GP|Solo Law Trends & News
Practice Area Newsletter

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

August 2005 **Volume 1, Number 4**

In this issue...

Dear Section Member:

Last fall, we launched *GP|Solo Law Trends & News*, a new member service. At that time, I told you this e-newsletter would be published quarterly and would be a product of articles, checklists, valuable practice information, practical tips and information from each of our substantive practice areas in the Section. I am very pleased to attach the fourth and final edition for the 2004 – 2005 bar year. This e-newsletter has been very warmly received by the members of the Section and we have received many notes and emails about this addition to the Section's on-line publications.

Like the previous 3 issues, this newsletter contains many timely articles, checklists and practical tips on topics of importance to our members. We hope they are helpful to you in your daily practice. I strongly urge each of you to take a few moments to read the wonderful work here. Of course, they are yours to download and keep as a reference for the future. And, as in the past, you can either download specific articles or you may download the entire newsletter by clicking the pdf link located below and read all of them at a later time when you are away from your computer.

There are many Section members integrally involved in putting this e-newsletter together. However, the individual member-volunteer that has taken the responsibility of coordinating the entire effort of making sure this publication is in fact produced on a timely basis is Jim Schwartz from Chicago. Without Jim, the quality and timeliness of this publication would have easily faltered. I publicly thank him for producing this new publication for the Section. Also, without the hard work and assistance of the Practice Area Coordinators and each of the E-Newsletter editors, none of this would have been possible and I thank each of them very much. Thanks also goes to Doug Knapp and the other staff members for their hard work in making this project such a success this

year.

I hope each of you have had as much enjoyment in reading the Law Trends articles this year as I have. It will return next year and I know it will continue to be as informative as it was this year. If you are interested in either writing an article for the fall issue or coordinating the behind the scene action of producing a newsletter or are interested in getting involved in any way, please contact Jim Schwartz, *Law Trend's* editor, at attyjls@aol.com. Jim can direct you to the proper editor if you would like to submit an article to be considered for publication in one of these newsletters or help you get involved in publishing it. I know that Jim is always seeking new writers and is willing to work with volunteers in submitting articles and working on the newsletter. Also, if you have any questions, comments or suggestions about this issue or other things you would like to see in the future, please contact Jim or me.

Lastly, let me thank all the readers who have either commented on our work or those who just sit quietly and read the newsletter. I have come to know many of you over the years and I look forward to seeing you at the annual meeting in Chicago later this week. For those of you that I have not yet met, please feel free to introduce yourself to me…..and if you are near the Sheraton Towers, please stop by the Chair's Suite and say hello.

Best regards,

Lee S. Kolczun, Chair

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Born and raised in Queens, New York, Jeffrey received his Bachelor's Degree from Northern Arizona University in 1992, his Masters of Public Administration from Arizona State University in 1994, and his law degree cum laude from Whittier Law School in 1998. Jeffrey has held numerous leadership posts in the ABA and other bar associations. Jeffrey spent the past 5 ½ years as a prosecutor, first as a Deputy Pima County Attorney and as an Assistant United States Attorney in Tucson, Arizona. He was also named 2004 Prosecutor of the Year by the Federal Law Enforcement Officers Association, Southern Arizona Chapter. Jeffrey recently transitioned into private practice and is an associate with Waterfall, Economidis, Caldwell, Hanshaw, and Villamana, in Tucson.

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

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A Primer on Sweeping Bankruptcy Reform

By Marc Stern

On April 20, 2005, President Bush signed the Bankruptcy Abuse Reduction and Consumer Protection Act into law. This act has engendered a number of acronyms, BAPA, BACA, and, my personal favorite, the Bankruptcy Abuse Reform Fiasco or BARF. A blacklined, hyperlinked version of the bill may be found at http://weberlaw.com/BARF/barf-main-index.htm. A downloadable pdf of the bill may be found at http://www.dpw.com/practice/code.blackline.pdf. Some of the act's changes became effective when the bill was signed; the majority of the changes will be effective as of October 17, 2005. Both websites have charts showing the different effective dates of the various sections.

This act is the most sweeping bankruptcy system reform since 1978, substantially effecting every chapter of the bankuptcy code. Of the changes, the "means test" was the most discussed and has received the most media attention. In a nutshell, the means test differentiates debtors into two categories - those above and those below the state's median income. The inquiry ends if the debtor falls below the state's median income. If the debtor's median income is above the line, the debtor's actual expenses are compared against the IRS standards for the city in which the debtor lives. There are then further deductions for payments to secured and priority debts, and other specified items. If the debtor still has a surplus, the filing is presumed abusive and the debtor is supposed to file a Chapter 13.

Whether the means test will have its intended effect is a substantial and untested question. What is clear is that the calculations necessary to make these determinations are substantial. In the future, bankruptcy filings will be much more complex and time consuming. In addition to adding to the complexity of the filing, Congress changed the role of the attorney in the bankruptcy process. The new code implements a series of requirements upon the debtor's attorney to insure the accuracy of schedules. Section 102 of the Act (codified in Section 707) requires the attorney to conduct a reasonable

investigation into the circumstances giving rise to the bankruptcy, and sanctions the attorney if, “after inquiry,” the attorney files schedules that are materially false. Unfortunately, this leaves the bar community with little certainty. There are 3 different tests arguably using 3 different standards. If you are going to represent parties in bankruptcy proceedings, you should be aware of these substantial changes. Contrary to popular belief, there is some indication that increased liability for incorrect statements will also effect creditors’ lawyers.

The act also creates a new class, the “assisted person.” An assisted person is one with less than $150,000 of non-exempt property - not equity in the non-exempt property, just property. Anyone giving bankruptcy advice (with certain exceptions) must identify themselves as follows: “A debt relief agency. We help people file for bankruptcy,” or something similar. This arguably means that a family law attorney telling his client, “I don’t do bankruptcy, have no idea what it is about, but you should see a bankruptcy lawyer,” or a creditor saying, “I don’t care, file bankruptcy, your debt is not dischargeable,” is a debt relief agency and must make the required disclosures. The new bankruptcy act also places strict, specific requirements on the attorney representing the assisted person, prohibiting certain types of legal advice that you can not give the assisted person. It requires complicated record keeping and also requires a written retainer agreement with statutory language.

Next, the act adds new classes of debt not entitled to discharge, including property settlement. In the past, property settlement obligations were dischargeable in Chapter 7 if not objected to. This is no longer the case and remain dischargeable in Chapter 13.

The Act also completely changes Chapter 13. Debts that were previously dischageable in Chapter 13 (but not Chapter 7) are, with certain exceptions, not dischargeable in Chapter 13. There are different standards for disposable income in Chapter 13. Repayment of loans to 401(k) plans is not counted as disposable income. Contributions to retirement plans are also not counted for Chapter 13 purposes. Timelines for confirmation of plans are substantially shortened. Stripdown of secured liens is limited to replacement value without regard to two of the Rash factors. The failure to include additional factors means that the valuation is still subject to dispute. There are further limitations on strip down.

There are also major changes to the law of exemptions and homestead, and should be an area of focus and study because the new provisions are complex. For example, the look back period for determining which exemptions to use is much longer.

Chapter 12 has been permanently reenacted. The debt limitation has been changed and has been extended to Family Fishermen. The percentage of income from fishing or farming operations has been decreased from 80% to 50%.

Some of the lesser-known changes can be found in Chapter 11. Small businesses, another defined term, must file a plan within 6 months. Other Chapter 11 cases must propose a plan within 18 months. In the new act, landlords and utilities get substantial relief. The debtor must assume or reject the lease within 120 days. That time may be extended once for 90 days and may not be extended again without the consent of the lessor. Utilities are entitled to adequate assurance of future performance, probably in the form of cash or a bond.

This article highlights just a few of the substantial changes that arise out of the Bankruptcy Abuse Reduction and Consumer Protection Act. Once the amendments become effective, what we once thought of as bankruptcy practice will change forever.

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Criminal Law for the Business Practitioner

By Hugh Ray

There is an old saying “you may beat the rap but you won’t beat the ride.” The Supreme Court’s recent decision in favor of Andersen proves that the legal aspects are sometimes secondary. Corporations live and die by their reputation. Sometimes a client needs a good criminal defense attorney. Sometimes it needs a damage control team. Sometimes nothing helps. What do you do, what can you do, when 60 minutes and the FBI show up at your client’s door? Somehow “no comment” just won’t cut it. Your client wants your advice, but realize that there is no cookie-cutter solution to the corporate criminal investigation.

First, meet with the board where you explain who you represent. Do you represent the individual or the corporation? You only represent one. To represent both is a prefabricated conflict of interest. It is likewise unethical to “wink” at representing the corporation but to have the individual’s interests at heart.

Many criminal defense attorneys then play a game of “what if” with the board members to find out what evidence is likely to be found by the prosecution. (“What if they find cash sent to a foreign official? What purpose would that money have had?” “What if they find a thank-you note? Who would that note have been written to?”) While a common practice for some, this “game” looks unethical to the layman. It also underestimates the intelligence of the board. While a defense attorney may have to spell out criminal elements and defenses to an indigent defendant, a savvy corporate board usually knows more. It is dangerous to play the “what if” game in today’s corporate culture. The first one who answers a “what if” may be fired and blamed for all the corporation’s wrongs. Your duty would be to report the answer to the board. Thus, an educated professional is unlikely to play such a game.

Instead, consider investigating your client. Interview the board but take their

explanations with a grain of salt. Be careful to remind them that you are not their lawyer. Ask the board to appoint an outside responsible person to act for the corporation in this matter. Recommend the board members get individual representation from another lawyer. Know your client and don't trust that the board will act for the client's interests. The Company comes first -- not the members of the board who (as luck will have it) has a convenient explanation for this "misunderstanding".

Second, realize that the corporate privilege and confidentiality rules don't work like they do for individuals. For instance, in a subsequent bankruptcy, the Chapter 7 Trustee can waive the corporate privilege. If the company is sold – the new company will own the privilege. One of the board members can publish a tell-all book. The confidentiality rules can be changed or abrogated by the legislature. Under the new Model Rules, the scope of permissible disclosures has expanded to include protection of the pecuniary interests of others. In most states, permissible disclosures are still limited to situations where the attorney's services have been used to commit a crime or fraud.

Thus, whether you document every conversation or not, your actions may be second-guessed later. Be consistent. If you document conversations, document them all. If you don't document conversations, never do. In either case, be ready to justify your actions later, and do not share your personal notes – not even with client representatives.

Third, try a measured response to an inquiry. How was the company approached? If two agents have politely asked the corporate CEO to interview employees and look at records for some as-yet-undisclosed crime, over-reaction can be very damaging. Avoid "stonewalling" or rudeness or supposition and hyperbole. Do not hire a rabble-rouser to allege baseless claims of bias or send a frightening memo to employees. You have an ethical obligation not to try cases in the media. Be truthful and polite. When both you and the government know more, have the government consider civil or administrative remedies that may be more appropriate.

However if, by comparison, a chopper full of commandos raids the corporate office in a stunning (albeit questionably necessary) show of force, then damage control is appropriate. But the same general rules apply -- be polite and be truthful. Your client may send the standard memo: "We are cooperating fully with the investigation and instruct you to do likewise. However, to protect you and the company from serious charges based on mis-communications, counsel must be present for all interviews and production of materials." The company should consider hiring respectable public relations personnel who specialize in damage control. Again consider employing independent board members,

oversight and internal investigation committees, taking steps to avoid a bunker mentality, and even (gasp) apologizing.

Fourth, ask yourself: “What is the goal of the investigation?” Is it a big rap or a little one? Is fighting a technical violation over foreign corrupt practices worth years of court battles and lost reputation? Is someone making political hay? Consider whether you can ethically recommend a plea or take other action that allows the client and management to take their lumps and quickly move on.

Finally, compare Martha Stewart and Arthur Andersen. Both were convicted of the same offense – destroying records to obstruct justice. Both made a sincere and public apology. It worked for Ms. Stewart, but not for Andersen.

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Please Release Me: Prospective Exculpatory Covenants in Arizona

By Dev K. Sethi

Releases, waivers of liability, assumption of risk agreements and prospective exculpatory covenants—these are all words expressing the singular concept that an injured party cannot be made whole because he signed a piece of paper. And use of those words is becoming more and more prevalent. It is the rare activity that does not require a participant to sign a release or that has one preprinted on the back of an admission ticket.

The circumstances surrounding the reading of the release are generally the same. Moments before starting an activity, a dense document is presented for signature. The only explanation from the provider about the document is that it is "a formality" or "procedure." Worse are the cases where the release is preprinted on the back of an admission ticket—where mere entry into a facility consents to all but the most egregious acts.

Arizona law disfavors these attempts by defendants to avoid responsibility for actions, and our courts examine releases with a skeptical eye.[1] In personal injury cases, especially, trial lawyers should take an aggressive approach and challenge the validity and application of the release. Recent developments, both in Arizona and other states, provide support for the proposition that unless a defendant meaningfully educates a participant as to both the release and the risks involved, the release is invalid as a matter of law.

To see the proposition in action, let's examine the case of a motocross participant who is injured.

While riding motocross at his local track, Michael Rogers crashed into the bucket of a front-end loader that Wallace Saunders, the track operator,

improperly hid behind a tabletop obstacle. Rogers shattered both of his legs and brought suit against Saunders and his track. Saunders raised the defense that Rogers' claim was barred because he signed a document titled "Release and Waiver of Liability, Assumption of Risk and Indemnity Agreement" before riding. The release contained language that insulated Saunders from liability—even liability created by his own negligence. Does this release protect Saunders from liability? Would it make a difference if Rogers had been a minor and had his parent sign the document?

Under current Arizona law, a court should hold that the release has no application— regardless of whether Rogers was an adult or minor. Given Arizona courts' approach to releases in personal injury actions, combined with similar decisions in other jurisdictions, trial lawyers should aggressively challenge any argument that attempts to insulate a defendant from liability based on a release, especially when the injured client is a minor.

What Do Releases Limit?

Although Arizona jurisprudence traditionally has recognized a strong policy of freedom of contract, there are instances in which public policy considerations for preserving an obligation of care about one person to another outweigh traditional regard for a freedom of contract. The Arizona Supreme Court has ruled that contracts intending to release one's self from liability must be strictly construed against the enforcing party.[2] Our Supreme Court has recognized that, "The law disfavors contractual provisions by which one party seeks to immunize himself against the consequences of his own torts."[3]

And under long and well-established Arizona law, releases only limit a defendant's liability for risks specifically contemplated by the release. In Valley National Bank v. Tang,[4] one of the earliest Arizona cases dealing with the issue of the prospective release of liability, the court noted, "It is … necessary that the express terms of the agreement be applicable to the particular misconduct of the defendant."[5] This does not mean that the release must expressly list every potential situation. To be valid, however, the document and the circumstances surrounding its execution must meaningfully educate the signer as to its effect and scope.

Maurer v. Cerkvenik-Anderson Travel[6] is a good example of this proposition. In Maurer, the plaintiff's signing of a waiver did not constitute an express assumption of risk because the waiver was too general and did not "alert plaintiff's decedent to the specific risks she was supposedly waiving." [7]

Maurer involved a young woman who was killed in an accident on a train vacation package through Mexico. The decedent was killed when she fell through the connecting areas between two cars of the train. The Arizona Court of Appeals held that the release in Maurer failed to alert the plaintiff to the risks being waived. Under Arizona law, the key to enforceability of a release is the knowledge on the part of the releasor of the exact nature of the agreement. [8] For the release to be enforceable, it must appear that the terms of the release were brought home to the person signing the release, or, if he or she did not know of the provision, that a reasonable person in his or her position would have known of it. Interpreting and Applying Waivers Perhaps the most well-reasoned and instructive Arizona case dealing with the interpretation and application of release and waiver documents is Morganteen v. Cowboy Adventures, Inc.[9] Morganteen involved a plaintiff who was injured while participating in a guided horseback ride under the watch of defendant Cowboy Adventures. When the plaintiff brought a negligence suit for injuries that Geraldine Morganteen sustained when she was bucked off a horse on a Cowboy Adventures ride, the defendant sought protection behind its “Release and Waiver of Liability, Assumption of Risk, and Indemnity Agreement.” The court, in a unanimous opinion written by Judge Noel Fidel, rejected defendant’s position. In strong words, the court stressed the baseline point of law that courts are to express great disfavor and skepticism toward release documents.

This is not a point to be taken lightly. If a defendant seeks sanctuary behind a release, that defendant must come forward with proof that the release was bargained for and that even after strictly construing the release against the defendant, it still has application.

The court in Morganteen compared the application and validity of a release in a personal injury tort case with the application of a release in a commercial tort case, Salt River Project v. Westinghouse Electric Corp.[10] The Supreme Court of Arizona addressed the validity of a limitation of liability provision in a commercial case in Salt River Project. In a section of its opinion titled “Can Liability in Tort be Bargained Away,” the Supreme Court answered with a qualified yes.[11] In Salt River Project, the Court stressed its reluctance to enforce release agreements, stating, “The law disfavors contractual provisions by which one party seeks to immunize himself against the consequences of his own torts.”[12] However, the Court went on to recognize that sound reasons in a few, discreet commercial settings existed to create an exception for the law’s general disfavor.

However, the Salt River Project Court made it clear that three conditions would

be placed upon the enforcement of any release document:

1. that there is no public policy impediment to the limitations

2. that the parties did, in fact, bargain for the limitations

3. that the limiting language be strictly construed against the party seeking to enforce it

Judge Fidel in Morganteen recognized that the Arizona Supreme Court placed special emphasis on the second factor in discussing the law of waiver, which requires "an intentional relinquishment of a known right." And the Salt River Project Court stated, "Tort remedies may not be waived in an unknowing exchange of forms. … An actual bargain must be made by those responsible for the transaction."[13]

In evaluating the effectiveness of the release in Morganteen, the Court of Appeals found that for a release to have application, it must be specifically negotiated and bargained for. That is a requirement for the application of a release in a commercial setting, and the analysis in the personal injury setting must be at least as stringent.

To that end, Morganteen seems to suggest that for a release to be effective, a defendant must do more than simply secure a signature on a boilerplate, form document. Instead, to comply with the "bargained for" requirement, it seems that a personal injury defendant would have to have someone explain to the lay participant what the terms of the release entailed. Anything less simply does not meet the requirement of the law. Furthermore, for a release to have application, it would need to be worded in plain language to bring its terms home to the participant. Broad, loosely phrased releases simply can have no application under the current state of the law.

A Restrictive Approach to Waivers

Benjamin v. Gear Roller Hockey Equipment[14] stands as the Arizona courts' most recent comment on the subject of prospective liability releases. The rationale underlying the holding of the case provides clear support for the very limited and rare application of releases in personal injury actions.

As a starting point, the court in Benjamin continued to recognize the wellestablished rule of law that Arizona courts look upon releases with disfavor out of concern that they may encourage carelessness. Accordingly, the court

recognized the need to construe the language of a release strictly against the party, here the defendants, relying on it.

In Benjamin, the court held that in certain circumstances a defendant can protect itself from liability by procuring a release signed by the plaintiff that absolves the defendant from liability due to the defendant's own negligence. The court, however, made it clear that such a general release is disfavored and will apply only in those specific instances in which the signing party understands the type of risks covered by the release.

Benjamin is a good example of the specific facts that must be present before a release can apply. Numerous factors lined up perfectly such that the court was able to follow the law and give effect to a release. Absent the unique confluence of facts, a prospective liability release should not apply in the personal injury context. Indeed, the facts of most cases are much closer to those of Morganteen and Maurer.

The court enforced a liability release in favor of a roller skating rink against the plaintiff—a 32-year-old lawyer who had participated in the sport of roller hockey for 15 years. The plaintiff had deep knowledge of both releases and tort law as well as the sport of roller hockey. Most important, the court enforced the release particularly because the plaintiff was aware of the nature of the risks involved in roller hockey, and the cause of the plaintiff's injury was precisely one of those risks—uneven flooring:

> The court wrote: Plaintiff was an experienced skater, familiar with the risks of roller hockey. He knew that problems with the skating surface—such as "debris"— could cause an accident. The Release itself warned participants to inspect the "facilities" for "unsafe" conditions, thus providing notice (if such were needed) that unsafe conditions could exist in the facilities and could cause an accident.[15]

What does this analysis mean in relation to our injured motocross rider?

In the case of the adult Michael Rogers, the release he signed should be declared meaningless as a matter of law. Although Rogers did sign a release document, and although he was aware of the risks inherent in motocross—going down in a corner, overshooting a jump or getting tangled up with another rider—he was unaware of the risks of crashing into a front-end loader hidden on the track. The presence of the front-end loader in this case is exactly the type of "extraordinary and unknown risk" identified in Benjamin and Maurer.

Imagine if the defendant had been cleaning a gun at trackside that accidentally discharged, hitting Rogers. There would be no doubt that the release would not apply in that situation. The hidden frontend loader is really not that different.

The perfunctory scanning and signing of a release by individuals who engaged in activities cannot provide a careless defendant with an absolute shield from responsibility. Unless the terms and application of the release have been meaningfully explained to the plaintiff, a release in a personal injury action should have no application. The plaintiff can, and should, raise this issue early on in a motion for partial summary judgment. Success on this motion will mean that the court has either rejected this defense in its entirety, or, at the very least, it has determined that the issue is a question of fact for a jury. Either way, it will limit the defense's ability to posture.

With the Benjamin decision, defense counsel will often express a confidence that is unfounded. Seizing this issue early will give the plaintiff the upper hand as the matter progresses.

Even More Problems for Reliance on Releases

In late June 2000, the Colorado Supreme Court issued an en banc decision setting out what is really no more than common sense. Before Cooper v. Aspen Skiing Co.,[16] however, Colorado courts were silent on the issue of whether a parent can sign an effective prospective exculpatory covenant on behalf of his or her minor child. In Cooper, the Colorado Supreme Court answered with a resounding "no."

Arizona courts have yet to weigh in on this issue. Cooper, and the majority of cases from other jurisdictions that have considered the issue, provide sound, persuasive authority that will help an Arizona trial judge reach a just decision until the matter makes it to Arizona appellate courts.

Seventeen-year-old David Cooper was a fantastic skier. He was an accomplished competitive ski racer and had been a member of the Aspen Valley Ski Club for several years. At the beginning of the 1995 ski season, Cooper and his mother signed a form titled "Aspen Valley Ski Club, Inc. Acknowledgement and Assumption of Risk and Release." The release from the ski club contained standard language, relieving it from:

> Any liability, whether known or unknown, even though that liability may arise out of negligence or carelessness on the part of persons

> or entities mentioned above. The undersigned participant and parent or guardian agree to accept all responsibility for the risks, conditions and hazards which may occur whether or not they are now known.

While training for a competitive, highspeed alpine race, on a course designed by his coach, Cooper fell and collided with a tree. He sustained severe injuries including the loss of vision in both his eyes, and he brought a claim against several defendants, including his coach and the ski club. The defendants argued that the release barred Cooper's actions.

The defendants were successful at both the trial court and appellate level. The Supreme Court of Colorado reversed.

Colorado, like Arizona, recognizes the principle of freedom of contract and the notion that prospective liability releases are disfavored and must be strictly construed. Relying on policy that protects minors from parental actions that foreclose a minor's rights to recovery, the Colorado court held that, because a parent may not release a child's cause of action after injury, it makes no sense to authorize a parent to release a child's cause of action prior to an injury.

The court reasoned that allowing such a result would render meaningless the special protections historically accorded minors. For example, in Colorado, like Arizona, the statute of limitations for a minor's tort claim does not begin to run until the minor reaches the age of majority. This delayed countdown to a filing deadline preserves the minor's rights in the event that his or her parents fail to take steps to preserve them.

In deciding Cooper, the Colorado Supreme Court conducted a survey of other jurisdictions' approaches to this issue. The overwhelming majority of jurisdictions that have considered the issue hold that a parent's attempts to waive a child's liability claim are void as they violate public policy considerations. No fewer than 11 states subscribe to this position.[17]

Parent Waiver Upheld

At least two states—California and Ohio— suggest that a parent may prospectively waive a child's rights to bring a tort action. Given California's influence on Arizona courts, practitioners should be aware of Hohe v. San Diego School District.[18]

Sarah Hohe was a 15-year-old junior attending a public San Diego high school.

She was injured during a school-sponsored hypnotism show. Once Hohe brought suit, the defendants relied on a release signed by Hohe and her father. With little analysis, the California Court of Appeals rejected Hohe's argument that the release could not be enforced because she was a minor. The court did not consider the safeguards in place to protect minors, nor did it consider the issue of whether a parent can prospectively sign away a minor's rights. Instead, the court simply conducted— without any mention of the specific concerns associated with prospectively releasing personal injury liability to a minor— that Hohe could not disaffirm the release because she was a minor.

Given Arizona law and public policy concerns, it is unlikely that an Arizona judge would find Hohe persuasive.

What Cooper suggests for Arizona litigants is that releases signed by parents before their minor children can participate in activities are most likely invalid. Although no Arizona case addresses this issue, the policies relied on in Cooper and its supporting cases, combined with Arizona's clear disfavor of releases in general, suggest that a defendant will have an extremely difficult time advancing a defense based on a waiver signed by a parent.

Therefore, in the motocross rider's case, a court considering the issue on an early motion for partial summary judgment need not even reach the standard analysis of Morganteen, Maurer and Benjamin before finding that the release has no application. A minor injured in an endeavor should not be precluded from being made whole because of the actions of his or her parents.

New Mexico and Waivers

Practitioners should refer to Berlangieri v. Running Elk Corp.,[19] a recent New Mexico case. There, the court held that a waiver of liability regarding horseback riding was unenforceable as a matter of public policy. Berlangieri was injured while riding at a lodge. The trial court granted defendant's motion for summary judgment, citing the waiver the plaintiff had signed. The appeals court reversed.

The court held that in determining whether a waiver is effective to relieve the commercial enterprise from liability for failing to exercise ordinary care to protect patrons, more is at stake than the question of whether one plaintiff is compensated. A private agreement cannot nullify society's interest in deterring conduct that society regards as unreasonable.

Furthermore, the court held that the fact that a recreational activity involves some inherent risk of physical injury does not justify relieving the operator of a

recreational facility of a duty of care to protect patrons against unreasonable and unnecessary risks. Jurors are capable of distinguishing between the risk of injury that cannot be eliminated without depriving a sport of its essential character and those unnecessary risks that arise as a result of the proprietor's failure to exercise due care for its patrons. The court held that the release was void.

Addressing Releases in Your Practice

Releases are standard fare in a variety of tort actions. People sign releases in endeavors ranging from apple picking to zoo tours. Activity providers have become increasingly reliant on boilerplate, convoluted and difficult-to-read documents that they believe insulate them from all but their most egregious acts. Some releases even attempt to provide protection for gross negligence and intentional acts. The validity of these prospective releases must be challenged.

Too often these documents are presented for signature in a cursory manner. When questioned about them, the service provider is often ill equipped to respond to even the most basic inquiries. Signing a release has become a meaningless hoop that people step through without a second thought.

