GP|Solo Law Trends & News
Practice Area Newsletter

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

May 2005 **Volume 1, Number 3**

In this issue...

Dear Section Member:

Below is the spring edition of **GP|Solo Law Trends & News**. This e-newsletter is the product of each of our substantive practice areas and contains articles, checklists and other valuable substantive, practical tips and information of benefit to the members of our Section. I am very pleased to report that it has been very warmly received by the members of the Section and we have received many, many notes and emails about how wonderful an addition it is to the Section's on-line publications.

Like the fall and winter issues, this one contains many timely articles, checklists and practical tips on topics of importance to our members. They include topics on new laws and timely issue as well as tips for your help and assistance. 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. As you will also notice, we have added the picture and biography of many of those integrally involved in putting this e-newsletter together. Without their hard work and assistance, none of this could be possible. Also, as a new feature, you have the option of either printing each article separately or there is a link below so you can print the entire newsletter as a .pdf document and then print it out for reading all of the articles at a later time when you are away from your computer.

As I mentioned in the Fall, this e-newsletter will continue to come out quarterly. The next one will be distributed shortly before the Annual meeting. If you are interested in writing an article for it, please contact Jim Schwartz at attyjls@aol.com. Jim is the Coordinator for our Section's five Substantive Group Newsletter Editors and 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. I know that Jim is always seeking new writers and is willing to work with volunteers in

submitting articles. 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.

On behalf of the entire Section, I want to thank all of those involved in this project, especially, once again, Doug Knapp, our Section's Staff Technology Coordinator. Many hours were spent by the authors, editors and staff in bringing this to you. But, without Doug's help in putting on the website, this would not be a reality. I hope you enjoy it and that it is helpful to you. Please let us know your thoughts about it. I hope those of you who attended the Spring meeting in Miami enjoyed it and I look forward to seeing each of you in the near future.

Best regards,

Lee S. Kolczun, Chair

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

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

Real Estate

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Profile: Kathleen Hopkins, Real Estate Committee Chair

Kathleen Hopkins is a founding member of the Seattle, Washington law firm: Real Property Law Group, PLLC. Kathleen limits her practice to commercial real property transactions, finance, commercial leasing and related bankruptcy issues. She is a frequent speaker and writer on real property, leasing, bankruptcy and creditors' rights issues. She is the mother of two boys, Neil (22) and Ian (13) and spends her free time as the manager of Ian's soccer team.

Family Law

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Profile: Richard A. Demichele Jr., Family Law Group Coordinator

Richard A. Demichele Jr. is a shareholder of DeMichele & DeMichele, P.C. in Cherry Hill, New Jersey. He practices in New Jersey and Pennsylvania in the area of family law including divorce, child support, child custody, and domestic violence. Rick is a graduate of Villanova Law School and Rutgers University College of Engineering. Rick and his wife, Sharon, live in Haddonfield, New Jersey with their daughter Amanda.

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Profile: William H. Wilhoit, Litigation Group Coordinator

William H. Wilhoit, Grayson, Kentucky, graduated in 1992 from the UK College Of Law. In 1999 he chaired the Kentucky Young Lawyers Section, and was the ABA YLD's Meetings Coordinator in 2002. Will now works with the GP Solo Section as the Litigation Group Coordinator and with the Corporate Sponsorship Committee. Will was elected to the Kentucky Bar Association's Board of Governors in 2005. He is a fifth generation attorney and has a small firm that focuses on personal injury and general litigation. www.wilhoitlaw.com.

Business Law

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Profile: Michael E. Adler, Business Law Group Newsletter Author

Michael E. Adler, Esquire, is an associate at Blank Rome LLP in Philadelphia. Mr. Adler concentrates his practice on litigation & dispute resolution, e-commerce and telecommunications issues, and appellate advocacy. He is a member of the Litigation and Antitrust Sections of the American Bar Association and the Young Lawyers Division Executive Committee of the Philadelphia Bar Association. Mr. Adler received his Juris Doctor from Temple University School of Law, Magna Cum Laude, in 1998 and his Bachelor of Arts from Rutgers University, With Honors, in 1995.

GP|Solo Law Trends & News
Estate Planning

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Estate Planning Malpractice: Special Issues in Need of Special Care

By Bradley E.S. Fogel

Recently, the news has been filled with reports of doctors complaining, and even striking, because of high malpractice insurance rates caused, they claim, by the high risk of malpractice claims. Despite the hullabaloo, doctors facing medical malpractice claims have an enormous advantage over estate planning attorneys facing legal malpractice claims. Doctors' duties extend, for the most part, only to their patients. In contrast, the typical estate planning attorney may be sued for legal malpractice by individuals she never met or worked for. This lack of privity between the attorney and the plaintiff creates special issues, and the need for special care, in the estate planning legal malpractice context.

