the refusal so that the employee has reason for concern?

7. Will the company deny a hearing (with witnesses present) to provide the employee an opportunity to admit or deny the reasons for discharge?

8. Has the company failed to give the employee an oral or written warning to correct the conduct?

9. Has the company let other employees get away with what the employee is to be discharged for?

10. Did the company promise the employee, at the time of hire or subsequently, that "the job will be yours for as long as you want it?" Was the employee promised an "annual salary"?

11. Will the employee be discharged for a physical condition (for example, high blood

pressure, diabetes, or a back condition) in violation of federal and state statutes prohibiting discrimination on the basis of disability or FMLA leave? Has the company tried to make reasonable accommodations for the employee to work at some other job?

12. Is there no written documentation (for example, prior reprimands) of the conduct leading to the employee's discharge?

13. Did the employee give up a job and/or home in another city to work at the company? Were promises made to induce the employee to do so that were not kept?

14. Will the company call the discharge one motivated by a need for reduction in force when in fact the reason is unsatisfactory work performance?

15. If the company plans to hold an investigatory interview prior to the discharge, will the employee be denied a union or coworker representative, despite his or her request?

16. Ask yourself "Am I retaliating in any way 'against an Employee's protected rights?'"

Key: each of these questions states the facts of a state or federal case litigating an employer's right to discharge an at-will employee. In each case, the employer answered "yes" - and lost. Still, the answer to any particular questions does not necessarily determine whether the discharge contemplated would be lawful. It is the process of asking and answering these questions - with the help of counsel - that can alert a company to potential liability and thereby help it avoid liability. - Arthur D. Rutkowski, J.D., partner, Bowers Harrison, LLP, Evansville, IN.

A monthly publication edited by Arthur D. Rutkowski JD, a partner in the law firm of Bowers, Harrison, Kent and Miller and Barbara Lang Rutkowski Ed.D., RN. Mr. Rutkowski has represented management in labor and employment law for over 25 years and has successfully directed hundreds of union organizing campaigns for management in the USA and Canada. He is also a management member of the American Bar Association Labor Law Committee on Labor Arbitration and Collective Bargaining Agreements. Dr. Rutkowski, is president of Nurse Consultation Services and specializes in management consulting and educational seminars. Her 20 year career includes a faculty position at the University of Florida, a hospital administrative position, and her current job of being the Quality Coordinator, St. Mary's Managed Care Services, Evansville, IN

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Working With Computer Forensics Experts — Uncovering Data You Didn't Know Existed Can Help Make Your Case

By Jiyun Cameron Lee, Esq.

Attorney Jiyun Cameron Lee discusses the steps that attorneys should take to discover and preserve electronic evidence.

In this electronic age, the significance of electronic discovery is well known. Most lawyers understand that discovery of paper documents is not enough. E-mails, typed in haste and without much thought, have dealt devastating blows in many court battles.

The field of computer forensics, however, remains a mystery to many. The phrase conjures up visions of white-coated lab technicians huddled around a deceased desktop PC.

The field of computer forensics is a mixture of science and art. On the one hand, it involves the investigation and extraction of computer-related data using specialized tools. On the other hand, it involves creative sleuthing to resurrect lost evidence, sometimes with little or no knowledge of what you are looking for.

Used correctly, computer forensics can be a highly efficient -- and often cost-effective -- means of uncovering critical electronic evidence.

Active vs. Ambient Data

Electronic discovery typically involves "active" computer files -- e-mails, word processing documents, spreadsheets, databases and design schematics -- that have not been deleted and are easily accessible to the ordinary computer user. Most users do not know, however, that large volumes of potentially critical evidence exist in hidden areas of computer storage devices.

This hidden information -- "ambient" data -- exists in areas of electronic media (computer hard drives, floppies, optical discs, etc.) that are not accessible to average users. Ambient data may consist of fragments of deleted e-mails, back-up copies of word processing files, deleted directory structures and hidden files reflecting the Internet history of the computer. A careful examination of such ambient data may tell a very compelling story about document destruction or theft of intellectual property.