By setting up the process in this way, the defendant seeks to have it both ways. He does not want to invest any time or resources in educating the participant as to the actual effect of the release, nor does he want to scare away potential customers with an explicit description of the risks. At the same time, he seeks to use the signed release as an absolute shield for any legal liability.

Arizona jurisprudence rejects this approach. Through the discovery stage of any case involving a release, it is imperative to fully explore, both with your client and the defendant, the circumstances surrounding the signing of the release. In addition, it is important to explore how the defendant came to use the release involved. Did he hire a lawyer to draft it? Is it one provided by a trade group? Or is it simply something that he copied from a competitor? In any event, it is important to find out whether the defendant himself has an understanding of the terms and the effect of the document.

Once this information has been collected, it is the plaintiff who should take hold of this issue. In those cases in which the defendant has not taken the time to "bring home" the terms of the release to your client and where the cause of injury is something other than the normal and anticipated risk associated with the activity, the plaintiff should file an early partial motion for summary

judgment. An aggressive approach to these releases will force defendants to recognize that a signed release is not an absolute shield to civil liability.

Dev K. Sethi is an attorney with Kinerk Beal Schmidt & Dyer PC in Tucson. His practice is plaintiffs' products liability, personal injury and wrongful death.

1. Salt River Project Agric. Improvement & Power Dist. v. Westinghouse Electric Corp., 694 P.2d 198 (Ariz. 1984).

2. Id.

3. Id. at 213.

4. 499 P.2d 991 (Ariz. Ct. App. 1972).

5. Id. at 994, citing PROSSER, THE LAW OF TORTS § 57 (3rd ed. 1964).

6. 890 P.2d 69 (Ariz. Ct. App. 1994).

7. Id. at 73.

8. Morganteen v. Cowboy Adventures, Inc., 949 P.2d 552 (Ariz. Ct. App. 1997).

9. Id.

10. 694 P.2d 198 (Ariz. 1984).

11. Id. at 212–215.

12. Id.

13. Id.

14. 11 P.3d 421 (Ariz. Ct. App. 2000).

15. Id. at 424.

16. 48 P.3d 1229 (Colo. 2002) (en banc).

17. Colorado, Connecticut, Illinois, Maine, New Jersey, New York, Pennsylvania, Tennessee, Texas, Utah and Washington.

18. 274 Cal. Rptr. 647 (Ct. App. 1990).

19. 48 P.3d 70 (N.M. Ct. App. 2002).

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Practicing Safe Computing: Security Tips, Products and Services to Protect Your Small Firm

By Ross L. Kodner, Esq

Electronic security and disaster prevention are facts of legal life today. With new computer viruses and daily security breaches, protecting client confidences and firm information is challenging. There are very real malpratice risks, as well as ethical traps and pitfalls that will befall the unwary pracitioner. Committing "Technology Malpractice" is not just a futuristic prediction – it is a daily reality that may be happening in every law practice at this moment. Complicating this is HIPAA's privacy legislation. Security and disaster planning are as critical in small firms as in mega-practices. This articles explores seven quick tips for practicing safe computing:

- Know your responsibilities: ethical rules are essential reading. Review for applicability to issues related to security and protection of client information from loss or intrusion. Pay attention in ethics credit CLE programs. Leverage the knowledge of your state bar ethics advisor. Talk to your malpractice insurance carrier and get their opinion, in advance.

- Understand how substantive law and technology use intersect. Example related to HIPAA: the healthcare privacy requirements in this legislation impact lawyers in many areas - not just those that are injury or healthcare-related. Lawyers and clients are subject to significant penalties for failing to protect the privacy of healthcare information. Example related to electronic discovery: failure to understand the broad range of technology issues and underpinnings of the discovery of electronic information will most certainly lead to negative case results . . . and potential malpractice claims.

- Backup - not optional: the need to backup should be a given after years of pleading and begging. Many small firms still have inadequate systems for backing up firm and client information. The ability to access the data (i. e. backing up your programs to enable quick restoration to normal operation) is as important as protecting data. Occasionally copying your documents to a writable CD isn ’t an adequate backup system; it’s a malpractice action waiting to happen. Whether via tape or external/ removable USB hard drives, employ purpose-built backup software, off-site backup storage, alternating media, and regular "test restores."

- Security - it ’s not someone else’s responsibility: so you have a shiny new cable modem in your office. The cable guy told you they’ve got that whole "security thing" taken care of - great news! WRONG! Security is YOUR responsibility - it’s your business, your practice, your obligation to protect the integrity of your client information. Use a hardware or software firewall to protect your internet connection from hacking. There are even "free" software firewalls available from vendors such as ZoneLabs (ZoneAlarm Standard) and Sygate (Sygate Personal Firewall). More preferable hardware firewalls can be had for as little as $100 (i.e. using a cable/DSL router device that also has built-in Network Address Translation (NAT) and "stateful packet inspection") although this is considered “barely adequate” (look for firewalls that also incorporate a technology called “stateful inspection”). Small firms can look at the hardware firewalls from companies such as SonicWALL, starting at less than $500. So cost shouldn’t be the reason that you throw security caution to the wind. Get firewalled, period.

- Security is an attitude: You can buy the most secure firewall products in the world but if you write passwords on Post-It notes stuck to your monitors, nothing will protect you. Think of the people (i.e. cleaning crew) who visit your office after hours. Security is, foremost, procedures created and enforced by top firm management. All the technology invented won ’t protect you from lax policies.

- Viruses: e-criminals distribute new viruses every day. Averting professional disaster means taking precaution against virus infection - or spreading them to others. Could you be liable if you didn ’t update your anti-virus software, thereby becoming infected and in turn, infecting a client whose business is shut down for days? You bet you could be. Four tips: a) use capable anti-virus software, b) update it automatically, DAILY, or even multiple times per day, c) educate your people about not inadvertently spreading viruses and the liability your firm could incur from

infecting other companies, courts, clients, etc., and d) never trust just one person to keep your anti-virus software update subscription current – it's not the software that let's most firms down, it's the liveware (the people!)

- Spyware: even more insidious than computer viruses, Spyware is everywhere. What is it?

Uninvited software that installs itself on your PC when you visit websites. In fact, this is often installed without the permission of the websites you visit – the websites themselves may have been compromised. These programs can "see" all the data on your office computer systems. In the worst situations, these malicious programs look for confidential financially-focused information such as passwords, social security numbers, account information. Failing to protect against spyware could be argued to be a per se breach of your obligation to protect and maintain client confidences. Use fee-based anti-spyware tools such as AdAware Professional, Spy Sweeper and others. These protect your system from spyware in real-time, just as anti-virus software does. It is critical to note that the free versions of these products do NOT provide continuous protection and should not be used.

Plug the holes: you need to keep your operating systems, your applications and your Internet software updated with the latest patches. Microsoft products are regular targets of hackers. You can counter the troublemakers with Microsoft 's free Security Bulletin Alerts. This e-mail based service warns of the latest security and privacy issues affecting their software and links you to the needed patches.

For all the law practices now using Microsoft Word as their document generation system, there's a horrifying threat that needs to be addressed: it's called "Metadata." From the time a Word document (or an Excel spreadsheet or a PowerPoint file) is created, through all the edits, revisions and modifications that occur during the life of the document, a frightening amount of information is permanently stored, invisibly, "under the hood" so to speak, in the file. Anyone who knows how to view such a file (as easy as selecting the "Recover Text from Any File"option in Word's "File | Open" dialogue box, whereupon retrieval of the file, all the contained metadata is tacked onto the end of the document) can exploit it to their advantage. For example, assume you've had several revisions of a document with passages of text being removed, copied from other documents, comments inserted and deleted, etc. Perhaps some of the language, or even the entire document was "leveraged" from work done for another client. If that document leaves your firm as an e-mail attachment, what are the consequences of someone outside your firm being able to view all the information you thought was no longer there? Have you breached client

confidentiality (of both the client in question as well as the earlier client whose work you recycled and whose information is still hidden in the document)? Could this be an ethical violation? How about malpractice?

The only practical ways to address this issue are to turn Word documents into PDF files (using Adobe Acrobat writer or an equivalent compatible product such as FinePrint Software's pdfFactory Pro), which strips virtually all the metadata out of the document. Or alternatively, use a Word add-in that removes Metadata from documents such as Metadata Assistant from Payne Consulting (or MetaWALL from Workshare Technologies or iScrub from Esquire, Ltd.). The point is, in the "protecting your clients from disaster" category, taking one of these approaches must be considered mandatory.

The bottom-line: we practice law in a complex electronic environment. Protecting our confidential information can't be an afterthought - it must be as rigid a daily procedure as entering time. It is essential that your law strive to "practice safe computing."

Ross L. Kodner is a "recovering lawyer" and President of MicroLaw, Inc., a 17 year old national-focused legal technology consultancy based in Wisconsin. He is a founding member of the T3 Network of Legal Technology Consultants and has held many leadership positions in national, state and local bar associations. He is perhaps best known for his internationally acclaimed "Paper LESS Office™" concept. He co-plans the CLE programming for all U.S. LegalTech events and he is a prolific speaker and author on legal technology topics. Ross can be reached at www.microlaw.com and 414-476-8433.

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Think Before You "Click"

By Lloyd D. Cohen, Attorney at Law

The riddle for modern times goes like this: *When is your signature not your signature?*

When is something in writing never written? The answer is simple but the impact is enormous.

Since the Middle Ages, people have memorialized their important legal choices with the ceremony of laying ink on paper and briefly waiting for it to dry. The ritual not only emphasized the importance of the action being undertaken, but also its finality. Recall the nervousness and hesitation associated with putting pen to paper when the realtor slides the purchase contract across the table, or the banker hands over the loan papers, or your lawyer gives you a draft of your Will.

In modern times, the signing ceremony may be replaced by the mere "click" of a computer key. A legally binding contract may only exist as electronic fields and templates associated by a database program stored in the memory of a computer. A digital or electronic signature binding you to the contract may be symbolized by something other then your name and might not exist on any paper anywhere.

The *Ohio Uniform Electronic Transactions Act* (UETA) says that an electronic signature may be attached to or logically associated with an electronic record. UETA provides as follows:

- Information, records, and signatures shall not be denied legal effect, validity, or enforceability solely on the grounds that they are in electronic form.
- Where a rule of law requires information to be "written" or "in writing," or provides for certain consequences if it is not, an electronic record

satisfies that rule of law.
- Where a rule of law requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law.

Since World War II, businesses in need of product have enjoyed the ease of being able to mail a “purchase order” to a supplier. Such orders, received in the normal stream of commerce, causes shipment of the requested product. The product later arrives at the business with an “order invoice” requesting payment of the amount due. This practice makes business more efficient by eliminating the need for buyer and seller to enter into a separate contract each time a purchase is desired. *E-commerce* laws now permit businesses to make purchases simply through the use of *e-mail*.

In tandem, the *Electronic Signatures in Global and National Commerce Act* (ESIGN) provides that, in the United States, the use of a digital signature is as legally valid as a traditional signature written in ink on paper. *The law also contains some consumer protections.* Information required by law to be in writing can be made available electronically to a consumer only if the individual affirmatively consents to receive the information electronically and if the business clearly and conspicuously discloses specified information to the consumer before obtaining the individual’s consent. A consumer’s consent to receive electronic records is valid only if the consumer confirms his or her consent electronically. This electronic consent must be obtained in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.

Under these laws, your consent and your signature may be represented by something other then your signed name. Some software makers talk about your *digital signature*.

However, this may refer to a cryptographically encoded document that alerts the reader to any alteration, or the reference may be to an attachment of an image that looks like your own signature. However, your *e-signature* may have nothing at all to do with an image of your name. The law provides that your *e-signature* can consist of almost anything. For example, a voice print, retinal scan, or passcode can be considered to be your signature. Your consent to a contract can be given as easily as just filling in a “dot” in an on-screen box, or the mere “clicking” of the “y” on your keyboard.

According to a *Federal Trade Commission* study on this subject, a clue that you

are dealing with an honest online party is that their disclosures are timely and clearly and conspicuously made, with ample opportunity for downloading and printing. A clue that you are dealing with unscrupulous operator is the presence of confusing or unprintable material. Either way,think before you “click.” Although a “keyboard click” is more casual than the physical action of taking a pen across a printed page, it can have the same legal significance.

Lloyd D. Cohen comments on life, law, economics and politics. He is engaged in the private practice of Law, concentrated in the solving of financial problems including: Bankruptcy, Business, Tax, Estate Planning, and the problems caused by predatory lending.

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You Don't Do Estate Planning? Practical Advice For Your Clients

By Irwin J. Dinn

Is your expertise not in the area of estate planning, but you care about the estate planning needs of your clients? Here's some practical advice.

You've probably been to one or more CLE seminars on estate planning. You've read a bit and you even remember some of what was discussed in trusts and estates at law school. You've heard about all those alphabet trusts and wondered just who needs them. Should you venture into this area on behalf of your client without the aid of an experienced estate planner? The answer is "no."

After more than 35 years of working with hundreds of clients and their estate planning, and then assisting many survivors, I've learned that the vast majority of clients want it simple. Although they like the idea of avoiding probate and saving on estate taxes, they don't want to be tied up in knots. Make it easy for the executor, the trustee—the attorney, in fact—to do his or her job. Beware of canned wills and trust instruments that are beautifully written and try to cover every eventuality, most of which do not apply to the client's needs. That 40-page trust instrument becomes a practical nightmare for the client's family to understand and then carry out.

If the estate planning client's wealth justifies the cost of creating and administering complicated trust arrangements, then seek out an experienced, knowledgeable "expert" planner. In such a case, your client may actually need a team of "experts" to formulate a plan, draft the documentation, and assist with the follow-through to meet the client's needs, as well as those of his or her family. Otherwise, seek out an attorney who has done the drafting, as well as the handholding. A good estate planner must be willing to take the time to find out enough about your client to recommend an estate plan that meets the client's needs and is simplest in administration. A good estate planner will also

take the time to help the client understand the documents and what they are intended to accomplish. In light of the current uncertainty about the future of federal (and state) death taxes, this process becomes all the more complicated.

Make sure your client feels comfortable with the estate planning attorney—comfortable enough to ask the same question more than once without fear. Comfortable enough that your client will provide the attorney with personal information that might be essential to proper planning, including the disclosure of conflicts between the interests of a husband and wife that might not be known to you as their attorney. The services of an experienced planner, whether to plan a sophisticated multi-trust arrangement, or to create a much simpler arrangement, are not inexpensive. Make sure your client is getting his or her money’s worth. After all, the client gets no benefit from the planning, other than personal satisfaction. The survivors benefit from the tax savings, the simplicity, the flexibility, and the protection afforded by a good plan.

The following letter can be used by you, as an attorney whose expertise is not in estate planning, in whole or in part, to encourage your clients to do their estate planning. You already know enough to have the introductory discussion with your client. Take the time to acquaint yourself with one or more knowledgeable estate planning attorneys in your area. If you save just one family a year from the nightmare of dealing with incapacity or death without proper estate planning, you will have contributed immeasurably to our profession, as well as to your own personal status as an attorney.

Sample Letter

Dear Client,Perhaps you’ve been to several “estate planning” seminars. Maybe you’ve read a few articles in the paper or in magazines. Are you now ready to talk about practical estate planning? Here are answers to some frequently asked questions:

Why Do I Need It?

It’s not for you. It’s for your loved ones or for whomever else you want to leave your family heirlooms, your furniture, your collection of various and sundry magazines, newspaper articles, old tax returns, and utility bill receipts. Seriously, though, it’s planning for your car, your miscellaneous brokerage accounts, stocks, your bank accounts, your IRA and other retirement benefits, your home, your life insurance, and all the other things you’ve accumulated over your lifetime. By doing some estate planning *before* it is needed, you will save the aforementioned potential recipients of your generosity much time, much

energy, and, of course, much expense.

What Do I Need?

The simple answer is that you need at least three properly prepared, properly executed documents. Most people, for various reasons, would be well served to have a fourth and fifth properly prepared, properly executed document, as well. A Will, possibly a Trust, a Durable Power of Attorney, a Health Care Power of Attorney, and, if you are not philosophically opposed to it, a Living Will are the tools used to carry out a practical, effective and efficient estate plan for most people.

What Are Each of These Tools?

The Will.The Will is a formally executed, written instrument, that directs your personal representative (a person to act in your place because you are deceased) to dispose of those assets that are or become “probate assets” in accordance with your written wishes. It is an instrument that names guardians (including alternatives) for your minor children. It is an instrument that designates who (including alternatives) you wish to serve as your personal representative. Simply put, your probate assets are those assets that are owned by you at death and do not pass to someone else under the terms of a contract that you entered into prior to death. Examples of probate assets include: real estate held in your name without survivorship rights in another; a bank or security account in your name without survivorship rights in another; your business; your household furnishings; your stamp collection. Any account or asset that is not set up to be transferred on death or paid on death to another named party is a probate asset. Thus, for example, the proceeds payable to a named beneficiary under a life insurance contract are *not* probate assets, nor are the proceeds payable to the named beneficiary of an IRA or other retirement benefit contract, nor is the joint and survivor, or payable on death, account you set up at your local bank. Picking your guardian and personal representative is the subject of further discussion.

The Trust. There are all kinds of Trusts. I mention only the simplest (it will look a lot more complicated than it is), which is a contract you enter into during your lifetime that directs your trustee to manage and/or dispose of the assets transferred to the Trust (during your lifetime and/or at your death) in accordance with the terms of the Trust. When minimizing or avoiding the unnecessary payment of estate or inheritance taxes is called for in your estate plans, a Trust is a necessary tool or vehicle to accomplish this goal for a husband and wife. It doesn’t happen very often, but once in a while mom and dad die leaving a minor

child or children behind. A Trust Agreement sitting in a secure place, entered into before death, will serve to save that minor child or the minor children many dollars. And, oh yes—those children won’t get all of those assets at age 18! You could include a Trust as part of your Will. But your experienced estate planning attorney can explain the benefits of setting up a Trust separately from your Will during your lifetime. Most states will allow you to serve as your own trustee during your lifetime. Picking a co-trustee and whether to have one, and picking successor trustees, are subjects for further discussion.

The Durable Power of Attorney. The Durable Power of Attorney is a formal appointment of an agent (called an “attorney-in-fact”) to conduct your financial or business affairs in your name if you cannot do so yourself. What makes a Power of Attorney “Durable” is the language in the document that provides that the Power of Attorney will remain in effect even if you become incapacitated. Thus, if you do become incapacitated for a short or long period of time (or, for example, you are out of the country at the very time a business-related document needs to be signed), someone will have the power and authority to act on your behalf. This can be a very broad, all-inclusive power, or it may be limited to certain business affairs. This document may be broadened to designate who you would like to serve as your guardian or the guardian of your minor child or children if one were required (thus, if you become incapacitated and a guardian must be appointed for your minor children, because you haven’t died, your Will does not come into play). Who should serve and how broad a Power of Attorney should be are all subjects for further discussion.

The Health Care Power of Attorney . In this document you formally appoint a person to make health-care decisions for you when you lack (again, this could be short-term or long-term) the capacity to make them for yourself. Some states will allow you to customize your own form. Most states have a standard format that is easily recognizable by health-care providers.

The Living Will. This formal document is an announcement to the world that you do not want to be kept alive by artificial means. You do not want heroic measures taken to keep you alive. This document is philosophically optional. If the execution of a Living Will makes you feel uncomfortable, don’t be afraid to say so.

What makes estate planning simpler and, hopefully, more palatable for you, the client, is being able to sit down with an experienced estate planning attorney with whom you should feel comfortable in discussing the issues that will come to mind as you and the estate planner determine what tools are best suited for your needs and the needs of your family. Remember, it’s your assets that you want to preserve and protect during a period when you might be incapacitated,

or pass on to your family (if that is the plan) in a fashion that saves taxes, if appropriate, and makes sense for your particular family situation. There is no good reason for putting off estate planning, even for young couples. A young couple with a total estate of $125,000, including life insurance, with one surviving minor child, can save that child thousands of dollars over the time of a potential guardianship, with some relatively simple estate planning. Planning for the eventuality of death or incompetence does not mean that it’s going to happen. The vast majority of Durable Powers of Attorney that I prepare are never used. Years go by and Wills and Trusts are either redone or amended. Over the years I have, on hundreds of occasions, said, “If you need these tools and you don’t have them, it’s too late to get them.”

So, let’s be proactive. I will be pleased to assist you in getting your estate planning accomplished, including, if necessary, providing you with the names of one or more qualified lawyers to assist in the process.

Very truly yours,

Irwin J. Dinn is a partner with the law firm of Dinn, Hochman, Potter & Levy, LLC, in Cleveland, Ohio.

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Helping Clients Deal With Some Of The Emotional And Psychological Issues Of Estate Planning

By Robert J. Solomon, M.D.

In designing an estate plan, clients must sort through a number of emotional and psychological issues, ranging from treatment of children—does being fair mean treating children equally?—to problems of communication.

If parents decide to divide their estate unequally, significant family disunity can occur. Families can avoid these disruptions by discussing the relevant issues before the parents' deaths. Not all parents feel comfortable having these conversations, however. To avoid future family conflict, it is important for the estate planner to recommend that families openly discuss these issues in the context of a family meeting. Often it is possible for families to get together successfully themselves, but when tension, conflict, or anxiety is anticipated, the estate planner should recommend the use of a facilitator to guide these meetings. A good facilitator can significantly enhance the chances of a successful family meeting.

This article presents examples of parents dividing their estates unequally. It discusses how estate planners can best help their clients confront the issue of fairness versus equality and the ways estate planners can best counsel clients who are resistant to the idea of discussing the plan with their children. Finally, the ideal qualifications needed in a facilitator, the ingredients that lead to a successful meeting, and the way a facilitator should organize and carry out a family meeting are reviewed.

Equity vs. Equality

The following are four case scenarios in which parents mindfully chose to distribute their assets unequally.

The first scenario involves two brothers who are middle aged, devoted family men, and passionately involved in their careers. The older brother is a high school history teacher earning $50,000 per year. The younger brother is an investment banker earning $1.5 million per year. In raising their sons, both parents emphasized the importance of finding meaningful work. The parents are delighted that both their sons have found satisfying careers but feel their older son should not be penalized for having a significantly lower income. Therefore, they plan to leave three-quarters of their estate to their older son and one-quarter to their younger son.

The second scenario involves three brothers, the oldest an electrical engineer, the second oldest a highly regarded academic physicist, and the youngest a sales clerk. The two older brothers are well-adjusted, middle aged men who are devoted husbands and fathers. Their 30-year-old younger brother has struggled all his life with a pervasive developmental disorder, which has left him severely socially and learning compromised. Despite all his hard work, he struggles to keep jobs. The parents admire their youngest son's courage and tenacity and agree he has far greater financial needs than his brothers. Thus, the parents' plan is to give two-thirds of their estate to their youngest son and one-sixth to each of their older sons.

The third scenario involves a blended family. The mother and father have two children. In addition, the mother has a 32-year-old son named John from a previous marriage. The father is a successful attorney who has an excellent relationship with all his children, including his stepson. The stepson is the only child of a cardiac surgeon. Because John stands to inherit from his birth father, the mother and father decide to give 10% to John and 45% to each of their other children.

The fourth scenario involves an uncle who has never married and is quite well off. He has two nephews and a niece. The two nephews are unmarried and the niece is married and has two sons. The uncle feels close to his niece, nephews, and great nephews and thus it is important to him to leave money to all of them. Therefore, the uncle decides to leave one-third of his estate to each nephew, one-sixth to his niece, and one-twelfth to each of his great nephews.

What do these four scenarios have in common? Each plan was based on what was important and meaningful to the parents and ultimately the families involved. Estate planners can achieve this outcome by helping their clients understand their values and goals. Then the planner can show the parents how to reflect them in their estate plan. Centering on these concepts is the key ingredient that enables parents to clarify the relevant issues involved in being fair versus equal. In addition, a plan based on values and goals can be

accepted much more easily and possibly respected by children as opposed to one perceived as either arbitrary or spiteful. This approach will clarify not only the issue of fairness versus equality but will also transcend the negative feelings and conflict that often emerge when people feel they are treated unequally.

The Importance of Talking about the Estate Plan

When parents are thinking about dividing their estates unequally, they should talk about their ideas with their children. Numerous cases of significant family conflict and animosity have resulted from parents not discussing these issues with their children before their deaths. Estate planners need to recommend these discussions and parents should be open to their children's reaction and feedback during these meetings. In this way, the parents are not just telling their children what the plan is but are leaving open the possibility of modifying their initial ideas.

But what can an estate planner do when his or her client either resists or outright rejects the idea of a family meeting? First, the estate planner should check that the client clearly understands what is suggested. Sometimes a simple misunderstanding can explain the resistance. Next, the estate planner should not try to pressure the client to have the meeting. This strategy simply creates more resistance. A more helpful strategy is to neutrally join the client in looking at the issues, knowing the decision to have a family meeting resides with the client. This approach takes the pressure off the client, thus reducing resistance. The attorney then wants to empathize with his clients by understanding their experience.

Ideally, the estate planner should be curious as to why the resistance is present. There may be several possibilities. Clients may feel uneasy discussing money with their children. Sometimes they are afraid their children will lose motivation if they know how much money they will receive. Sometimes they are afraid their children will feel differently about them if they know the specifics of their estate plan. Estate planners want to have all these possibilities in mind as they explore their clients' concerns. Attorneys should ask directly what their clients' concerns are and address each concern in an empathic, supportive manner, emphasizing that such concerns are normal. The attorney may share experiences with clients who have had similar concerns but nevertheless chose to discuss these issues with their children. The attorney should discuss the pitfalls of not having a family meeting. He might mention that these discussions often lead to further closeness and cohesiveness within families. Despite the attorney's best efforts, if clients still refuse to discuss the plan with their children, the attorney should back away and state that he or she is only making this recommendation out of concern. Again, the decision to have the meeting

resides solely with the parents.

Using a Facilitator

When parents are considering dividing their estate unequally, often it is possible for families to successfully discuss the relevant issues on their own. But when tension, conflict, or anxiety is expected, the estate planner should recommend the use of a facilitator to guide the meeting, because a good facilitator can significantly enhance the chances of a successful family meeting. What are the ideal qualifications of facilitators? They should have outstanding interpersonal skills. They should have a calm, confident demeanor, exuding a sense of integrity, fairness, and trust, and should be perceived by all family members as neutral, objective, and fair. They should have an excellent understanding of group dynamics and experience in facilitating groups. In addition, they should be well-versed in estate planning and the intergenerational dynamics of wealth transfer. The parents' estate planner would be a poor choice for facilitator because he or she might be perceived by the children as being a representative of the parents. A good choice might be a mental health professional.

When an estate planner makes a referral to a facilitator, how might the facilitator go about approaching and carrying out a family meeting? First, he or she creates an atmosphere that maximizes the potential for success. Ideally, the meeting should be at a neutral site. Thus, the parents' home or the estate planner's office is not the best place. A resort or hotel is a better possibility. The meeting might take place during a retreat at which family members can be together in a casual way. This setting is likely to create a more relaxed atmosphere, which is a key ingredient for a successful meeting. Family members should feel that the meeting is not for the parents to proclaim what the plan will be but rather is for a discussion of all relevant issues.