Background and History

Attorneys typically owe a duty of care only to their clients. In estate planning, however, an attorney's malpractice typically harms only the beneficiaries (or intended beneficiaries) of the client's estate. Because of the lack of privity with the estate planning attorney, injured beneficiaries traditionally had no cause of action against the attorney, even if the attorney was clearly negligent. Buckley v. Gray, 42 P. 900 (Cal. 1895).

As the privity doctrine was rejected in other contexts, however, it was reexamined in the estate planning context. Beginning in the 1950s and 1960s, courts relaxed the privity bar to malpractice suits by beneficiaries against estate planning attorneys. Biakanja v. Irving, 320 P.2d 16 (Cal. 1958); Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), cert. denied, 368 U.S. 987 (1962). Since then, state courts have addressed the issue of estate planning attorney malpractice in a variety of ways. For the most part states may be divided into three distinct groups: (1) states that allow a broad cause of action; (2) states following the "Florida-Iowa rule"; (3) and "strict privity" states.

Broad Cause of Action

The first case to breach the privity barrier between an estate planning attorney and a nonclient beneficiary was Lucas v. Hamm, 364 P.2d at 685. In Lucas, the California Supreme Court held that whether the beneficiary could maintain a malpractice cause of action against the estate planning attorney despite the lack of privity was based on a multi-factor balancing test. The factors included "the extent to which the transaction was intended to affect the plaintiff." Id. at 687, citing Biakanja, 320 P.2d at 19. Reasoning that the "main purpose" of the agreement between the estate planning attorney and the client was to benefit the beneficiaries, Lucas held that the attorney owed a duty of care to the beneficiary.

The plaintiff's victory was pyrrhic. The attorney in Lucas made a fundamental mistake regarding application of the rule against perpetuities. The court held, however, that the attorney did not breach the newly created duty of care. It reasoned that the rule against perpetuities was beyond the ken of the ordinarily skilled attorney. 364 P.2d at 690. Thus, the attorney escaped liability.

Despite this somewhat ironic holding, Lucas is a milestone in the expansion of malpractice exposure for estate planning attorneys. Indeed, the court noted that the duty of care it established could lead to "large and unpredictable" liability. Id. at 688. This statement was prescient. In California and the numerous states that have adopted the Lucas court's analysis and variations thereof (including the third-party beneficiary theory), the estate planning attorney owes a virtually limitless duty of care to nonclient beneficiaries. See, e.g., Blair v. Ing, 21 P.3d 452 (Haw. 2001); Auric v. Continental Cas. Co., 331 N.W.2d 325 (Wis. 1983); Trask v. Butler, 872 P.2d 1080 (Wash. 1994); Linck v. Barokas & Martin, 667 P.2d 171, 173-74 (Alaska 1983); Milboer v. Mottolese, No. 373081, 1996 WL 57022, at * 2 (Conn. Super. Ct. Jan. 24, 1996); Needham v. Hamilton, 459 A.2d 1060, 1062-63 (D.C. 1983); Ogle v. Fuiten, 466 N.E.2d 224, 226-27 (Ill. 1984). In these states the attorney is, for example, potentially liable for substandard tax planning. Bucquet v. Livingston, 129 Cal. Rptr. 514 (Cal. Ct. App. 1976); Petersen v. Wallach, 764 N.E.2d 19, 21 (Ill. 2002). Indeed, even if the estate plan is consistent with the client's wishes, the attorney may be forced to try to convince the fact-finder that the attorney discussed the relevant issues with the client. This will be especially difficult because the client is, of course, deceased and the attorney's testimony will seem self-serving. For example, beneficiaries have sued estate planning attorneys when husband and wife clients fail to use bypass trusts to make use of both unified credits. See, e.g., Noble v. Bruce, 709

A.2d 1264 (Md. 1998). Although the attorney may claim that she explained this estate panning technique to the clients and that they decided to forgo the potential tax savings, this may be difficult to prove.

Even more troubling, however, is beneficiaries' ability to press claims that amount to little more than dissatisfaction with the beneficiaries' share of the estate. See, e.g., Creighton University v. Kleinfeld, 919 F. Supp. 1421 (E.D. Cal. 1995). Based on a claim that the testator must have wanted the beneficiary to receive a greater share and an allegation that the attorney was negligent in her failure to effect such assumed intent, the beneficiary's case would likely survive a motion to dismiss. Thus, the disgruntled beneficiary would be able to test its case before a jury or, more realistically, be able to exact a settlement from the attorney or her insurer.

In essence, this broad cause of action splits the attorney's loyalty. The beneficiaries are made hidden parties to the attorney-client relationship, even though the interests of the client and beneficiaries may diverge. Bradley E.S. Fogel, Attorney v. Client--Privity, Malpractice and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning, 68 TENN. L. REV. 261, 311-24 (2001). This has dire consequences for the attorney-client relationship, since the attorney may be caught between the best interests of her client and potential malpractice liability.