A Case in Point

Imagine the following scenario: Mr. Smith, a longtime employee of ABC Company, resigns from ABC to join its direct competitor, XYZ Company. At XYZ, Mr. Smith assumes responsibilities identical to those he had at ABC.

XYZ's product is suddenly transformed to resemble ABC's product. ABC suspects that Mr. Smith has taken its trade secrets to XYZ, but cannot prove it. In discovery, Mr. Smith denies having taken anything belonging to ABC.

My firm faced this very familiar scenario in a recent case involving the misappropriation of trade secrets. Using computer forensics, we were able to show not only that Mr. Smith had lied under oath but had destroyed documents to avoid getting caught.

In our case, the forensic evidence came from Mr. Smith's home computer. (Names and details have been changed.) Based on our prior experience in similar cases, we knew that computer forensics may provide the evidence we needed to establish our case. We hired New Technologies Inc. (www.dataforensics.com), based in Gresham, Ore., to conduct the forensic analysis.

The forensic analysis yielded a treasure trove of information, including the following:

- Two weeks before his resignation from ABC, Mr. Smith created a new directory on his home computer called "Business Strategy." The directory contained ABC's business plan and its proprietary market analysis;
- The "Business Strategy" directory was deleted from Mr. Smith's home computer three months after his resignation from ABC, just days after ABC filed suit against XYZ and Mr. Smith;
- Registry information (information contained in a special operating system file) found on Mr. Smith's home computer showed that the "Business Strategy" directory had been unzipped from a floppy disk. The floppy disk had never been produced; and
- Three days before his resignation, Mr. Smith downloaded an extensive database from ABC's server onto his home computer.

The forensic evidence destroyed Mr. Smith's credibility and transformed the case.

Not Hocus-Pocus, But Teamwork

There is no doubt that the evidence against Mr. Smith could not have been found without sophisticated software tools used by our computer forensics expert. However, it is also true that the evidence against Mr. Smith would not have been found in the absence of collaborative teamwork between counsel and expert.

Teamwork is key in computer forensics because typically, neither counsel nor the expert knows what he or she is looking for. This was true in the case of Mr. Smith.

We did not know what Mr. Smith did before he left ABC. Mr. Smith had been a 15-year employee with ABC and had access to documents, databases, plans and source code. For all we knew, Mr. Smith had done nothing. But his rapid transition to his new duties at XYZ -- which mirrored his duties at ABC -- suggested that he was using ABC's information.

The fact that we found ABC documents on Mr. Smith's home computer, moreover, told us nothing. Even though we were finding deleted fragments of ABC documents, that fact alone was easily refuted by Mr. Smith's claim that he sometimes used his home computer to do ABC work and deleted from his computer those documents he no longer needed.

We clearly needed more. The expert, who was skilled at the science of computer forensics but did not know the detailed facts of the case, was hampered by the volume of information available to him on the computer hard drive.

The lawyers, on the other hand, were hampered by the fact that we could not simply flip through documents to look for kernels of facts that may lead to more intriguing evidence, as we would have done in a typical case. We bridged this gap through extensive collaboration.

The lawyers reviewed the fragments of deleted documents provided by the expert to identify those that were potentially "of interest." The expert attempted to resurrect every documentary fragment so identified, and to trace the document back to determine, where possible, when and how it was created on the computer and when it was deleted. Such collaboration ultimately allowed us to retrace Mr. Smith's steps.

Working With Computer Forensics

If you are faced with a situation in which a computer may contain potentially relevant evidence, consider the following.

Prepare for discovery of not just "documents," but of original media. If you are representing the party seeking the discovery of electronic media, craft a discovery plan that targets the media, for example, a computer hard drive. Remember that in addition to "active" data in the form of word processing documents, spreadsheets and the like, "ambient" data may reveal relevant evidence.