The facilitator should take several steps to create such an atmosphere. First, several days before the meeting, the parents might want to distribute a written summary of their initial thoughts concerning their estate plan, the amount of money involved, the investment profile, and the amount likely available at their deaths. A written summary is advisable because it gives the children time before the meeting to digest the information, assess how they feel about the plan, and formulate what they would like to say during the meeting. Before distributing this information, parents should make clear to their children that this information is confidential and under no condition should be shared with anyone outside of the family. Some parents feel uncomfortable revealing this information in written form before the meeting. If so, a summary can be distributed at the meeting.

The next step is for the facilitator to talk with all family members individually before the meeting. Talking in person is preferable, but talking on the telephone is acceptable if people live out of town. In these individual meetings, the facilitator should ask each family member how the member feels about the family meeting and what the member's goals and concerns are. Any anxiety needs to be addressed and hopefully diffused. The facilitator should review the importance of open communication in the family meeting and that individuals are free to bring up anything deemed important. In the process of these individual meetings, rapport will be built, and each family member will gain confidence in the facilitator as someone objective, trustworthy, and able to handle any conflict that may arise in the family meeting.

The family meeting itself should start with the facilitator explaining his or her role, reviewing confidentiality, and stating the purpose of the meeting. The facilitator should make clear that he or she is not acting as an arbitrator and thus has no decision-making power. The facilitator should emphasize that conflict is normal and can be resolved. The facilitator should then go around the room in no particular order asking how people are feeling, what their thoughts are about the meeting, and if they have any particular agenda. This intervention again reinforces the idea that anything can be talked about and anything talked about will be listened to. The facilitator then should say to the children that this is their opportunity to give feedback to their parents and to state their hopes and desires.

The facilitator may occasionally make suggestions, but he or she makes clear to the family that these are only suggestions. Afterwards, the facilitator should ask for any final thoughts. Then the facilitator should inquire if anyone feels another meeting is needed. The facilitator should then summarize his or her understanding of what took place during the meeting and what the family has agreed to. If everyone agrees with the summary, the facilitator, if appropriate, should make a comment praising family members for their fine work. After any responses from the family, the facilitator adjourns the meeting. The facilitator then prepares a written report that he or she distributes to the family.

Conclusion

In summary, confronting the issue of being fair versus equal can be extremely challenging for parents planning their estates. Estate planners can provide valuable assistance in this area by focusing conversations around clients' values and goals. The importance of having family discussions of estate plans, especially when children are not being treated equally, cannot be stressed too much. When tension, anxiety, or conflict can be anticipated, the estate planner

should recommend the use of a facilitator to guide these meetings. A qualified facilitator can be an invaluable resource in creating the conditions that will maximize the success of a family meeting

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How To Manage An Estate Practice

By Daniel B. Evans

Flying an airplane has been described as "hours of boredom interrupted by moments of sheer panic." The same could be said of the practice of law, and an estate practice is no exception. You cruise along on autopilot, and you think you know what you're doing; but one night you find yourself sitting bolt upright in bed, in a cold sweat. You realize you missed a deadline or a tax election, or you spot the flaw in the document you drafted that could result in a large (and unnecessary) liability for your client.

Good practice management, and the systems that go into it, can make the hours of boredom more bearable and the moments of sheer panic fewer and farther apart. Using efficient forms, checklists, and other practice systems can achieve the following miracles:

- Save time by eliminating the need to reinvent the wheel for each client;
- Prevent errors and oversights that can result from doing things on an ad hoc basis again and again;
- Improve the quality of your work product by ensuring that every client gets the benefit of the latest forms and planning techniques; and
- Improve client relations by giving clients more information at little or no additional cost.

This article describes several types of forms and systems that estate and trust lawyers can incorporate to improve their practices. (Many of these techniques will work for other practices as well.)

New Clients

A number of forms and procedures can facilitate dealing with new clients and improve the quality of information you give and receive.

Brochures and fee agreements can help clients understand the nature of your practice, your qualifications and services, how your fees are determined, and when payments are expected. Information presented in this format helps build client confidence and may answer questions that clients are concerned about but are embarrassed to ask. Written fee agreements may be required in some jurisdictions but are simply a sound business practice.

Questionnaires mailed (or accessible online) to new clients in advance of the initial meeting, or used to collect information during it, ensure that nothing important is overlooked. They also organize all important client information in the same way for quick and easy reference. Streamlining this process makes the estate planning process more efficient and reduces the time you spend in client meetings.

Questionnaires are helpful in estate administrations for similar reasons. Giving clients lists of specific information to collect about a decedent or the decedent's assets can reduce lawyer and paralegal time spent collecting that information and result in more profitable estate administration when billing is not hourly. (Even when billing is hourly, eliminating unnecessary time helps ensure the total fee remains reasonable under local law.)

Projections and estimates are very important for both estate planning and administration, and software can be used to make projections quickly and accurately. Estate tax projections help clients understand how the lawyer can help and demonstrate the practical effects of the lawyer's recommendations. Some clients may not follow all of the laws, rates, and deductions, but most will understand numbers or graphs that illustrate how their estates will be distributed.

Many software programs on the market are specifically designed for these kinds of projections, and you should be able to find one suitable to your particular practice and style. Estate administration projections also are important because the fiduciaries and beneficiaries can use realistic expectations for the net distributions from the estate (after taxes) as soon as possible.

Pamphlets and crib sheets (overviews) can be extremely helpful in giving clients background information on the laws and techniques the lawyer recommends. They are not a substitute for client meetings and directly answering clients' questions, but they can refresh the client's memory of the lawyer's explanations and suggest further points of clarification. Preprinted explanations also can expedite personal written communications, for example, explaining your recommendation for an irrevocable life insurance trust and allowing you to concentrate your letter on the tax savings or other benefits.

Topics for such overviews include the following: federal estate and gift tax system, federal estate tax unified credits, advantages and disadvantages of marital trusts, trusts and lifetime giving for children, life insurance, IRAs and qualified plan benefits, charitable remainder trusts, and estate administrations. Be sure to cover basic information in an easily digestible format. One of my most popular web pages is an extremely simple timetable for estate administrations in Pennsylvania explaining how executors must collect assets, pay debts and taxes, and distribute the remaining assets in accordance with the will and giving due dates for various taxes. This is basic information most people do not have and can use. You can check out a copy of it at http://evans-legal.com/dan/easched.html.

Client Meetings and Communications

Many theories and sources exist to explain how to conduct client interviews and effective letter writing for clients, but a few points are worth emphasizing. Whenever possible, prepare an agenda or checklist for the meeting. For an estate planning client, the checklist should cover necessary information like that detailed above and a list of the most relevant estate planning techniques or issues. For an estate administration client, list the decisions that must be made before the estate can be distributed, or other relevant matters.

When writing to a client about something that requires more than one page, break up the letter with subheadings if possible to make it easier to read and digest. A letter summarizing missing information or decisions that need to be made can be divided into these two subject sections.

Every meeting should end, and every letter should close, with a brief summary of what needs to be done next, by whom. Too often, clients sit waiting for recommendations from the lawyer while the lawyer sits waiting for information from the client. In your summation, make explicit what should happen next, rather than assuming the process is obvious to all. Mentioning this at the end of the letter will keep it memorable.

Planning the Plan

Although most lawyers have general ways of dealing with estates and estate planning clients, having a specific plan for each client and estate is important. Whenever possible, establish the plan in as much detail as possible during the first meeting.

For most estate planning clients, the planning procedure is fairly simple. Decisions are made during the first meeting, the lawyer drafts documents, the client reviews the documents, necessary corrections or changes are made, and the client signs the final documents. In some cases the plan is more complicated, usually because some issues can't be resolved right away or it is easier to break up the process into different phases. For example, certain proposed lifetime gifts may require additional decisions or be simpler to make at a future date. Even deferred decisions or actions, however, should be included on a timetable for the client's overall estate planning.

Estate administrations are most effective when a complete plan and timetable for administration and distribution of the estate are established as soon as possible. The most time-consuming, expensive, and also unprofitable estate administrations are those that drift from deadline to deadline without a clear plan for how and when to distribute the estate. Instead, immediate estimates of debts and taxes should be readied, as well as plans for selling assets to meet these obligations and for how and when to distribute the remaining assets--taking into account the possible income tax consequences of the distributions. In this respect, even a tentative plan is better than none; a tentative plan can be changed, but the absence of any plan will probably lead to the absence of anticipatory thinking--and trouble.

Document Drafting

Drafting wills, trusts, powers of attorney, and other estate planning documents is another area where systems or checklists can ensure the right provisions are included, the wrong provisions are excluded, and lawyers do not spend unnecessary time recomposing standard clauses.

Several drafting systems on the market can draft documents suitable for most practices in most states. Not all can create testamentary charitable lead trusts, but all create simple wills, wills with trusts for minor children, and marital deductions and bypass trusts for estates that require marital deduction planning. Some of these systems may seem expensive, but they quickly pay for themselves simply by saving time.

Software tools such as HotDocs, which can automate a firm's own system of will and trust forms, also are available. Implementing the program may require some time and effort and a lawyer, paralegal, or consultant who is adept at using the software, but the resulting efficiency often is worth the effort.

Even a manual system is better than no system at all. A library of clauses that

can be cut and pasted into a document, a master document that can be adapted to fit individual needs by adding or deleting clauses, or even just a notebook with sample clauses can significantly improve the speed and accuracy of will and trust drafting.

Case Management

Most of the preceding discussions have been about the lawyer's interactions with the client and client services, but internal management issues for the lawyer and the lawyer's staff also can be expedited.

When a new client is accepted or a new file is opened, contact information is always needed for billing; conflicts checking; Rolodex or e-mail files; and general client mailings of newsletters, holiday cards, and so forth. A specific procedure that inputs such standard information at the beginning saves duplication and errors.

Keeping track of contacts, to-do lists, due dates for court proceedings or tax returns and other commitments, and calendars for appointments often is best handled by specialized case management software such as Amicus Attorney or Time Matters. Using such programs helps avoid missed deadlines, keeps client logs and information at the ready, accurately records billable time, and generally streamlines practice.

Law firms also should have well-established file closing procedures. Always review the physical file to ensure all original documents have been returned to the client. In addition, be sure the client has information for future tax returns or transactions, for example, date of death values of assets that passed through the estate and now have a new income tax basis. Just as important is archiving all client information that may be logged within different computers. E-mails, telephone notes, case notes, time records, word processing documents, incoming faxes, spreadsheets, tax returns, and fiduciary accounting data could be needed in the future. Just as paper files are retained for a period of time, electronic files also should be collected, archived, and saved in an electronic client folder until they can be safely deleted.

Effective planning and management and the implementation of forms and systems can cut down on the moments of panic and make the work in between more efficient and enjoyable for both the lawyer and the client.

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Talking About Estate Planning

By Jon J. Gallo and Eileen Gallo, Ph.D.

On successful completion of the bar exam in California, an applicant is admitted to practice as an attorney and counselor-at-law. According to the *American Heritage Dictionary,* a counselor is a "knowledgeable person who provides advice and guidance." Much of the advice and guidance that estate planners provide deals with highly technical issues, ranging from structuring marital deduction trusts to explaining the issues involved in choosing between a grantor retained annuity trust and an installment sale to an intentionally defective grantor trust.

Just think of some of the personal issues an estate planner needs to address: How and when should clients discuss their estate plans with their children? How can adult children who are worried about their parents' lack of estate planning raise the topic? When the client (or the client's child) comes to an estate planner to discuss a prenuptial agreement, what advice should accompany the agreement? And how generally should the estate planner counsel the client?

John Levy, a pioneer researcher on the effects of money on children and an advisor to wealthy families in Northern California, observes that not only is it common not to share estate plans with children but "when kids work up the courage to ask their parents for specifics, they often get slapped down." Perhaps the most common reason parents give for why they do not share their estate plan (and their net worth) with their children is that "knowing how much we have and what they are going to inherit will harm them; it will demotivate them." Levy believes that this belief is built on two underlying concepts:

• "Making a lot of money is the most important thing for my child to do. I don't want to do anything that interferes with this goal; if my child knows she has a trust fund or that I'm worth a lot of money, she may not work hard or may select a job that doesn't produce a high income"; and

• “I’m raising a child who lacks both a work ethic and a sense of responsibility.”

The first underlying concept—making a lot of money is the most important thing for my child to do—overlooks the fact that for some people, making a lot of money is far less important than becoming a writer, artist, or teacher or giving money away through philanthropy. The world needs poets as well as successful entrepreneurs. Clients should be reminded that affluence, handled properly, makes it possible to help their children become either.

The second underlying concept—my child lacks both a work ethic and a sense of responsibility—is an unfortunate fact of life that many estate planners see in their day-to-day practices. If clients raise their children with a strong work ethic and a sense of responsibility, the children will want to do the best they can no matter what career path they take or how much is in the trust fund. On the other hand, clients who have raised children who lack both a work ethic and a sense of responsibility probably should think twice before telling them how much they are going to inherit. Doing so will likely do nothing more than increase their sense of entitlement. If clients find themselves in this situation, they have more important issues to worry about than whether to discuss their estate plan with their adult Peter Pan.

Do trust funds really demotivate children? Many of the wealthiest American families have worried about creating too large a trust fund. “The parent who leaves his son enormous wealth,” Andrew Carnegie wrote in an 1891 essay, “generally deadens the talents and energies of the son and tempts him to lead a less useful and less worthy life than he otherwise would.” Warren E. Buffett, the richest man in America until he was unseated by Bill Gates, was quoted in the 1990s as saying that he was in favor of giving his children enough money that they can do anything but not so much they could do nothing. Other families, such as the Waltons, have done exactly the opposite, leaving vast fortunes to their children. It hasn’t seemed to harm some of them, at least from what is reported about them in the news. Sam Walton’s oldest son, S. Robson Walton, worth $20 billion or so (some of which is through trust funds), is a Columbia Law School graduate, an Iron Man tri-athlete, and chairman of the board of the world’s largest retailer. He certainly does not seem unmotivated.

Freud observed that each person has two major needs in life: to be loved by another and to feel competent. If the clients’ children are economically secure and can maintain at least a middle-class lifestyle without working, they need to develop a purpose that helps guide their lives. If they have such a guiding interest, the trust fund is not a disincentive to responsible behavior. Without a guiding interest, problems can and often do occur. As the mother of three adult children who began receiving distributions from their grandfather’s trust at age

18 observed to the authors, a trust fund can enable children to live a “half life,” in which they neither have to work nor have a guiding interest that gives meaning to their lives. Instead, the trust distributions might simply “buffer them from harsh reality.” One of her children found himself in agreement. He commented that he wished he had not received the money at such a young age because it created problems of self-worth. Although society expected him to work, he did not have to, and even though it gave him the room to explore different lifestyles, too much money too early made it “tough to gain a sense of the value of money and easy to burn through it.”

If the clients have concerns about the effect of gifts to their young adult children, whether outright or in trust, they should consider discussing their concerns and their expectations with the children before making the gifts. If the gifts are being made with strings attached, the children should know in advance. Even if there are no express conditions, there may be expectations that should be articulated. Clients may have expectations about how their children should express gratitude for their largesse. Estate planners can help their clients identify and articulate those expectations. If the client is giving her son and his wife $100,000 for the down payment on a house, does she expect to be invited over to the new house for dinner regularly? Does she expect them to buy a house in a certain price range? Does she expect them to look for a house in her area? The client may also harbor expectations about how the children will manage the money and end up judging their every expense.

Daniel M. Stern, C.F.P., and psychiatrist Deborah Nadel, M.D., are a husband and wife consulting team who live and work in Santa Monica, California. They suggest that estate planners should not only help their clients identify their expectations but also help them examine and clarify them before communicating them to their children. Are the strings that are attached reasonable ones? The parents who give their married child money for the down payment on the couple’s first house may expect regular dinner invitations or want the children to buy a house in their neighborhood. They need to consider whether they are using money as a means to control their children rather than fostering their growth. Helping the clients examine their motivations will lead to a healthier interaction between parent and child.

Many estate planners deal with clients who impulsively change their estate plans as a way of rewarding or punishing their children or grandchildren. If they have a fight with a child, their first step is to call the lawyer and change their will to reduce the child’s share of the estate. If a grandchild does something memorable, perhaps the grandchild’s share of the estate is increased. Several months later, after thinking things through, they usually tell their lawyer to revise the will again so that everyone is treated equally. An estate planner working

with one of these people should strongly recommend that the client not convene family meetings to announce who is in and who is out of the will this week. Such an approach tends to be highly destructive.

Stern and Nadel recommend that estate planners should try to persuade their clients to step back and look at what they are doing. Clients should not immediately change their estate plans under stressful circumstances. They should take sufficient time to reflect and determine carefully whether the conflict justifies or should result in a change in inheritance rights. Encouraging clients to make reasonable, constructive, and meaningful decisions, not impulsive and punitive ones, will benefit both the clients and their children.

Prenuptial agreements involve other sensitive areas, especially when considerable disparity in wealth exists between the two spouses-to-be. Quite frequently, the parents of the wealthier spouse-to-be raise the subject of a prenuptial agreement. The estate planner may have helped the clients transfer substantial wealth to their child through various estate planning techniques. Now, the clients want to protect their child's wealth in the event the marriage does not work out. The young couple, on the other hand, are madly in love, cannot imagine that their marriage would ever run into trouble, and may be upset over what they perceive as the clients' lack of trust. The problem is enhanced if the clients have not talked to their children about the family wealth.

Prenuptial agreements that are imposed by the parents result in a couple who feels coerced. The less wealthy spouse is also likely to conclude that his or her spouse values wealth more than their relationship. Prenuptial agreements cause the least damage to the relationship when both parties participate in the process and agree with the agreement's provisions. In some instances, resistance to a premarital agreement is so great that abandoning the concept should be recommended to the parents. Instead, a premarital inventory can be prepared to facilitate tracing assets in the event of future marital difficulties.

Estate planning can be a microcosm of a family's relationships. If clients can talk about these issues in a healthy way, it will nurture healthy family relationships and transmit positive values for generations to come.

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Anatomy of Trial Technology

By Catherine Sanders Reach

LOA -- Office Automation: Computer Hardware & Software

It would seem these days that, with the proper technology, a case could go from start to finish without ever generating a piece of paper. What little paper exists is scanned in, annotated, organized, searched, retrieved and stored electronically, along with e-mail, word processing documents, spreadsheets, and all other digital data. Trial preparation includes EDD, online depositions, and real-time transcription. Briefs, motions, filings, and documents are all delivered electronically. Timelines and evidence are generated graphically, shown to jurors simultaneously on plasma monitors and a 6-foot screen. Documents are displayed the same way, with a skilled attorney or paralegal annotating, highlighting, and emphasizing on-screen. Witnesses are called in from all over the globe, testifying over live satellite links. CGI enhanced recreations of events educate and enliven jurors. No attorney would dare be seen lugging boxes of documents into a courtroom. But is this reality or still just a technology dream (or nightmare)?

In June 2004, the American Bar Association's Legal Technology Resource Center completed its annual technology survey, published in five parts. The Litigation and Courtroom Technology volume serves as a sobering background for those who crave a total technology trial. Firms are slowly embracing litigation technology, but there is still a long road to follow before the technology is ubiquitous. Courtrooms have yet to provide much technology in the way of hardware or software, citing expenses and implementation as key barriers. Many lawyers are hesitant to spend thousands, much less hundreds of thousands, of dollars on sophisticated hardware and software. So what are the courts and attorneys embracing, and what are they putting off for another day?

Electronic Filing

According to this year's survey data, a little less that one-quarter of attorneys (23%) filed court documents electronically at some time, ranging from 4% reporting that they did so one or more times a day to 10% indicating that they did so 3 to 11 times a year. The number of attorneys who received court documents electronically jumped from 36% last year to 45% this year. Solo firms had the highest percentage of attorneys who had never received court documents electronically (73%), compared to roughly half of attorneys in larger practices (2-9 attorneys: 52%; 10-49 attorneys: 49%; 50 to 99 attorneys: 52%; 100 or more attorneys: 49%). The most popular types of court documents filed electronically were pleadings (78%), motions (76%), appearances (47%), and discovery documents (42%). Similarly, the most popular types of court documents received electronically were pleadings (68%), motions (63%), discovery documents (40%), and appearances (30%). Most lawyers had a positive experience filing court documents electronically, with 45% very satisfied with the experience and another 50% somewhat satisfied. Attorneys had equally positive experiences receiving court documents electronically -- 46% were very satisfied and 44% were somewhat satisfied.

Electronic Discovery

A great majority of the survey respondents had never received an electronic discovery request (75%), with little to no difference displayed in the responses of large firms (64%) (see Table 1). Of those who had processed requests, large firms occasionally used Web-based electronic discovery tools (19%), electronic discovery software (23%), electronic discovery consultants (29%), or litigation support software (35%). These findings suggest there is no pervasive way to process these requests. When asked to report on how often they made electronic discovery requests, 71% of large firm attorneys responded with a resounding "never" (72%). For those who had made such request, the pervasive method was in-house (94%), followed by electronic discovery consultant(s) (31%). While electronic discovery is on the rise, very few respondents have yet to engage in the activity.

Online Depositions

Lawyers' participation in online depositions is similar to that of electronic discovery. The vast majority of respondents (95%) had never been involved in an online deposition, with large firms sighting a lack of knowledge about the technology (22%), a lack of knowledge about the process (39%) and having no need to do so (72%) as the reasons why not.

Courtroom Hardware

Courts are not supplying hardware for use in their courtrooms as a whole. There are a few examples of high-tech courtrooms, and projects such as Courtroom 21 show the potential for technology in the courtroom, with wireless networks, flat panel monitors, rolling presentation stations outfitted with gadgets galore, and a judge's bench with more controls than a Boeing 747. However, these courtrooms are the exception, rather than the rule. For example, color video printers, light pens, telestrators, and touch screens were available to less than 10% of the attorneys surveyed. However, in each case, roughly 40% of respondents admitted that they did not know whether or not the device in question was available. Much more readily available were familiar devices like analog audiotape players (32%), closed-circuit television (28%), CRT monitors (26%), overhead projectors (49%), televisions (59%), and VCRs (59%) (see Table 2). Technically sophisticated devices such as plasma monitors and electronic whiteboards were only available to 3% and 9%, respectively.

The most readily available evidence presentation device was a laptop equipped with presentation software (22%). On the other hand, the availability of barcode readers (5%), evidence cameras (10%), and integrated lectern/evidence presentation units (13%), was limited. On the digital front, 22% of attorneys reported the presence of real-time reporting equipment capable of delivering a transcript to their personal notebook or laptop, and another 19% of respondents said that real-time reporting equipment that could deliver a transcript to a court monitor was also present.

Although it would be desirable for the courts to provide hardware, larger firms (over 100 attorneys) are taking matters into their own hands. Digital slide projectors (54%), notebook/laptop with presentation software (82%), and overhead projectors (76%) seem to be a part of the trial attorneys arsenal. Growing in availability are evidence cameras (34%) and digital audio recording devices (26%). Even for solo attorneys, a laptop with presentation software (21.4%) is becoming a standard tool of the trade.

Attorneys also have to be wary about bringing technology into the courtroom, checking with the judge and the court rules first. Some judges are fascinated by new technologies, but some are not as impressed. Opposing counsel may argue that the technical wizardry creates an uneven playing ground. Other impediments may be a lack of grounded outlets and other necessities. Always check with the court, review the layout, and bring back-up to keep away the worst-case-scenario.

Courtroom Training

The majority of lawyers had not received any training in courtroom technologies (24.9%) (see Table 3, at left). This fact might well explain the high percentage of attorneys that did not know what technologies were available in a courtroom setting. The attorney's firm size did not appear to have any significant impact on the decision to get such training: 76% in small firms (2-9 attorneys) and 75% in large firms (100 or more attorneys). In law firms with 50-99 attorneys, 64% had not received any training, slightly less than the 67% in firms with 10-49 lawyers. Large firm attorneys had received training most often via training materials provided by the firm (64%), training from in-house staff (54%), and vendor-sponsored courses (46%). The survey shows that 31% of respondents found live classes taught by staff to be the most effective, with lawyers in large firms finding this to be the case 78% of the time. When asked why they had not had any courtroom training, 28% of respondents found such training unnecessary.

Litigation Software

Almost half (48%) of the lawyers surveyed reported the availability of litigation support software, up significantly from last year's 25%. Within the litigation practice, two-thirds (66%) have this type of software, up from 43% in 2002. The software was noticeably more present in large firms with 100 or more attorneys (79%) than in small firms with 2 to 9 attorneys (33%) and solo practitioners (21%). In mid-sized firms with 10-49 attorneys, 56% of the lawyers had access to litigation software, and in firms with 50-99 attorneys; the availability rate was 91%.

While the software was readily available to so many attorneys, it was not used as often as one would expect (see Table 4). Only one in four (24%) used litigation support software regularly. Surprisingly, large-firm attorneys (over 100) reported using litigation support software significantly less (12%) than firms with 50-99 lawyers (37%). Large firms reported 27% used it occasionally, while 18% seldom took advantage it. Those remaining (36%) reported that they never used it. Interestingly, the individuals that did use the software regularly included other attorneys in the firm (48%) and support staff with specialized litigation training (44%). Very few support staff with no specialized litigation training (3%) use the software.

Respondents wrote in which specific software packages were being used by the firm. Summation, Concordance and Casemap were the top three products specified for large firms, while Casesoft appeared in the top three for smaller and mid-size firms (2-49).

Over two thirds (78%) of the large firm respondents agreed that transcript and

document management are very important features to have in litigation support software, along with document imaging (65%). Features such as trial presentation functionality and access to Internet/Intranet/Extranet were deemed very important by 47% and 43% respectively. For large firms, features such as barcode scanning and real time transcription tools were judged somewhat or not very important.

Motivating factors for purchasing litigation support software are also captured in the survey. For large firms, cases with high demand or potential liability are very likely (27%) or somewhat likely (30.3%) to cause a firm to invest in the technology, while opponent's use of the software was not at all likely (36%) to spurn a purchase. A client's request for litigation support software was by far the most compelling reason for large firms to make this type of investment (66%).

In conclusion, the survey shows that while litigation and courtroom technologies exist, they have yet to be used at the mainstream level as that of word processing, spreadsheets, and other business applications. There are still many processes and procedures to work out to effectively use technologies such as electronic discovery and e-filing. Cost barriers, lack of need, and lack of training still keep hardware and software under the radar, although often the larger firms will embrace the technology earlier. It appears that until clients demand the pervasive use of these technologies, their acceptance and implementation will continue to be slow.

For more information about the survey, see: www.lawtechnology.org.