The Florida-Iowa Rule

Dissatisfied with the virtually limitless cause of action allowed by Lucas and similar cases, several state courts have adopted a narrower cause of action. See, e.g., Glover v. Southard, 894 P.2d 21 (Colo. Ct. App. 1994); Mieras v. DeBona, 550 N.W.2d 202 (Mich. 1996); Henkel v. Winn, 550 S.E.2d 577 (S.C. Ct. App. 2001); Beauchamp v. Kemmeter, 625 N.W.2d 297 (Wis. Ct. App. 2000) (Beauchamp seems inconsistent with Auric, decided by the Wisconsin Supreme Court in 1983). This narrower cause of action--the so-called "Florida-Iowa rule"--is, not surprisingly, closely identified with the Florida and Iowa state courts. Espinosa v. Sparber, Shevin, Rosen & Heilbronner, 612 So. 2d 1378, 1380 (Fla. 1993); Schreiner v. Scoville, 410 N.W.2d 679, 683 (Iowa 1987). In fact, the rule originated in a California case that, although inconsistent with more recent California precedent, continues to meet with approval in the courts in other states. Ventura County Humane Inc. v. Holloway, 115 Cal. Rptr. 464 (Cal. Ct. App. 1974).

Under the Florida-Iowa rule, a beneficiary may maintain a cause of action

against the estate planning attorney only if the client's intent, as expressed in the will (or other document), is frustrated. Espinosa, 612 So. 2d at 1380. This limitation is based on courts' traditional reluctance to appeal to parol evidence in will construction proceedings. Id. at 1379. Applying this principle to the legal malpractice context, courts following the Florida-Iowa rule require the malpractice to be apparent on the face of the will.

Under the Florida-Iowa rule, estate planning attorneys are largely immune from liability based on failure to give accurate tax planning advice or errors of law, such as failure to understand ademption of specific devises. Stept v. Paoli, 701 So. 2d 1228 (Fla. Dist. Ct. App. 1997); Schreiner, 410 N.W.2d at 683. Similarly, an attorney who drafted an ambiguous will was not liable based on the reasoning that the client's true intent was ultimately effected. O'Neil v. Sacher, 526 So. 2d 771 (Fla. Dist. Ct. App. 1988). In another case, a beneficiary who claimed that he was not mentioned in the will because of the attorney's negligence was precluded from recovery because the testator's intent, as expressed in the will (which did not mention the plaintiff) was effected. Espinosa, 586 So. 2d at 1227 (Levy, S., specially concurring), aff'd, 612 So. 2d 1378.

For the most part, only execution errors are actionable under the Florida-Iowa rule. If the documents have been properly executed, then the testator's intent as expressed therein will ultimately be effected. Thus, no action will lie.

The Florida-Iowa rule is based on the misapplication of will construction principles to a tort malpractice action. Indeed, the cases adopting the Florida-Iowa rule rely heavily on will construction precedent. Moreover, these cases have expanded the will construction doctrine without considering the similarities and differences among the policies underlying the rule in the alternative contexts.

In addition to having a questionable logical basis, the Florida-Iowa rule leads to arbitrary distinctions. For example, an attorney who provides blatantly incorrect legal advice is wholly immune from malpractice liability. In contrast, the attorney who allows a client to incorrectly execute a will may be liable to the intended beneficiaries. The difference between the two situations seems negligible, but the ramifications are enormous.

Strict Privity

In a few states, the lack of privity between the estate planning attorney and the

beneficiaries is an absolute bar to legal malpractice claims. See, e.g., Robinson v. Benton, 842 So. 2d 631 (Ala. 2002); Noble, 709 A.2d at 1275; Lilyhorn v. Dier, 335 N.W.2d 554, 555 (Neb. 1983); Mali v. De Forest & Duer, 553 N.Y.S.2d 391, 392 (N.Y. App. Div. 1990); Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987); Barcelo v. Elliot, 923 S.W.2d 575 (Tex. 1996). These states retain the strict privity rule based on the fear of splitting the attorney's loyalty between the client and nonclient beneficiaries. Despite the importance of protecting the attorney-client relationship, the strict privity rule has been widely criticized. The rule can clearly lead to harsh results. The attorney is immune to malpractice liability regardless of the extent of the negligence or the severity of damage. Moreover, to the extent potential malpractice liability encourages greater care, no such increased care is obtained in strict privity states.

Proposal for Reform

The three approaches to estate planning legal malpractice claims all have substantial flaws. The states that follow Lucas, or analogous reasoning, allow for an overly broad cause of action that exalts the beneficiary's interest to the detriment of the attorney's representation of her client. The Florida-Iowa rule leads to inconsistent results and is based on questionable reasoning. Lastly, strict privity states allow an injured beneficiary to go unrecompensed and fail to take advantage of the increased care potential malpractice liability may lead to.