If you are representing the party who is the target of such discovery, keep in mind that most judges in most situations will be reluctant to order a forensic examination of electronic media unless there is some established evidence of evasion or wrongdoing. Work closely with your client to minimize your opponent's ability to levy such charges.

Preserve the original hard drive. As soon as you are on notice that a computer may contain potentially discoverable evidence, preserve the original hard drive and do not allow anyone to use or access the hard drive. If the computer is in the possession of the opposing party, ask for preservation as soon as possible. This is because each time the computer is turned on, the mere operation of the computer can overwrite potential evidence. The prohibition on use and access should be extended to information management specialists employed by your client.

Know your expert. As in any field, the range of skill and expertise varies greatly among those who work in computer forensics. Most computer forensic "experts," for instance, know **how to** retrieve deleted documents and e-mails. Many, however, do not possess the knowledge or tools to do more. Carefully interview the expert and check references to determine whether the expert has the skills and the tools to conduct the type of forensic analysis you need.

Carefully craft the terms of the order allowing a forensic investigation. If a forensic investigation is allowed, you will need a stipulation or court order setting out the process for conducting such investigation. Regardless of whether you represent the party who is seeking to do the forensic examination or the party who is the target of such examination, propose terms that will give you, not your opponent, maximum control over the process. Understand how each provision in the stipulation or order will help or impair your ability to direct a forensic review by consulting with your expert.

Recognize the limits of computer forensics. I have heard computer forensics experts proclaim that they can find information on a computer storage device (e.g., a floppy disk or hard drive) even if the information has been deleted and overwritten up to seven times with other data. This may sound good, but be aware that:

- In order to find it, you have to know what you are looking for;
- In order to know that it has been overwritten, you have to know where the information is buried; and
- The astronomically expensive tools that you will need to dig through the seven layers of data are probably not available to you.

There is no guarantee that by simply hiring a computer forensics expert, you will unearth that smoking gun. However, used appropriately in the right case, computer forensics can be a cost-effective discovery tool.

Jiyun Cameron Lee is a partner in the San Francisco office of Folger Levin & Kahn. She can be reached at jlee@flk.com.

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Managing Cooperation While Minimizing Exposure: As Courts Tighten The Noose On The Selective Waiver Doctrine, Congress May Extend A Lifeline

By Matthew M. Oliver

Relying on the "selective waiver" doctrine has always been a risky strategy. Faced with a request from the government to disclose otherwise privileged documents and information resulting from an internal investigation, corporate counsel faced the difficult choice between full cooperation with the government and arming plaintiffs' lawyers with a roadmap to the conduct at issue. The selective waiver doctrine provided a potential way out of this dilemma, allowing corporations in some limited circumstances to argue that providing information to the government furthered societal interests to such a degree that any waiver of the attorney-client privilege or work product protection should not extend to plaintiffs in private litigation. Although this argument met with some initial success, it never was fully embraced by the courts on a scale wide enough to give corporate counsel substantial comfort.

The selective waiver debate took on increased significance as the government increased its focus on prosecuting corporate crime in the wake of numerous, well-publicized corporate scandals. The Department of Justice's 1999 Holder Memorandum and 2003 Thompson Memorandum formalized the requirements for corporate cooperation, and included as a factor a corporation's willingness to waive privilege. Changes to the U.S. Sentencing Guidelines in 2004 applicable to the sentencing of organizations provided similar incentives for corporations to waive privilege in order to qualify for a reduction in sentence[1]. Paradoxically, as government requests to waive privilege became the norm, the courts became increasingly reluctant to embrace the selective waiver doctrine. Thus, corporate counsel were once again faced with the stark choice of being perceived by the government as uncooperative or potentially placing the corporation at a disadvantage in civil litigation, with little room to navigate between these two extremes.