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How To E-Mail Documents To Opposing Counsel

By David W. Snyder

IT IS NOW COMMON in litigation practice to transmit pleadings and briefs to opposing counsel through e-mail. Courts have adopted rules that permit the service of pleadings and other documents on opposing counsel via e-mail. See, e.g., Pa. R. Civ. P. 205.4(g)(2) . Even if you do not take advantage of electronic service rules available to you, opposing counsel may ask you to e-mail him or her an electronic version of a recently filed document as a courtesy. Opposing counsel may have practical, legitimate reasons for such a request. If you recently served discovery *24 requests, it may be more efficient for opposing counsel to work directly from an electronic copy rather than typing your discovery requests into the computer system. Receiving an electronic version of your recently filed document may also save time for opposing counsel-it will enable opposing counsel to transmit the document to his or her client more quickly and it will allow opposing counsel to prepare a response immediately.

THE DANGERS OF E-MAILING DOCUMENTS TO OPPOSING COUNSEL . There are, however, at least two hidden dangers in e-mailing documents to opposing counsel that could embarrass you or hurt your client.

Metadata

The first potential danger is that the recipient may be able to view hidden information about the document's creation and development, which is sometimes referred to as "metadata." Examples of metadata that may be attached to your document include:

- A document summary, similar to a mini-profile of the document, which may identify the author of the document, the date it was created, the date (s) it was modified, or the identities of those who accessed, edited, or printed the document;
- Custom fields created by the author;

- Your company or organization's name, and the name of your computer;
- Comments and notations typed directly into the document; and
- Hidden text such as track changes (e.g., prior versions and red-lined versions of the document).

Some of this information may be harmful to your case or your client. If the document you transmit to opposing counsel contains prior drafts or comments, however, you may be disclosing attorney-client communications or attorney work product. See Jan Sylanski, Threat of Metadata and Malpractice Initiates Problems for Attorneys, 15 Law. J. 8 (2001). A prior version of your document may contain sensitive information about your litigation strategy, or it may contain comments that you or your client typed directly into a draft of the document. Moreover, if you re-use forms or template documents, the document you transmit may contain metadata about other cases that has been inherited from other prior documents.

Some of this information may be harmless. There may be strategic reasons, however, why you do not want opposing counsel to have access to some of the traditionally harmless metadata. For example, if an attorney is seeking a preliminary injunction alleging exigent circumstances, but the metadata reveals that the attorney has been preparing the papers for several weeks, opposing counsel could determine how long the attorney has been working on the document through the document summary and use this information to undermine the movant's exigency claim.

Document Alteration

The second potential danger of e-mailing documents to opposing counsel is that the recipient may intentionally (or unintentionally) alter the document.

If, for example, you send opposing counsel an electronic copy of a pleading you filed, he or she has the power to alter your document, including changing the representations you made in your document. Opposing counsel could conceivably alter a document intentionally and then distribute the altered version to the court or-in a case important to the public interest-to the press. This may be an unlikely scenario, but it may be a risk that is significant enough to cause concern depending on the nature of your case or your assessment of your opponent.

Opposing counsel may also unintentionally alter your document. When you draft a document it is formatted to be printed from your computer's default printer, not opposing counsel's printer. When opposing counsel prints the document, the

page breaks and the overall appearance of the printed document may be markedly different. If opposing counsel uses this version of your document as an exhibit to a brief or a motion, the court will see an improperly formatted version of your document instead of the professionally formatted document you painstakingly drafted. This could be an embarrassment to you and your client.

TWO SIMPLE WAYS TO MITIGATE THE RISKS . There are two ways to prepare your document for electronic distribution that will help to mitigate these risks.

Convert Your Document to PDF Format

The most effective way to mitigate both of the risks discussed above is to convert your document to PDF (portable document file) format. PDF format has become a standard format for distributing a document electronically because it enables you to preserve the document's original graphic appearance. If you convert your document to PDF format, it will diminish the risk that opposing counsel will unintentionally alter the formatting of your document. There are two types of PDFs: text PDFs and image PDFs. While a text PDF can be edited, an image PDF cannot. Therefore, if you convert your document to a text PDF, opposing counsel may still be able to edit your document substantially. If the document is converted to an image PDF, however, the document cannot be edited.

Minimal Metadata

The converted PDF document will contain some metadata, such as the date the PDF document itself was created. However, any metadata that may have existed in your document before converting to PDF format will not be transferred to the newly created PDF document.

Clean Your Document Before Electronic Distribution

If document alteration is not a concern, it may be practical to "clean" (i.e., remove) the metadata from the document before e-mailing it to opposing counsel. Your ability to clean metadata from your document depends on the word processing software you are using. The word processing software itself may allow you to remove certain types of metadata. Because metadata can exist in a variety of forms, however, your word processing software may not be able to provide you with a single method to remove all of the metadata. Some companies have developed software specifically designed to remove metadata, making the cleaning process easier and more thorough. It is important to note,

however, that even if you clean a document before e-mailing it to opposing counsel, there is still a risk that the document could be altered.

CONCLUSION . The use of e-mail will continue to gain popularity as a means of transmitting filings to opposing counsel. As the use of e-mail in the day-to-day practice of law continues to grow, so does the need to identify and mitigate the attendant risks.

Practice Checklist for How To E-Mail Documents to Opposing Counsel

E-mail provides the fastest way to send documents to opposing counsel, but there can be some things lurking in those transmissions that you might not know about. All lawyers should be aware of the risks involved in using e-mail to send documents, and what can be done about them.

. Two hidden dangers in e-mailing electronic documents to opposing counsel are that the recipient may:

__ Be able to view hidden information about the document's creation and development ("metadata"); and

__ Intentionally (or unintentionally) alter the document.

. There are two ways to prepare your document for electronic distribution that will help to mitigate these risks:

__ Convert your document to PDF (portable document file) format. A text PDF can be edited, an image PDF cannot; and

__ "Clean" your document before electronic distribution. Your ability to clean metadata from your document depends on the word processing software you are using. The word processing software itself may allow you to remove certain types of metadata.

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Inside The Juror's Mind

By Robert B. Hirschhorn, Lisa Blue, and Macy Jaggers

You can't really communicate with your jurors unless you understand them, and you can't fully understand each and every panel member by the end of voir dire. Each juror is a unique person with a unique set of life experiences, but jury selection is a common experience to which jurors have similar responses. This article will use psychodrama to help you better understand what it is like to be a juror.

For those unfamiliar with the term, "psychodrama" was developed in the early 1900s by therapist Jacob Moreno. At its most basic, psychodrama is role-playing. This psychological rechnique has been used by therapists to treat patients, by actors to prepare for movie roles, and by lawyers to succeed in trial. Psychodrama is useful to attorneys on many levels: it can help you better understand your clients, help your clients relate to the jurors, help the jurors identify with your clients, and help you get in touch with your own fears, among other things.

In this article, we are going to put you in the shoes of a juror. This peek inside a juror's mind should give you an idea of what's weighing on them as they sit through voir dire and how this affects their ability and willingness to participate in voir dire. Once we've walked you through this experience, we will give you some tips for making the jury selection process easier for jurors and more successful for you.

You, the Juror

You open your mail to find a document entitled Jury Summons. It tells you to report to the county criminal courts building at 123 Main St. on Feb. 20, 2005, at 8:45 a.m. The date jumps out because you have an important meeting scheduled with the bigwigs from the home office that day -- and it's the same day as your daughter's school play. Maybe you can get out of it. "Jury Service Is

a Most Vital Function of Citizenship," it reads across the top. You stick the summons in your briefcase and decide to deal with it later.

It's Feb. 19, and you realize you're scheduled to be in court tomorrow morning. You dig out the jury summons and notice that you were supposed to have detached the bottom portion, filled out a short questionnaire, and mailed it to the court five days before your jury service date. Oops! Maybe you can call in sick. "Medical Excuses Require a Letter or Statement from Your Doctor," the summons tells you.

You go to your boss in a panic, and she tells you to report for duty. She's not worried, she explains, because she knows you won't get picked as long as you follow her instructions: sit quietly throughout jury selection, look at no one, and say nothing.

The next day, you head to the courthouse. You pull up at 8:30 a.m. with plenty of time to spare and notice a sign that reads " Civil Courts Building." Oops again. Maybe you should just blow it off. You glance at the summons for the address of the right court building and read, "Failure to Answer a Jury Summons Is a Contempt Action Punishable By a Fine of $100 to $1,000." You call your spouse to look up the court's address while you head in the general direction. Your spouse reminds you that your daughter's play is at 6 p.m.

You arrive at the courthouse late and rattled. Your boss has already called once to see if you're done yet. You follow the signs and the crowd to a central jury room where you watch a short video on the importance of jury service. "Serving on a jury is one of the most importance responsibilities of every American citizen," the video tells you. Your heart swells a little; maybe you should try to get on the jury?

A man in uniform herds you toward your assigned court, where you spend an hour waiting in the hall. The man to your right smells like it's about time for his monthly shower, the woman on the other side can't stop talking about how the police and prosecutors are the biggest crooks of them all (apparently, they put her innocent grandson in jail for being at the wrong place at the wrong time), and your boss has called two more times. Why in the world did they tell you to be at the courthouse at 8:45?

At 10:15, you're finally ushered into the courtroom. As you take your seat on the hard wooden bench, you look around the courtroom and try to identify the players. One woman looks too young be a lawyer but too respectable to be a defendant. You find out she's the prosecutor. You see a man who might be the

defendant and you wonder what he did. You find out he's the defense attorney. "Same thing," you think.

The judge walks in and thanks you for your patience. She explains that the delay had nothing to do with this case but was caused by a short hearing on another case. After talking about the words "bias" and "prejudice," she tells you that she's resisting the urge to tell the joke about the time two Aggies went fishing. You smile because you know the punch line. Then she tells you that she's turning things over to the lawyers. Here we go ...

Stop the Madness

As an attorney, you can't take away all of the jurors' anxiety, but you can help them feel a whole lot more comfortable in the courtroom. First, address some of their logistical concerns. If they are distracted by questions like "How long will this trial last?" and "What is that woman over there doing?" they will not be able to hear what you are telling them. Deal with these issues early in voir dire. If the judge doesn't address logistical concerns with the jurors, you should feel free to. Also, introduce the people in the courtroom and briefly explain their roles. This helps the jurors feel more comfortable in their environment, but also shows the jurors that you are considerate and appreciate the work that all the individuals in the courtroom do. Remember, the first step to the jurors' liking your client is getting them to like you.

As you can see from our psychodrama exercise, much of the jurors' stress comes from things in their personal lives that are weighing on their minds: work, family, and finances are a few of the most common. You can't make those problems go away, but you can try to take their minds off them by drawing them into your case. If you don't pique the jurors' interest in your case immediately, you'll have a hard time getting them to listen to you at all. That's why it's important to prepare a power statement for your case. Your power statement should communicate your theory of the case. It should be easy to remember and easy to repeat -- almost like a bumper sticker.

Once you've grabbed the jurors' attention with your power statement, you want to warm them up to the idea of talking to you. Getting a stranger to talk openly in front of a group of strangers is no easy task. Start with a simple icebreaker like "Good morning." When no one responds (they usually don't), take a moment to explain that an important part of your job is hearing from them during voir dire. Then try again. This time, after you say "Good morning," make a gesture that encourages a response. This usually elicits a decent response and even a few nervous laughs.

Another good exercise is to ask everyone to raise their hands (or their cards if you're using them). This, too, is a good opportunity to explain how important it is that you hear from them. Never tell jurors that they may not be right for a case; instead, tell them that the case may not be right for them. Phrasing the explanation this way removes the burden from the jurors. It lets them know that it's okay if they say things that show they might be biased toward a party in the case. Constantly reaffirm this concept throughout voir dire by praising every negative answer you get. Once the jurors feel comfortable speaking out against your ideas, you'll be in a much better position to identify those that are adverse to your client -- even possibly securing strikes for cause.

Let's return to the power statement. You will use this statement to pique the jurors' interest in your case, but you will also use it throughout voir dire and trial. You should use voir dire to tell the story of your case. This story will be the unfolding of your power statement. Story-telling is an art, and most lawyers have to work at it to do it well. Rather than focusing on technicalities or complicated legal concepts when talking about your case in voir dire, simply tell the story of your client in a way the jurors can relate to. As your story unfolds, the jurors will get drawn into it. If it is compelling, they will forget about the other distractions that were on their minds when they arrived at the courthouse. Lawyers who are good storytellers help the jurors get to know their clients and like them. By the end of voir dire, the jurors should feel like they understand your position on the case and that it makes a lot of sense.

You're never going to understand fully every juror on a panel, no matter how much time you have or how talented you are. But you can certainly start with some basic assumptions. The courtroom is not their world, and they are not accustomed to being in court. They have issues in their own lives that are much more important to them than your case -- no matter how important your case. These factors and countless others combine to make juror service a nerve-wracking experience for many people. Empathizing with this stress and doing your best to minimize it goes a long way toward a more productive voir dire.

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Writing Tips

By Gertrude Block

Looking for Misplaced Modifiers; How Usage Trumps 'Correctness'

Q The president was quoted by The New York Times as having said after an interview with the president of Uganda, "I gave a speech to the nation that was cleared by the intelligence services." Isn't that comment ambiguous? His remark seems to indicate that "the nation" was cleared.

A Yes. Grammatically, the modifier is assumed to be the clause or phrase closest to the modificand (the word being modified). That means that the phrase "cleared by the intelligence services" refers to "the nation" not to "a speech." The meaning was no doubt clarified by subsequent comments, but the president should have said, "I gave a speech, cleared by intelligence services, to the nation of Uganda."

The error of a misplaced modifier is understandable in impromptu statements. In writing, however, misplaced modifiers may sometimes be amusing or damaging. The unintended humor of the following statements occurred in the responses of a few law students to test questions:

• The proposed site was deemed unsafe due to contamination by a leading university scientist.

• The plaintiff was a passenger in a taxi raped by the driver.

• The robber entered the café and threatened the cashier standing at the register with a small-caliber handgun.

In legal documents, misplaced modifiers may be damaging. Courts have been asked so often to construe modifying language that they have given the

grammatical rule a legal title, "The Doctrine of the Last Antecedent." In my book (Effective Legal Writing, 5th edition, 1992, pp. 93-96), I give some illustrations from court decisions. Following are two.

Under the Doctrine of the Last Antecedent, courts presume that drafters have placed modifying words next to the language they intend to modify. For example, one court construed the language, "an ad valorem tax on a leasehold interest or government property that is measured by income or volume of transaction" to mean that the governmental property was measured, although the drafter intended to it to mean that the ad valorem tax was being measured. Properly placing the modifying phrase would have avoided the problem: "an ad valorem tax that is measured by income or volume of transaction on a leasehold interest or government property."

One hospital's failure to observe the Doctrine of the Last Antecedent proved costly to the hospital. Before admission to the hospital, persons were asked to sign the following consent form:

• I hereby authorize the Physician or Physicians in charge to administer such treatment and the surgeon to have administered such anesthetic as found necessary to perform this operation which is advisable in the treatment of this patient.

In this case, a patient sued after the surgeon removed her reproductive organs during an appendectomy. The language of the consent form did not indicate that the hospital had received the patient's consent to enlarge the scope of the operation if necessary. The court held against the hospital on the ground that the consent form the patient had signed was so ambiguous as to be almost worthless. Part of the problem was the modifying clause introduced by the word which. Because that clause was placed directly after the word operation, the court construed it to mean that the operation was advisable, although the hospital intended it to mean that the patient consented to whatever treatment was necessary.

Once you become sensitive to the prevalence of misplaced modifiers, you see them in speech and writing everywhere, even in presidential interviews.

Q Here's a sentence for you to comment on. The language is typical of today's writing. This came from the headline of our local newspaper: "Shade gardens aren't that labor intensive; and plants seem to grow slower and steadier."

A As anyone who has checked a dictionary knows, that has many meanings.

But the use of that to mean "very" or "so" is not listed in either The American Heritage Dictionary (2000) or Webster's International Dictionary (1996), although it is commonly used with that meaning today. Correctly used, that requires a referend: "The mistake seemed horrendous, but it was not really that bad."

In the same sentence, an additional error results from the substitution of adjectives for adverbs. Instead of the adjectives slower and steadier, the adverbs slowly and steadily should have been used. The disappearance of the traditional use of adverbs is one symptom of language leveling -- the disappearance of categories, tenses and semantic distinctions -- that is common today, probably because English has become mainly a spoken language, because of the dominance of television, radio and even cell phones and e-mail, in which persons "talk" to each other electronically.

Leveling is seen, for example, in the replacement of like for as in many contexts, for example in, "Tell it like it is." The relative pronoun whom has almost disappeared, as in, "The bank robber who the police discovered hiding under a house." The personal pronoun I has replaced me in contexts such as, "Give it to my wife and I." Gerunds and gerundives are ignored, except by persons who studied grammar in primary school, and semantic distinctions, as in the adjectives notorious and famous, widespread and prevalent, and others are lost.

Persons who grieve at the loss of such distinctions often write to me, sometimes expecting me to "do something about it." But because wide and accepted usage always eventually trumps grammatical "correctness," there is nothing that can be done, and the language changes that are widely adopted will become "correct" for future generations. If that were not true, we would all still be speaking Anglo-Saxon!

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Making the Cross-Cultural Case: Educating the Judge About Race, Religion, and Ethnicity

By Holly Kuschell Haworth

A woman walks into your office for a divorce consultation. You begin by asking her to describe her family and living situation, income, and marriage. Her story is not unusual: a six-year marriage; two young children; a house, two cars, and a middle-income marital estate. The woman stayed at home with her children for a few years while her husband provided their main source of income, but now she works part-time.

You probe further and ask where they got married. She tells you they were married on a reservation in Northern Wisconsin where they lived until early this year. Upon further questioning, the woman explains that she is a member of the Lac Du Flambeau Tribe of Chippewa Indians as are her children, but that her husband is not Native American. She describes herself as a "traditional Indian" who is very religious and devoted to her cultural heritage, which her husband rejects. She wants custody of her children so that she may raise them to embrace their tribal traditions and knows that her husband will not agree.

You decide to take the case, but realize there may be Native American cultural issues that will affect its outcome. After some cursory research, you find that not only does jurisdiction come into question, but that Native American cultural traditions may conflict with mainstream "American" norms built into the family law judicial system. It is your job to educate the judge as to tribal law as it affects jurisdiction and any relevant cultural heritage issues.

Cases that contain cultural issues, particularly those unfamiliar to mainstream courts, can be challenging for lawyers, judges, and clients. You may one day, for example, represent a Native American such as in the scenario above, an Arab, Chinese-American, or impoverished Appalachian client with whom you

and the judge may not share traditions or cultural values. To represent your client fully, you must educate yourself, the judge, and your client on issues of law and culture that are germane to the case. In so doing, your role may shift from advocate to educator and back several times during the course of the case.

Depending on your client's heritage and the circumstances of the case, many tools are available to you in educating the court, such as written memorandum, treatises, and expert witnesses. However, the most important tool in your arsenal is you. Immerse yourself in your client's culture and heritage and any relevant laws. You must make yourself sufficiently knowledgeable on the subject of your client's heritage and the relevant law to present and maintain your client's case.

Where to begin

Your case is only as good as the quality of your resources. As a lawyer juggling a busy caseload and high service expectations, it becomes exceedingly important to narrow your focus to the best possible sources.

Legal sources, such as those found in the law library or on an Internet legal research site, are the most obvious and accessible places to begin. Look first to familiar sources, such as state and federal law digests, treatises, and journals, and then expand your scope as your knowledge grows.

Culturally relevant research information may be found in tribal court or international law digests, treatises, and journals. If you are unable to find relevant law there, ask for help from other lawyers or law groups specializing in the client's heritage. For example, several legal organizations around the country cater specifically to Native Americans, such as Michigan Indian Legal Services (814A S. Garfield Ave., Traverse City, MI 49686-34301; (800) 968-6877; www.mils.org).

Upon contacting their office, you will find that part of their work focuses on Michigan family law. You also may find that they have had family law cases from other states, such as Wisconsin (the state of your client's reservation). Or perhaps one of their lawyers could direct you to a helpful specialized legal resource.

Another way to find relevant case law is to locate rules in your jurisdiction that allow courts to rely on experts for matters that are not common knowledge. Then seek expert assistance from reliable legal or nonlegal sources with knowledge of your client's culture.

Why go through all this trouble to deal with what appears to be an uncomplicated issue? Because issues that you don't presently understand fully may deeply influence or in some instances turn the case for or against your client. For example, in the scenario above, the issue of jurisdiction will arise because your client and her husband were married and lived (with their children) on an Indian reservation for a significant part of their marriage. How crucial the question of jurisdiction is to your client's case will depend on the law of the jurisdiction for that particular Indian tribe as well as the law in your circuit.

Although your state may require only six-months' residency to attain jurisdiction over the marriage and children, the tribal court on the reservation may have conflicting long-arm jurisdiction. You also may find that the tribal laws concerning marriage and child custody are beneficial to your case. Conversely, as opposing counsel, you may find that your client will unexpectedly be hailed into tribal court. Therefore, knowing and finding the correct law on the subject of jurisdiction and possibly that of conflicts of law is essential to your case.

Your search, however, should not be limited to legal resources. Do not be fooled into thinking that because you cannot find case law relevant to the cultural issues, important resources, such as anthropological, social, or psychological studies, do not exist. Many successful attorneys have made judges more comfortable looking beyond traditional case law by showing directly or by implication that courts can and do rely on nonlegal professional journals and studies in resolving family law matters. In particular, public or university libraries and educational facilities may have excellent materials. Likewise, cultural community members and/or organizations may provide additional invaluable tools.

The cultural group

The cultural issues in your client's case may not be strictly legal or may be a combination of legal and cultural. Either way, it is important to educate yourself with sources that come directly from the cultural group. This may be a departure from your traditional research methods. For many years, cultures in and outside the United States were studied and recorded, primarily by Caucasian men with an Anglo Saxon education. Although their many contributions cannot be deemphasized, their research and conclusions cannot replace the "inside" information that comes directly from the cultural group. As almost any member of a cultural group will tell you, no one knows them like they know themselves.

Many bar associations are composed of lawyers who are members of or work with specific cultural groups. These associations may be part of a larger

organization, such as the American Bar Association (Commission on Racial & Ethnic Diversity in the Profession or Council on Racial & Ethnic Justice, 321 N. Clark St., Chicago, IL 60610; (312) 988-5000; www.abanet.org/minorities) or the Hispanic National Bar Association (815 Connecticut Ave., N.W., Ste. 500, Washington, DC 20006; (202) 223-4777; www.hnba.com) or may be independent and state-specific, such as the Illinois Native American Bar Association (P.O. Box 2319, Chicago, IL 60690-2319; (847) 622-4192). For complete listings of bar associations, contact the American Bar Association or do an Internet search. Once you find the bar association, contact its leaders or spokespersons and query them on the subject of your research. Although they may be unable to answer your inquiries directly, they may put you in contact with a member or other helpful resource.

In addition to bar associations, most states have other organizations that represent or cater to particular cultures. You can do an Internet or telephone listing search to find community centers or social service organizations with cultural affiliations, such as the American Indian Center in Chicago (1630 W. Wilson Ave., Chicago, IL 60640; (773) 275-5871; www.aic-chicago.org) or the Chinese Cultural Center in San Francisco (750 Kearney St., 3rd Floor, San Francisco, CA 94108-1809; (415) 986-1822; www.c-c-c.org). However, don't expect to call one of these organizations and get the answers to your legal dilemma. What you can expect is a rich source of cultural history and information about current norms and practices. This may require you to interview several community members to get a full view of the culture and its nuances.

You might call, for instance, the American Indian Center and speak to its director regarding your questions on marriage practices for the Lac Du Flambeau Tribe in Wisconsin. Because it is traditional for Native Americans to be taught by elders in their community, he or she may direct you to one of these valuable sources. You also may be referred to several other community members who are Lac Du Flambeau tribal members or to the tribe itself in Wisconsin.

If you decide to take this step, please remember to inquire about how best to interview or speak with community members in a respectful manner relative to their traditions. For example, if you need to interview an immigrated Arab woman and you are a male lawyer, it is important to know that you may not interview her without speaking first to her husband. Although no law in the United States forbids such contact, Arab cultural practices do. Although other sources of information may be available, you will have wasted your client's time and money because you were insensitive to Arab custom.

If you cannot find resources regarding your client's cultural heritage using the previous suggestions, seek the recordings of historians, anthropologists, and/or other scholars who have contributed to a study of the cultural group. This option might seem easy because you need only search a public or university library for books, periodicals, or texts on the culture. However, take into account that many of the traditional scholarly works may not be wholly accurate portrayals of a culture. Rather, they may be only an outsider's perspective. Although such resources may not be the best choice for legal purposes, they may be a helpful starting point. Read a book about the culture for a cursory overview, and then follow up with other culturally appropriate sources.

Share your knowledge

Now that you've completed your studies, you are ready to share your knowledge with the judge. First, tell the court about the cultural issues in the case. Do so in a formal or informal way, whichever best suits the cultural issues, the law, your case, and the judge.

Many issues can be brought before a judge in an informal way, depending on local law. You may inform the judge verbally that your client is of a certain cultural heritage, which requires special consideration during the case. Many judges will ask what considerations would be necessary and will direct you accordingly. Others may not be familiar with the issues and may ask for a formal education on the subject, such as a memorandum. Still others may respond that no special considerations will be given, whereupon you must be prepared to educate the judge further or make a formal motion.

In all cases, you will need a working knowledge of the law surrounding the cultural issue before bringing the issue before the judge. Most judges will be receptive to preparedness at the outset and may allow you to proceed without further formal motions. Please note, however, that an informal introduction may not work when the law requires a written motion or otherwise.

A settlement conference is another informal way to introduce cultural issues. You may work quickly with your client and opposing counsel to find issues that can be stipulated to and flesh out aspects in controversy, including issues of cultural significance. Then, sit down in conference with the judge, giving an informal, easy-to-understand overview and discussing issues in controversy. If you choose this method, be sure to bring copies of the legal and cultural sources for both the judge and opposing counsel.

Use a similar process--mediation--to bring cultural issues into the open by filing

a request for mediation. During mediation, educate the mediator with optimal resources so as to obtain a beneficial result for your client. If the mediation doesn't end with a settlement agreement, you will, at the very least, have "practiced" your cultural education on the mediator before presenting it to the judge.

Do not be surprised if the judge asks for a written memorandum of law on your client's culture or the law as it affects your case. This is an excellent opportunity to educate the judge in a manner that is beneficial to your client. Keep your memorandum concise and to the point. Carefully scrutinize it to avoid giving cultural misinformation, a common mistake. Finally, provide the judge with a complete listing of your resources in case he or she opts to do further study.

