GP|Solo Law Trends & News
Practice Area Newsletter

A SERVICE OF THE ABA GENERAL PRACTICE, SOLO & SMALL FIRM DIVISION

LATE FALL 2007 • VOLUME 4, NUMBER 1

Dear Division Member:

Below is the first issue of *Law Trends* for the 2007-08 bar year. This is a very exciting issue and I am very happy to present it to you. 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 General Practice, Solo & Small Firm Division. This issue highlights some emerging areas, some interesting checklists, the use of e-discovery in various applications, and much more.

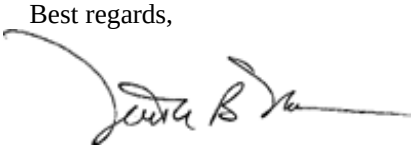
With this issue, *Law Trends* is now four years old. We hope you agree that with each edition, Law Trends continues to provide meaningful articles for each of you and continues to improve. We trust that this edition, like the others, continues to be helpful to you in your daily practice. I encourage you to take just a few moments to read the list of articles included below. 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.

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.

I hope each of you enjoys this issue of *Law Trends*. The publication will continue quarterly and we hope you continue to find it a source of valuable information. If you are interested in either writing an article or participating in the production of the newsletter, please contact Jim Schwartz at attyjls@aol.com.

I hope to see you at the ABA Mid-year Meeting in Los Angeles!

Best regards,



Keith B. McLennan
Chair, GP|Solo Division

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REAL ESTATE

Jessica K. Ferrell **FEATURED AUTHOR**

Jessica's practice focuses on environmental and natural resource litigation. She has special expertise in endangered species and marine resource issues in the western United States. Jessica received her B.A. from Cornell University and her J.D. from Lewis & Clark Law School, where she obtained a Certificate in Environmental and Natural Resources Law, won the Davis Wright Tremaine International Law Writing award, and served on the Editorial Board of the *Environmental Law Review*.

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Business Law

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Avoid Putting Your Company at Risk: The Top Ten Employer Mistakes When Investigating Employee Harassment and Discrimination Complaints

By Jane Kow

Employers have an obligation under both federal and state laws to conduct a prompt, thorough and objective investigation where an employee complains of discrimination or harassment in the workplace. However, far too often, employers have failed to properly investigate such complaints or take necessary precautions to prevent further recurrences of discriminatory or harassing conduct, resulting in claims of retaliation and ultimately, substantial liability.

In an effort to help employers avoid putting their companies at risk, the following are some tips from a seasoned employment lawyer and EEO investigator who is frequently retained to conduct independent investigations into these complaints, *after* the company has failed to take appropriate action and litigation has ensued. Here are the top ten mistakes committed by employers, which you can avoid:

1. ***Not conducting an investigation unless the complainant submits a signed written complaint or demanding that all witnesses provide their statements in writing.*** This remains one of the most common employer mistakes that typically flow from misguided company complaint procedures. However, the employer is obligated to conduct an investigation when it knows or has reason to know that an employee is being subjected to discrimination, harassment or other unlawful conduct in the workplace, even if the complainant never submits a formal written complaint and no witnesses provide written statements.

2. ***Not starting or concluding an investigation promptly.*** Waiting too long to kick off an investigation or postponing the conclusion of investigation could lead to a claim that the company ignored the complaint or failed to take the concerns seriously.

3. ***Not proceeding with the investigation when the complainant or the employee accused of harassment refuses to participate.*** Although an employer may avoid liability under Title VII of the 1964 Civil Rights Act for failure to investigate a harassment complaint, this may not be true under various state anti-discrimination laws. For example, the Ninth Circuit in Hardage v. CBS, 436 F.3d 1050 (9th cir. 2006) affirmed the dismissal of a plaintiff's sexual harassment and retaliation claims under Title VII where the employer did not fully investigate his claims or take any corrective action at the request of the complainant. However, the California Supreme Court in *Department of Health Services v. McGinnis, 31 Cal. 4th 1026* (2003) rejected the applicability of such an affirmative defense to claims brought under the CA Fair Employment & Housing Act, holding that under CA state law, an employer can only limit

its damages but not avoid liability altogether.

4. ***Not conducting an investigation in good faith without the appearance of bias or subjectivity.*** Cross examining witnesses even those whom you suspect to be withholding information, could result in a claim that the investigator was biased and therefore the investigation was not objective. Even where the investigator suspects the complainant, witness or employee accused of misconduct is lying or hiding information, the investigator should ask the witness to explain contradictory statements or evidence that refutes their statements in a respectful manner that allows them a full opportunity to respond to questions without feeling like they are being subjected to cross examination.

5. ***Failing to keep the investigation and all information gathered during the course of the investigation confidential.*** Failing to safeguard witness identities or the confidentiality of the information could result in a claim of retaliation by any witnesses who later suffer any adverse consequences following the investigation.

6. ***Allowing/inviting other third parties (complainant's friend or lawyer) to participate in the investigative interview in a non-union context.*** In *IBM Corp*., 341 NLRB No. 148 (2004) the NLRB ruled that a non-union employee does *not* have the right to have a co-worker present at an investigatory interview that the employee reasonably believes might result in disciplinary action. It stands to reason that the complainant (who is not under investigation) should not be accompanied by his/her attorney or a friend, who could impede the investigator's effort to obtain candid responses to questions aimed at uncovering the basis for his or her complaint.

7. ***Not assuring the complainant and witnesses, and reminding the employee accused of misconduct that the company has a policy against retaliation.*** The EEOC reports that retaliation claims have more than doubled since 1992 and now account for nearly a third of all claims filed with the agency. With this staggering rise in retaliation claims that typically follow a complaint of harassment or discrimination and result in punitive damages, employers should ensure all individuals who are interviewed as part of an investigation that the company has a no retaliation policy, which means that it will not tolerate any adverse action taken against anyone who makes a complaint in good faith or participates in an investigation of such a complaint and it will take disciplinary action against anyone who violates this policy.

8. ***Not interviewing witnesses all witnesses with knowledge of the relevant events, even if they did not directly witness the incident that gave rise to the investigation.*** Witnesses to whom the complainant contemporaneously complained when she was allegedly being subjected to harassment, should be interviewed to see whether what the complainant disclosed to them is consistent with what she shares with the investigator in the course of the investigation. If these accounts are consistent, it can help bolster a credibility determination.

9. ***Not reviewing all relevant records and tangible evidence.*** Too often, company investigators overlook documents that lie at the heart of an investigation (e.g., cell phone and telephone records of the complainant and the alleged harasser that can confirm the time and date of harassing phone calls).

10. ***Making inconclusive findings when faced with the classic "he said, she said" scenario.*** Not making findings after conducting an investigation is equivalent to not conducting an investigation at all. Even when the evidence is disputed by both sides, the investigator must nonetheless make findings of fact based on a preponderance of

the evidence. The investigator must make credibility determinations in the absence of direct evidence of wrongdoing (e.g. consider whether the alleged harasser has ever made the same comments to other women in the workplace, ever uses such expressions to address women, etc.).

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Personal Protection Tips
Part I: Your Car

By David Zachary Kaufman

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.

David Zachary Kaufman, J.D., Ph.D. Websites: KAUFMAN LAW , A Professional Corporation; www.karatelaw.com; and Qui Custodes , the Personal Protection Blog.

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Business Law

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Business Protection Tips
Part II: The Office (Lights and Doors)

By David Zachary Kaufman

This is the second 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.

As I said in the introductory column, 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?")

This column will begin a discussion of security tips for your Office. Why am I concerned about your office security? Several reasons: First of all, never forget that for most of us, we spend more time at the office than anywhere else. Second, everyone knows where our office is located. They have to since we sell our services to the public. Third, I don't know about the "usual" lawyer (if there is one) but most of use are at the office more than 40 hours a week. Plus, we come and go early and late, on weekends, and we usually have lots of "goodies" like money, easily disposable electronic goods (laptops, phones, etc. etc.). And we should never forget that we are also intended targets of disgruntled clients and others.

So, how can we protect ourselves at the office? . Today we discuss lights and exterior doors. In the next column we will talk about interior doors, windows and other thing to provide physical safety in your office.