Most recently, the trend of judicial hostility towards the selective waiver doctrine has continued, with the Tenth Circuit joining the majority of Courts of Appeal that have

rejected the selective waiver concept in the context of disclosures made to the government. The recent appellate decision in the Qwest Communications Securities Litigation[2] found the company's selective waiver arguments unpersuasive, holding that class action plaintiffs were entitled to discovery of otherwise privileged documents disclosed by the company to the Department of Justice and the Securities and Exchange Commission in response to subpoenas. While certain courts in the past had reasoned that selective waiver could be available when the disclosure to the government was made pursuant to a confidentiality agreement, the Tenth Circuit in Qwest found the terms of the confidentiality agreements between Qwest and the SEC and the DOJ insufficiently restrictive of the government's ability to use the information at issue.[3]

Despite the negative trend, hope is on the horizon. At its April meeting, the Advisory Committee on Evidence Rules approved for publication and comment proposed new Federal Rule of Evidence 502, which, if ultimately approved and codified, would supplant the Qwest decision and its predecessors and cement the selective waiver doctrine as the law in the federal courts. The proposed rule provides, in relevant part, that "[a] voluntary disclosure [of privileged information] does not operate as a waiver if . . . (3) the disclosure is made to a federal, state, or local governmental agency during an investigation by that agency, and is limited to persons involved in the investigation." Under this rule, corporations would have much greater ability to protect themselves in civil litigation, while maintaining the ability to cooperate as fully as desirable with government investigations.

Not all corporate counsel are thrilled with the protections afforded under the proposed rule, however. Concerns have been expressed that the new rule will only exacerbate what many perceive to be the problematic trend of government prosecutors and regulators routinely demanding privilege waivers. Indeed, by eliminating one of the primary arguments that corporations have relied upon to justify a refusal to waive privilege, the proposed rule may only embolden prosecutors who no longer will be receptive to the argument that privilege cannot be waived due to potential repercussions in civil litigation. On balance, the freedom that the new rule will provide to corporations dealing with governmental investigations should outweigh the potential burdens, but only time will tell whether it is a panacea or simply another step in the erosion of corporate privilege.

Matthew M. Oliver is Counsel in the Litigation Department of Lowenstein Sandler PC, and a member of the firm's White Collar Criminal Defense and Securities Litigation and Enforcement Practice Groups.

[1]Earlier this spring, the Sentencing Commission voted to delete the language at issue from the Application Note to the Guidelines because of criticism and concerns that it could be misinterpreted to require privilege waivers.

[2] In re Qwest Communications Int'l, Inc. Sec. Litig., -- F.3d --, 2006 WL 1668246 (10th Cir. June 19, 2006).

[3] As a practical matter, merely convincing the government to enter into any confidentiality agreement was a coup for the corporate defense bar; an expectation that defense lawyers can dictate the terms of such agreements and prohibit the government from using information in ways critical to its investigative functions misperceives the parties' relative bargaining power.

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How To Implement Electronic Medical Records Retrieval In Your Firm

By W. Roger Smith, III, J.D.

Can you remember when your secretary typed your brief on an electronic typewriter? Can you remember when Westlaw or Lexis wasn't available for legal research? Without a doubt, the advent of the personal computer and the internet has pushed the legal profession – sometimes kicking and screaming - quickly into the age of automation. Although many lawyers are averse to change, most have now embraced the "computer age." From electronically filing lawsuits to communicating with opposing counsel or clients via e-mail, from electronic legal research to document management systems, most firms now utilize some form of computer system to handle day-to-day legal functions. In fact, many larger firms now employ IT staff to manage the complex computer software necessary to operate today's law office efficiently.

A fairly recent option available to lawyers is the electronic retrieval and management of client medical records. For firms involved in medical-related litigation, this type of system is essential, as it can save significant amounts of time, cost, and liability for missed deadlines. It certainly did for our firm! Additionally, some firms are finding expanded revenue opportunities through undertaking larger or more complex cases without significantly increasing support infrastructure.

Case Study

A quick review of the decision process in my own firm may be instructive on how an automated medical record retrieval and management system solved our problem with medical record overload.