Written motions

Some cultural issues are best brought by written motion. For example, the issue of jurisdiction in the scenario above requires a written motion for lack of jurisdiction to proceed. Similarly, the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C.A. § 1901 -1963 , P.L. 95-608, 92 Stat. 3069 (1978) , which occasionally appears in custody, abuse/neglect, and/or adoption cases, requires the court to file written documentation with a child or parent's Indian tribe before the case can proceed. However, the type and content of the written motion depends on the issue, the requirements of law, and the particularities of your client's culture. You might, for instance, find that bringing a written motion for mediation on behalf of your client would be better if she was Navajo, as the tribe employs a mediation program called the Peacemaker Court, which is more progressive and successful than many nontribal programs. In so doing, you would research and write a motion that "fits" within the framework of a Navajo Peacemaker Court (Office of the Chief Justice, P.O. Box 520, Window Rock, AZ 86515; (520) 871-6385; see www.navajo.org).

On the other hand, your client might be from a tribe that doesn't sanction divorce and, therefore, doesn't have a divorce mediation program. You would then consider alternatives to mediation or, if the tribe has jurisdiction over the case, fit your motions within the framework of the tribe's rules and regulations.

Other cultural issues may be presented by written motion at your own judgment. For example, in divorce/custody cases, issues of cultural background or heritage, parental homeland, and/or sexual preference can be introduced under most state best-interest-of-the-child standards.

In Jones v. Jones, 542 N.W.2d 119 (S.D. 1996) , the trial court awarded primary

physical custody to the father, who was a member of the Sisseton-Wahpeton Dakota Nation, under the state's best-interest-of-the-child standard. The court reasoned that because the children were part Native American and had Native American features, the father would be better able to deal with any discrimination that might occur and the children's subsequent needs.

On appeal, the South Dakota Supreme Court upheld the trial court's decision, finding that it was proper for the court, when determining the best interests of a child to "consider the matter of race as it relates to a child's ethnic heritage and which parent is more prepared to expose the child to it." Id. at 123.

As in the case above, your client might benefit from consideration of the effect of discrimination on the children. Therefore, you could include this as a point of argument in your motion for custody, along with other issues, such as exposure to cultural heritage, the unwillingness of one parent to honor the child's heritage, etc.

Proving the case

In addition to making formal or informal motions, you will need to decide whether to provide evidence to support and/or prove up your client's case. This depends on the content of your case and requirements of law. In considering how best to provide evidence, remember this principle: evidence should give your client a voice regarding his or her cultural heritage that will persuade the judge to decide in your favor.

Occasionally, tangible evidence will be necessary, such as written materials (for example, a tribal membership card or ID), cultural items, photos, etc. Although these items may not seem important, they may give the judge a firsthand view into the culture. For example, in ICWA cases, a child's Indian heritage may not come into question if documentation is not immediately available. For some judges, a child might not look or "seem" Native American, until a photo showing him or her dressed in ceremonial regalia or participating in other cultural activities is produced in court. Suddenly, the issue of the child's cultural heritage becomes more concrete and important.

A useful way to give your client a voice regarding his or her cultural heritage is to provide a voice for the judge to hear. Oral testimony from a good witness gives valuable "hands-on" or "inside" information for the judge's consideration. Many kinds of witnesses may be called in a family law case. The trick is to narrow your scope to those witnesses who are most relevant to your client's heritage as well as plausible and persuasive.

The cultural issues that arise in civil cases often are specific or unique enough to point you toward the kind of witness you'll need. A good example is in termination-of-parental-rights cases where the child is of Native American heritage. The Indian Child Welfare Act requires a qualified expert witness to testify in the case. (Indian Child Welfare Act of 1978, 25 U.S.C.A. § 1912(f)). The guidelines set forth by the BIA for ICWA further specify that the expert witness must be (a) a member of the child's tribe or (b) an expert who has worked with the tribe and has knowledge of social and cultural standards as well as child-rearing practices and so on. ("Bureau of Indian Affairs Guidelines for State Courts: Indian Custody Proceedings," Federal Register, Vol. 44, No. 70, Monday, April 23, 1979.)

***30** This example is, perhaps, more clear-cut than one might find in other cases involving cultural issues due to requirements of law. But finding and using a cultural expert witness needn't be difficult. Your research into the cultural heritage of your client will likely lead you to a person qualified to testify. If not, search for an expert witness in a fashion similar to that described above: use your legal resources and then additional resources within your client's cultural group.

Interpreters/translators

You may find that your client or witness doesn't speak English as a first language and/or does not speak or read English fluently enough to understand court proceedings. A language barrier often makes people feel intimidated by and/or distrustful of the court system, particularly in adversarial proceedings such as in family law.

The American legal system relies heavily on the spoken word, and lawyers often use their legal training to argue detailed distinctions between the meanings of words and phrases or the intent behind the use of a word.

Cultural Consideration in Domestic Violence Cases, A National Judges Benchbook, § 6.12, pp. 6-8 to 6-9.

Where cultural issues are a consideration in family law cases, provide your client and/or witnesses with a well-trained and experienced interpreter and/or translator.

Having an interpreter who truly speaks the same language and dialect as the witness is crucial. In one case a Cuban battered woman tried to tell the judge

that she had been "stabbed" with a knife. The interpreter, who was from Uruguay and spoke a different form of Spanish, said that she had been "scratched" with a knife.

When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts (1998), prepared by the National Judicial Education Program to Promote Equality for Women and Men in the Courts (New York, N.Y.). See Unit 111, page 25.

It also is important that the interpreter/translator be sensitive to the type of case and prevent his or her personal feelings from becoming part of the interpretation/ translation. Although some easily accessible people may appear to be great resources, avoid their use in family law cases if they may be biased. These people may include children, other family members, and/or friends of the parties or family.

Conclusion

Your case involving a client with a cultural background unfamiliar to you need not be intimidating. Instead, important educational tools, cultural resources, and expert witnesses are at your disposal. The case will challenge you and the court to learn about other laws or traditions that could provide a fascinating insight into the lives of a culture not your own.

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GP|Solo Law Trends & News
Family Law

August 2005 Volume 1, Number 4

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Domestic Violence Ten Years Later

By Edward S. Snyder and Laura W. Morgan

I. Introduction

Ten years ago, Remedies for Domestic Violence: A Continuing Challenge appeared in these pages. [FN1] At that time, its author, Edward S. Snyder, outlined the significant progress made in the field of domestic violence [FN2] from the 1960s through the 1980s, as feminism brought the scourge of domestic violence to the nation's attention. The article focused on how matrimonial practitioners should approach the issue of domestic violence in their practices. [FN3]

***34** Since that article, practitioners, scholars, and the government have continued to document the impact of domestic violence on batterers, [FN4] the battered, [FN5] and children. [FN6] The raw statistics, however, continue to frighten, shock, and astonish:

• In 1996, among all female murder victims in the U.S., 30% were slain by their husbands or boyfriends; [FN7]

• In 2000, 1,247 women and 440 men were killed by an intimate partner; [FN8]

• In 2001, there were 691,710 nonfatal violent victimizations committed by current or former spouses, boyfriends or girlfriends;

• In 2001, intimate partner violence made up 20% of all non-fatal crime experienced by women;

***35** • Each year, up to 4 million women are physically abused by their husbands or live-in partners. [FN9]

This article will not revisit the historical overview of domestic violence or the psychology of domestic violence. Rather, this article will focus on changes in federal and state law that have been wrought in response to the continuing social ill of domestic violence over the last ten years. The article will then consider how the matrimonial lawyer can confront and deal with domestic violence in practice.

II. Federal Law

A. Statutes

1. The Violence Against Women Act

Historically, the federal government lacked jurisdiction over crimes of domestic violence. Victims of domestic violence had to rely on state criminal statutes and protective orders for relief. In 1994, however, as part of the Violence Crime Control and Law Enforcement Act of 1994, Congress enacted the Violence Against Women Act of 1994 ('VAWA'). [FN10] This Act recognized that violence against women is a crime with far-reaching consequences for families, children and society. [FN11] In 1996, Congress reaffirmed its commitment to VAWA by the enactment of additional federal domestic violence crimes in VAWA, and again in 2000 by the passage of amendments to the VAWA statutes. [FN12]

***36** VAWA comprises numerous federal statutes to prosecute domestic violence offenders in the federal courts. [FN13] VAWA also created a civil rights remedy for gender motivated violence, but this part of VAWA was ruled unconstitutional. [FN14]

a. Interstate Travel to Commit Domestic Violence

It is a federal crime for a person to cross state lines or enter or leave Indian [FN15] country with the specific intent to kill, injure, harass or intimidate that person's intimate partner, if in the course of or as a result of such travel the suspect commits or attempts to commit a violent crime. [FN16] The term "intimate partner" includes a spouse, a former spouse, a past or present cohabitant (as long as the parties cohabitated as spouses), parents of a child in common, and any other person similarly situated to a spouse who is protected by the domestic or family violence laws of the State or tribal jurisdiction in which the injury occurred or where the victim resides. "Intimate partner" does not include a girlfriend or boyfriend with whom the defendant has not resided, unless protected by state law. This section does not require either a completed

commission of a crime of violence or bodily injury. [FN17]

It is also a federal crime to cause an intimate partner to cross state lines or enter or leave Indian country by force, coercion, duress or fraud, and during, as a result of, or to facilitate such conduct or travel, commit or attempt to commit a crime of violence. [FN18] The law does not require a showing of specific intent to cause the spouse or intimate partner to cross state or reservation ***37** lines, but it does require proof that the interstate travel resulted from force, coercion, duress or fraud. [FN19]

b. Interstate Stalking

It is a federal crime to cross a state line with the specific intent to kill, injure, harass or intimidate another person, if in the course of, or as a result of such travel, the defendant places such person in reasonable fear of death to, or serious bodily injury to, that person or that person's immediate family. [FN20] The term 'immediate family' includes a spouse, parent, sibling, child or any other person living in the same household and related by blood or marriage. [FN21] This section also applies within the special territorial or maritime jurisdiction of the United States. [FN22]

Under the 2000 amendments, it is a federal crime to use the mail or any facility of interstate or foreign commerce (including the Internet) [FN23] with the intent to kill, or injure, or place in reasonable fear of death or serious bodily injury, a person in another State or within the special maritime or territorial jurisdiction of the United States, or to engage in a course of conduct that places such person in reasonable fear of death, or serious bodily injury to themselves, their intimate partners, or a member of their immediate family. [FN24] This provision requires a 'pattern of conduct composed of two or more acts, evidencing a continuity of purpose.' [FN25]

c. Interstate Travel to Violate an Order of Protection

It is a crime to travel, or travel into or out of Indian country, with the specific intent to violate the portion of a valid protection order that prohibits or provides protection against violence, threats, repeated harassment, contact, communication with, or ***38** physical proximity to another person. [FN26] It does not require an intimate partner relationship (although such a relationship may be required by the state or other governmental body issuing the protection order), and it does not require bodily injury. It does, however, require an actual violation of the protection order. [FN27]

It is also a crime to cause a person to cross state lines, or enter or leave Indian country, by force, coercion, duress or fraud, and during, as a result of, or to facilitate such conduct or travel, engage in conduct that violates the portion of an order of protection. [FN28] This law does not require a showing of specific intent to cause another person to cross state or reservation lines, but does require proof that the travel resulted from force, coercion, duress or fraud, and proof that the person violated the relevant portion of the protection order during the course of, as a result of, or to facilitate the forced or coerced conduct or travel. [FN29]

d. Penalties

Penalties for violations of VAWA sections 2261, 2261A, and 2262 depend on the extent of the bodily injury to the victim and whether a weapon is used. Terms of imprisonment are incremental, and range from a maximum of five years when there is no injury to the victim, ten years if there is serious bodily injury or if a dangerous weapon is used, twenty years if there is permanent disfigurement or life threatening bodily injury, up to life imprisonment if the crime of violence results in the victim's death. [FN30]

2. The Gun Control Act [FN31]

a. Possession of a Firearm While Subject to an Order of Protection

It is a crime for a person to possess a firearm while subject to a court order restraining such person from harassing, stalking, or threatening an intimate partner or the child of an intimate partner. ***39** The protection order must have been issued following a hearing for which the defendant had notice and an opportunity to appear, and includes a specific finding that the defendant represents a credible threat to the physical safety of the victim or an explicit prohibition against the use of force that would reasonably be expected to cause injury. [FN32]

b. Transfer of a Firearm to a Person Subject to an Order of Protection

It is a crime to knowingly transfer a firearm to a person subject to a court order that restrains that person from harassing, stalking, or threatening an intimate partner or the child of an intimate partner. [FN33]

c. Possession of a Firearm After Conviction of a Misdemeanor Crime of Domestic Violence

An amendment to VAWA, effective September 30, 1996, makes it a crime to possess a firearm after conviction of a misdemeanor crime of domestic violence, even if the conviction occurred before the law's effective date. [FN34]

d. Transfer of a Firearm to a Person Convicted of a Misdemeanor Crime of Domestic Violence

It is a crime to illegally and knowingly transfer a firearm to a person who has been convicted of a misdemeanor crime of domestic violence. [FN35] An amendment to the Brady statement requires purchasers of firearms to state that they have not been convicted of a misdemeanor crime of domestic violence. [FN36]

e. Penalties

The maximum term of imprisonment for a violation of sections 922(d)(8), 922(g)(8), 922(d)(9), or 922(g)(9), is ten years. If, however, the defendant has three or more convictions for a violent ***40** felony or a serious drug offense, or both, committed on occasions different from one another, the defendant must be imprisoned for not less than fifteen years, and the court may not suspend the sentence or grant probation. [FN37]

3. Full Faith and Credit to Orders of Protection

Pursuant to federal law, a qualifying civil or criminal domestic protection order issued by a court in one state or Indian tribe shall be accorded full faith and credit by the courts of other states or tribes, and enforced as would their own orders. [FN38] Qualifying protection orders may be permanent, temporary or ex parte, but they must be issued by a court that has jurisdiction over the parties, and provide the defendant with reasonable notice and an opportunity to be heard, consistent with due process. Mutual protection orders do not qualify if (a) the original respondent did not file a cross or counter petition seeking a protective order or (b) if such a cross or counter petition was filed, but the court did not make specific findings that each party was entitled to such an order. [FN39]

4. Victims' Rights

All victims of federal crimes, including victims of domestic violence have the following rights: [FN40]

• The right to be treated with fairness and with respect for the victim's dignity and privacy

• The right to be reasonably protected from the accused offender

• The right to be notified of court proceedings

• The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial

• The right to confer with attorney for the Government in the case

***41** • The right to restitution [FN41]

• The right to information about the conviction, sentencing, imprisonment, and release

5. 42 U.S.C. § 1983

Section 1983 provides a general federal cause of action against government officials whose actions deprive individuals of a constitutionally protected right. [FN42] DeShaney v. Winnebago County Department of Social Services, [FN43] however, severely restricted the ability of plaintiffs to sue police and municipal officers for their failure to protect women who were victims of domestic violence. In DeShaney, the plaintiff was a young boy whose father routinely abused him. State social workers were aware of the abuse, and while they took action, they did not remove the boy from his father's custody. A few months later, the boy's father beat him so severely that he was rendered permanently retarded and institutionalized. The boy's mother filed a lawsuit on his behalf alleging a due process violation. In affirming the trial court's grant of summary judgment to the defendant, the Court explained that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." [FN44] Since states have no affirmative duty to provide ***42** such services, they cannot be held liable for injuries that would have been averted had they chosen to provide them.

Consequently, most cases that have asserted a violation of due process for the failure to protect against domestic violence have not been successful. [FN45]

DeShaney, however, created two exceptions: when the victim is in the state's custody, and when the state has itself created the danger, such as by actively discouraging intercession and arrest in domestic violence cases. Under these exceptions, plaintiffs have garnered some successes. [FN46] Therefore, this possibility should not be overlooked.

B. Case Law

Many viewed the civil enforcement provisions [FN47] of VAWA as a victory for the victims of domestic violence. [FN48] These sections established a civil rights remedy for violent acts based on discriminatory intent, by a person acting under color of state law or by a private individual. Congress stated that gender based violence had a negative impact on interstate commerce, and denied victims of gender motivated crimes equal protection of the laws, life, liberty, and property without due process of law.

In May 2000, the United States Supreme Court, in United State v. Morrison, [FN49] struck down this powerful civil rights provision. ***43**[FN50] In a sharply divided 5-4 opinion, the Rehnquist court held that modern Commerce Clause jurisprudence has identified three broad categories of activity that Congress may regulate: the use of the channels of interstate commerce; the instrumentalities of interstate commerce and people or things in interstate commerce, even though the threat comes from intrastate activities; and economic activities that substantially affect interstate commerce. [FN51] Gender-motivated violence, the majority held, is not economic activity. The majority also stated that Congressional regulation of that activity could not be upheld based on its aggregate affect on interstate commerce: "The Constitution requires a distinction between what is truly national and what is truly local. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." [FN52] What the court deemed to be the non-economic, criminal nature of the conduct at issue was central to its decision.

In reaching its decision that intrastate violence is local in character, the Court held that it was up to the Court, not Congress, to ultimately decide whether an activity has a "substantial affect" on interstate commerce so that Congressional action is permissible. Thus, the four years of hearings, the mountains of findings in the Congressional Record concerning the impact of domestic violence on job opportunities and lost wages, and its effect on transportation, meant nothing. The Supreme Court could strike down a law if it simply disagreed with a Congressional assessment of the interstate impact on the activity it regulated.

***44** Of further interest is the majority opinion's reiteration that Congress cannot regulate "family law":

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in Lopez, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context. See 42 U.S.C. § 13981(e)(4) . Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace. [FN53]

At the same time, the minority, per Justice Breyer, stressed that child support could be regulated under the Commerce Clause; it is not, therefore, merely a matter of what is "family law" and what is not; the question is what has an effect on commerce and what does not. [FN54]

In contrast to the civil provisions of VAWA, the criminal provisions have been upheld by every court that has considered the issue. [FN55]

III. State Law

For the matrimonial lawyer, the greatest impact of domestic violence on state law has been in the areas of child custody/visitation, property division in **divorce**, and **divorce** mediation. These topics will be dealt with in section IV below. Before reaching that section, two uniform laws, as well as state VAWA-type acts, should also be considered in domestic violence cases.

***45** A. The Uniform Child Custody Jurisdiction and Enforcement Act

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), [FN56] proposed by the National Conference of Commissioners of Uniform State Laws and approved by the American Bar Association in December 1997, includes many new provisions helpful in meeting the needs of victims of domestic violence forced to take their children and seek refuge in a another state. [FN57]

First, the definition of "custody proceeding" in the UCCJA was ambiguous. State court decisions, as well as the Commissioners themselves, did not agree on whether the UCCJA applied to protection from domestic violence proceedings. The UCCJEA, by contrast, includes a sweeping definition that, with the

exception of adoption, includes virtually all cases that can involve custody of or visitation with a child as a 'custody determination.' [FN58] Second, notice under the Act may be given in a manner consistent with notice in a domestic violence proceeding. [FN59] Third, the UCCJEA recognizes that a protective order proceeding will often be the procedural vehicle for invoking jurisdiction by authorizing a court to assume temporary emergency jurisdiction when the child's parent or sibling has been subjected to or threatened with mistreatment or abuse. [FN60] Fourth, the Act allows for the defense of forum non conveniens based on the likelihood of domestic violence in a forum. [FN61] Fifth, a court can refuse jurisdiction by reason of an abuser's conduct. [FN62] Sixth, the court may ***46** enter orders providing for the safety of the child and the person ordered to appear with the child. This alternative might be important when safety concerns arise regarding victims of domestic violence or child abuse traveling to the jurisdiction where the abuser resides. [FN63]

B. The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act

The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act [FN64] was approved in 2000. [FN65] This Act establishes uniform procedures that enable courts to recognize and enforce valid domestic protection orders issued in other jurisdictions. This uniformity will enable courts to treat such cases consistently, thereby better serving the needs of victims of domestic violence. This Act supplements VAWA's full faith and credit provisions. [FN66]

C. State VAWAs

The Supreme Court suggested in United States v. Morrison that states can regulate the type of conduct prohibited by VAWA, and can, under state law, provide civil causes of action and remedies similar to VAWA. [FN67] In 2000, New York City was the first ***47** jurisdiction to adopt a local version of VAWA, giving persons injured by domestic violence the right to sue their abusers for civil damages. [FN68] California followed suit in 2002, and Illinois in 2004. [FN69]

IV. Practice: Representing Victims of Domestic Violence

A. Screening for Domestic Violence

Clients should be screened to determine if they are victims of domestic violence. [FN70] If the attorney determines that domestic violence is present,

the first goal is to stop the violence and help ***48** the client be safe. The most valuable tool in keeping a client safe is the civil protection order. [FN71] Every state has a mechanism for such an order, [FN72] and obtaining an order not only prevents further abuse but may grant valuable remedies, such as temporary custody, child support, and use of the marital home. Every state also has a domestic violence arrest law, [FN73] and criminal prosecution should not be overlooked.

In recent years, many states have also adopted laws allowing employers to apply for restraining orders to prevent violence, harassment, or stalking of their employees. [FN74] Therefore, requesting the employer to obtain such an order should be considered by the practitioner as well. If the domestic violence is serious, the employee can, in some states, request leave to address the domestic violence. [FN75]

***49** Even the threat of a civil protection order can have benefits. Attorneys guilty of committing domestic violence face disciplinary measures from their state bar, including, but not limited to, public censure or reprimand, [FN76] suspension, [FN77] or disbarment. [FN78] Courts justify imposing discipline on attorneys for nonprofessional misconduct as appropriate to protect the public, preserve the reputation and integrity of the legal profession, and enhance public confidence in attorneys. [FN79] Police officers guilty of domestic violence may find themselves dismissed for conduct unbecoming an officer. [FN80] Although there may be economic ramifications in filing for a protective order, an attorney must realize that a ***50** victim could be swayed by the consequences to the abuser. The attorney must encourage the victim to focus upon thwarting further abuse.

Once a civil protection order has been obtained, the attorney must then devise specific strategies for custody and property division that take into account the domestic violence. Mediation must be avoided, since a power imbalance exists in violent relationships. Finally, the attorney should consider tort remedies.

B. Custody

Men who batter their partners are likely to physically abuse their children. [FN81] Moreover, children in homes where domestic violence is present suffer the same emotional and psychological impact as children who are themselves targets of abuse. [FN82]

The psychopathology of the batterer often leads him to demand custody of the

children as a means of maintaining control. Men who have battered their partners continue to attempt to maintain their control over the abused party and her children. [FN83]

Today, in stark contrast to ten years ago, 48 states [FN84] have child custody statutes that consider domestic violence in the ***51** awarding of custody. [FN85] The statutes provide either that (a) a rebuttable presumption exists against the perpetrator of domestic violence being awarded custody, [FN86] or (b) domestic violence is a factor to be considered by the court when determining the best interests of the child. [FN87] Moreover, Model Code § 401 of the National Council of Juvenile and Family Court Judges provides for a ***52** rebuttable presumption that it is detrimental to the children for perpetrators of domestic violence to be given any custodial role and Model Code § 402 provides that domestic violence must be considered in any custody or visitation proceeding. [FN88]

Some states also have statutes that encourage or create a presumption in favor of joint custody. [FN89] Obviously, joint custody is incompatible with domestic violence. [FN90] Consequently, many custody statutes contain presumptions against the award of joint custody where domestic violence exists. [FN91]

Most states now also require that judges must consider the presence of domestic violence when granting the non-custodial parent visitation. [FN92]

C. Property Division

At one end of the spectrum, some states specifically consider domestic violence in property division. Of these states, some specifically list domestic violence as a factor in property division, ***53** while in others, "marital fault" is a factor in property division. In those states where "marital fault" is a consideration in the division of property, a definite trend exists towards giving weight to acts of domestic violence during the marriage when distributing marital or community property. [FN93] Spousal abuse is a relevant factor in and of itself without specifically requiring particularly egregious abuse, and without expressly demanding a connection between the abuse and some other factor. [FN94]

In the center of the spectrum, some states do not allow the courts to consider "marital fault," but do allow the courts to consider "economic fault." In these states, courts are more than willing to find that spousal abuse constitutes economic fault because of the economic impact that spousal abuse may have, such as increased medical bills or a decreased ability to work. [FN95]

At the other end of the spectrum, some states have taken the view that domestic violence is relevant in property distribution only if the abuse was egregious. In New York, for example, spousal abuse must be "egregious" to be factored into a property ***54** distribution. [FN96] Some other courts have also suggested that domestic violence is relevant only if was the precipitating cause for the divorce. [FN97]

When domestic violence is weighed into the determination of an appropriate property distribution upon divorce, the most common result is that the wife (the spouse who is typically abused) is given a larger portion of the marital estate than she might have received otherwise. [FN98]

***55** D. Mediation

Mediation is a widely accepted method of resolving custodial and financial issues in **divorce**. [FN99] Commentators generally agree that mediation should be avoided in cases where there has been a pattern of domestic violence. [FN100] Violence, and the resulting fear, taints all aspects of the negotiation process, and mediation may be wildly inappropriate in such cases. [FN101] Consequently, many states have statutes that specifically exempt domestic violence cases from mediation. [FN102]

E. Tort Law

1. Causes of Action

With the abolition of interspousal tort immunity, domestic torts have become an increasingly effective way to compensate the victim of domestic violence. Common legal theories that have been used in domestic violence cases include: negligence, negligent infliction of emotional distress, [FN103] negligence per se, defamation, deceit and fraudulent misrepresentation, false imprisonment, intentional infliction of emotional distress, wrongful ***56** death, assault and battery, and an implied cause of action for violation of a criminal statute. [FN104]

2. Joinder of Tort Action with Divorce Action

In some states, courts have held that tort and contract claims that arise during the marriage should be litigated and decided in the divorce case. In these states, the effect of requiring that tort and contract claims be joined with the

dissolution action is the application of res judicata to any tort or contract claims that were not brought. [FN105] In some other states, joinder of a tort claim with a divorce action is permitted but not required. [FN106]

In most states, however, the courts have held that interspousal tort or contract claims should not be joined with pending divorce actions. For example, in Simmons v. Simmons, [FN107] the Colorado court stated that joinder was inappropriate, because of the entirely distinct natures of divorce and tort proceedings. [FN108]

V. Conclusion

The last ten years have seen an amazing development in both statutory and case law recognizing the impact of domestic violence on marriages and children. With the Supreme Court's decision in Morrison, however, an important piece of legislation ***57** remains undone: state civil remedies similar to that in VAWA. The Congressional findings of the extraordinary physical, psychological, and economic impact of domestic violence make the need for such legislation clear. This is therefore a call to state legislatures to take up the invitation issued in Morrison and create appropriate civil remedies for victims of domestic violence.

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[FN1] . Edward S. Snyder, Remedies for Domestic Violence: A ContinuingChallenge, 12 J. Am. Acad. Matrim. Law. 335 (1994) .

[FN2] . "Domestic violence" occurs when one intimate partner uses physical violence, threats, stalking, harassment, or emotional or financial abuse to control, manipulate, coerce, or intimidate the other partner. Roberta Valente, Domestic Violence and the Law, in The Impact of Domestic Violence on Your Legal Practice 3 (American Bar Association Commission on Domestic Violence, 1996). See also Definitions of Domestic Violence (National Clearinghouse on Abuse and Neglect Information, United States Department of Health and Human Services, Administration for Children and Families, 2002).