Lights:

First, always leave at least some of the lights on inside your office. In an office, in the hallway, somewhere. But if the lights don't change over time, a careful observer will notice that fact. So but a cheap timer (or two) from Radio Shack or Target or somewhere that runs your lights. They aren't very expensive--I think each one goes for less than $5.00. Then set them to go on/off at different times. If you are truly paranoid, change them around every week or so. (This is what I do, but then the difference between being paranoid or not is whether there *really are* people out to get you. With my history of antagonizing people, there is no question that there are people out there who *really* don't like me.)

Outside lights should be bright and not leave any shadows people can hide in. If you are not sure, I absolutely guarantee you that someone can hide in it. You would be amazed. They should be set up so that you can see at a glance what is outside and you should be able to see this *before* you step outside the safety of your office's front door.

Something that always seemed intuitively obvious to me was brought to my attention by a young female professional when I was teaching a class in office safety: she had a ground-floor office and never closed the window blinds when she was working at night. CLOSE THEM. That way people walking buy cannot tell if you are alone or not. With varying lights as described above, a passer-by won't even be able to tell if you are there or not.

Doors:

The Door. Such a simple thing. Or is it? A door is supposed to hold others out, provide security for those inside it and allow you to control who you let in. But doors can also conceal. With the door closed, you don't know who is outside or what they are doing. This is not good. But there are solutions.

First, let's talk about the door itself. Most offices that open directly into the outside have a solid wood door. (Called a "wood core" door.) This is good. It is hard to break through a solid wood door. But offices that open up off a common lobby frequently do not have a solid wood door. They use interior doors which are hollow. These doors are worthless for keeping a determined intruder out. My daughter can kick a hole in these doors without trying too hard. A big man can punch through them. So be sure your outside door is either solid wood or steel covered with a veneer.

Second, when the outside door is installed, be sure it has a deadbolt. This is not expensive, I think the cost of a deadbolt lock versus a regular lock is about $25.00. And make the door installer use 3" screws when installing the flushplate and lock. Shorter screws can be forced out of the wood with a crowbar or tire iron and the lock is "popped". 3" screws are *much* harder to break through.

Third, the inner door to your office should also be solid wood with a deadbolt and 3" screws. If there is an intruder or irate client you want to be able to seal your office. I know 2 offices where staff is protected from the public by a ½ wall. To get in from the foyer you must be passed by the staff or an attorney. You may not wish to go this far. But I urge you to have some secondary barrier in case you need it. Some people have found it useful.

Last (for this column anyway) be sure to install a peephole and use it. I am always surprised at how many people have peepholes but never use them. Words fail me. By the way, most peepholes seem to be installed at eye level for people (usually men) who are over 5'6" tall. This means that the peephole is usually 5' or more from the floor. If you are under 5'6", be sure to have the peephole installed at a comfortable height. If you do not do this, my experience has shown that you will not use it--nobody likes to have to stand on tip-toe to look out the door. It's easier to just open the door.

Here's hoping you never need these tips.

David Zachary Kaufman, J.D., Ph.D. Websites: KAUFMAN LAW , A Professional Corporation; www.karatelaw.com; and Qui Custodes , the Personal Protection Blog.

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Estate Planning

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Estate Planning to Protect Your Children

By Kenneth A. Vercammen

It has been written that death is as much a reality as birth, growth, maturity and old age — it is the one certainty of life. Thus, there may come a time when a parent, for example, is unable due to physical or mental incapacity, to take care of his or her minor children. In these circumstances, those caring for the children will need direction. By writing a Will with instructions on guardianship, one may select someone with the legal authority to act as guardian for the minor children and provide the control over assets for the children. Wills and Estate planning are just as important for young families with minor children as they are for senior citizens.

A Trust within a Will is often a good way to prevent minor children and grandchildren from blowing their inheritance.

Trust Clause in a Will

In the event that your spouse predeceases you, dies with you in a common disaster, or dies within thirty (30) days of the date of your death, you will probably give all your property to your children in trust, to be divided into equal shares so as to provide one equal share for each of your children to be held by a Trustee selected by you. You may direct that the income and principal of each child's share shall be held as a separate trust, and distributed by your Trustee for the following uses and purposes:

A. To invest, reinvest, and keep it invested in accordance with the powers vested in your Trustee and to collect, recover, and receive rents, issues, interest, income, and profits thereof, and after deducting proper and necessary expenses of the trust;

B. To use the net income from each child's share and so much of the principal as your Trustee, in his sole discretion deems advisable for the medical expenses, care, support, and maintenance, including education in preparatory school, college, and professional school, of your children. Your Trustee may apply such income or principal for the benefit of your children directly or by payment to the person with whom your children reside or who has the care or control of your children.

C. The principal held in each child's share shall be distributed to him or her upon his or her attaining the age of thirty (30) years. At the Trustee's option, upon either of your children attaining the age of twenty two (22) years, the Trustee may distribute one-third (1/3) of the principal held in such child's share to him or her. Thereafter, the Trustee may, when either child has attained or upon attaining the age of twenty five (25) years, distribute an additional one-half (1/2) of the balance of the principal held in such child's share. Upon attaining the age of thirty (30) years, the balance of the principal held in such child's share shall be distributed to him or her.

D. In the event of the death of a child of yours prior to complete distribution of the

share set aside for him or her, such share, or the remainder thereof, shall be distributed, per stirpes, to his or her then living issue, if any, or if none, per stirpes to your then living issue.

Executors

Most individuals select their spouse to serve as Executor of their Will. In the event that he/she shall predecease you, or fails or ceases to act, then your Will should select a trusted family member or close friend to serve as successor Executor of the Will

Guardians

Most individuals appoint their spouse to act as Guardian of the person and property of your minor children. It is suggested your Will include a clause providing that in the event that your spouse predeceases you, or is unsuitable or ceases to act as Guardian of the person and property of your minor children, then you appoint a trusted family member or close friend to act as successor Guardian of the person and property of your minor children.

Your Executor, Guardian and Trustee, including your successor Executors, Guardians and Trustees, hereinafter referred to as "your Executors, Guardians and Trustees", may also be given the following powers in addition to the powers vested in fiduciaries by law, to wit:

A. To retain any investments comprising your estate at your death for such length of time as your Executors, Guardians and Trustees may think proper, without liability by reason of such retention.

B. To make such investments and reinvestments of principal and any accumulated income and in such proportions without limitations to what are known as legal investments as your Executors, Guardians and Trustees, in their sole discretion, may consider proper, including but not being limited to holding cash balances and tangible personal property, and investments in preferred and common stocks of corporations and interests in common trust funds, it being your intention to give to your Executors, Guardians, and Trustees broadest powers of investment.

C. To buy, alter, repair, improve, sell, mortgage, lease, exchange, or otherwise develop, operate, or dispose of any business, real, or personal property as part of your estate at any time for such prices and terms and in private or public transactions without court hearing, or approval, as may seem proper in the sole discretion of your Executors, Guardians and Trustees without any liability on the purchasers to see to the application of the purchase money.

D. To make distributions in cash or in kind, or partly in cash and partly in kind, and in such manner as your Executors, Guardians and Trustees may determine, and at valuations finally to be fixed by your Executors, Guardians and Trustees.

E. To compromise, arbitrate, or otherwise adjust claims in favor of or against your estate.

F. To make payments to the person with whom a minor child resides or who has the care or control of such minor, without the intervention of a guardian. Your Executors, Guardians and Trustees shall not be obligated to supervise or inquire into the application of such amounts by such person and the receipt of such person shall be a complete release of your Executors, Guardians and Trustees.

Many people direct that the provisions of a Will shall also apply to all of their afterborn children. Therefore, if you have any additional children subsequent to the execution of a Will, then wherever you have designated only your named children you intend that all of your named children shall share equally, per stirpes, in the residuary provisions of your Will. In addition to having a formal Last Will and Testament, individuals are encouraged to plan ahead and write messages to their family and executor detailing their specific desires regarding funeral and burial. Written instructions to your family and executor containing information and guidance will minimize uncertainty, confusion, and possible oversights following your death.

While the preceding article contains possible items to be discussed with your family, attorney and executor, the article is by no means exhaustive. A number of these items may not be applicable in your situation, and probably there are many others that are applicable. The important thing is to spend some time now considering what you should tell those most closely associated with you to facilitate their handling of your affairs upon your death.