To balance the positive aspects of potential malpractice liability with respect for the attorney-client relationship, a new standard is required. It is submitted that allowing the beneficiaries to recover from the estate planning attorney only if they can prove their case by clear and convincing evidence strikes the proper balance. Fogel, supra, at 308-32. Such a standard allows injured beneficiaries to recover from the attorney when the negligence is clear. At the same time, it properly respects the attorney-client relationship by assuring that the attorney's loyalty is not split between the client and the beneficiaries. In essence, the attorney is immunized from liability based on an estate plan that might appear to be the result of negligence, even though it is actually the product of the client's choice. But the truly negligent attorney will be liable for the damages caused in those cases in which recovery will not impugn the attorney-client relationship.

Statutes of Limitations

Statutes of limitations have the potential to be almost as significant a bar to estate planningmalpractice recovery as the privity doctrine. As a practical matter, it is unlikely that the attorney's negligence will be discovered until after the client's death. If the statute of limitations begins to run when the negligence

occurs (when the documents are executed), it is likely that the beneficiaries' cause of action will be time barred.

States that have relaxed the privity barrier, however, have also found ways to prevent a statute of limitations from creating a de facto bar to estate planning legal malpractice claims. Generally, the limitations period will not begin to run until the injury is either incurred or discovered. Petersen, 764 N.E.2d at 21; Blair, 21 P.3d at 471-72; Millwright v. Romer, 322 N.W.2d 30, 32 (Iowa 1982). Thus, the statute of limitations will generally not begin to run until the client's death, at the earliest.

Damages

For the most part, the measure of damages in a legal malpractice claim is the loss suffered by the plaintiff. Lavigne v. Chase, Haskell, Hayes & Kalamon, P. S., 50 P.3d 306 (Wash. Ct. App. 2002). Thus, for example, if the attorney's negligence voided an intended bequest, the damages should be the amount of the lost bequest. Auric, 331 N.W.2d at 329. Similarly, if the attorney's negligent planning increased the tax burden, the attorney is liable for the increased tax. Bucquet, 129 Cal. Rptr. at 516.

In some estate planning malpractice cases, plaintiffs may recover the remedial costs necessitated by the estate planning attorney's negligence. These costs include, for example, the cost of the construction proceedings if the attorney has drafted an ambiguous provision or the cost of correcting the estate plan through post-mortem use of disclaimers and lifetime gifts. Id.; Estate of Arlitt v. Paterson, 995 S.W.2d 713, 721 (Tex. App. 1999).

The damages caused by the attorney's negligence may be quite speculative. Martin D. Begleiter, First Let's Sue All the Lawyers--What Will We Get: Damages for Estate Planning Malpractice , 51 HASTINGS L.J. 325 (2000). For example, suppose an attorney negligently gives a surviving spouse a power of appointment over a bypass trust. If the surviving spouse uses lifetime gifts and/or disclaimers to fix the estate plan then, as mentioned, the cost of these remedial measures will be recoverable as damages. In contrast, if the estate plan is not fixed, the amount of damages, if any, will not be determinable until the surviving spouse's death. Id. at 346. By that time, however, the malpractice claim may be time barred. It has been suggested that courts could fashion a remedy even in the case of such speculative damages through the use of a trust created by the court to handle the alternatives. Id. at 361.

Attorney, Protect Thyself

All estate planning attorneys must be mindful of the risk of malpractice liability to nonclient beneficiaries. Even attorneys in strict privity states may represent clients outside of their home state. Moreover, considering the broad criticism of the strict privity rule, it seems that some strict privity states may eventually join the majority. Indeed, strict privity states have allowed suits against estate planning attorneys in limited circumstances. See, e. g., Estate of Arlitt, 995 S. W.2d at 713.

Of course, attorneys can protect themselves from most malpractice liability by exercising care. A startling number of estate planning malpractice cases involve very basic errors, such as having an insufficient number of witnesses sign a will or having a beneficiary witness the will. Exercising greater care in executing documents should reduce the chance of an error. Moreover, a cautious attorney might make a habit of reviewing the executed will before placing it in her will vault. If an execution error is discovered, the attorney can (sheepishly, no doubt) ask the client to re-execute the will. Embarrassing, to be sure, but a better option for both attorney and client.

To avoid more subtle errors, such as improperly drafted documents, the attorney should carefully review the documents before they are executed. Moreover, in a multi-attorney office, it would not be excessive to have a different attorney review the final draft of the documents. Unfortunately for the client, it seems that the cost of these measures must be passed on to the client.