<http://nccanch.acf.hhs.gov/general/legal/statutes/stats02/domviol.cfm>

A simpler definition is "the physical, sexual, and emotional maltreatment of one family member by another." Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family 3 (1996).

[FN3] . See also The Impact of Domestic Violence on Your Legal Practice: A Lawyer's Handbook, supra note 2; John M. Burman, Lawyers and Domestic Violence: Raising the Standard of Practice, 9 Mich. J. Gender & L. 207 (2003) ; Roberta Valente, Addressing Domestic Violence: The Role of the Family Practitioner, 29 Fam. L.Q. 187 (1995) .

[FN4] . Donald G. Dutton, The Batterer (1995).

[FN5] . E.g., James Ptacek, Battered Women in the Courtroom (1999); Ann Shalleck, Feminist Inquiry and Action: Introduction to a Symposium on Confronting Domestic Violence and Achieving Gender Equality: Evaluating Battered Women & Feminist Lawmaking, 11 Am. U. J. Gender Soc. Pol'y & L. 237 (2003) .

[FN6] . E.g., Peter G. Jaffe, Nancy K.D. Lemon & Samantha E. Poisson, Child Custody and Domestic Violence, A Call For Safety and Accountability (2003).

In recognition of the profound effect that witnessing domestic violence has on a child, some states use child endangerment statutes to permit prosecution of batterers who commit abusive behaviors in the presence of a child. Further, approximately 19 states now specifically identify children who witness acts of domestic violence as a class of persons in need of legal protection. Child Witnesses to Domestic Violence (National Clearinghouse on Child Abuse and Neglect Information, United States Department of Health and Human Services, Administration for Families and Children, 2002). <http:// nccanch.acf.hhs.gov/

general/legal/statutes/stats02/childwit.cfm> See also Annelies Hagemeister, Overlap of Domestic Violence and Child Maltreatment in U.S.A. State Civil and Criminal Statutes (Minnesota Center Against Violence and Abuse, 2000). <http:// www.mincava.umn.edu/link/documents/statutes/statutes.doc>

[FN7] . Federal Bureau of Investigation, U.S. Dep't of Justice, Uniform Crime Reports of the U.S. 1996 (1996).

[FN8] . Office of Violence Against Women, U.S. Dep't of Justice, Intimate Partner Violence, 1993-2001 (2002). <http:// www.ojp.usdoj.gov/bjs/pub/pdf/ ipv01.pdf>

[FN9] . Lawrence a. Greenfield, et al., U.S. Dep't of Justice, Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends (1998).

Of course, the precise incidence of domestic violence is difficult to determine: it often goes unreported; there is no nationwide organization that gathers information from local police departments about the number of substantiated reports and calls. C.J. Newton, Domestic Violence: An Overview, Feb. 2001 Mental Health Journal. <http://www.therapistfinder.net/Domestic-Violence/ Domestic-Violence-Statistics.html>

[FN10] . 42 U.S.C. § 13981 (2000) .

[FN11] . Congress stated its goal was to treat violence against women as a major law enforcement priority, take aim at the attitudes that nurture violence against women, and provide the help that survivors need. The Violence Against Women Act of 1991, S. Rep. No. 102-197, at 34-35 (1991) .

[FN12] . See discussion infra.

[FN13] . VAWA contains seven subtitles that address domestic violence: Subtitle A, Safe Streets for Women; Subtitle B, Safe Homes for Women; Subtitle C, Civil Rights for Women; Subtitle D, Equal Justice for Women in Courts; Subtitle E, Violence Against Women Act Improvements; Subtitle F, National Stalker and Domestic Violence Reduction; Subtitle G, Protection for Battered Immigrant Women and Children.

[FN14] . See discussion II(B) infra.

[FN15] . See Sandra J. Schmieder, The Failure of the Violence Against Women Act's Full Faith and Credit Provision in Indian Country: An Argument for Amendment, 74 U. Colo. L. Rev. 765 (2003) ; Melissa L. Tatum, A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementingthe Full Faith and Credit Provisions of the Violence Against Women Acts, 90 Ky. L.J. 123 (2001-2002) .

[FN16] . 18 U.S.C. § 2261(a)(1) .

[FN17] . Id.

[FN18] . 18 U.S.C. § 2261(a)(2) .

[FN19] . Id.

[FN20] . 18 U.S.C. § 2261A(1) .

[FN21] . Id.

[FN22] . Id.

[FN23] . See 1999 Report on Cyberstalking: a New Challenge for Law Enforcement and Industry (United States Department of Justice, Report from the Attorney General to the Vice President, August 1999).

<http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm>

[FN24] . 18 U.S.C. 2261A(1) .

[FN25] . Id.

[FN26] . 18 U.S.C.§ 2262(a)(1)

[FN27] . Id.

[FN28] . 18 U.S.C. § 2262(a)(2) .

[FN29] . Id.

[FN30] . 18 U.S.C. § 2621(b); 18 U.S.C. § 2262(b) .

[FN31] . Possession of a firearm is strongly associated with homicide at the hands of a family member or intimate. A strong association between a history of domestic violence and homicides committed in the home with a firearm has been shown. Arthur L. Kellerman, Gun Ownership as a Risk Factor for Homicide in the Home, 329 New Eng. J. Med. 1084, 1087 (1993).

[FN32] . 18 U.S.C. § 922(g)(8) .

[FN33] . 18 U.S.C. § 922(d)(8) .

[FN34] . 18 U.S.C. § 922(g)(9) .

[FN35] . 18 U.S.C. § 922(d)(9) .

[FN36] . 18 U.S.C. § 924 .

[FN37] . 18 U.S.C. § 924(e)(1) .

[FN38] . 18 U.S.C. § 2265 .

[FN39] . Id.

[FN40] . 42 U.S.C. § 10606(b) .

[FN41] . In a VAWA case, the court must order restitution after conviction to reimburse the victim for the full amount of losses. These losses can include costs for medical or psychological care, physical therapy, transportation, temporary housing, child care, lost income, attorney's fees, costs incurred in obtaining a civil protection order, and any other losses suffered by the victim as a proximate result of the offense. In a conviction under the Gun Control Act, the Court may order restitution. 18 U.S.C. § 2264 .

[FN42] . Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person withing the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976) .

[FN43] . 489 U.S. 189 (1989) .

[FN44] . 489 U.S. at 196 .

[FN45] . E.g., May v. Franklin County Bd. of Comm'rs, 59 Fed. Appx. 786, 2003 WL 1134499 (6th Cir. Mar. 12, 2003) ; Gonzales v. City of Castle Rock,307 F.3d 1258 (10th Cir. 2002) ; Jones v. Union County, 296 F.3d 417 (6th Cir. 2002) ; O'Brien v. Maui County, 37 Fed. Appx. 269, 2002 WL 1192768 (9th Cir. June 4, 2002) ; Piotrowski v. City of Houston, 237 F.3d 567 (5th Cir. 2001) .

[FN46] . E.g., Fajardo v. County of Los Angeles, 179 F.3d 698 (9th Cir. 1999) .

[FN47] . 42 U.S.C. § 13981 .

[FN48] . See Julie Goldsheid, Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement, 22 Harv. Women's L.J. 123 (1999) ; Leonard Karp & Laura C. Belleau, Federal Law and Domestic Violence: The Legacy of the Violence Against Women Act, 16 J. Am. Acad. Matrim. L. 173 (1999).

[FN49] . 529 U.S. 598 (2000) . See Sally F. Goldfarb, The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism, 71 Fordham L. Rev. 57 (2002) ; Sally F. Goldfarb, No Civilized System of Justice: The Fate of the Violence Against Women Act, 102 W. Va. L. Rev. 499 (2000) ; Julie Goldscheid, United States v. Morrison and the Civil Rights Remedy of theViolence Against Women Act: A Civil Rights Law Struck down in the Name of Federalism, 86 Cornell L. Rev. 109 (2000) ; Jennifer R. Hagan, Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence after the Death of Title III of the Violence Against Women Act, 50 DePaul L. Rev. 919 (2001) ; Jennifer R. Johnson, Privileged Justice Under Law: Reinforcement of Male Privilege by the Federal Judiciary Through the Lens of the Violence Against Women Act and U.S. v. Morrison, 43 Santa Clara L. Rev. 1399 (2003) ; Alberto B. Lopez, Forty Yeas and Five Nays--The Nays Have It: Morrison's Blurred Political Accountability and the Defeat of the Civil Rights Provision of

the Violence Against Women Act, 69 Geo. Wash. L. Rev. 251 (2001) ; Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, 3 The Yale Law Journal 619 (2001);

[FN50] . 28 U.S.C. § 13981.

[FN51] . 529 U.S. at 608-09 .

[FN52] . 529 U.S. at 617-18 .

[FN53] . 529 U.S. at 615-16 .

[FN54] . 529 U.S. at 660 (Breyer, J., dissenting).

[FN55] . United States v. Lankford, 196 F.3d 563 (5th Cir. 1999) ; United States v. Page, 167 F.3d 325 (6th Cir. 1999) ; United States v. Von. Foelkel, 136 F.3d 339 (2nd Cir. 1998) ; United States v. Wright, 128 F.3d 1274 (8th Cir. 1997) , cert. denied, 523 U.S. 1053 (1998) ; United States v. Casciano, 124 F.3d 106 (2nd Cir.) cert. denied, 522 U.S. 1034 (1997) ; United States v. Bailey, 112 F.3d 758 (4th Cir.) , cert. denied, 522 U.S. 896 (1997) ; United States v. Gluzman, 953 F. Supp. 84 (S.D.N.Y. 1997) , aff'd 154 F.3d 49 (2nd Cir. 1998) , cert. denied, 526 U.S. 1020 (1999) ; United States v. Frank, 8 F. Supp.2d 253 (S.D.N.Y. 1998) .

[FN56] . 9, Part 1A, U.L.A. 649 (1999). The UCCJEA is intended to replace the outdated Uniform Child Custody Jurisdiction Act (UCCJA) and is currently in effect in most jurisdictions.

[FN57] . 27 Joan Zorza, The UCCJEA: What Is it and How Does it Affect Battered Women in Child- Custody Disputes, 2000 Fordham Urb. L.J. 909 (2000).

[FN58] . UCCJEA § 102(4) .

[FN59] . Id. at § 108.

[FN60] . Id. at § 204.

[FN61] . Id. at § 207(b)(1).

[FN62] . Id. at § 208.

According to the Reporter's Notes, domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another State to establish jurisdiction has engaged in unjustifiable conduct and the new State must decline to exercise jurisdiction under this section.

[FN63] . UCCJEA § 210(c) .

[FN64] . 9, Part 1B U.L.A. 28 (Supp. 2004). See Andrew C. Spiropoulos, Prefatory Note and Comments to Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, 35 Fam. L.Q. 205 (2001).

[FN65] . As of August 15, 2004, UIEDVPOA had been adopted in Alabama, California, Delaware, District of Columbia, Idaho, Indiana, Mississippi, Montana, Nebraska, North Dakota, South Dakota, Texas and West Virginia. Bills were introduced in Kansas, Oklahoma, and the U.S. Virgin Islands for its passage.

<http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-uiedvpoa.asp>

[FN66] . 18 U.S.C. § 2265 . See discussion supra II(A).

[FN67] . 529 U.S. at 616 . See Deborah M. Weissman, Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local", 42 B.C. L. Rev. 1081 (2001) .

[FN68] . N.Y. City Admin. Code § § 8-901 to 8-907 (2001) (providing a civil cause of action for any person committing a 'crime of violence motivated by gender' and authorizing compensatory and punitive damages, injunctions, and fees).

[FN69] . Cal. Civ. Code § 52.4 (2002) ; Ill. Public Law 94-0416 (effective Jan. 1, 2004).

Similar legislation has been proposed in other municipalities, as well as in the states of Arizona, Arkansas, and New York. E.g., "Violence Motivated by Gender," S.B. 1550, 45th Leg., 1st Reg. Sess. (Ariz. 2001) (providing damage actions when acts of violence are 'motivated by gender,' as established by a 'preponderance of the evidence,' but not if 'random'); "Arkansas Violence Against Women Act of 2001," H.B. 1691, 83d Gen. Assem., Reg. Sess. (Ark. 2001) (providing for protection of the 'civil rights of victims of gender motivated violence and ... promoting the public safety, health, and activities by establishing a state civil rights cause of action'); "An Act To Amend the Civil Rights Law, in Relation to Providing a Civil Remedy for Victims of Bias-Related Violence or Intimidation," S.B. 2776, 224th Leg., Reg. Sess. (N.Y. 2001) (providing remedies for injuries based on gender and sexual orientation and authorizing civil suits to be brought by both the attorney general and individuals).

[FN70] . Lois Shwaeber, Representing Victims of Domestic Violence in 1999 Wiley Family Law Update 166 (1999), from a composite of questions suggested in American Medical Association Diagnostic and Treatment Guidelines on Domestic Violence 4, n. 18 at 8 (1992), recommends the following screening questions:

1. Are you in a relationship where you are being physically hurt? Threatened? Treated Badly?

2. Has your partner ever destroyed things? Your property? Pets?

3. Has your partner ever threatened or hurt the children?

4. Has your partner ever forced you to have sex? Forced you to engage in sexual acts you were uncomfortable with?

5. Has your partner prevented you from leaving the house? From seeing your friends?

6. Does your partner make you account for your every minute? Does your partner check up on you constantly? Check your mileage?

7. Does your partner control the family finances? Dole out small amounts of money for you to spend?

8. Does your partner accuse you of having an affair? Does your partner behave in an overprotective manner?

9. Has your partner ever threatened you with a gun or dangerous instrument?

10. Are you afraid?

11. What do you need to be safe?

See also Susan Schechter, Guidelines for Mental Health Practitioners in Domestic Violence Cases 13, n. 24 (1987); New York State Office for the Prevention of Domestic Violence 8, n. 76 (1999); David Adams, Identifying the Assaultive Husband in Court: You Be the Judge, Boston Bar J. 25 (July/Aug. 1989).

[FN71] . The civil protection order is also known as a temporary restraining order, temporary injunction, stay away order, or no-contact order.

[FN72] . See Fredrica L. Lehrman, Domestic Violence Practice and Procedure Appendix 4A (Supp. 2003).

[FN73] . See id. § 6:1.

[FN74] . Ariz. Rev. Stat. Ann. § 12-1810 (West 2003); Ark. Code Ann. § 11-5-115 (Michie 2002); Cal. Civ. Proc. Code § 527.8 (West Supp. 2004) ; Colo. Rev. Stat. Ann. § 13-14-102(4)(B) (West 2003); Ga. Code Ann. § 34- 1-7 (2004) ; Ind. Code Ann. § 34-26-6 (Michie Supp. 2004); Nev. Rev. Stat. Ann. § 33.200 -.360 (Michie 2004); R.I. Gen. Laws § 28-52-2 (2003) ; Tenn. Code Ann. § § 20-14-101 to -109 (Supp. 2003).

[FN75] . In recent years, several states have enacted laws that provide domestic violence victims time off from work to address the violence in their lives. Alaska Stat. § 12.61.017 (Michie 2002); Ariz. Rev. Stat. Ann. § 13-4439 (West Supp. 2003) ; Cal. Lab. Code § § 230 through 230.2 (West 2003 and Supp. 2004); Colo. Rev. Stat. Ann. § 24-34-402.7 (West 2003); Conn. Gen. Stat. Ann. § 54-85b (West Supp. 2004) ; Haw. Rev. Stat. Ann. § 378-72 (Michie 2004); 820 Ill. Comp. Stat. Ann. § 180/1 -45 (West Supp. 2004); Me. Rev. Stat. Ann. tit. 26, § 850 (West Supp. 2003) ; Mo. Ann. Stat. § 595.209(1)(14) (West 2003); N.Y. Penal Law § 215.14 (McKinney 1998) .

Moreover, almost half the states have enacted laws that explicitly provide unemployment insurance to domestic violence victims in certain circumstances.

Cal. Unemp. Ins. Code § § 1030 , 1032 , 1256 (West Supp. 2004) ; Colo. Rev. Stat. Ann. § 8-73-108(4)(r) (West 2003); Conn. Gen. Stat. Ann. § 31- 236(a)(2)(A) (West 2003); Del. Code Ann. tit. 19, § 3315(1) (Supp. 2002) ; 820 Ill. Comp. Stat. Ann. 405/601 (West Supp. 2004) ; Ind. Code Ann. § 22- 4-15-1(1)(C)(8) (Michie Supp. 2003); Kan. Stat. Ann. § 44-706(A)(12) (Supp. 2004) ; Me. Rev. Stat. Ann. tit. 26, § 1043(23)(B)(3) (West Supp. 2003) ; Mass. Gen. L. Ann. ch. 151A, § § 1, 14, 25, 30 (West 2004); Minn. Stat. Ann. § 268.095(1)(8) (West Supp. 2004) ; Mont. Code Ann. § 39-51-2111 (2003) ; Neb. Rev. Stat. Ann. § 48-628(1)(a) (Michie Supp. 2003); N.H. Rev. Stat. Ann. tit. 23, § 282-A:32(I)(a)(3) (Supp. 2003); N.J. Rev. Stat. § 43:21- 5(j) (Supp. 2004) ; N.M. Stat. Ann. § 51-1-7 (A) (Michie 2004); N.Y. Lab. Law § 593(1)(a) (McKinney Supp. 2004) ; N.C. Gen. Stat. § 96-14(1f) (Supp.2003) ; Okla. Stat. Ann. tit. 40, § § 2-405(5) , 3-106 (G)(8) (West Supp. 2004) ; Or. Rev. Stat. § 657.176(12) (Supp. 2004) ; R.I. Gen. Laws § 28-44- 17.1 (2003) ; S.D. Codified Laws § 61-6-13.1 (Supp. 2003) ; Wash. Rev. Code Ann. § § 50.20.050 , 50.20.100 , 50.20.240 , and 50.29.020 (2002 & Supp. 2004) ; Wis. Stat. Ann. § 108.04(7)(s) (2002) ; Wyo. Stat. Ann. § 27-3-311 (Michie 2003).

[FN76] . See Matter of Principato, 655 A.2d 920, 922-23 (N.J. 1995) .

[FN77] . See In re Knight, 883 P.2d 1055, 1056 (Colo. 1994) .

[FN78] . See Attorney Grievance Commission of Maryland v. Painter, 739 A.2d 24, 24 (Md. 1994)

[FN79] . Ignacio G. Camarema, II, Comment, Domestically Violent Attorneys: Resuscitating and Transforming a Dusty Old Punitive Approach to Attorney Discipline into a Viable Prescription for Rehabilitation, 31 Golden Gate U.L. Rev. 155, 167 (2001)

[FN80] . See Oaks v. City of Philadelphia, 59 Fed. Appx. 502 (3rd Cir. 2003) .

[FN81] . Susan Schechter, Jon Conte, Loretta Fredrick, Domestic Violence and Children: What Should the Courts Consider? in Courts and Communities: Confronting Violence in the Family (National Council of Juvenile and Family Court Judges Family Violence Project, 1993).

[FN82] . Maria V.B. Frankel, The Aftermath of Child Witnessing: Some Rays of Hope, 3 Synergy: The Newsletter of the Resource Center on Domestic

Violence: Child Protection and Custody No. 1, at 2-3 (1998). See also 3 David Pelkovitz & Sandra J. Kaplan, Child Witnesses of Violence Between Parents 745-46 (1994); Marjory D. Fields, The Impact of Spouse Abuse on Children and its Relevance in Custody and Visitation Decisions in New York State, 3 Cornell J.L. & Pub. Pol'y 221, 222-234 (1994) ; Lynne R. Kurtz, Comment, Protecting New York's Children; An Argument for Creating a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child, 60 Alb. L. Rev. 1345 (1997) ; Mildred D. Pagelow, The Effects of Domestic Violence on Children and Their Consequences for Custody and Visitation Agreements, 7 Mediation J. 348 (1990); Custody of Vaughn, 664 N.E.2d 434 (Mass. 1996) (child who witnesses or experiences domestic violence suffers profound and deep harms).

[FN83] . Evan Stark, Framing and Reframing Battered Women, in Domestic Violence: The Changing Criminal Justice Response 287 (Eve S. Buzawa & Carl G. Buzawa, eds., 1992).

[FN84] . Linda D. Elrod, Child Custody Practice and Procedure § 4:01 at 172 (Supp. 2003).

[FN85] . See generally Nancy K.D. Lemon and Peter Jaffe, Domestic Violence and Children: Resolving Custody Disputes 2 (1995); Annotation, Construction and Effect of Statutes Mandating Consideration Of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children, 51 A.L.R.5th 241 (1999) ; Martha Albertson Fineman, Domestic Violence, Custody, and Visitation, 36 Fam. L.Q. 211 (2002) ; Lois Schwaeber, Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution, 10 Divorce Litig. 141, 145 (1998).

[FN86] . E.g., Ala. Code § 30-3-131 (1999) ; Ariz. Rev. Stat. Ann. § 25- 403(B) (West 2000); Ark. Code Ann. § 9-13-101 (Michie Supp. 2003) (presumption may be overcome by a finding that there is no risk of future violence); Colo. Rev. Stat. Ann. § 14-10-124(1.5)(m) (West 2003); Del. Code Ann. tit. 13, § 705A (Supp. 2002) (presumption may be overcome by a finding that there is no risk of future violence); Fla. Stat. Ann. § 61.13(2)(b)(2) (West Supp. 2004) ; Haw. Rev. Stat. Ann. § 571-46(9) (Michie Supp. 2003); Iowa Code Ann. § 598.41 (2001) ; La. Rev. Stat. Ann. § 9:364 (West 2000) (presumption against giving custody to an abuser but the statutory presumption may be overcome by "clear and convincing" evidence or by a preponderance of the evidence that the abuser has completed a treatment program successfully); Mass. Gen. L. Ann. ch. 209A, § 1 (West 1998); Mo. Ann. Stat. § 452.375.11 (West 2003); N.H. Rev.

Stat. Ann. § 458:17 (Supp. 2003) ; N.D. Cent. Code § 14-09-06.2 (2003) ; Ohio Rev. Code Ann. § 3109.04(F)(1)(h) (West 2003); Okla. Stat. Ann. tit. 43 § 112.2 (West Supp. 2004) (requires that domestic violence be proved by clear and convincing evidence before the presumption operates); Tex. Fam. Code Ann. § 153.004 (West Supp. 2004) ; Wash. Rev. Code Ann. § 26.09.191 (2) & (3) (West 1997); Wyo. Stat. Ann. § 20-2-113(a) (Michie 2003).

Just six years ago, in 1998, only 11 states had a rebuttable presumption that the perpetrator of domestic violence should not be awarded custody. Opinion of the Justices to the Senate, 691 N.E.2d 911 (Mass. 1998) . See also Fields, supra note 82.

House Concurrent Resolution 172 declared the sense of Congress that evidence of one parent's physical abuse of the other should create a statutory presumption that it is detrimental to the child to be placed in the custody of the spouse-abusing parent. 136 Cong. Rec. H11777 (1990).

[FN87] . Idaho Code § 32-717 (Supp. 2004) ; 750 Ill. Comp. Stat. Ann. 5/602(a)(7) (West 1999); Mich. Comp. Laws Ann. § 722.23 (West 2002); Minn. Stat. Ann. § 518.17(2)(d) (West Supp. 2004) ; N.Y. Dom. Rel. Law § 240 (McKinney Supp. 2004) ; R.I. Gen. Laws § 15-5-16 (2003) ; Va. Code Ann. § 20-124.3 (Michie Supp. 2004); Wis. Stat. Ann. § 767.24(2)(b)(2)(c) (West Supp. 2003) . See Dale Patrick D. v. Victoria Diane D., 508 S.E.2d 375 (W. Va. 1998) .

[FN88] . 2 Synergy: The Newsletter of the Resource Center on Domestic Violence: Child Protection and Custody No. 3 (Fall 1997).

[FN89] . 1 Jeff Atkinson, Modern Child Custody Practice § 6-1 (2d ed. 2000). Atkinson states there are eleven jurisdictions with general presumptions in favor of joint custody: District of Columbia, Florida, Idaho, Iowa, Kansas, Louisiana, Minnesota, Missouri, New Hampshire, New Mexico and Texas. Further, there are ten states with a presumption in favor of joint custody if both parents agree: Alabama, California, Connecticut, Maine, Michigan, Mississippi, Nevada, Tennessee, Vermont, and Washington.

[FN90] . Clare Dalton, When Paradigms Collide: Protecting Battered Parentsand Their Children in the Family Court System, 37 Fam. & Conciliation Cts. Rev. 273 (1999) .

A study of failed joint custody arrangements found that 57% of such

arrangements had incidents of domestic violence. Susan B. Steinman et al, A Study of Parents Who Sought Joint Custody Following **Divorce**: Who Reaches Agreements and Sustains Joint Custody and Who Returns to Court, 24 J. Am. Acad. Child Psychiatry 554 (1985).

[FN91] . E.g., Alaska Stat. § 25.20.090(8) (Michie 2002); Colo. Rev. Stat. Ann. § 14-10-124(1.5)(m), (4) (West 2003); Fla. Stat. Ann. § 61.13(2)(b) (West Supp. 2004) ; Kan. Stat. Ann. § 60-110(a)(3)(B) (Supp. 2004); Tex. Fam. Code 153.131 (West Supp. 2004) .

[FN92] . E.g., Del. Code Ann. tit. 13, § 701A (Supp. 2002) ; Ind. Code Ann. § 31-17-2-8.3 (Michie Supp. 2003); Iowa Code Ann. § 598.41 (West 2001); Mo. Ann. Stat. § 452.375.13 (West 2003); N.D. Cent. Code § 14-05- 22 (2003) .

[FN93] . Brett R. Turner, The Role of Marital Misconduct in Dividing Property Upon **Divorce**, 15 **Divorce** Litig. 117, 129-139 (July 2003).

[FN94] . E.g., Crowe v. Crowe, 602 So. 2d 441 (Ala. Civ. App. 1992) (record clearly reflected husband's physical abuse of wife; award of majority of marital property to wife not error); Bleuer v. Bleuer, 755 A.2d 946 (Conn. Ct. App. 2000) (husband abused wife and children; wife awarded 80%); Crews v. Crews, 949 S. W.2d 659 (Mo. Ct. App. 1997) (wife awarded 88% of marital property); McMann v. McMann, 845 S.W.2d 159 (Mo. Ct. App. 1993) (wife testified to ongoing spousal abuse of husband; wife awarded 63% of marital assets); Reiser v. Reiser, 621 N.W.2d 348 (N.D. 2000) (dividing estate in favor of wife despite short term marriage where husband abused wife); Weigel v. Weigel, 604 N. W.2d 462 (N.D. 2000) (dividing home equally although husband made down payment); Viti v. Viti, 773 A.2d 893 (R.I. 2000) (60% to wife where husband abused wife); Thompson v. Thompson, 642 A.2d 1160 (R.I. 1994) (husband admitted to three incidents of physical abuse and trial court found that husband abused wife both physically and emotionally; wife awarded 65% of marital assets); West v. West, 431 S.E.2d 603 (S.C. Ct. App. 1993) (wife left husband as result of his extreme physical and mental abuse and sought equitable distribution of property; wife awarded 40% of equity in marital home); Faram v. Gervitz-Faram, 895 S.W.2d 839 (Tex. Ct. App. 1995) (awarding husband only 27.1% of assets where he had abused wife during marriage).