Kenneth A. Vercammen is a Middlesex County trial attorney who has published 125 articles in national and New Jersey publications on Probate and litigation topics. He often lectures to trial lawyers of the American Bar Association, New Jersey State Bar Association and Middlesex County Bar Association. He is Chair of the American Bar Association Estate Planning & Probate Committee. He is also editor of the ABA Elder Law Committee Newsletter. He is the Editor in Chief of the New Jersey Municipal Court Law Review. Mr. Vercammen is a recipient of the NJSBA-YLD Service to the Bar Award.

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Family Law

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Special Issue in Same Sex Adoptions

By Brian T. Hermanson

Mary and Sue had been living together for several years when they decided that they wanted to adopt a child together. The first problem they faced was that the State they lived in would not allow two people of the same sex adopt a child. So Mary, who had the better job and credentials, adopted the child. She would never interfere with Sue's right to see the child.

Everything went well. Sue was a wonderful Mother to the child and was the most important person in the child's life. She took care of the child during the day and was the care giver for the child. Sue thought her life was perfect until Mary decided that Sue was no longer the love of her life. Mary planned to leave the relationship and take the child with her. She was, after all, the person who adopted the child. Sue had no legal rights. In order to get along, Mary and Sue signed an agreement giving Sue the right to visit the child. Sue was to pay child support. Each party had a lawyer when they entered into the agreement. Everything went well and the contract was followed until Mary and her new partner decided to terminate Sue's right to visitation with the child. As you would imagine, Sue was crushed.

What to do? In the state where Sue lived the trend has been to rule that same sex issues were against public policy and unenforceable. What could Sue do to enforce her rights?

You would be surprised how often the scenario that is described above actually occurs in this country. When your client hits your door with this problem, how do you deal with this complicated set of facts? Do you file a petition in family court to enforce visitation or do you go into civil court to enforce the contract? Can you file both ways so as to avoid finding out later that you made the wrong choice?

Certainly you need to file the case under as many theories as possible. But think about filing as one of your causes of action an assertion that raises the rights of the child. If visitation and child support are for the benefit of the child then how about claiming that the contract between Mary and Sue is a third party beneficiary contract for the benefit of the child. What you end up doing is taking the issue of the same sex relationship out of the argument and focus on the rights of the child.

The lawsuit that you file may well fail at the trial level. You will be making new law and most trial judges believe that is the role of the appellate courts. It is very easy for the trial judge to dismiss the action as being a violation of public policy.

Recently the Court of Civil Appeals from the State of Oklahoma dealt with this very scenario. In an unpublished opinion the Court, when faced with a similar fact pattern, ruled that the interest of the child was paramount. The Court of Appeals, after

reviewing the facts of the case, found that the contract was a third party beneficiary contract for the benefit of the minor child. The appellate court then sent the case back to the trial court to make a determination what was in the best interest of the minor child. We have provided a copy of the opinion for a complete review of the Court's decision.

Brian T. Hermanson is a solo practitioner from Ponca City, Oklahoma. Brian's practice is a general practice including criminal, family, personal injury, civil rights and probate practice. Brian was named the General Practice, Solo and Small Firm Division's Solo of the Year in 2005. He can be contacted at bhermanson@oklawhoma.com.

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Family Law

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Practical Aspects of a Military Divorce

By Marion J. Browning-Baker

Any attorney who has decided to represent either an active duty service member, a retired service member or the spouse of either an active duty or retired service member where one or both parties is living overseas will face certain pitfalls not normally experienced in a domestic civilian divorce.

The purpose of this article is to provide an attorney with the practical problems faced in an overseas military divorce concerning Service of Process and Jurisdictional issues over the military pension, child custody and child support.

A. Service of Process: As my law school civil procedure professor used to say, " If you don't have proper service you don't have a case." Service of process can be particularly vexing when dealing with an overseas military case. I cannot stress strongly enough the need for proper service. It does neither you or your client any good to have your final judgment set aside due to lack of proper service. An attorney representing a defendant servicemember is not off the hook. That attorney must insure that proper service has been made on the client.

If your defendant is overseas you have some options as to service.

a. **Voluntary Acceptance of Service.** If the defendant wants the divorce as much as the plaintiff then he/she may be willing to accept service voluntarily. When drafting the acceptance of service it is good practice to mention the applicable treaty in the acceptance of service.

a. **Formal Service**. If your defendant is overseas and will not accept voluntary service he/she must be served under the appropriate treaty. If you try to cut corners by using a state statue that allows for service by publication you will not have made proper service. The only time an overseas defendant may be served by publication is when the defendant's address is unknown. Many attorneys think that because a defendant has a military postal address he/she may be served via certified or registered post. That is not considered proper service unless the country in which they are located allows service in that manner. The particularities of not only the treaties and the signatories change on a fairly frequent basis. Therefore, your best resource for overseas service is the United States State Department website which lists all the service treaties and country requirements. Currently one may serve a defendant in Iraq or Afghanistan via the U.S. postal service.

One may want to think twice about serving a defendant in a war zone. I won't do it unless the servicemember also wants the divorce, because I know of at least one case where the servicemember died as a direct result of receiving the service.

B. Jurisdiction. Jurisdiction in an overseas military case generally has four aspects:

Jurisdiction over the military pension, jurisdiction over personal and real property and jurisdiction over child custody and support. Jurisdiction over personal and real property will fall under United States state jurisdictional statutes. The pitfalls lie in jurisdiction over the military pension, child custody and child support.

1. **Jurisdiction Over the Military Pension**. Jurisdiction over the military pension is controlled by federal statute; specifically Title 10 U.S.C. 1408, which states the requirements for jurisdiction over the military pension. Jurisdiction over the military pension can be compared to subject matter jurisdiction with the exception that the active duty or retired servicemember may waive the jurisdiction. Only a court of the United States and its territories may divide the military pension; no foreign court may divide the military pension.

a. **Jurisdiction Over the Active Duty Member's Pension**. In order to have jurisdiction over the military pension the follow requirements must be met:

(1) The military member cannot be resident of the state only due to military assignment, or

(2) The military member must consent to the jurisdiction of the court.

In order to understand what "The military member cannot be resident of the state only due to military assignment," means one must understand a peculiar aspect of military life. We all know that normally we are residents of the state in which we live. Even though, we were born and raised in State A and we still think of State A as home, we live in State B and that is where we are residents. But, for an active duty military member, that does not hold true A military member is allowed to maintain State A as his/her residence even though he/she is stationed (living)in State B. All states have statutory provisions which state that a servicemember who has left the state due to military orders is considered to be still resident of the state.

A servicemember's residence may be the same his/her Home of Record, which is generally where the servicemember entered the service, or it may be that the servicemember has changed his/her residence to another state. The normal indica of residency may not tell you. It is common for a servicemember to have a driver's license in State A and real property in State B but be a resident of State C. So how does the practitioner know which state is the servicemember's state of residence? The best clue is to see which state is on the servicemember's Leave and Earnings Statement (LES) or pay statement. That is the servicemember's tax home.

Consent or waiver to the court's jurisdiction is fairly obvious. If the servicemember is the petitioner he/she has consented to the court's jurisdiction. The pitfall lies with the attorney who represents a servicemember defendant. In order to preserve the jurisdiction the servicemember must invoke it otherwise the servicemember has waived jurisdiction. Therefore, when representing a defendant servicemember make sure you know his/her state of residence.

b. **Jurisdiction over the Retired Member's Military Pension.** Obtaining jurisdiction over a retired servicemember's pension is not nearly as difficult as jurisdiction over the active duty servicemember's pension. If the retired servicemember is living in the United States his/her state of residence is where he/she is physically located. However, many retired servicemembers work for the United States government overseas or live in an overseas area. If the retired servicemember is working for the US government overseas he/she retains residency in either the last state in which he/she

lived prior to going overseas or in the state of residence he/she had while on active duty. The question is how does one know? If the retired servicemember lived in a state for at least six months after retirement then that state is probably the state of residence. If the retired servicemember either retired overseas or took an overseas position shortly after retirement look to the state in which he/she was resident on active duty. Let me give you a couple of examples:

While Mary was on active duty her state of residence was in Kentucky. Her last duty station was in Georgia. Upon her retirement, rather than moving back to Kentucky while looking for a job she decided to remain in Georgia. However, she did not register to vote or apply for a driver's licence in Georgia and accepted a U.S. government position shortly thereafter. In this case one would look to Kentucky, her state of residency, while she was on active duty.

While Jon was on active duty, his state of residence was New York. His last duty station was in Virginia. Upon his retirement, he applied for a driver's license and registered to vote in Virginia. However, about six months after he retired, he was offered a position with the US government in an overseas location which he accepted. His state of residency would be Virginia.