We are a firm of 40 attorneys focused on personal injury, consumer fraud, toxic tort and mass tort pharmaceutical cases. We average about 1,350 medical record requests per month. Generally, we obtain a limited set of medical records at the initiation of a case to determine merit and fit. Statute of limitations deadlines require fast turnaround of

records requests. Cases we ultimately pursue require a large number of detailed records from numerous sources to complete trial preparation.

Our Problem

Initially, we handled all medical records requests internally. This presented a number of serious challenges, including:

- Volume: the sheer volume of medical record requests was overwhelming, even after adding additional staff to assist in the process. For each record, there was the initial contact with the provider (after tracking down appropriate contact information) and, frequently, a number of follow-up calls.
- Accounting issues: payment logistics became burdensome, as checks had to be cut for individual invoices to each provider before records would be released.
- Tracking: when attorneys needed to know the status of a records request, the information was rarely available, and a separate call had to be made to the provider.
- Time: turnaround time suffered as many records languished in the request cycle.

We investigated different ways of improving the system, including building up our in-house capabilities. But, as we looked into it, we realized that to build an efficient system would require a much larger staff than we currently had or wanted to bring on.

Our Decision

After studying many of the problems we were facing, and after researching the options we had available to us, our solution was to automate the retrieval and management of our clients' medical records. We realized relatively quickly that our solution was the right one!

Is Automated Retrieval and Management of Medical Records Right for Your Firm?

Any legal practice that regularly orders medical records should consider it. Based upon our own hands-on experience with these systems and input from a variety of other firms, we've put together this list of essential questions to consider:

> ***Is your current staff able to quickly retrieve the records you need?***
> Firms that order large amounts of medical records for multiple clients, such as the firms involved in mass tort or pharmaceutical litigation, must typically employ large numbers of staff to order, follow-up on, and process medical records requests. By utilizing an electronic retrieval and

management system, these firms can employ fewer people and save precious time and space.

Are you getting the records you ordered quickly? It is critical to get medical records back as quickly as possible. Electronic retrieval and management of medical records can shed weeks, or even months, off the lengthy process of obtaining client medical records.

Are you out of space, or is space at a premium? "Paperless" offices are becoming essential to an efficient law practice. Paper copies of medical records can easily consume most, if not all, of your office storage space. The maintenance of electronic client files, including electronically scanned medical records, saves time and space.

Is your medical record staff constantly getting pulled to help on other projects? Moving to an automated system can free up staff to work on other important areas of your case.

Are you interested in saving money? Automation provides another area for bottom line-focused firms to realize additional cost savings and profitability improvement.

Moving Ahead – Inside or Out?

So you think an electronic system of retrieving and managing medical records may be right for your firm? Your next decision is whether you want to implement an internal system with in-house managed software and hardware systems, or whether you want to completely outsource this function to an online medical record retrieval supplier.

While it is often tempting to keep the process in-house, there are a number of key considerations in this decision:

Headcount. Behind the automated tracking systems, records retrieval can be fairly labor intensive. Outsourced suppliers specialize in this type of work and are able to spread their expertise and provider contact experience across many clients. An internal solution also increases the load on IT resources.

System Cost and Expertise. An internal solution requires the acquisition and maintenance of an automated system, including software, software maintenance and upgrades, and depending on your current setup, some additional hardware (e.g. high-speed scanners, servers for databases, etc..)

Outsourcing eliminates this need entirely as the expertise in operating the system and the associated costs are included in the retrieval fees.

Training and Turnover. Another consideration for an internal solution is ramp-up, training and turnover of personnel. Again, with an outsourced solution, these headaches are, well, outsourced.

In the final analysis, these additional costs and challenges must be weighed against the outsource supplier's per-transaction fee, and their ability to deliver records in a timely manner.

Because of the expense and administrative issues involving with handling this function in-house, my firm chose to outsource the entire medical record retrieval and management function.

What Should You Look For in an Outsourced Provider?