[FN95] . E.g., Jones v. Jones, 942 P.2d 1133 (Alaska 1997) ; Mosley v. Mosley, 601 A.2d 599 (D.C. 1992) ; In re Marriage of Coomer, 622 N.E.2d 1315 (Ind. Ct.

App. 1993) (wife awarded 60% of marital assets in part because her health was impaired as a consequence of the husband's physical abuse).

[FN96] . See Orofino v. Orofino, 627 N.Y.S.2d 460 (N.Y. App. Div. 1995) ; Kellerman v. Kellerman, 590 N.Y.S.2d 570 (N.Y. App. Div. 1992) . In both cases, the courts found that the spousal abuse was not so egregious as to be considered in determining equitable distribution. In Kellerman, the husband's abuse consisted of verbal harassment, threats and several acts of minor domestic violence. In Orofino, the husband consumed extraordinary amounts of alcohol; was verbally abusive to plaintiff on a biweekly basis; was physically abusive and threw an ashtray at plaintiff causing a laceration to her scalp; threatened to commit arson; and placed the muzzle of a rifle to plaintiff's head and threatened to kill her. Cf. Wenzel v. Wenzel, 472 N.Y.S.2d 830 (N.Y. Fam. Ct. 1984) , where the husband had attacked the wife with a knife, inflicting numerous serious wounds, and then left the wife for dead. There, the court found the conduct "egregious" enough to consider in property distribution. See generally Cheryl J. Lee, Escaping the Lion's Den and Going Back for Your Hat - Why Domestic Violence Should be Considered in the Distribution of Marital Property Upon the Dissolution of Marriage, 23 Pace L.Rev. 273 (2002) (surveying New York law).

[FN97] . See Shirley v. Shirley, 600 So. 2d 284 (Ala. Civ. App. 1992) ; Faram v. Gervitz-Faram, 895 S.W.2d 839 (Tex. App. 1995) .

[FN98] . E.g., Crowe v. Crowe, 602 So. 2d 441 (Ala. Civ. App. 1992) (wife awarded exclusive possession of majority of marital property, both real and personal, in part because of husband's physical abuse); In re Marriage of Coomer, 622 N.E.2d 1315 (Ind. Ct. App. 1993) (wife awarded 60% of marital assets in part because her health was impaired as a consequence of the husband's physical abuse); Dodson v. Dodson, 904 S.W.2d 3 (Mo. Ct. App. 1995) (testimony that husband dragged wife across floor by her hair on one occasion, put a loaded pistol in her mouth and threatened to kill her on two occasions, and locked her in a dog house on one occasion; court awarded wife the marital home); McMann v. McMann, 845 S.W.2d 159, 161 (Mo. Ct. App. 1993) (wife awarded 63% of marital assets; appellate court ruled that '[e]ven if Wife's contribution was much lower than that of Husband, the trial court's division of the marital assets could be supported by Wife's testimony concerning ongoing spousal abuse of Husband'); Thompson v. Thompson, 642 A.2d 1160 (R.I. 1994) (wife awarded 65% of marital assets in part because of husband's physical and emotional abuse of wife); Faram v. Gervitz-Faram, 895S.W.2d

839, 844 (Tex. App. 1995) (72% of community property awarded to wife in large part because of husband's 'abusive and violent nature, which ultimately contributed to the **divorce**').

[FN99] . Holly Joyce, Comment, Mediation and Domestic Violence: Legislative Responses, 14 J. Am. Acad. Matrim. L. 447 (1997).

[FN100] . Nancy Ver Steegh, Yes, No, and Maybe: Informed Decision Making about **Divorce** Mediation in the Presence of Domestic Violence, 21 Miss. C. L. Rev. 145 (2002); Sarah Krieger, Note, The Dangers of Mediation in Domestic Violence Cases, 8 Cardozo Women's L.J. 235 (2002) ; Laurel Wheeler, Mandatory Family Mediation and Domestic Violence, 26 S. Ill. U. L.J. 559 (2002) ; René L. Rimelspach, Mediating Family Disputes in a World with Domestic Violence: How To Devise a Safe and Effective Court-Connected Mediation Program, 17 Ohio St. J. on Disp. Resol. 95 (2001) ; Alexandra Zylstra, Mediation and Domestic Violence: A Practical Screening Method for Mediation and Mediation Program Administration, 2001 J. Disp. Resol. 253; Jennifer P. Maxwell, Mandatory Mediation of custody in the Face of Domestic Violence: Suggestions for Courts and Mediators, 37 Fam. & Conciliation Cts. Rev. 335 (1999) .

[FN101] . Sarah M. Buel, Domestic Violence and the Law: An ImpassionedExploration for Family Peace, 33 Fam. L.Q. 719, 731 (1999) .

[FN102] . Joyce, supra note 99 at 459-465.

[FN103] . E.g., Feltmeier v. Feltmeier, 798 N.E.2d 75 (Ill. 2003) .

[FN104] . Ira Mark Ellman & Stephen D. Sugarman, Spousal Emotional Abuse as a Tort?, 55 M.D. L. Rev. 1268 (1996) . See generally Leonard Karp & Cheryl L. Karp, Ph.D., Domestic Torts (1989).

[FN105] . E.g., Coleman v. Coleman, 566 So. 2d 482 (Ala. 1990) ; Brown v. Brown, 506 A.2d 29, 32 (N.J. Super. App. Div. 1986) .

[FN106] . E.g., Maharam v. Maharam, 575 N.Y.S.2d 846 (N.Y. App. Div. 1991) ; Hakkila v. Hakkila, 812 P.2d 1329 (N.M. Ct. App. 1991); Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993) .

[FN107] . 773 P.2d 602 (Colo. Ct. App. 1988) .

[FN108] . Accord Windauer v. O'Connor, 485 P.2d 1157 (Ariz. 1977) ; Nash v. Overholser, 757 P.2d 1180 (Idaho 1988) ; Vance (Chandler) v. Chandler, 597N. E.2d 233 (Ill Ct. App. 1992) ; Henrikson v. Cameron, 622 A.2d 1135 (Me. 1993) ; Heacock v. Heacock, 520 N.E.2d 151 (Mass. 1988) ; Aubert v. Aubert, 529 A.2d 909 (N.H. 1987) ; Koepke v. Koepke, 556 N.E.2d 1198 (Ohio Ct. App. 1989) ; Walther v. Walther, 709 P.2d 307 (Utah 1985) ; Ward v. Ward, 583 A.2d 577 (Vt. 1990) ; Stuart v. Stuart, 421 N.W.2d 505 (Wis. 1988) . See generally Leonard Karp, Cheryl L. Karp, & Catherine Palo, Domestic Torts § § 1.36, 1.42 (Supp. 2003); Steven J. Gaynor, Annotation, Joinder of Tort Actions Between Spouses with Proceeding for Dissolution of Marriage, 4 A.L.R.5th 972 (1993 & Supp. 2003) .

GP|Solo Law Trends & News
Family Law

August 2005 Volume 1, Number 4

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Duress Diverts Dual Tax Liability For Joint Returns

By Melvyn B. Frumkes

Introduction

If a joint tax return [FN1] is filed by or on behalf of a husband and a wife, they are jointly and severally liable for the full tax liability. Internal Revenue Code Section 6013(d)(3) provides: "if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several." Such liability covers not only the basic tax but also any addition to the tax on account of fraud, notwithstanding that the wife may have signed the return in blank and that she was innocent of any fraud. [FN2] Furthermore such liability extends to the taxpayer with respect to a joint return even where that spouse failed to sign it, provided that it was intended to be a joint return. [FN3]

Each spouse is potentially liable for the full amount of the tax or any deficiency in tax and one spouse may not insist that the IRS first collect the tax or deficiency against the other. [FN4] The provision in a settlement agreement between the parties that one shall assume the sole responsibility for a tax as well as any deficiency subsequently determined will not insulate the other spouse from the IRS. [FN5]

I.R.C. § 6015 , entitled "Relief from joint and several liability on joint returns," enacted in 1998, superseded the earlier provision *2 for innocent spouse relief. [FN6] It provides three types of "innocent spouse" relief: (1) that which was similar to the preempted section of the Code, albeit easier to obtain, which the IRS labels as "innocent spouse relief," (2) "separation of liability," and (3) "equitable relief." [FN7]

One of the requisites for innocent spouse relief [FN8] is if in signing the joint return he or she did not know, and had no reason to know, that there was an

understatement of tax. [FN9] Separation of liability relief is not available if the individual seeking this relief had actual knowledge, at the time that individual signed the return, of any item giving rise to a deficiency (or portion thereof). [FN10] However, the Code provides that actual knowledge will not disqualify an individual from separate liability relief where it is established *3 that the individual signed the return under duress. [FN11] In In re Hinckley, [FN12] the court observed that proving that the returns were signed under duress is the only avenue for relief where a court determines the spouse had actual knowledge at the time he or she signed the return of any item giving rise to a deficiency (or portion thereof). [FN13]

If an individual proves duress in the signing or acquiescence in the filing of a joint return, it is not a joint return. The IRS regulations for relief from joint and several liability on a joint return signed under duress [FN14] refer to Treasury Regulation § 1.6013-4(d) , which reads:

Return signed under duress. If an individual asserts and establishes that he or she signed a return under duress, the return is not a joint return. The individual who signed such return under duress is not jointly and severally liable for the tax shown on the return or any deficiency in tax with respect to the return. The return is adjusted to reflect only the tax liability of the individual who voluntarily signed the return, and the liability is determined at the applicable rates in section 1(d) for married individuals filing separate returns.

As to whether a return is joint, the burden of proof is upon the petitioner. [FN15] What constitutes sufficient acts that qualify as duress is discussed hereafter in this article. The cases dealing with duress are fact intensive and look to subjective criteria for the state of mind of the subject of the duress. More often than *4 not physical violence or the threat of physical violence is involved.

Definition of Duress

Duress is not defined in the Internal Revenue Code. Thus, attorneys must look to case law for guidance. The law concerning duress pre-dates the current innocent spouse provisions. On at least two occasions the Tax Court has applied case law analyzing former I.R.C. § 6013(e) to cases under the present innocent spouse provisions, I.R.C. § 6015 . [FN16]

The federal courts reject applying state law rules for duress since a uniform set of standards should be utilized. [FN17] In analyzing the rules of duress the courts have likened the signing of a joint return under duress to that of signing a

contract under duress, and have adopted [FN18] the following definition:

Under the modern doctrine there is no standard of courage or firmness with which the victim of duress must comply at the risk of being without remedy; the question is merely whether the pressure applied did in fact so far affect the individual concerned as to deprive him of contractual volition; if it did there is duress, if it did not there is none. [FN19]

In its opinion in Furnish v. Commissioner, the Ninth Circuit stated that "duress may exist not only when a gun is held to one's head while a signature is being subscribed to a document. A long continued course of mental intimidation can be equally as effective, and perhaps more so, in constituting duress." [FN20]

*****5 Thus, the standard, as developed, involves two critical elements: first, whether the taxpayer was unable to resist demands to sign the return; and second, whether the taxpayer would not have signed the return except for the constraint applied to the taxpayer's will. [FN21]

The inquiry is wholly subjective. The focus is on the mind of the individual at the relevant time in question, "rather than [on] the means by which the given state of mind was induced." [FN22] Cases on this issue are decided upon the peculiar factual situations involved. [FN23]

Finding of Duress

In Hickey [FN24] the Tax Court held that signing of a joint return by the wife was not her voluntary act and relieved her of any deficiency. There, the husband was severely ill from chronic congestive heart failure. The wife was under doctor's orders to comply with her husband's wishes and that she was not to excite or argue with him. [FN25] When the husband told her to sign the return she did so. [FN26]

While Hickey involved coercive forces external to the marriage Frederick v. Commissioner centered on coercion within the marriage. The wife's testimony was to the effect that she and her husband were married in 1930 and divorced in 1950; that they had marital difficulties; that six or more times during their married life the husband had knocked her down; that she had caused the husband's arrest on three occasions for assault; that at the time she signed the 1948 return her husband handed it to her in blank; and that when she protested signing it in that state because she was unacquainted with his business affairs he put his hands around her throat and "told me if I knowed when I was *****6 well

off, I would sign." Because of fear of bodily injury she then signed the return. The court found, on the facts, that the wife in Frederick [FN27] signed the return under duress and that the return was therefore not a joint return.

Brown v. Commissioner [FN28] entailed similar physical duress. After the returns were prepared, the husband gave them to the petitioner solely for the purpose of signing them. In each instance she requested an opportunity to look at the returns and inquired how the husband knew they were correct. He assured her that "the C.P.A. fixed them" and refused to allow her to read or study them. If the petitioner asked any questions about the return, the husband became enraged and demanded, "you sign it or else." He often hit petitioner, and as a consequence, she and the children suffered more. Because of the husband's size and his violent temper, the petitioner was on occasion put in fear of her life. She reluctantly signed the Federal income tax returns for each of the years 1956 through 1959 at the direction of her husband whose threats and physical abuse rendered her incapable of resisting his demands. [FN29] The court held that the petitioner wife's signature was procured by the husband through duress and "not the result of her voluntary act." [FN30]

The court found duress of a different variety in Stanley (Diane). [FN31] It involved the wife's surrender to her husband of her W-2 so that he could file a joint return, albeit without her signature. He then signed her name without her authorization. [FN32] The husband, George, told the petitioner that if she, Diane, wanted to stay with her children she would have to give him her W-2 forms covering her wages. On one occasion he forced her into their car, drove at a speed in excess of 100 miles per hour and threatened to push her out of the car with his feet. When the husband asked the wife for her W-2 forms, she believed that she would have to surrender them if she wanted to stay with her children. *****7 So, against her will, she relinquished her W-2 forms to her husband.

In Stanley (Diane), the court observed that:

While there is evidence that petitioner feared "physical bodily harm from [her] husband," which was the basis of the finding of duress in Brown v. Commissioner, [FN33] we recognize that the special bond between a mother and her children can be even more important to a mother than her physical safety. We believe petitioner's testimony that the threat of separation from her children induced her, against her will, to do what George told her to do and we find on these facts that this constituted duress. Under these circumstances we find neither petitioner's actions nor her inaction establish an intent to file jointly with George.

Pirnia v. Commissioner [FN34] presented a similar case of imminent violence as duress. Dr. Pirnia both physically and emotionally intimidated petitioner. The court remarked that "Dr. Pirnia's unconventional sexual habits contributed to matrimonial disharmony." [FN35] Here the court found that:

Petitioner suffered 'a long continued course of mental intimidation' by Dr. Pirnia. He ruled all aspects of petitioner's life. His reign of terror over her was both mental and physical. Forced to obey him, petitioner led an isolated and subjugated life.

We believe petitioner signed the 1984 return that Dr. Pirnia presented to her under duress. The first critical element of duress (that the spouse claiming duress must show that she was unable to resist demands from the coercer spouse to sign the return) has been met. We further believe that petitioner has met the second element, namely that she would not have signed the return except for the constraint applied to her will by Dr. Pirnia. The facts herein clearly indicate that petitioner signed the 1984 return only because she was fearful that Dr. Pirnia would carry out his threat to take away their children if she did not sign the return. [FN36]

The Pirnia court concluded there was duress by the husband, Dr. Pirnia, who had a violent temper.

In re Hinckley[FN37] has an excellent discussion of the role of duress in relieving a spouse from joint liability for a joint return. Among other observations the court said "While proof of specific *8 incidents at the time of the signing of the returns is not required to show duress, in the absence of a stated reason for reluctance, proof of specific incidents becomes increasingly relevant," although it is not the only proof a taxpayer must offer to prove duress. [FN38] In Hinckley, the court found duress notwithstanding the fact that Mr. Hinckley never physically attacked his wife, nor did he threaten to physically harm her.

The court rejected the IRS's arguments in Hinckley that the wife did not prove duress because she failed to offer sufficient evidence of specific threats or incidents at or near the moment she signed the returns. Dismissing Mr. Hinckley's rages as shouting and arm waving, the IRS asserted that a continued course of mental intimidation is required for mental intimidation to rise to the level of duress. The court then concluded:

Unlike the spouse in Stanley [FN39] the Debtor articulated a very specific reason for her reluctance to sign the returns in question - - she thought his theory was very likely incorrect. Additionally, she testified she would not have

signed the returns were she not afraid of what her husband would do, either to her, or to himself, if she refused. Thus, the signing of these returns took place at a time when the Debtor was in fear, and was reluctant to participate. She capitulated only to avoid further verbal and mental assaults from a strong willed, well-educated husband. At the time in question, Mr. Hinckley's unpredictability and volatility are reaching a peak that will ultimately end in his entering a nursing home. Under these conditions, the Court concludes, the Debtor's acts were not voluntary and were the product of duress. [FN40]

Finding No Duress

In a number of cases, courts have concluded that pressure did not rise to the level of coercion sufficient to undermine voluntariness.

The court concluded that the wife's signature to the joint return in Aylesworth v. Commissioner [FN41] was not produced by duress. The court was not convinced that her signature was not voluntary, regardless of her reluctance to sign and regardless of the domestic violence that occurred about the time. The Court *****9 was of the opinion that her signature was voluntary "although perhaps distasteful." [FN42] The returns in issue were for 1948 through 1951. The court wrote:

The record contains evidence suggesting numerous ugly incidents which occurred between the Aylesworths. In connection with the 1948 return she testified:

He told me if I did not sign it, that I would be very, very sorry. He told me that he would destroy my father. He told me that he would mutilate my face, and when I told him I would divorce him rather than sign it, he said, "You haven't got a chance. I will go to Bruce Bromley and see--I will go anywhere, to everyone, and your word against Merlin Aylesworth's will never stand." And I think he was probably right. [FN43] She testified that when she signed the 1949 return she was 'just a wreck' and was still being threatened. She made no similar statement as to the threats made or the state of her mind when she signed the 1950 return, except that, in response to a question, whether the signing of that return was "a free act on (her) part", she replied "It was not." [FN44]

A similar episode occurred regarding the 1951 return, during which the inebriated husband "was abusive, he tore her clothes, and pulled her hair so severely that some came out. She, on the other hand, countered with a hat pin, and summoned police assistance." [FN45]

What apparently sunk the wife in Aylesworth was the fact that she continued to live with the husband. She never disavowed her signature on any returns within a reasonable time and she filed no separate return of her own.

Notwithstanding the severe treatment by the husband of the wife in Stanley (Hazel) v. Commissioner [FN46] the court could not find that her signing of the joint return was due to duress because she did not prove she would not have signed the returns "except for the constraint applied to her will through her fear" of her husband. [FN47]

The evidence in Stanley showed that during the years Hazel was married she received several beatings. He frequently criticized her and accused her of various inadequacies and *10 threatened to kill her, to break her legs and to have her committed to a mental institution. He told her he intended to subjudicate her to his will. Her psychologist concluded that the husband was a psychopathic personality with violent paranoid tendencies and that he feared that the husband under stress might go berserk and possibly kill her and the children. The psychologist told the wife that he would continue to treat her only if she agreed not to argue with her husband or to disobey him, or do anything else that might upset or anger him. When the husband presented the tax returns to her she signed each without question and without examining them.

The court stated that "We are satisfied that if [the wife] had felt any reluctance about signing the returns in question when they were presented to her by [her husband], she might nevertheless have signed them out of fear of the consequences or angering her husband. But petitioner was required to prove such reluctance." [FN48] She failed to prove the necessary causal relationship between her fear of her husband and her signing of the returns. The court observed:

Proof that a starving man was ordered at gunpoint to eat a piece of bread would not, standing alone, be satisfactory proof that it had been eaten involuntarily. . . . Not only must fear be produced in order to constitute duress but the fear must be a cause inducing entrance into a transaction, and though not necessarily the sole cause, it must be one without which the transaction would not have occurred. [FN49]

Another factor, the court said, which indicated that the wife did not sign the return involuntarily, was her failure to raise the issue until shortly before the trial, rather than in her original petition.

The absence of physical violence seemed important to one court assessing the

sufficiency of evidence regarding duress. In Allen v. Commissioner [FN50] the wife testified that the husband was short tempered, however he never hit her or in any way physically abused her or the children and never threatened to do so. He did once say to his oldest son that should the son make him mad enough, he might have to kill him. The wife testified that the husband had the type of personality that liked to control *11 transactions in which he was involved. The court, in ruling that the wife did not make a sufficient showing of duress, concluded:

Judged by the standards set forth in the Brown [FN51] case and cases cited therein, we find no duress to have been established in the instant case. The record is clear that petitioner did not cross her husband but let him direct her activities in most regards. However, there is no showing in this record that Mr. Allen ever physically abused her or threatened her or even insisted that she follow his directions. It was her determination not to question her husband but to do as he asked. Furthermore, it is clear that Mrs. Allen has not shown that she would not have signed the returns except for Mr. Allen's insistence. She actually prepared one of the returns. Her income was reported on the return for each year involved. She filed no separate return. Had she not signed the joint return, she would have been obligated to file a separate return.

Know or Reason to Know

Affected by Domestic Violence

Under innocent spouse rules, relief is afforded a spouse only if he or she, at the time of signing the joint return, did not know and had no reason to know, that there was an understatement of tax. [FN52] Under the rules for separation of liability, entitlement to relief is not available if the Internal Revenue Service establishes that he or she actually knew of the item giving rise to the understatement. [FN53]

While not rising to the level of duress, thus disqualifying a return as joint, domestic violence has impacted the elements required for both innocent spouse relief and separate liability.

An IRS regulation explains the abuse exception: [FN54]

If the requesting spouse establishes that he or she was the victim of domestic abuse prior to the time the return was signed, and that, as a result of the prior abuse, the requesting spouse did not challenge the treatment of any items on

the return for fear of the nonrequesting spouse's retaliation, the limitation on actual knowledge in this paragraph (c) will not apply. [FN55]

*12 Courts have applied cases analyzing the former innocent spouse code to the present provisions. [FN56] Repeated physical abuse by the husband of the wife and a threat to kill her was sufficient in Brown v. Commissioner [FN57] to free the wife of the not knowing or having no reason to know requirement of the innocent spouse code. The court found that Mr. Brown often forced his wife to sign important documents, including tax returns, without allowing her the opportunity to review such documents. She always complied with his demands, for fear that she would be beaten if she refused.

While violence may satisfy the exception, extreme deference will not. The Eleventh Circuit Court of Appeals has held that an alleged innocent spouse's role as a homemaker and complete deference to the other spouse's judgment concerning the couple's finances, standing alone, are insufficient to establish that a spouse had no "reason to know." [FN58]

However, in Kistner the record indicates a history of physical abuse between Kistner and Weasel [Mrs. Kistner's former husband] over many years. Although Mrs. Kistner was fearful of angering Mr. Weasel, she did not claim that she was coerced into signing the return or that she did so under duress. [FN59]

The court held that "a reasonable prudent taxpayer under the Kistner circumstances: living an affluent life for many years, fearful of physical violence, and uninvolved in the financial affairs of the business, at the time of signing the return could not be expected to know that the tax liability stated was erroneous, or that further investigation was necessary."

The wife's (petitioner's) limited inquiry of the husband's source of income to support the party's lifestyle was excused in *13 Makalintal v. Commissioner. [FN60] Citing Kistner [FN61] and noting that "physical or mental abuse may also be a factor in considering a claim for innocent spouse relief," the court held:

[I]n light of the frequent physical abuse by Mr. Makalintal and Mr. Makalintal's general refusal to discuss his business and financial affairs with petitioner, we believe that petitioner's inquiry was reasonable and sufficient to satisfy her duty of inquiry with regard to the taxable income reported on Mr. Makalintal's and her joint Federal Income tax returns. [FN62]

The facts revealed that throughout their marriage, petitioner lived in fear of Mr.

Makalintal, that he repeatedly physically abused her and that on numerous occasions he threatened to kill her with a gun. Mr. Makalintal also physically abused his children.

Abuse was applied as a factor as to why the wife did not know nor have reason to know in Aude v. Commissioner. [FN63] Citing Kistner, [FN64] Makalintal [FN65] and Brown (Estate of) [FN66] the court ruled that:

While petitioner was not coerced or physically threatened into signing the returns, she was intimidated by Mr. Aude because she feared being physically abused if she refused. Petitioner testified that she didn't have "any right" to question Mr. Aude, and if she did, she feared she "would be physically attacked." From this, she learned that she had to skirt issues with Mr. Aude, or face his wrath. Petitioner testified that if she "had not felt intimidated by [Mr. Aude], [she] might have had the option of going through" the returns. We find this to be a factor explaining why petitioner did not review or inquire about the returns. [FN67]

The Aude court distinguished the Ninth Circuit's holding in Wiksell v. Commissioner [FN68] which rejected the taxpayer's argument that duress clouded her perception, thus concluding that she had a reason to know of the understatement. In reaching its decision in Wiksell the court noted that the taxpayer had asked her husband "why there was no income on the returns reflecting *14 the money that [they] had been living off." [FN69] She stated that he gave her a bizarre explanation that did not make sense to her. Prior to signing the return, the taxpayer had learned of a restraining order preventing her husband from soliciting investments, and she read an article that purportedly explained the sham in which her husband was involved. At the very least, the court stated that the taxpayer "knew something was awry, but refused to go further." [FN70] In light of extremely small sums of income reported, the evidence of excessive spending, and the large sums of money on hand, the court held the evidence of an understatement was overwhelming and the taxpayer could not hide from it. In light of this overwhelming evidence, any abuse did not provide an adequate explanation for her behavior.

In cases such as Wiksell, the abuse was not all pervasive, although the indicia of tax understatment was. Abuse will not assist a spouse that does not cloud a perception of obvious tax cheating.

Joint Return Not Signed By Spouse

Generally, a joint return must be signed by both spouses. [FN71] However,

where an income tax return is intended by both spouses to be a joint return, the absence of the signature of one spouse will not prevent their intention from being realized. The issue of intent is one of fact, with the burden of proof resting upon petitioner. [FN72] The intent to file jointly may be inferred from the acquiescence of the nonsigning spouse. [FN73]

Spousal intent to file a joint return may be "tacit" as opposed to express. The tacit consent rule is applicable in circumstances where the existence of certain factors indicate the spouse *****15 has implicitly provided consent to the filing of a joint return. The spouse's conduct rather than the signature establishes the necessary intent. Relevant factors include a failure to object, a lack of a valid reason to refuse to file jointly, the delivery of tax data to the other spouse, and an apparent advantage in filing a joint return. [FN74]

Courts have held that returns signed solely by the husband and the tax preparer, [FN75] by the husband signing both his and wife's name, [FN76] and by the husband alone [FN77] were all joint returns.