C. Jurisdiction over Child Custody. Jurisdiction over a child for the purposes of custody in the United States is based on state law which is, usually, based on the UCCJEA. The problem arises when the child is overseas. However, the concept is the same as under the UCCJEA. Jurisdiction over a child is in the state or foreign country in which the child is habitually resident: in other words, the place in which the child has been physically located for the six months prior to the filing. Child custody jurisdiction is subject matter jurisdiction, which cannot be waived or conferred. Addressing all aspects of child custody belongs in its own article. I will address some common pitfalls found in military cases.

1. One may not bootstrap the parent's state of residency for child custody. Just because the military parent has residence in State A does not give State A jurisdiction over child custody.

2. Citizenship has nothing to do with child custody jurisdiction. If the child is habitually resident in Foreign Country A then that court has jurisdiction over child custody. It doesn't matter that the child is a US citizen.

3. This bares repeating, one may not waive or submit to the jurisdiction of a court for the purposes of child custody. Jurisdiction over one party has nothing to do with jurisdiction over the child. If the child has been in Foreign Country A for six months prior to the filing or the child was born in foreign country A and is still there, your state does not have jurisdiction.

What can you do? Your client can either apply to the foreign court for a custody order. Some foreign courts are more user friendly than others or if the parties are civil, they can agree to custody and visitation. If the parties can agree to custody I use a parenting agreement option for two reasons: First, although it is not an order, it is enforceable under contract law and second some foreign courts will not issue a child custody order if the parties are in agreement as to custody and visitation.

D. Jurisdiction Over Child Support. The jurisdiction over child support is personal jurisdiction over the parent paying the support; not the child. Again, easy enough if you've got everyone in the same place or can use a state long arm statute, or even if

the non-custodial parent (NCP) subsequently relocates to State B.

But what do you do when you represent the custodial parent (CP) in a state with which NCP has no connection and NCP goes to an overseas assignment. This is where the military member's state of residence can work to your benefit. The servicemember's state of residence always has personal jurisdiction over the servicemember. Thus, while the NCP is overseas the CP can file for child support in the NCP's state of residence. Please keep in mind that you will still have to properly serve the NCP.

E. MISCELLANEOUS PITFALLS

1. Most servicemembers have Service Member's Group Life Insurance (SGLI). SGLI is a low cost term life insurance policy that has no cash value. If you want to insure child support using life insurance do not use SGLI. There is no provision under the federal statute that governs SGLI which allows for enforcement if the servicemember decides to change the beneficiary.

2. Become familiar with the new Servicemember's Civil Relief Act (2003) (SCRA). There is a Judges' Guide in the Military Section of the ABA Family Law website.

3. As the SCRA is new, use the cases for the old Soldiers' and Sailors' Civil Relief Act.

4. Remember that the military pension is divided under state law. There is no federal statue mandating how the pension is to be divided.

5. The 10-Year Rule applies only to whether the non-military spouse is eligible to receive his/her share of the pension from the military finance department. It is not a threshold for eligibility for the pension division.

6. When drafting a visitation schedule take into consideration overseas and out of state visitation and draft appropriately.

7. If the service member is close to retirement and your state allows it, draft a re-calculation of child support to be accomplished at the time of retirement.

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Litigation

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Tips On Handling a Minimum Impact, Soft Tissue (MIST) Case

By Jonathan G. Stein

Before I can give you the tips, I should probably explain what a MIST case is and why you should care. A MIST case (also called a LIST case) is a Minimum Impact, Soft Tissue case. In other words, the vehicles have less than $1,000 in damage and the injuries are whiplash type injuries. There are a variety of technical definitions that may differ slightly, but this definition is a good working definition. As to why you should care, the simple reason is that this niche practice area can help you either expand your practice or provide work for associates who need training in litigation.

However, handling MIST cases is different than handling any other type of auto case. MIST cases are hard fought cases that require study of medicine, biomechanics and the law. And the payoff is not going to be a million dollar settlement that brings fame and fortune, but rather enough money to keep the lights on – if you can settle one per month.

For those of you who are not scared off, here are ten tips on handling MIST cases:

10. Read the literature. If someone is involved in an accident and breaks an arm, almost any attorney could settle the case. You obtain the medical bills, determine the wage loss and make a demand. Especially with a clear liability case, it is usually not rocket science. However, with a MIST case, the insurance companies have a ton of arguments that they use. These arguments range from the simple "We do not think he was hurt" to the complex "The force of the impact was 1.1 g's and the biomechanical analysis revealed that the force was not sufficient to cause the type of injury claimed." You need to know how to respond to these arguments. The only way to learn, besides experience, is to read the literature and learn the arguments.

9. Talk to the potential client. While talking to the client is always important, the single most important factor in a MIST case is the client. A poorly presenting client with a good claim will have very little, if any, value. A great client with not a lot of special damages will have an excellent claim with a lot of value. The differences in the client are small, a conviction here, or a better command of the language or even outward appearances. But, you will only learn these from a long talk with the client – not about the case, but about the client!

8. Learn to use the internet. The internet is your friend. This is even more true in a MIST case. You can use the internet to check on the defendant's assets, check on your client, obtain asset information, even get insurance information on the defendant. Myspace, Google, Friendster and the like are a wealth of information. Get an account and learn how to use them.

7. Take a look at the cars. Do not rely on the insurance company's estimate of damages. Some estimates are low because of "hidden damage," i.e. damage that cannot be seen without the car being torn down. Some estimates are low because the car is an obvious total loss and the insurance company stops writing the estimate because it is clear that the car will be a total loss. Some estimates are low because no one asked the client what damage there was and just wrote an estimate for the rear bumper. Make sure you inspect the vehicle with the client. Then, make sure the client gets an independent estimate from a body shop, which should be free.

6. Get to know the treating doctor. Your treating doctor is your second most important witness behind your client. Get to know the treating doctor. Take her to lunch and talk to her. Look her up on the internet (see 8 above) and with your state licensing department. While the case is proceeding, take a few minutes to check the doctor quarterly in case there are updates. If the doctor has problems, your case will have problems.

5. Set reasonable expectations. Tell the client from the beginning that this is not a "lottery" type case. In other words, the client will not be winning the lottery and will not be getting enough money to retire. When the client expectations are reasonable, you will have an easier time settling the case.

4. Get your discovery done timely. Discovery is usually not fun. Well, some attorneys really enjoy it. But, in the end, most people do not like creating discovery or responding to discovery. But a MIST case should go quickly. The faster you get it done, the better your return on your investment. Send out your discovery as soon as possible and make sure you respond to opposing counsel's discovery within 10 days. That will keep your case moving quickly and avoid wasting time. One trick: have your client answer mock discovery questions early in the case so when you get the real discovery in, you can answer it quickly.

3. Don't waste money. These are not huge moneymakers. (See 5 above) Therefore, you must use your money wisely. In a rear end case, do not take the defendant's deposition. It will not help you. Similarly, do not spend time and money on investigators if you can obtain the same information in a less expensive manner such as written questions to a witness.

2. Be aggressive but fair. MIST cases require some aggressiveness to settle. Despite popular misconceptions, insurance companies do not "roll over" on smaller cases. You must be aggressive, but be fair, especially to defense counsel. Do not bury your opponent in paperwork or set unreasonable deadlines. But do push the case towards resolution.

1. Try the cases. The key to running a successful MIST practice is to try cases. You must show the insurance companies you will try the cases. If you work them up and settle them, case values will decrease and you will never be able to handle these cases successfully.

MIST cases can be a productive, profitable part of your firm. However, you need to make sure that you are prepared to enter this new area and enter it fully. You cannot dabble in MIST cases and be successful. These 10 tips will give you a start.

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Improving Your Personal Injury Practice and Service to New Clients

By Kenneth A. Vercammen

Insurance companies do not pay money even on good cases unless plaintiff's counsel is properly prepared. Preparation for the case begins during the initial telephone call by the perspective client to your office. Your secretary should ascertain the person's name, who referred them, and what type of matter (i.e. automobile, fall down, medical malpractice, products liability). If you are in the office, you should then speak to the person immediately and try to find out more about their case, then schedule an appointment. If you are not in the office, your secretary should schedule the appointment. People want to speak to an attorney, not support staff. Don't lose a good case because you don't want to talk to a potential client.