Even a careful attorney, however, may find herself on the wrong side of a "v." simply by following a client's unusual instructions. For example, if a wealthy client declines to take advantage of the potential transfer tax savings that could be obtained by making annual exclusion gifts, beneficiaries may later claim that the attorney was negligent in failing to advise the client to make such gifts. In a similar vein, clients who are financially situated in a manner that suggests use of both spouses' unified credits (through bypass trusts, for example) or both spouses' generation-skipping transfer tax exemptions (through generation-skipping trusts) may decline to employ these techniques for personal reasons. Again, the attorney must be mindful of the risk of a later malpractice claim by nonclient beneficiaries arguing that the attorney never gave the clients adequate advice.

Similarly, some clients may make truly unusual choices. For example, one attorney tells of husband and wife clients who could not decide what to do with their property upon the death of the survivor. Because of the disagreement

between the spouses, they wanted the estate to pass by intestacy upon the death of the survivor. Certainly, this unusual disposition would appear to be the result of the attorney's negligence unless the attorney can prove that the issue was fully discussed with the clients.

In these cases, the attorney should protect herself from a potential malpractice claim by confirming the client's instructions in writing. Such a "protective letter" would be powerful evidence that adequate advice was given.

Protective letters are not, however, a panacea. The protection they provide is not absolute. A letter that simply confirms the choice made by the client (for example, "As we discussed, you have decided not to use bypass trusts in your wills") invites the plaintiffs to argue that the clients would have chosen otherwise if they were fully informed. Indeed, from a strictly self-protective point of view, the attorney should draft a protective letter that urges the client, in the strongest possible language, to adopt the estate plan that is most beneficial to the beneficiaries (the likely plaintiffs). Fogel, supra, at 321. Of course, even such a strongly worded letter does not provide the attorney with absolute immunity.

Moreover, the use of protective letters is not without cost. First, there is the time spent drafting the letter. More significantly, protective letters intrude into the attorney-client relationship as an outgrowth of the attorney's duty to the beneficiaries, not the client. Certainly, most attorneys would not recommend an estate plan solely to immunize themselves from liability. But the broadsword of potential malpractice liability urges the attorney to suggest the estate plan most beneficial to the beneficiaries, regardless of the client's interests. It seems that the malpractice system should not create such a perverse incentive.

Attorneys may also consider declining clients who wish to implement an estate plan that runs a high risk of a later malpractice claim. If an attorney takes such a client, she can reduce the risk of a later claim (or, at least, the risk of a successful claim) through the methods discussed above. As mentioned, however, none of these methods is fool-proof. Moreover, estate planningmalpractice claims are rarely tried. The overwhelming majority of such cases settle. This is likely because of the public's low degree of faith in the average attorney's veracity and that the attorney's testimony will, by necessity, be self-serving. Thus, even the careful attorney with a well-documented file may find it expedient to offer a settlement payment to disgruntled beneficiaries.

Conclusion

Of the three main analyses employed by courts in estate planning legal

malpractice cases, all have significant drawbacks. Lucas and similar analyses are overly broad. They create a duty in the attorney that is inconsistent with her duty to her client. The Florida-Iowa rule is less broad, but it is based on logically flawed reasoning and leads to inconsistent results. The strict privity rule, in contrast, immunizes all estate planning attorneys from malpractice claims regardless of the degree of negligence or the harm caused. A new standard is necessary. It is suggested that requiring beneficiaries to prove their claim by a clear and convincing standard of proof would strike the proper balance.

Regardless, the attorney must be mindful of her duties to nonclient beneficiaries. The best defense against malpractice liability is exercising care. Because of the breadth of the duty owed by the attorney to nonclient beneficiaries, however, even the most careful attorney may be faced with a malpractice suit. Protective letters may ameliorate the risk that such a suit would be successful. The sad fact, however, is that attorneys must decide whether accepting a client interested in a high-risk estate plan is worth it.

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Estate Planning

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Financial Planning:
Summary Checklist For Financial Planning For An Elderly Client

By A. Kimberley Dayton, Timothy H. Guare, Louis A. Mezzullo, and Molly M. Wood

Client Name: _____

Date: _____

Goal Setting/Database: (Importance: High Medium Low)

1. Establishing realistic short-term and long-term financial goals

2. Developing a satisfactory recordkeeping system for home

3. Obtaining a safe-deposit box for storing valuable papers and possessions

4. Obtaining a comprehensive current inventory of household furnishings and possessions

5. Preparing a household budget listing expected income and expenses

6. Other: _____

Credit Management: (Importance: High Medium Low)

1. Establishing credit

2. Reducing credit card debt

3. Reducing general debt

4. Preparing for a major purchase or expenditure that will require borrowing

5. Securing a home equity loan

6. Funding education for children or grandchildren

7. Other: _____

Insurance: (Importance: High Medium Low)