Like anything else, there are the "Must Have's" and the "Nice to Have's".

Must Have's Short List

- Reputable supplier
- Fast turnaround
- On-line, web-based
- Simple, intuitive interface
- Real-time status tracking
- Cost controls
- National/international reach

Must Have's

Reputable Company. Not only do you need an easy-to-use system, which I discuss below, you need to use a company that is 100% behind your goal, which is the quick and efficient retrieval of client medical records.

Fast Turnaround. Typically, in moving from a manual to an electronic system, you should expect turnaround times to drop from one to three months to about three weeks. Suppliers should be able to document their performance over time and across a sampling of firms.

On-line, Web-based System. The company should provide an on-line, web-based system for ordering records. Delivery and management of the records, including storage and backup, should also be through the same web-based interface, available 24 hours a day, 7 days a week, 365 days a year.

Simple, Intuitive Interface. A simple user-interface is crucial to ensure that the initiation of records requests is quick and easy, and that status

tracking and reporting are routine and intelligible.

Real-Time Status Tracking. With a few clicks of your mouse, you should be able to determine the date of an initial medical record request, see dates and detailed call logs of conversations with medical providers, and determine the current status of a request and the estimated date of delivery.

Dedicated Account Management. The company should provide to your firm a dedicated account manager available during your normal business hours. The account manager should assist your firm with implementation and training needs regarding their system, and should quickly address your questions and solve any concerns or problems.

National/International Reach. The best outsource suppliers have developed a vast network and capability to quickly access records from virtually any medical provider in the U.S. and increasingly, overseas if necessary.

Nice To Have

Searchable Documents. OCR (optical character recognition) technology can turn medical record images (scanned copies which are not searchable) into searchable documents with annotation capabilities.

Record Consolidation. Multiple records for a client can be consolidated and indexed into one complete indexed record for easier review and case preparation.

Provider Cost Controls. Suppliers now help control costs by requiring that provider fees stay within appropriate state statutes, and by setting limits on provider fees by flagging any request that may exceed that limit *before* the request is approved for payment.

Online, Individual Client Billing Detail. Access to online tracking and invoicing data for all transactions and retrieved records related to a particular client. This feature can be an enormous time saver in approving fees and reconciling with your own accounting systems.

Interface to Case Management Systems. Ready-made interface capabilities with your own proprietary or popular off-the-shelf case management system can provide the ability to order and receive medical

records without ever leaving your electronic case files.

Customized Controls and System Flexibility. Has the ability to quickly customize the system to fit your firm's needs and is flexible enough to modify or enhance based on your user experience and feedback.

Expanded Cost Control Options. A simple interface which allows managers to review status and reasons for over-limit charges and take appropriate action.

Specialized Services. Additional services often offered include:

- Page and bates stamping
- Record sorting and indexing
- Medical reports and summaries
- Document coding
- Missing provider searches
- Records backup and storage

Nice To Have's Short List

- Searchable documents
- Specialized services
- Record Consolidation
- Provider cost controls
- Online, individual client billing detail
- Interface to case management systems
- Customized controls and system flexibility
- Expanded cost control options

The Outcome

Ultimately, Beasley, Allen selected an online, outsourced solution from MediConnect. A key factor in that decision was MediConnect's RapidRetrieve™ web interface. From any Internet-connected computer, our staff can quickly and easily manage all aspects of medical records retrieval, from initiating new requests, to tracking pending or past request status, to downloading completed records. They can also order additional services without leaving the system.

A crucial piece of the solution for us was MediConnect's willingness to work with us in designing an internal system which allows medical provider information to be collected from each client's electronic file and imported directly into MediConnect's web-based system, eliminating the need to manually enter the information into the system.

Our firm has realized significant time and cost savings with the outsourced

MediConnect solution. Turnaround times have improved dramatically, and we are more productive at lower staffing levels. Not only did we avoid hiring more people, we were able to move several employees who had been involved in requesting and tracking records to more productive work.