INITIAL INTERVIEW AND PRE-COMPLAINT WORK

In the initial telephone conversation, you should also determine the type of matter involved. It is also my practice to try to speak to potential personal injury clients over the telephone to determine the liability issues. If it is questionable liability, we still may bring in the person for an initial consultation but we do not to spend a substantial amount of time working with the case unless we feel we have a winner. If there is a Statute of Limitations problem or if it is a type of case that you do not handle advise the caller you will not handle the case and save time and energy. We accept only good cases and reject more cases than we accept. If you don't even want to office interview the caller, politely end the conversation, thank the person for the call and provide them with the telephone number of the Lawyer Referral Service in the event they wish to proceed with their matter. If there is a potential case but you do not handle it, give the telephone numbers of attorneys you know in that field of law. Beware of people who want to know how much their case is worth over the phone.

APPOINTMENTS

Appointments should be scheduled within 24 hours following the initial telephone call. You should instruct the potential client to bring with them some of the following information: (1) police report; (2) declaration sheet; (3) health coverage; (4) property damage information; (5) photographs of the car accident site; (6) bills and business cards of health providers; (7) any other papers they have in connection with their accident. You should ask potential clients to bring this information with them because we want to make an early determination as to whether or not the client will cooperate and listen to instructions. You must make a determination early on if you even want the case. This is important in all cases, not only personal injury matters. Is the potential client a jerk or uncooperative? This client will be in your office for 1-3 years so you want to evaluate personality.

THE INITIAL INTERVIEW

You should develop a Personal Injury Interview Form which your entire staff should use in all cases so relevant information is placed in the same location in each file. You should ask all the questions contained in interrogatories at the first interview to obtain a complete background of injuries, doctors, witnesses, and circumstances of the accident. When my Personal Injury Form information is transferred to the computer, the program I developed automatically creates a Personal Injury Fact Sheet which answers most of the standard Interrogatory questions. The computer program we created also generates our own Motor Vehicle Complaint and Jury Demand. We use little match box cars for clients to help explain how an accident took place.

PI FOLDER

You must be prepared for each new potential case that you interview. We followed the suggestion of past ATLA NJ President Harrison Gordon, to have folders with retainers and medical authorizations. (See Gordon & Lynch, "Preparing the Personal Injury Case to Win," *Trial Lawyer*, page 81, March 1991.)

If you make the decision to accept the case at the initial interview, you should have the client sign medical authorizations, employment/wage authorizations, a retainer agreement, an insurance application, and any extra standard interrogatory questions. Explain when they sign the retainer that you will not charge for legal services if you do not recover anything for them, but you are required to remind them that the costs will be their responsibility. You must also explain to them the option of hiring you on an hourly rate rather than contingency.

PHOTOGRAPHS

If the client does not have photographs of his injuries or property damage, you should take photographs during the initial interview. In fall down cases, photographs of the defective location should be taken as soon as possible in the event the store or property owner corrects the problem. Immediately travel to the fall down site yourself. Your clients want action, not words. In accident cases, I often go with my client to photograph and video tape the accident location. As stated earlier in my office we only take cases where we feel we can obtain excellent results for the client. Personal observations are important, never rely entirely on what a client tells you. The "dangerous condition" is usually not as bad as your client describes it.

You must explain to clients how medical bills should be submitted to the car insurance company (PIP) and also to any health insurance companies. Make the clients understand they have responsibilities to cooperate. Explain to clients they must provide your office with the names and addresses of all new doctors. It is a good idea to explain that "letters of protection" and "liens" mean that the client eventually will have to pay medical bills out of their share of the settlement. Not all medical bills will be paid by insurance. Explain if the case settles for $12,000.00 and there are $4,000.00 in unpaid bills, the unpaid doctor bills still must be paid out of the injured person's share.

ACCEPTING THE CASE

At the initial interview, I personally open up the file on the computer. I want to show the client that I begin working for them immediately and put their case as a priority. Computer technology is essential to provide competent representation and to handle

litigation files today. We now have approximately 60 Form Letters used in Litigation Files. You should also give your clients information that explains their duties to cooperate and not discuss the case with individuals outside of the law office. After the interview we mail our client a detailed letter explaining the Personal Injury process from claim letter to complaint to discovery. If we decide not to handle the case a No representation letter is sent out by certified mail.

CLAIM LETTER

A claim letter is next dictated to the defendant and also to the defendant's carrier. In the claim letter to the defendant, you should request information regarding the insurance company, policy number and policy limits. A return, stamped post card for the defendant should be enclosed with the letter, otherwise they will not respond.

NO INSURANCE

Occasionally, after sending out the letter to the insurance company listed on the police report, they respond that the policy was canceled for non-payment. Occasionally the defendant has responded to our claim letter with a different policy number. You want to confirm insurance coverage or put your client's carrier on notice of a uninsured motorist claim if their insurance policy provides for uninsured or underinsured motorist coverage. If your claim letter to the defendant is returned for "Moved, left no address", you should write to the State Division of Motor Vehicle and local Post Office to obtain a correct address for the potential defendant.

POST INTERVIEW: THE NEXT WEEK

You should send letters to accident witnesses requesting that they call you. If it is a questionable liability case or a serious injury case, you should have an investigator directly speak with the witnesses and obtain a statement. You should also send a letter to the client's car insurance carrier requesting a copy of the declaration sheet, inquiring as to whether or not the provisions have been modified and confirm the coverages and limitations. Immediately prior to filing the complaint, we write to the Plaintiff's car insurance company requesting a copy of the entire insurance file. If they fail to comply we send the insurance carrier's claim representative a Subpoena to obtain documents in the file. Since the Defendant's carrier will probably also subpoena these records, you want to know what was obtained by the insurance carrier. When requesting hospital records or medical records, we request certified copies.

If your potential defendants are governmental agencies, immediately send out notices to them by certified mail and also complete any of the state entity's Claim Forms.

CONTESTED LIABILITY AND DEFENDANTS

You must identify all potential defendants. It is more difficult in fall down cases to determine all responsible parties. Property owners and their Insurance companies are often uncooperative in admitting control or ownership. We thus file suit and force the property owner to identify other responsible parties.

We use private investigators to conduct interviews and obtain statements. They will bring an unbiased opinion and will help you make any early determination whether to pursue a difficult contested liability case (ex. tavern assault, fall down). You may have professional photographers take photographs of fall down or car accident sites.

TO DO LISTS

Once a month, hold your calls and touch every file. Make a "to do" list and have a secretary/clerk take notes on calls to be made and things to be done. The next month do your list again and see what you have completed and what still needs to be done. Avoid malpractice and unsatisfied clients. Lazy attorneys give our legal profession a bad name.

While insurance companies brag in their advertisements of their claimed service and commitment to the policy holders, they often provide little cooperation once their policy holder is injured. If the insurance carrier fails to pay medical bills within 60 days, you may consider filing a insurance suit or demand for insurance arbitration and obtain counsel fee.

Write to the Municipal/ Police Court where the accident took place to determine the disposition of any Motor Vehicle summons. If snow or other weather conditions are in issue, obtain daily weather reports.

You and your staff have to be on top of your files. We also keep in constant contact with our clients, keeping them informed of progress.

LOST INCOME

If your clients will be out of work for at least 2 weeks, assist your clients in applying for state temporary disability benefits and insurance disability benefits. Even if our client is only going to miss a few days of work, obtain verification of wages from Plaintiff's employers and wage stubs from your client.

PRE-COMPLAINT WORK

Obtain Certified copies of all hospital records and bills. Write for all medical, diagnostic and physical therapy bills and records, together with property damage estimates. If these providers don't respond or demand exorbitant fees for photocopies, subpoena the records and documents once the complaint is filed.

Keeping clients informed and happy goes a long way to improving the public perception of the Legal Profession. Work hard and keep your clients happy.

Kenneth A. Vercammen is a Middlesex County trial attorney who has published 125 articles in national and New Jersey publications on Probate and litigation topics. He often lectures to trial lawyers of the American Bar Association, New Jersey State Bar Association and Middlesex County Bar Association. He is Chair of the American Bar Association Estate Planning & Probate Committee. He is also editor of the ABA Elder Law Committee Newsletter. He is the Editor in Chief of the New Jersey Municipal Court Law Review. Mr. Vercammen is a recipient of the NJSBA-YLD Service to the Bar Award.