1. Establishing sufficient life insurance coverage for client and, if applicable, spouse or other dependents

2. Obtaining continuous health insurance coverage for family

3. Establishing adequate long-term disability insurance coverage

4. Ensuring adequate homeowners' or renters' insurance coverage

5. Obtaining additional insurance protection for valuables

6. Maintaining a personal liability (umbrella) insurance policy

7. Ensuring sufficient professional liability insurance

8. Other: _____

Accumulating Capital: (Importance: High Medium Low)

1. Establishing regular savings through payroll withholding or other savings programs

2. Establishing an emergency fund equal to at least three months' salary

3. Determining appropriate investment objectives

4. Establishing a proper balance between stocks and savings in the portfolio

5. Periodically reviewing the investment portfolio

6. Reducing risk in the investment portfolio

7. Participating in an employer's stock-purchase or tax-deferred plan

8. Diversifying the investment portfolio

9. Participating in dividend reinvestment plans of stocks or mutual funds

10. Buying a first home or condominium

11. Making major home improvements

12. Purchasing a second home

13. Purchasing a vacation time-share

14. Directly investing in income-producing real estate

15. Owning real estate through a limited partnership

16. Other: _____

Tax Planning: (Importance: High Medium Low)

1. Understanding current tax laws and tax-saving techniques

2. Maintaining adequate tax records

3. Evaluating tax-advantaged investments

4. Planning for significant increases in future income

5. Understanding the tax implications of full- or part-time self-employment

6. Other: _____

Retirement Planning: (Importance: High Medium Low)

1. Making individual retirement account contributions

2. If self-employed, participating in a Keogh plan or simplified employee pension plan

3. Participating in an employer-sponsored thrift plan, savings plan, or salary reduction (401(k)) plan

4. Retiring before age 65

5. Investing in tax-deferred annuities

6. Estimating income that will be available on retirement

7. Taking action to fund a comfortable retirement

8. If preretiree, evaluating investment portfolio mix in light of retirement income needs

9. Evaluating expected pension benefits

10. Choosing between a lump-sum pension payment and an annuity at retirement

11. Ensuring that the Social Security Administration has accurate records of earnings

12. Estimating what social security retirement benefits will be

13. Becoming aware of impact of inflation

14. Identifying fixed and variable incomes

15. Developing inflation protection plan

16. Other: _____

Estate Planning: (Importance: High Medium Low)

1. Maintaining a valid and up-to-date will

2. Preparing a letter of instructions

3. Familiarizing immediate family with both the location and contents of will and letter of instructions

4. Appointing a financial guardian for dependent children

5. Establishing an adult guardianship arrangement in the event that either spouse becomes disabled or mentally incapacitated

6. Establishing trust funds as part of estate planning

7. Exploring alternative methods of ownership of real estate to ascertain the most advantageous

8. Considering the implications of business or real estate interests in more than one state

9. Evaluating the impact of possible uninsured illness (e.g., a nursing home stay) during retirement

10. Other: _____

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Probate
Mediating Probate Disputes

By Susan N. Gary

A lawyer involved in a probate dispute must be able to advise his or her client both about the client's legal rights and remedies and about the client's options for resolving the dispute. If the lawyer advises the client only about the costs and chances for successfully litigating the dispute, the lawyer will not have served the client well. The lawyer should be able to discuss knowledgeably the alternative forms of dispute resolution available to the client and to advise the client on which approach is most appropriate.

Mediation has played a role in dispute resolution for centuries in legal systems as diverse as those of China and various American Indian groups. In the United States, interest in mediation has grown dramatically since the 1970s. One area of the law in which mediation plays an increasingly important role is family law, where parties routinely use mediation to resolve divorce and custody disputes. Surprisingly, in probate, another area of the law in which family issues predominate, mediation is still in its infancy. Although mediation will not be appropriate for all probate disputes, in many cases mediation may allow parties to reach agreements preferable to the decision a court would reach and may promote healing of strained family relationships. This article examines the potential uses of mediation in probate proceedings.

Nature of Probate Disputes

Disputes arise in probate for a variety of reasons. Conflict may occur over the disposition of a decedent's property because relatives are dissatisfied with the decedent's estate plan. Grief associated with the death of a loved one creates tensions, and lawsuits may follow from misdirected anger over the death. Death may cause dormant family disputes to resurface and a dispute nominally over property may in fact be a dispute over family relationships.

Disputes may arise because family members have different views of a fair distribution of a decedent's property. For example, one of a decedent's children may regard equal distribution among all the children as fair, while another child may believe that he or she should have received more because of care given an older or incapacitated parent. A dispute may arise between children of one marriage and the surviving spouse of a later marriage. The decedent's children may view the decedent's property as theirs, while the surviving spouse may feel a right to a sizable portion of the property. Litigated solutions to these problems ignore the complex emotional issues that may underlie the dispute.