Conclusion

Automated medical records retrieval gives attorneys today one more good option for streamlining their practices. While there are many options and questions to consider, using an objective checklist to carefully select an outsourced supplier will help keep your firm profitably at the cutting edge.

W. Roger Smith, III, is a Shareholder at Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., a personal injury, consumer fraud, mass/toxic tort-focused law firm based in Montgomery, Alabama.

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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.

Kirby T. Griffis is a partner at Spriggs & Hollingsworth and works primarily in the area of pharmaceutical products liability defense. He practices in federal and state jurisdictions at both the trial and appellate levels. He has coordinated massive multinational discovery efforts, and he has spoken and written on various issues relevant to pharmaceutical litigation, including scientific evidence and punitive damages.

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Set Out Easements
Specify Square Footage
Identify Common Areas
Identify Store Location by Number & Location

Retail Stores - In building
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Customer Parking
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Identify Store Location
Specify Square Footage
Directory Board in Lobby
Entrance to Lobby
Signs

Office Space
Parking
Directory Board
Square Footage
Attach Drawing
Window Treatment
Appurtenant Rights
HVAC – Hours of Operation
Room Number and Floor
Restrictions As to Signage
When Is Access Permitted?
Front and rear Entrances

Apartment unit
Parking
Security
Restrictions
Attach Drawing
Windows Treatment
Suite Number and Floor

Combination office and warehouse
Access

Loading Docks
Personal Property
Square Footage of Each Area
Floor Weight Per Square Foot
Drive around building for Heavy Trucks

Use

A. Retail space
Restrict to One Use
Operating Agreement - Continuous Occupancy

B. Office space
Restrict Use, Noise, Traffic to Office

C. Apartment space
Limit to One Family
Restriction As to Noise
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Parking
Storage Area
No Other Use
No Illegal Purpose
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Tenant Considerations

Zoning - use restrictions
Adequate utilities
Right to use parking area
Does rent commence before occupancy?
Time for Making Tenant Improvements
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Environmental matters
Expansion rights

Retail Space
Clear span with no columns
Delivery area for trucks
Hours of operation
Base year for taxes

(Dorothy Stein Shops, Inc. Case, 59 Misc. 2d 122)
Restrictions on signs - name on Pylon sign

Term of Lease

1. Interim Term
2. Fixed Term
3. Be Specific As to:

   a. Termination Date
   b. Commencement Date
   c. Basis for Determining Dates

4. Statute of Frauds
5. Must Tenant Take Possession Before Commencement
6. Renewals

Options

To Renew or Extend Lease
Except Exercised Options
Agreement to Agree - Not Enforceable
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Definite As to Term and Amount
(Or Specific Formula to Determine Amount)

Option to Lease Additional Space
Designate Space
Time Option May Be Exercised

a. Definite Time
b. When Space Vacant
c. Rent Per Square Foot

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By Tenant:

a. After Certain Period
b. If Anchor Tenant Vacates

To Purchase Landlord's Fee Interest
Notice Required
Specific Purchase Price
Set Forth Terms of Contract
Time to Exercise

Right of First Refusal
Landlord Can't Sell for Less, or 5% or 10% Less, Than Offer
Period to Decide
All Terms Must Be Set Forth

Right To Match Offer
Offer Must Be Furnished in Writing
Period to Decide
Difficult for Landlord to Sell

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Fixed Rent
Interim Rent
Additional Rent
Percentage Rent

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Contributions toward Taxes, Insurance
Payment of Utilities
Payments for CAM
Nominal Amount

Fixed Rent
Methods to Determine Increases:
Appraisal
Step-up Rents
Indexed Rents

Percentage Rent

Based on:
a. Gross Sales
b. Net Profits (Not Gross Income)
c. Type of Business

Need Floor Amount
a. Natural (Rent Capitalized)
b. Negotiated

Define Terms
a. Sales
b. Gross Sales
c. Net Revenues

Requirements
Conduct Business in Full Space
Store Adequately Stocked
Hours Open for Business
Maximize Gross Sales
Monthly Report of Sales