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Real Estate

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Logging on Private Land and the Endangered Species Act

By Jessica K. Ferrell

When clearing timber or developing their property, private landowners must comply with state forest practices laws and, if protected species or habitat are present, the federal Endangered Species Act ("ESA"). If a plaintiff can show that there is a reasonable likelihood of future habitat modification that is reasonably certain to injure the protected species by impairing their essential behavioral patterns, for example, he may be able to obtain a preliminary injunction under the ESA to stop logging. Accordingly, the logging or developer client should be cognizant of multiple state and federal laws and regulations, including the ESA, and understand that even if regulatory bodies acquiesce or approve of the landowner's plans, development and clearing practices could still be subject to a challenge and injunction.

In the Pacific Northwest, for instance, courts have enjoined public and private land clearing to protect the Northern Spotted Owl ("spotted owl"). Most recently, a federal district court in Washington issued a preliminary injunction under the ESA barring the Weyerhaeuser Company from logging its own land in Southwest Washington. *Seattle Audubon Society v. Sutherland*, No. 06-1608, 2007 WL 2220256 (W.D. Wash. Aug. 1, 2007) appears to be the second ESA case to halt logging on private land on account of the spotted owl.[1] The lawsuit is part of a larger controversy regarding endangered species and forest practice regulation, involving federal and state regulators, the timber industry, private landowners, and conservation groups. The lessons learned in the *Audubon* case could apply throughout the country, particularly where development and timber harvesting occur within a protected species' habitat.

Background

The Spotted Owl

The spotted owl's range extends from southern British Columbia to northern California. The U.S. Fish and Wildlife Service ("USFWS") listed the species as threatened under the ESA in 1990, and designated its critical habitat two years later. Spotted owls require old growth forests to survive. In 2004, the USFWS completed a five-year status review and found that the species continues to decline, so recommended that it remain listed as threatened. Although Southwest Washington covers about 40% of the owl's historic Washington range, remaining habitat is limited and fragmented, and only a few pairs and single spotted owls remain in the area.

State and federal governments jointly regulate spotted owl habitat and recovery. Washington's Department of Natural Resources ("WDNR") administers a Habitat Conservation Plan ("HCP") to protect spotted owls on WDNR-managed forested lands within the owl's range. The HCP, a long-term management plan authorized under the

ESA, covers about 1.6 million acres of state trust land in Washington and aims to allow timber harvesting and other activities while conserving the spotted owl and other species.

Washington State Forest Practices Regulation

Washington's Forest Practices Act governs forest practices on non-federal land in Washington. WDNR administers and enforces regulations promulgated under the Act. The Forest Practices Appeals Board hears appeals of decisions related to forest practice permits. In 1996, the Forest Practices Board adopted rules regarding spotted owls that included: (1) defining and prioritizing locations of spotted owls recorded by the Washington Department of Fish & Wildlife ("WDFW") called "site centers"; (2) establishing Spotted Owl Special Emphasis Areas, intended to contribute to recovery efforts on federal lands; and (3) designating administrative "owl circles."[2]

The *Audubon v. Sutherland* Lawsuit

In November 2006, the Seattle and Kittitas Audubon Societies filed suit against Weyerhaeuser, Doug Sutherland and Vicki Christiansen of WDNR, and several other Washington State officials and agencies. The Plaintiffs alleged violations of Section Nine of the ESA on land containing owl habitat in Southwest Washington, including lands that Weyerhaeuser owns.[3] Plaintiffs sought to enjoin: (1) the State Defendants from authorizing logging of certain spotted owl habitat on private lands; and (2) Weyerhaeuser from logging within four owl circles in Washington. Plaintiffs alleged that all Defendants' actions were likely to "harm" and result in a "take" of spotted owls under the ESA. The ESA prohibits "take" of listed species; "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1531(19). The U.S. Supreme Court upheld the Secretary of Interior's definition of "harm": an act, including "significant habitat modification or degradation . . . which actually kills or injures wildlife." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 700 n.3 (1995) (internal quotations omitted) (*citing* 50 C.F.R. § 17.3 (1994)).

In May 2007, the *Audubon* Court dismissed WDNR and the Board because they are immune under the Eleventh Amendment, and dismissed individual Board members because they are immune under common law from civil suits related to lawmaking functions. In contrast, the Court found that Sutherland and Christensen, "acting as implementors and enforcers, rather than as quasi-legislators, do not enjoy sovereign immunity in their role as Department administrators." Furthermore, state regulators "purportedly authoriz[ing] activities that violate the ESA" can be liable for take in their official capacities.

Under the ESA, a plaintiff seeking a preliminary injunction must show that a violation of the ESA is "at least likely in the future." In order to obtain an injunction under Section Nine of the ESA, the *Audubon* Plaintiffs were required to show "that there is a reasonable likelihood of future habitat modification that is reasonably certain to injure spotted owls by impairing their essential behavioral patterns." The Court adopted a science-based "take" standard in the case, finding that "removal of suitable habitat below [40%] of the median annual home range area risks harming spotted owls by removing resources necessary to their essential behavioral functions."

Applying the ESA-specific test for preliminary injunctions, and noting that the ESA tipped the balance of hardships and the public interest "heavily in favor of endangered species," the Court still found that Plaintiffs failed to show a reasonable likelihood that

the State Defendants will authorize a take of spotted owls by approving Forest Practice Applications affecting suitable habitat within administrative owl circles outside of Special Emphasis Areas. The Court therefore denied injunctive relief against the State Defendants.

In contrast, the Court found that Plaintiffs demonstrated a reasonable likelihood of take in and around four owl circles on Weyerhaeuser's land. Specifically, the Court found that "[a]ny additional harvest of suitable spotted owl habitat within 2.7-miles of the center of the . . . circles is reasonably likely to harm spotted owls by impairing their essential behavioral functions. Additional harvest in these areas, particularly within the 0.7-mile core area, poses a reasonably certain threat of actual injury to these owls in the form of diminished reproductive success or death from starvation, exposure, or predation." The Court also found that Plaintiffs demonstrated that Weyerhaeuser intends to harvest suitable spotted owl habitat within the 2.7-mile radius circle around each site center, and concluded that "[a]ny harm from logging of these circles will be irreparable[,]" because "[t]he loss of a single listed species is an irreparable harm."

Accordingly, the Court issued a preliminary injunction to prevent harm to the owls in four owl circles on Weyerhaeuser property, pending a trial on the merits. Specifically, the Court enjoined Weyerhaeuser "from any further logging of suitable habitat mapped as part of the take-avoidance plans of the mid-1990s within the 2.7-mile radius circles around each of these four site centers. In those portions of these 2.7-mile radius circles that were not mapped for the take-avoidance plans, Weyerhaeuser [is enjoined from logging] any stands over 50 years in age without conducting a comprehensive survey of the harvest unit." *Id.*at *17. Trial is set for April 2008.

*Audubon v. Sutherland*in the Context of Recovery Planning and ESA Liability

This case is part of a larger debate about spotted owl recovery and timber harvest in the Pacific Northwest. In June 2007, the USFWS proposed reducing the spotted owl's critical habitat by 22 percent. 72 Fed. Reg. 32450 (June 12, 2007). In April 2007, the USFWS released a Draft Recovery Plan for the spotted owl. In that Plan, the USFWS estimated that recovery and delisting of the species could feasibly occur within the next 30 years, at a cost of approximately $198 million. That determination was based, in part, on the USFWS' conclusion that barred owls (rather than habitat destruction) represent the primary threat to the species – a conclusion that has met with significant criticism. USFWS, *Draft Recovery Plan for the Northern Spotted Owl* (2007) at vi, x. Additional research is likely needed regarding threats to the owl, as well as its behavior and use of habitat.

Lessons from *Audubon v. Sutherland* are not limited to the particular facts of timber harvest in spotted owl habitat in Washington State. The ESA provides for citizen enforcement of its provisions, 16 U.S.C. § 1540(g), and prohibits "any person" from "taking" listed species. *Id.* § 1538(a)(1). Absent an exception, immunity or other defense, even state regulators authorizing activities that could violate the ESA – for example, by issuing timber harvest permits – can be liable for take in their official capacities. Further, private actors typically enjoy fewer potential defenses than state officials. *See id.* §§ 1535, 1539 (setting forth the limited exceptions to ESA liability).