Probate courts are also the forum for conservatorship and guardianship proceedings. Disputes may arise in these proceedings if the proposed protected person contests the guardianship or if family members disagree among themselves over the appropriate approach for their older relative. Disputes may develop between a care facility and family members. These disputes all involve emotional issues.

Finally, disputes may arise between beneficiaries of a trust or estate and a fiduciary. The family may disagree over who should act as fiduciary, or the beneficiaries may be concerned about investment decisions or property management issues under the fiduciary's control. If the fiduciary is also a beneficiary, the other beneficiaries may perceive inequities or conflicts of interest, whether real or imagined.

Benefits of Mediation

Family members involved in a dispute often resolve their differences without seeking assistance outside the family. Even after one party contacts a lawyer, a negotiated settlement may be possible. For some families, however, a more formal dispute resolution process becomes necessary. Some benefits of using mediation instead of litigation to resolve disputes are of particular interest in the probate context.

Confidentiality. Mediation allows parties to a dispute to air their grievances in a private setting. Although the level of confidentiality depends on agreement between the parties and varies depending on state law, the parties may keep much of what they discuss out of the public record. The mediator usually asks the parties to sign an agreement not to disclose information conveyed during the mediation. In addition, state law generally limits the disclosure of information obtained in settlement discussions and extends that protection to mediation. Some states grant additional evidentiary privileges for mediation, but many states also impose a duty to report specified information, such as disclosures of

abuse or threats of harm.

If a family involved in a will contest is airing "dirty laundry" or if information about an older person's eccentric behavior is relevant to a guardianship proceeding, the family will benefit from privacy if they mediate the dispute. If the parties agree not to disclose information revealed during the mediation, they might speak more freely and address messy relationship issues in crafting solutions to their dispute. Both sides may be more open, and that willingness to discuss difficult issues may lead to a better understanding between the parties.

Emotional benefits. The emotional benefits of mediation can be significant. Mediation gives parties a chance to be heard. For some family members, being able to air grievances and receiving an apology or explanation for troubling behavior may be more important than receiving a property settlement. In addition, giving parties more control over the outcome may increase psychological well-being.

In a guardianship proceeding, mediation involves the older adult in the process, giving that person a voice and helping him or her listen to the concerns of other family members. Mediation may leave the person less angry and confused than a more formal court proceeding.

Mediation also helps families avoid some of the emotional costs of litigation. Mediation may be less stressful and traumatic than litigation because litigation pits parties against each other and tends to escalate the conflict. Mediation may even have emotional benefits when compared with disputes that remain unresolved. If a family member knows that he or she will not likely prevail in a lawsuit, that person may not pursue a legal remedy. Although no lawsuit ensues, the conflict within the family may persist. Anger and estrangement between family members may continue for years.

Improved ongoing relationships. Mediation can repair, maintain or improve ongoing relationships. Probate disputes involve family members. In most cases, continuing the relationships among the various family members will benefit the family. Because the parties must work together during the mediation to develop a solution to their conflict, they may acquire communication and problem solving skills that will aid them in the future. Mediation is less likely than litigation to drive family members farther apart.

Unique solutions. Mediation allows the parties to forge their own solution to a dispute. There are limited remedies available to a judge to resolve a dispute over property. Mediation allows the parties to take nonlegal as well as legal

interests into consideration. Parties may best handle the division of property with sentimental value in this way. For example, if two siblings who are to receive the decedent's tangible personal property work together to divide the property, they will likely achieve a better result for both of them than they would if a court divided the property to reach a financially equal result.

In guardianship proceedings in most states, the court faces an all or nothing choice--the court can either appoint a guardian and deprive the protected person of all rights or decide not to appoint a guardian and leave the person on his or her own. Through mediation, the older person, family members and others can develop less intrusive solutions that will protect the older person while minimizing the loss of rights. The mediated solutions can also take into account the interests of family members who are concerned about the care of the older person.

Cost-effectiveness. Mediation may also be more cost-effective than litigation. Particularly in small estates, litigation costs may be disproportionate to the amount at issue. More parties may be able to protect their interests if a less expensive alternative is available.

Potential Problems with Mediation

Although mediation is appropriate in many situations, some characteristics of probate disputes may make mediation difficult or even inappropriate.

Grief. If the dispute involves a decedent's estate, the family may still be grieving over the death of a loved one. Grief may be a factor in the dispute itself because one family member may blame another for the death. If, for example, parents of a decedent have not accepted the fact that the decedent is homosexual, they may misdirect their grief over the death as anger at the decedent's domestic partner who is the primary beneficiary under the decedent's will. Grief may also affect the parties' ability to mediate. Delay may be necessary to allow the parties to progress through the grieving process.