Payment Dates
Monthly
Monthly after Floor Attained
Quarterly
Annually
Annual Adjustment

Recapture Space
If False Statements Received
If % Rent Not Paid for Set Time

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Must Prior Notice Be Given
Period Records Must Be Kept
Who Pays for Audit
Rights after Audit

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Radius Restriction
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Self-Help - Repairs (Landlord’s Obligation)
Lenders Disapprove of Full Offset
Leasehold Improvement Costs Offset

Takeover of Tenant's Former Lease
Interruption of Landlord's Services
Fire - Condemnation
Landlord's Default

Landlords's Obligations

Free Standing structure
Structural repairs but exclude

a. doors
b. docks
c. skylights
d. windows

Multi-tenant building
Structural repairs
Painting after certain period
Electrical, plumbing and HVAC systems

Obligations of Tenants
Maintain Leased Premises
Compliance with Laws
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a. Non-Structural Repairs
b. If Landlord Fails, May Tenant Do Them?
c. If Landlord Makes Repairs, Tenant Billed Comply with Building Regulations
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e. Signage
f. Window Treatment
g. Hours of Operation

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If Silent, Tenant May Assign
Consent to Assignment by Landlord

a. Not to Be Unreasonably Withheld
b. In Landlord's Sole Discretion

Recapture Premises If Assigned

Original Tenant Remains Liable
Right to Terminate if Assigned by Operation of Law
Right to Assign to Parent, Subsidiary or Affiliates

Subletting
Consent of Landlord
All or Part of Premises
Right to Terminate Lease
Right to Get Portion of Increased Rent from Subtenant
Right of Landlord to Get Rent From Subtenant
Require Subtenant to Attorn to Landlord (Attornment by Subtenant - Not Landlord's Consent)

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Interest Protected
Coverages Required

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b. Boiler
c. Dramshop
d. Plate Glass
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g. Rent or Business Interruption

Use of Proceeds
Waiver of Subrogation
Mortgagee as Loss Payee

Damage and Destruction
May lease be terminated?
Who has obligation to restore?
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Who will hold proceeds during construction?
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Condemnation
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Limit Notices for Re-Occurring Defaults
Right to Notice and Cure
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b. Non-Monetary

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Remedies:

a. Reentry of Leased Premises
b. Dispossess Tenant
c. Terminate Lease
d. Collect Rent to End of Term
e. Damages

Landlord Wants to Collect for:

a. Cost of Redecorating
b. Cost of Reletting
c. Tenant's Share of Taxes, CAM
d. Attorney's Fees
e. Lost Rents - Fixed and Percentage

Tenant Wants:

a. Release From Lease
b. Limit Rents Which May Be Collected

c. Landlord to Mitigate Damages
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a. Should Be Subordinate to All Existing and Future Loans
b. Could Require Non-Disturbance and Attornment Agmt.
c. Subordination Should Cover Modifications, and Renewals

To Reciprocal Easement Agreements

a. Include Modifications and Extensions

To Development and Operating Agreements
Quiet Enjoyment Clauses

a. Subject to Subordination

Cut-off States

a. Mortgagee Has Right to Have Mortgage Subordinate to Lease

Lease Ahead of Mortgage

a . Except Insurance Provisions

Estoppel Certificates

From Tenant

a. For Mortgagee
b. For Potential Purchaser
c. Each Lease Year for Update on Status

From Landlord

a. For Assignment
b. Leasehold Financing
c. Each Lease Year for Update on Status

Limit Number of Estoppels Per Year

Miscellaneous
Notices
Signs and Advertising
Surrender of Premises
Holding Over
Partial Invalidity
Descriptive Headings
Binding Effect
Memorandum of Lease
Integrated Agreement
Choice of Law
Waiver
Counterpart Signatures
Litigation Expenses
Pronouns

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