Successful "take" cases are somewhat rare, primarily due to proof issues. Still, the consequences of ESA violations can be significant. *See id.* § 1540(a)-(f) (providing for $25,000 penalties, jail time, and property forfeiture for ESA violations). In addition to statutory penalties, litigation can result in preliminary or permanent injunctive relief that can prohibit landowners from putting their property to economically beneficial

uses. If ESA-listed species or habitat exist on a landowner's property, she should consult with an attorney and work with regulators before engaging in any activity that could arguably result in a take under the ESA.

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[1] *See also United States v. West Coast Forest Res. Ltd. P'ship*, No. 96-1575, 1997 WL 33100698 (D. Or. 1997) (denying United States' motion to permanently enjoin harvest of 94 acres of privately-owned forest land containing two spotted owls, but preliminarily enjoining harvest pending completion of radio-telemetry monitoring); *United States v. West Coast Forest Res. Ltd. P'ship*, No. 96-1575, 2000 WL 298707, at *5-6 (D. Or. 2000) (same).

[2] Owl circles have a specified radius and are centered on a spotted owl site center. *See* WAC Ch. 222-16
et seq. The Board did not establish any Spotted Owl Special Emphasis Areas in Southwest Washington.

[3] Weyerhaeuser is a Washington corporation that owns and manages forest land in Washington where several spotted owl site centers are located. In 1994, the company committed to: (1) develop five-year management plans for seven such sites; (2) classify suitable habitat in cooperation with the USFWS; and (3) refrain from harvesting certain stands classified as suitable habitat within 2.2 miles of site centers for five years. In 1995 and 1996, the USFWS approved Weyerhaeuser's plans to avoid "take" of listed species. Those plans remained in effect until 1999, and were not renewed.

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Options: First Refusal Rights Could Be Thorny

By Harris Ominsky

A right of first refusal means that a recipient has the right to meet an outsider's offer when the seller puts the property up for sale. These rights sound simple and on the surface do not seem to be much of a sacrifice by the optionor, but frequently they are the subjects of litigation.

A recent Maryland appellate court decision held that the optionor may be guilty of bad faith when it contracts to sell property to a third party subject to a condition that has the primary purpose of frustrating the optionee's rights. That is particularly true when the added condition to the third-party sale would be of little benefit to the optionor. *Bramble v. Thomas,* 2007 WL 49255 (Md., Jan. 8, 2007).

In that case Bramble, a company mining sand and gravel, had acquired the parcel it was working on for its business. It had also obtained an assignment of a right of first refusal on an adjacent property owned by "Lanes." The right of first refusal gave Bramble the right to acquire the property by matching any offer that Lanes intended to accept. Lanes were required to tender such an offer to Bramble within thirty days, and Bramble was required in the agreement to match both the price and the terms of the intended sale.

A Bramble of Offers

The dispute revolves around an attempted sale by Lanes of the optioned parcel to a local real estate broker named Thomas for $105,000, and a condition in the proposed sale prohibiting mining on the optioned parcel. When Bramble received the proposed agreement, it accepted the price with one major deviation. It excluded the mining restriction.

After that, without responding to Bramble's acceptance, Lanes renegotiated with Thomas to sell the property to Thomas for $120,000. Lanes then tendered this contract to Bramble. Bramble indicated that its earlier acceptance of a $105,000 offer constituted a binding contract, and that therefore the renegotiated contract was a nullity that did not affect Bramble's rights. Bramble then retendered its acceptance of the first offer for a price of $105,000, this time including the mining restriction. This acceptance was more than thirty days after the original tender of the first Thomas offer, and so was technically not in compliance with the right of refusal.

Lanes then asserted that they could not sell to anyone because of the confusion, and attempted to return a deposit that Thomas had paid them. Thomas countered by suing to nullify the first Bramble acceptance because it did not comply with the use right, and also sought to enforce its other rights against Lanes.

The trial court granted summary judgment for Thomas, holding that Bramble's original

acceptance did not comply with the terms of the refusal right, and Bramble then appealed.

In light of the litigation, the right of first refusal, which seems simple on the surface, had become a costly and thorny issue for Bramble. It may not escape the reader that there is a certain Dickensian quality to the name of "Bramble", one of the major characters in the somewhat complex plot that has unfolded here.

Appellate Wisdom

On appeal, the Maryland Appellate Court reversed the lower court and found that the summary judgment was inappropriate because a genuine issue of fact existed. The issue was whether the first Thomas contract was tendered to Bramble in bad faith because of the insertion of a condition that was of no consequence to the parties except to frustrate Bramble's rights under the option. Thomas argued that the restriction against mining was material because the property was worth less with the restriction than without it. Therefore, Bramble would be getting a windfall if it would be able to acquire the property for the $105,000 price without the restriction.

The appellate court, in a well-researched opinion, cited conflicting precedents in various jurisdictions about whether this type of option may be exercised if accepted with variations from the triggering offer where the variations "constitute no substantial departure" from the offer. The court held, however, that whether the omission was material was not necessary to its decision in this case. It stated that there was a genuine issue here of whether the Lanes and Thomas inserted "in bad faith," the no-mining clause as a "poison pill" to discourage Bramble from exercising its right of first refusal. The court characterized the original contract that created the refusal right as a contract, which Lanes had a duty to carry out in "good faith." It held that the optionor "should not be permitted to engage in a subterfuge or devious means to prevent the other party from performing, and then use that as an excuse for failing to keep its own commitment."

The court said that when the case goes to trial, Bramble would have the burden to show that the no-mining condition was inserted in bad faith, and then that burden would shift to Thomas and Lanes to counter that. Bramble had argued that the mining restriction was inserted at the request of Thomas, in order to impede the exercise of the refusal right. Thomas was a real estate broker, knew of Bramble's use of the property, and would have no apparent reason to desire such a restriction on its own rights. Since it seems that the Lanes were selling out all of their property at that location, it is not apparent why they would have any reason to include a restriction on mining. Of course, that restriction might have value, and the Lanes may have been looking to sell that right in the future to Bramble or some other party, which would give them additional income to the $105,000 price for the property.

Frustrating Rights of First Refusal

While options of first refusal seem simple, the *Bramble* case is just one factual situation indicating how thorny they can be. For example, the court cited an earlier case where the option or included the option parcel in a proposed sale of a larger parcel, and then requested that the optionee match the price for the larger parcel.

It also cited a case where the optionors received an offer from a third party to buy their property for $200,000.00, which consisted of a combination of the offerors' home stated to be worth $48,000, with the balance to be paid in cash. When the optionee

attempted to exercise its right of first refusal, it matched the $200,000 price but conditioned the acceptance with an offer to pay $50,000 of that price with any piece of real estate of the seller's choice with a value of up to $50,000. In that case the court held that the optionee had not exercised effectively its right of first refusal because the optionors were acting "in good faith" even though the inclusion of "unique consideration" made it impossible for the optionee to match exactly the terms of the triggering offer.

The casebooks are populated with many versions of offers to sell by optionors, which tend to frustrate or defeat options of first refusal. For example, in a Wyoming case, a court barred the optionor from selling the optioned property as part of a larger sale; and in *Halyak v. A. Frost, Inc.,* the Pennsylvania Superior Court held that a landlord could not defeat the right of a tenant which had been given the right of first refusal to lease other space in the building. In that case, the landlord had offered another tenant a lease for new space, conditioned on the other tenant's obligation to surrender its occupied space. The landlord claimed that the designated space it had demanded in return was a key component to the transaction, because the landlord could lease that surrendered space at a much higher rental. Since the optionee could not possibly surrender the other space he did not occupy, he could not meet that part of the offer. See OMINSKY, REAL ESTATE LORE, PP. 329-331 (AMERICAN BAR ASSOCIATION, 2005).

Some of these issues may be headed off by proper drafting of rights of first refusal. However, for cases where that has not worked, the *Bramble* decision is trying to strike a balance between two clashing concepts. One requires an optionee to "match exactly the terms of a triggering offer (i.e., a lack of materiality of the omitted terms is no defense)." On the other hand, the bad-faith rule prohibits adding "bad faith terms to the triggering offer which are intended to nullify the right of first refusal."

This should prove to be a difficult balance for future courts to implement in dealing with rights of first refusal, particularly because a proper ruling seems to depend on getting into the head of the optionor.

The American Bar Association has recently published Mr. Ominsky's new book, Real Estate Lore, Modern Techniques and Everyday Tips for the Practitioner. *This article originally appeared in the ABA Section of Real Property, Probate and Trust Law's* RPPT eReport.