In Malkin v. United States [FN78] the federal district court considered four factors when assessing whether the intent to file a joint return exists: (1) whether the couple has a history of filing joint returns; (2) whether the wife relied on the husband to handle financial matters; (3) whether the wife's income was reported on the joint return; and (4) whether the wife filed a separate return.

However, abuse of a spouse reflects on intent. In Snyder v. Commissioner [FN79] the husband, Alvin, who was involved with criminal and gambling elements, made threats against his wife, Evelyn, and unreasonably harassed her. Alvin threatened to leave Evelyn penniless and he entered the marital home late at night and harassed her by, among other things, making a great deal of noise, setting off alarms, and turning the furnace up above comfortable levels. She refused to sign a joint tax return for fear of being responsible for her husband's potential tax liability. She was concerned that since she was proceeding with the divorce, to which her husband objected, he would not assume full responsibility for any joint tax liability. The return filed by the husband was signed only by him. The court held that no joint return was filed.

Duress in Stanley (Diane) [FN80] precluded a finding that a joint return was intended. The wife gave the husband her W-2 because *****16 he threatened separation of her from her children. She did not sign the joint return.

Thus, the same measure of abuse that defeats liability when both spouses in

fact sign the joint return is applicable to overcome the liability where the spouse did not sign but the Internal Revenue Service seeks to construe an intent of filing a joint return.

Conclusion

Allegations of duress and spousal abuse can be a valuable defense against the liability of a joint tax return. However, the duress must be directly connected with the signing of, or, if not signed, the refusal to sign, a joint return. This duress then can free a taxpayer of knowing or having a reason to know of a deficiency. The more allegations, the greater number of incidents, the worse the parade of horribles the better - but they must be related to the signing or refusal to sign. If duress or spousal abuse exists it must be brought up early and often, and the joint return must be disavowed as soon as possible.

[FN1] . IRS form 1040.

[FN2] . Furnish v. Comm'r, 262 F.2d 727 (9th Cir. 1958) .

[FN3] . Kann v. Comm'r, 18 T.C. 1032, 1044 (1952) aff'd, 210 F.2d 247 (3d Cir. 1953) , cert. denied, 347 U.S. 967;Howell v. Comm'r, 10 T.C. 859, 866, 869 (1948) , aff'd, 175 F.2d 240 (6th Cir. 1949) .

[FN4] . See Bloom v. United States, 272 F.2d 215 (9th Cir. 1959) (involving responsible persons jointly and severally liable for the 100% penalty).

[FN5] . Pesch v. Comm'r, 78 T.C. 100 (1982) (it is clear that a taxpayer cannot avoid such liability through the simple medium of an agreement to which the IRS is not a party.)

[FN6] . I.R.C. § 6013(e) , which has been repealed.

[FN7] . Internal Revenue Serv., U.S. Dep't of the Treasury, Pub. No. 971 (revised Mar. 2004).

[FN8] . For discussions of relief under the current innocent spouse, see generally Frances D. Sheehy and Anthony J. Scalette The Continuing Evolution of the "New" Innocent Spouse Rules as Implemented and Interpreted by the Internal Revenue Service and the Courts, 76 Fla. B.J. Feb. 2002 at 41 and Mar. 2002 at 54; Robert S. Steinberg, Three Bats Against Joint and Several Tax Liability: (1) Innocent Spouse (2) The Election to Limit Liability and (3) Equitable Relief: The Treasury and Courts Begin to Interpret IRC 6015 after Enactment of the IRS Restructuring and Reform Act of 1998, 17 Am.Acad.Matrim.Law. 2001 at 403; Lily Kahng, Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Tax Liability, 49 Vi.L.Rev. 261 (2004).

[FN9] . I.R.C. § 6015(b)(1)(C) (2004) provides for relief from liability if:

(A) a joint return has been made for a taxable year;

(B) on such return there is an understatement of tax attributable to erroneous items of one individual filing the joint return;

(C) the other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was such understatement,

(D) taking into account all the facts and circumstances, it is inequitable to hold the other individual liable for the deficiency in tax for such taxable year attributable to such understatement, and

(E) the other individual elects (in such form as the Secretary may prescribed) the benefits of this subsection not later than the date which is 2 years after the date the Secretary had begun collection activities with respect to the individual making the election,

[FN10] . Id. § 6015(c)(3)(C) (2004) .

[FN11] . The last sentence of I.R.C. § 6015(c)(3)(C)(2004) provides "This subparagraph shall not apply where the individual with actual knowledge establishes that such individual signed the return under duress."

[FN12] . 256 B.R. 814 (Bankr. M.D. Fla. 2000) .

[FN13] . The Internal Revenue Service, in its publication Innocent Spouse Relief

(and Separation of Liability and Equitable Relief), supra note 7, instructs:

DOMESTIC ABUSE EXCEPTION. Even if you had actual knowledge, you may still qualify for relief if you establish that:

• You were the victim of domestic abuse before signing the return, and

• Because of that abuse, you did not challenge the treatment of any items on the return because you were afraid your spouse (or former spouse) would retaliate against you.

If you establish that you signed your joint return under duress, then it is not a joint return, and you are not liable for any tax shown on that return or any tax deficiency for that return. However, you may be required to file a separate return for that year.

[FN14] . Treas. Reg. § #1.6015-1(b) (2004) .

[FN15] . Hughes v. Comm'r, 26 T.C. 23 (1956) .

[FN16] . Cheshire v. Comm'r, 115 T.C. No. 15 (2002) ; Charlton v.Comm'r, 114 T.C. No. 22 (2000) .

[FN17] . See Stanley (Hazel) v. Commissioner, 45 T.C. 555 (1966) , where the court stated:

We do not believe that Congress intended the meaning of the term "joint return" as used in section 6013 , to vary from State to State according to the peculiarities of local rules about duress. Such local rules tends to involve artificial tests as to whether certain kinds of pressure are insufficient as a matter of law to result in duress, or whether the pressure applied need be so great as to overcome the will of a "reasonable man" or a "person of ordinary firmness."

[FN18] . Furnish v. Comm'r, 262 F.2d 727 (9th Cir. 1958) .

[FN19] . Id. at 733.

[FN20] . Furnish, 262 F.2d at 733 .

[FN21] . Brown, 51 T.C. 116 (1968) .

[FN22] . Stanley (Hazel) v. Comm'r, 45 T.C. at 561 .

[FN23] . Stanley (Diane) v. Comm'r, 81 T.C. No. 35 (1983) .

[FN24] . Hickey v. Comm'r, T.C. Memo 1955-149.

[FN25] . The court noted that the wife, as petitioner "is an elderly woman, under a doctor's care, and could not attend the hearing." Could that "rachmones" factor (a cry for pity) have influenced the court?

[FN26] . The court observed that the facts were distinguishable from those present in Aylesworth v. Commissioner, 24 T.C. 134 (1955) discussed further in this article in the text at note 41.

[FN27] . Frederick v. Comm'r, T.C. Memo 1957-225.

[FN28] . 51 T.C. 116 (1968) .

[FN29] . The court notes that the element missing in the proof in Stanley (Hazel), 45 T.C. 555 (1996) , discussed further in this article in the text at note 46 "that she was reluctant to sign," was present in this case.

[FN30] . Id. at 121.

[FN31] . Stanley (Diane) v. Comm'r, 81 T.C. No. 35 (1983) .

[FN32] . See discussion further in this article in the text at notes 71-80 of situations where returns are filed without the other spouse's signature.

[FN33] . Brown is discussed supra at note 28.

[FN34] . T.C.M. (P-H) P90.444.

[FN35] . The court did not further elucidate.

[FN36] . Id. at 90-2151.

[FN37] . 256 B.R. 814 (Bankr. M.D. Fla. 2000) .

[FN38] . Id. at 825.

[FN39] . Stanley (Hazel) v. Commissioner, 45 T.C. 555 is discussed further in this article in the text infra at note 46.

[FN40] . Id. at 828.

[FN41] . 24 T.C. 134 (T.C. 1955)

[FN42] . Id. at 146.

[FN43] . Id. at 145.

[FN44] . Id. at 146.

[FN45] . Id.

[FN46] . 45 T.C. 555 (1966) .

[FN47] . Id. at 562.

[FN48] . Id. at 562.

[FN49] . Id.

[FN50] . T.C. Memo 1986-125.

[FN51] . Brown (Lola) v. Commissioner, 51 T.C. 116 (1968) , cited supra at notes 21 and 28.

[FN52] . I.R.C. § 6015(b)(1)(C) , 2004.

[FN53] . I.R.C. § 6015(c)(3)(C) , 2004.

[FN54] . Treas. Reg. § 1.6015-3(c)(2)(v) (2004) .

[FN55] . Treas. Reg. § 1.6015-3(c)(2)(i) (2004) provides, in part:

Actual knowledge--(i) In general. If, under section 6015(c)(3)(C) , the Secretary demonstrates that, at the time the return was signed, the requesting spouse had actual knowledge of an erroneous item that is allocable to the nonrequesting spouse, the election to allocate the deficiency attributable to that item is invalid, and the requesting spouse remains liable for the portion of the deficiency attributable to that item.

[FN56] . See supra text at note 16.

[FN57] . T.C. Memo 1988-297.

[FN58] . Kistner v. Comm'r, 18 F.3d 1521 (11th Cir. 1994) .

[FN59] . Id. at 1526.

[FN60] . T.C.M. (RIA) 96,009.

[FN61] . Discussed supra in text at note 58.

[FN62] . Id. at 54-96.

[FN63] . T.C.M. (RIA) 97,478.

[FN64] . Discussed supra in text at note 58.

[FN65] . Discussed supra in text at note 60.

[FN66] . Discussed supra in text at note 57.

[FN67] . Id. at 3192-97.

[FN68] . 90 F.3d 1459 (9th Cir. 1996) .

[FN69] . Id. at 1462.

[FN70] . Id. at 1463.

[FN71] . Treas. Reg. § 1.6013-1(a)(2) (2004) .

[FN72] . The Tax Court noted in Heim v. Commissioner, 27 T.C. 270 (1956) that "No great help can be obtained from prior decisions in deciding a difficult case like this, since each such case must be decided upon its own facts and differences in the facts distinguish the cases."

[FN73] . Crew v. Commissioner, T.C. Memo 1982-535 (Concluding that the fact that the couple had a history of filing joint returns and that petitioner relied entirely upon her husband to prepare and file the returns is evidence that returns filed as joint returns were intended as such).

[FN74] . In re Lois Rutigliano, 77 A.F.T.R. 2d 96-525 (Bankr. E.D. Pa. 1995) .

[FN75] . Harnesworth v. United States, 936 F.2d 583 (10th Cir. 1991) .

[FN76] . Gorham v. United States, 61 A.F.T.R. 2d 88-800 (E.D. Pa. 1988) ; Federbush v. Comm'r, 34 T.C. 740 (1960) .

[FN77] . Kann v. Comm'r, 18 T.C. 1032 (1952) .

[FN78] . 3 F.Supp.2d 493 (D.N.J. 1998) .

[FN79] . T.C.M. 1983-75.

[FN80] . 81 T.C. No. 35, discussed supra in text at note 31.

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Is it Against the Law to Run Away from Home?

By Kara A Nyquist

In most jurisdictions it is not a crime to runaway from home, except in 9 states (Georgia, Idaho, Kentucky, Nebraska, South Carolina, Texas, Utah, West Virginia, Wyoming). In these jurisdictions it is considered a “status offense”, which means it is against the law only when someone under 18 years old does it.

However, in jurisdictions in which it is not against the law to runaway away a youth may still end up in court. Youth that repeatedly run away may be classified as a habitual runaway in need of states if the state determines that their parents are not meeting the youth’s basic needs. The court process has different names in different states, but it is commonly called a “Child in Need of Supervision” (CHINS) process. Runaway youth are considered CHINS in 34 states. Although the CHINS process can provide services to youth and families, it can also result in punishments, such as fines, suspended driving privileges, and mandatory drug screening.

Almost every state allows police or other law enforcement officers to take runaway youth into custody without a court order and without the youth’s permission. Five states explicitly allow police to hold runaway youth in secure detention facilities (Alabama, Georgia, Indiana, Nevada, South Carolina). Additional states also allow this practice, although it is not written into their laws. Thirty-six states explicitly authorize police to return runaway youth directly to their homes without considering the youth’s wishes.

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Key Drivers for Negotiating a Commercial Lease for the Small Tenant

By Kathleen Hopkins, Janene Collins, Cynthia Thomas and Ann Peldo Cargile

In negotiating and drafting a commercial lease, the lawyer representing the small commercial tenant is advised to keep in mind her client's business and those matters which can be critically impacted by the lease. Most of your client's leasing decisions will be driven by one of these three concerns:

- **Business Operations**
- **Protecting the Bottom Line**
- **Preserving an Exit Strategy**

Since it is highly unlikely the small tenant will be able to use its own lease form, the prudent lawyer will carefully review the landlord's form for minefields which, if triggered, could spell disaster for her client's business.

1. Business Operations – The small tenant will want to ensure it can operating its business profitably from the premises. Look for benefits and pitfalls in these lease sections:

- **Permitted Uses** : Advocate for broad language or a method which accommodates changes to permit tenant to maximize profitability.
- **Exclusive Use** : Argue for a restriction on leasing to competitors, if competition will be the death-knell. Note that your tenant is more likely to an exclusive use right if the right is limited to *critical areas of income.*
- **Non Disturbance by Lender:** Obtain a non-disturbance agreement to ensure that landlord's lender will allow tenant to continue its business under the current lease terms if the lender forecloses.
- **Financing** : Your client may need to grant is lenders first priority on all its property, senior to landlord's liens. The lease should, therefore, include landlord's agreement to subordinate its rights in the tenant's property (e.

g. landlord's liens). Also, the lender may have a "landlord's consent" form to negotiate with landlord – this should be done early in the process as it the lender's form may not start out as being acceptable to the landlord.

- **Franchises** : For franchisees, the Lease's transfer section will need to reflect certain franchisor rights to replace the tenant - review the franchise agreement and incorporate necessary terms.
- **Expansion:** Speed in often important in expanding, thus critical terms such as rent should be negotiated and included in the original lease.
- **Maintenance:** The landlord base form may overburden the small tenant, at a minimum try and make it the landlord's duty to maintain the structure, exterior, all common areas and any shared building systems (e.g. plumbing and HVAC).
- **Disruption of Services and Casualty:** It will be difficult to get the landlord to agree to allow the tenant to terminate for long disruptions in services or casualty, but for a small tenant being closed too long will be its death-knell. Negotiate for short deadlines for repairs and restoration of services, and advise your client of the importance of obtaining business interruption insurance.
- **Parking:** Depending upon the tenant's business, convenient, sufficient and reasonably priced parking may be critical to its success. Watch for separately operated parking garages, and try and get rates established, reserved parking and sufficient spaces.
- **Signage:** Get any necessary signage pre-approved by landlord, and negotiate a reasonable process for future signage.

2. Bottom Line – The small tenant needs to avoid financial surprises and wants to know in advance and be able to budget for expenses. Consider the following minefield of unanticipated costs:

- **Building Out the Premises:** Attempt to shift some or all of the risk in cost overruns to the landlord. This could be accomplished by requesting "turn key" space, rather than a shell which will be built out using an "allowance." Franchisee tenants may face additional challenges embedded in their franchise agreements.
- **Complying with Laws:** ADA and other code compliance may differ depending upon the premises' use. Ask for the landlord to deliver the premises in compliance with laws relating to the permitted use (rather than as-is); and state who is obligated for subsequent changes in laws – perhaps agreeing to a cap on tenant's future costs or, with if no cap then at least a right to terminate if costs become prohibitive.
- **Utilities:** Landlords are often unwilling to install separate meters for small tenants; watch for landlord reserving the right to bill tenant for "excess usage" in addition to pro-rated utilities; or the converse – having a small

tenant which does not use excess utilities pay for the others' excess (e.g. a stationery shop paying extra for the hair salon's water use or the restaurant's trash).

- **Operating Costs:** The small tenant is unlikely to have much leverage in negotiating exclusions on passed-through operating costs, the best way to control costs is to agree upon a cap on its share of costs. Expect the landlord to exclude from the cap those charges over which it has no control (utilities, taxes, insurance). Also, for insurance costs, review and determine what insurance is included in the landlord's current operating costs, is there the potential for a huge increase (e.g. to add earthquake) and if some reasonable limit can be placed on the pass through of such costs to tenant.
- **Surrendering Premises:** Always have the tenant document the condition of the property upon delivery, and try and limit any repairs or improvements required at the end of the lease (**e.g.** except of ordinary wear and tear, and insured casualty).

3. Exit Strategy – The small tenant's lease needs to incorporate exit strategies both for the sale of business and its possible failure.

- **Lease Transfer:** Every tenant needs some right to transfer the lease as part of an overall exit strategy. Look for clauses which impose reasonable limitations on landlord's consenting to assignments and transfers. Where the lease requires tenant to share any excess rent with the landlord, make sure it only includes rents and not any other consideration the tenant received from its assignee in connection with the sale of the business; and also make sure that any tenant expenses get deducted before the excess rent is split. Watch also for unlimited expense reimbursements for landlord consents. Consider also, where the transferee is creditworthy, asking for a release of the current tenant and guarantors.
- **Lease Termination:** Early termination rights and termination agreements are difficult to obtain because landlord's lender often has approval rights or may discount the value of a lease which includes them. If early termination is permitted, expect the clause to be one-time, a few years into the term, and require the payment of a termination fee (equal to some of the lost rent), plus at least the unamortized cost for landlord's expenses (improvements, leasing commissions).
- **Guaranties:** Try and include some limitations in lease guaranties – terminating after a certain number of years without a tenant default, limited to a certain amount of rent, number of months' rent or unamortized landlord costs. Also try for a release where there is a creditworthy successor tenant or guarantor.

- **Relocation and Transition:** Timing certainty and cost are important factors for the small tenant faced with relocation. Ask for delay damages if delivery of premises or relocation cannot be done when promised (e.g. 2 days free rent for every day late); and for relocation make sure all tenant's expenses associated with a landlord imposed move are paid by landlord. For retail, consider limiting relocation if foot traffic or visibility is critical to the tenant's success.
- **Disputes:** Make sure attorney's fees clauses are bi-lateral and awarded to the substantially prevailing party, and that the clause applies to include arbitrations, appeals and bankruptcy proceedings. Also try and get quick and cheap arbitration provisions inserted, uses indices when possible to avoid arbitration (e.g. CPI for rent rates) and identify and designate neutral experts in advance to decide some issues (e.g. measurement of the space or extent of a casualty).

This checklist by Kathleen Hopkins was distilled from an article written by Janene Collins, Cynthia Thomas and Ann Peldo Cargile, appearing in ABA Probate & Property, Vol 18, No. 6 Nov/Dec 2004. Kathleen Hopkins and Cynthia Thomas are founding members of the Seattle firm: Real Property Law Group, PLLC, more information on their firm can be found at www.rp-lawgroup.com; and they can be reached at khopkins@rp-lawgroup.com and cthomas@rp-lawgroup.com respectively. Janene Collins is with the Seattle firm of Graham & Dunn PC and can be reached at JCollins@GrahamDunn.com; Ann Peldo Cargile is at the Nashville firm of Boult, Cummings, Conners & Berry, PLC and can be reached at acargile@boultcummings.com.

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Outline of the Torrens Act

By Shaun Watchie Perry

- History of Torrens Act (Registered Land)
  - Modeled in 1858 by Sir Robert Torrens after a method for recording ownership interest in ships that Torrens encountered in his work as an Australian customs administrator.
  - Torrens is a system that was originally a ship registry system whereby each ship owner was assigned a Certificate that included certain information. When a vessel was sold, the seller surrendered the Certificate for cancellation and a new Certificate was given to the new owner.
  - Torrens system ultimately spread to many English speaking countries, including England and Canada.
  - Since late 1800's as many as 21 states in United States had enacted Torrens legislation.[1]
  - With an "abstract system" of title, an abstract is evidence of title. In the Torrens system, the Certificate of Title **IS** the title.
  - The Torrens system differs from traditional recording systems in that it establishes a legal procedure whereby the state ***guarantees*** the owner's title.
    - Process begins with Court proceedings that involve Court approval of the examination of the history of title by the "Examiner of Title".
    - Differences between "Examiner of Title" and the "Registrar of Title": The "Examiner of Title" is an attorney, appointed by Court who reviews the title and must sign off on court orders approving transferring of title certificates. The "Registrar of Title" maintains the Torrens system property records and is responsible for registering title by filing certificates of title.
    - The Court ultimately issues a Certificate of Title to the owner that establishes legal ownership against any claims that remain undeclared or unrecorded at time of registration.[2]

- Once the property is registered in the Torrens system, subsequent voluntary (as opposed to involuntary) transfer does not require such an extensive procedure. A purchaser need only examine the Certificate of Title to verify ownership and learn of any valid claims.
- Ease of transfer following the registration represents an important benefit because under the recording system a full title search must be done in connection with each transfer.
- Differences between the Torrens system and the Recording system:
    - Under Recording system, a good faith purchaser bears the risk of losing his interest in the land if a claimant later appears.
    - Under the Torrens system, the owner's certificate of title defeats any competing claims not declared at the initial proceedings.
    - Under Torrens system, the possessor of the land retains the land and the claimant retains monetary compensation, whereas under the recording system (with title insurance) the claimant gets the land and the possessor is compensated.
    - Torrens Indemnity Fund financed by registration fees (e.g., in Washington State, upon registration owner pays to the Registrar of Titles 1/40 of 1% of the assessed value of the real estate based on the last tax assessment).

- Torrens VS Recording

Advantages

- Torrens system purportedly offered advantages over the Recording system because it cleared clouded titles thereby promoting land marketability and development.
- Much of the early motivation for Torrens registration in the United States was to promote land development during periods of rapid urbanization, e.g., used extensively after the great Chicago Fire of 1871 when the public land records were destroyed.
- Land registration has been used to clarify boundaries when early property lines became blurred or historical surveying techniques were found to be unreliable.
- The Torrens system protects absentee owners against loss of their land to "squatters" under adverse possession statutes.

- The Torrens system is arguably efficiency enhancing.

Disadvantages

- Despite the above referenced advantages, Torrens has been put to fairly limited use in our country. This lack of success suggests that the system disadvantages outweigh the advantages in most jurisdictions.
- The principal disadvantage is the cost of registering a parcel which involves filing a summons and petition in court and paying an application fee as well as court filing fees.[3] Additionally, there are the additional attorney's fees and court cost involved with involuntary transfers.
- Even though there is an insurance fund, it is extremely under-funded and most purchasers of registered land (and their lenders) still require title insurance which is an additional cost.
- Process is antiquated and very cumbersome particularly with involuntary transfers (described below).
- Owners of registered land buy private insurance and lenders often require it because certification of ownership under Torrens system admits several exceptions that pose threats of loss.[4]
- There is resistance to the Torrens system by parties, especially lawyers and private title insurers.

- Involuntary Transfers[5]
  - Under the Torrens system, the owners of registered land may voluntarily convey, mortgage, lease, charge or otherwise encumber the property as if it had not been registered. In this regard, owners may use forms of deeds, trust deeds, mortgages and leases or other voluntary instruments. However, no voluntary instrument of conveyance shall take effect as a conveyance unless it is so registered.
  - The exceptions to this are various involuntary transfers, described below:
    - Probate transfers
      - Probate under non-intervention Will
      - Probate without non-intervention Will
      - Trust transfers
      - Intestate transfers
    - Transfer by community property agreement (in community property states such as Washington)
    - Award in lieu of homestead
    - Mortgage foreclosure
    - Deed of Trust foreclosure

        - Real Estate contract forfeitures
        - County tax foreclosure
        - Transfers from guardianship estates
        - Quiet title actions
        - Where new title is claimed by heir-ship but no probate occurred

- Torrens system in Seattle, Washington and surrounding neighborhoods:
    - There are 3,500 registered parcels in King County.
    - There have been no new registrations.
    - There are clusters of registered parcels in Maple Leaf, White Center, Burien, Des Moines, Sand Point, Mercer Island and Medina.
    - Registrar of Title maintains ownership records of a specific parcel of land, much like a title company.
    - All documents related to a parcel of land registered under the Torrens system are maintained in a special index that provides chain of title.
    - Unlike the general index (where all documents are indexed by name and date), the Torrens Track Index list documents by parcel.

- Pitfalls to Watch For
    - If preliminary title report indicates land is registered, contact an attorney immediately because of time and effort needed to clear title.

Examples:

        - Lender is ready to fund but can't because title can't be passed without opening probate (with will or intestate) and petitioning court for transfer of title. Here are the mechanics in transferring the title in such a situation[6]:
            - Filing Summons and Petition
            - Review of title documents by Examiner of Title
            - Role of Examiner of Title (must approve form of Order before Judge will sign)
            - Attaching various other court documents to Petition
            - Court Appearance/Ex Parte
            - Taxes must be current (major issue if closing proceeds will pay taxes).
            - Order of Solvency
            - Role of Registrar (must approve recording of new

certificate of title)
        - Substantial attorney fees and costs (particularly if filing a probate is involved)
    - Seller is subject to Breach of Contract for failure to timely close
        - Forfeiture of earnest money
        - Professional liability of broker
        - Reduction of commission
    - Inconvenience and expense of opening probates years after death
    - ***Caveat:*** Encourage client to also file Application for Withdrawal from Registered Land if opportunity presents itself. This is also encouraged by the King County, Washington Examiner of Title.

CREDITS:

I would like to credit and thank the following who provided me with information that I used in this Outline:

- *Richard R. Beresford, Attorney at Law and Examiner of Title in King County, Washington.*
- *Thomas J. Miceli and C.F. Sirmans, "Torrens vs. Title Insurance: An Economic Analysis of Land Title Systems", Illinois Real Estate Letter, Published by the Office of Real Estate Research University of Illinois at Urbana-Champaign, Fall, 1997.*
- *Leroy Chadwick, Records Specialist, King County Recorder's Office, Seattle, WA.*

This system has been used extensively in only a few jurisdictions, including Illinois, (primarily in Cook County; although the state repealed it's Torrens Act in 1992), Massachusetts and Minnesota. As of 1991, there were only a few states that allowed land to be registered under the Torrens Act: Colorado, Georgia, Hawaii, Massachusetts, Minnesota, New York, North Carolina, Ohio, Virginia, and Washington.

Any claims that are known or discovered, such as current mortgage or deed of trust are recorded on the Certificate of Title.

The obtaining a decree of registration and receiving a Certificate of Title is deemed an agreement running with the land and is binding upon the applicant and all successors in title unless withdrawn from registration.

Examples include tax and mechanics liens, claims from bankruptcy proceedings, and claims from Native American tribes. In addition, the public indemnity funds, which potentially compensate victims of these losses, can go bankrupt as a result of under funding.

These examples are considered involuntary transfers under the Washington Torrens Act, RCW 65.12, et seq, and the author believes that these examples would be considered “involuntary transfers” in other Torrens jurisdictions requiring court action to transfer title.

These steps must happen with any involuntary transfer of Registered Land under the Torrens Act.