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Building Financial Independence on a Bubble?

By Frank D. Prestia

The world of real estate transactions generally involves two parties who ultimately want the same thing: a transaction. Despite their diverging interests, disputes over price and terms, irreconcilable personalities, and attention to immaterial details, an attorney needs to have some real world understanding of people and interpersonal skills to reach mutual acceptance on a contract, keep these parties together and close the transaction. In short, you can provide all the legal advice in the world, but when that newlywed couple or the family of four finally find the home they want or the seller who recently lost his/her job needs to sell, it is important to provide that advisement in light of your client's ultimate goal.

It is also important for an attorney to have some familiarity with the real estate market and the different cast of characters that are involved. In the same way, you can know all about the law, but when you go to court to litigate, you need to know the laws and case law, information about the jurors, how to "work" the courtroom, the Judge and the Judge's staff, etc.

Real Estate Bubble?

Is there a bubble? Is there a correction? Around the country many housing markets are down. In my opinion, however, in certain markets (e.g. my area of Western Washington State) housing prices have increased and been sustained by a variety of factors, the greatest being a small class of highly paid executives and transplants from other states. Even in those areas with sustained prices, the average salaries have not, do not, and will not keep up with increases in housing prices. As the rest of the economy slows it will at some point affect the local housing market.

Potential problems are compounded with the recent housing boom. Akin to the tech stock boom of the late 1990's, market exuberance pretty much made picking stocks based upon careful research and analysis seem silly and many people became stock traders and/or day traders. Furthermore, the over exuberance of the public further escalated the gravity of the situation. Unfortunately, many people learned this lesson the hard way when the tech bubble burst.

Why Does This Happen?

Every time there is an opportunity to make money in a particular industry, there is a vast influx of people to that industry. Unfortunately, some of these individuals have no expertise, no long term dedication and commitment and unfortunately no long term accountability.

Statistically, there has been a tremendous increase in the amount of licensed real estate agents in Washington, where a person without a high school diploma need only attend 60 hours of classes and pass the real estate exam to become a licensed agent.

Unlike the process and work involved in becoming an attorney, a person can typically become a real estate agent in a few weeks and regardless of how good of an agent that person is, experience is important. What sometimes happens is people hire these agents because they are family members or friends and rely on them for advice on significant transactions, which is similar to getting stock tips from your newly licensed friend/family member in the late 1990s.

The internet, online real estate courses and online real estate listings have made it easier for individuals to enter the real estate market. This is similar to someone buying pleading forms or a last will and testament on line: these forms only "scratch" the surface of the process. Simply finding a home you desire is only the first step and unfortunately many people buy a home without understanding the financial risks, costs of ownership and maintenance, and ultimately may be "upside-down" (mortgage and costs of closing are higher than profit) once the market corrects itself. Some people will even go so far as to get a real estate license to save on commission which is reminiscent of people trading stocks directly and without a broker in the late 1990s. They saved on commissions too and sure many made money, but how many were able to keep it?

Unfortunately, many people have used their home's appreciation and belief of continued appreciation to continually finance debt for vacations, investments, luxury items and so on. Well, as the market "corrects" itself, many of these same people will be unable to sell their homes with any equity, with some even having to pay off debts at closing.

In fact, many of the challenges being faced by the sub-prime mortgage and lending institutions are directly related to the overvaluation of real estate by borrowers. Specifically, if Lender lends home Buyer money to purchase a property valued at $1000,000.00 even though Buyer may have questionable financials but based on Lender's belief that property values will keep rising which protects Lender's loan by having more equity, then if values diminish by 5%, then that same property is now valued at $950,000.00 so the Lender's concerns regarding Buyer's financials and potential "time on the market" if Lender needs to sell home are compounded.

Should People Still Invest In Real Estate?

It this writer's opinion (which is admittedly a bias one since I believe in my professional services) there are definitely sound investments in real estate, as there were during the stock boom of the 1990s. Also, so long as a region's residents cannot afford the average home, there will be a need for commercial and investment rental units: apartment buildings and storage/warehouse units. Along the same lines, businesses will be unable to purchase space and will have to rent office, retail and industrial space.

However, after reaching record prices for office buildings, apartments and hotels earlier this year, commercial real estate prices are expected to decrease by up to 15% in certain markets in the next 12 to 18 months. The area potentially hit hardest will be office buildings, which I think is partially attributed to new technologies which make it easier for small professional offices (like a solo law practice) to work from home. Recently, Bloomberg Office Property Index fell 2.9 percent, led by SL Green Realty Corp., Manhattan's largest office landlord. Shares of the countries largest commercial broker, CB Richard Ellis Group Inc. dropped 9.3%. As always, potential opportunities will be available to the knowledgeable investor.

Ultimately, the world of real estate transactions is a fascinating field with plenty of

complex issues and an interesting cast of characters. Fortunately, from the real estate agents, to the lenders, to the inspectors and appraisers, to even the attorneys and parties themselves, everyone wants a smooth transaction and to "Close."

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Handy Tips for Any Home Purchase

By Frank D. Prestia

For obvious reasons, any transaction involving someone's home is a significant and important transaction. Some attention to the following subjects will add value to your services for your clients.

1) **Credit**: Since most of your clients will need a mortgage, make sure they get a copy of their credit and review it for errors. Advise them to reduce any credit card balances which are over 50% of the credit card limit. If they are going to receive the down-payment funds from any source other than their bank account, try to have those funds transferred at least 2 months before and preferably six months before attaining financing. Also, without a doubt, having a pre-approval letter is almost an unstated requirement for any bona-fide purchaser in today's market.

2) **Predatory Lending**: There are potential bills going around Congress but no clear definitions. On the one hand, equal opportunity and anti-discrimination laws have helped to expand access to capital for previously under served borrowers. On the other hand, many families suffer from abusive practices. The most common form of predatory lending is risk-based pricing where interest rates on loans are based on credit risk. Lenders argue that since a greater percentage of loans made to less creditworthy borrowers can be expected to go into default, higher prices are necessary to obtain the same yield on the portfolio as a whole. The other common practice is selling the borrower credit insurance which pays off the loan should the borrower die. Although most life insurance policies could be used the same way, credit life insurance is usually the only one the lender is licensed to sell. It is probably the most expensive form of insurance and since the single premium can be financed into the loan, people buy it since they do not have to pay up front. However, unlike a regular insurance policy, if you sell the home, this policy ends and you already paid the single premium whereas life insurance can be paid monthly according to need and transferred to other mortgages/debt obligations.

3) **Real Estate Agent Representations**: I will never forget one of my first dealings with an agent and when I asked him if he thought the building was well built, he kicked a few doors, knocked on the wall with his ear to it and gave me a confident nod. No, this was not a movie. We all love to know the answers and unfortunately we are not skilled enough to give them. My most frequent response to clients is "I am not an engineer, but I can refer you to one who can tell you about the structural integrity of the building." Whether it is roofing, plumbing, electric, etc, make sure your client is not relying on an agent's representation instead of on a licensed plumber, electrician, etc.

4) **Mortgage Brokers**: Always get it in writing. I have had brokers promise a loan that never occurs. I have seen a lender try to rescind on a mortgage commitment after issuing a commitment. Unfortunately, once your client waives the financing

contingency then that is usually the last contingency before closing. If there is a problem with the loan, then they can lose the earnest money. I always try to get a written commitment with no conditions or at least the conditions in writing so to minimize my client's risk.

5) **Extended Title Insurance**: Easy to remember and it costs a little more, but it is worth it.

6) **Home Inspectors**: As with the increase in real estate agents, there has been an increase in home inspection companies. Ultimately, I always refer my clients to a licensed engineer and not someone who just received their certificate in the mail.

7) **Agent Referrals**: Like most agents, I have my network of lenders, inspectors, etc that I make available to my clients as part of my value added services. However, many real estate companies legally disclose to their clients that the company has an interest in and/or compensation agreements with mortgage lenders, escrow companies, etc. Unfortunately, most people simply sign these disclosures when they have no idea about the amount of compensation involved. For example, I have been offered as much as 1% of the total transaction by a lender who wanted me to refer my client to them. I am proud to say that I have never, ever accepted any such rebate or compensation whatsoever. In my opinion, my client will incur the cost at some level and so I feel unethical receiving monetary compensation above my commission. Despite my position, there are an increasing number of real estate agencies using such disclosures and agents receiving anything from monthly desk fee payments to plain cash.

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