Power imbalance. Power imbalances are always a concern in mediation, but may be of particular concern in probate disputes. In a guardianship proceeding, if the older person contests the guardianship, mediation will be appropriate only if he or she can participate effectively. An advocate can assist the older person, not by taking the older person's place but by facilitating the older person's expression of his or her concerns. If the older person cannot participate, even with assistance, mediation is inappropriate.

Power imbalances may also exist in disputes between family members over a guardianship for a relative or in disputes over property. An older surviving spouse may be intimidated by younger family members, or preexisting power imbalances between siblings may adversely affect the mediation. If minors are involved, it may be necessary to arrange for one or more advocates to represent their interests. A skilled mediator should be aware of potential power imbalances and manage them during the mediation so that all parties are protected. In some situations, however, the power imbalance may be too great for mediation to be appropriate.

Long-term dispute. Although triggered by a family death, some probate disputes may grow out of a longstanding family feud. If parties have become entrenched in their positions after years of animosity, mediation may not be appropriate.

Need for a precedent. In some situations, litigation may be appropriate to create a precedent for use in subsequent cases. This situation is less likely to occur in the probate context than in other areas of the law, such as racial discrimination cases. If, however, the situation is one for which establishing a precedent is important, that will be a factor in weighing the merits of litigation versus mediation.

Guidelines for Using Mediation

In considering mediation to resolve probate disputes, a lawyer should evaluate a number of factors. The presence of some factors makes mediation more appropriate, while other factors may mean that the lawyer should recommend against the use of mediation. Each case is unique, and a lawyer should evaluate each case individually. The guidelines that follow may help to determine whether a lawyer should recommend mediation.

Ongoing relationship. If the parties would benefit from an ongoing relationship--the case with most family relationships--mediation may help. Further, if the parties express concern about maintaining an ongoing relationship, they are likely to work together constructively in mediation. Parties may be more concerned with rebuilding or preserving a family relationship among siblings than one between a stepparent and stepchildren. Even in the latter situation, though, a family relationship may be important, if only out of respect for the decedent.

Willing parties. Mediation works best if all parties want to participate. If the parties come to mediation willingly, they are more likely to work together to

resolve their dispute. Mandatory mediation has been criticized and is inappropriate in probate. If the parties have entrenched positions due to a longstanding dispute or moral or religious beliefs, then a negotiated or litigated resolution of their dispute will be more appropriate than mediation.

Competent parties. All parties must be able to participate effectively. The mediator may need to make accommodations for older persons who may have restricted mobility, may have difficulty hearing or may be confused by new settings. Arranging the mediation to take personal concerns into consideration and allowing an advocate to participate when necessary may make mediation possible. If any party is mentally incapacitated, so overcome by grief that he or she cannot function or physically unable to attend the mediation, the lawyer should not recommend mediation.

Nonlegal issues. If a dispute involves nonlegal issues, mediation may benefit the parties. Mediation permits parties to create their own solution to the dispute and allows them to address both nonlegal and legal issues in reaching that solution. Mediation also allows parties to express their personal concerns, anger or grief. Being heard by other family members may be part of what some disputants want or need.

Confidentiality. If parties want confidentiality because of the sensitive nature of the dispute, mediation will provide greater privacy than litigation. In family disputes, minimizing the public record may benefit the parties. If one of the disputants is a public figure, this factor may be of particular importance. If the dispute involves relationships outside of society's accepted norms, the privacy associated with mediation may also be desirable.

Minimal power imbalances. A lawyer recommending mediation should consider whether power imbalances might adversely affect the mediation. Although a skilled mediator can manage some power imbalances, and although power imbalances can affect litigation as well as mediation, effective participation remains an important factor. An older person with weakened physical or mental abilities may not be able to participate adequately. If there is a history of dominance in the family, between either generations, spouses or siblings, the power imbalances may be too great to overcome. If there is an indication of physical or mental abuse, mediation will be inappropriate. In addition, if an entity such as a hospital or nursing home is on one side of the dispute and an older person or the person's family is on the other side, the individual or family may feel intimidated by the institution. Mediation may not adequately protect the rights of someone who feels overwhelmed by the other party.

Example

A probate dispute has legal issues that a court can resolve. A litigated outcome will likely mean that one party "wins" and the other party "loses," based on legal rules. A dispute, however, may also involve a number of emotional issues. For example, parties may disagree on what would be a "fair" distribution of the decedent's estate. The court can determine whether the will was valid but will not be able to address the underlying family issues. In contrast, parties who mediate their dispute may construct a solution that allows both sides to win.

To demonstrate a situation for which mediation would be appropriate, consider a family consisting of a mother, a father and their two adult daughters, Alice and Barbara. After the father died, the mother moved in with Alice and lived with her for eight years until the mother died. In the last two years before her death, the mother was bedridden, and Alice cared for her at home. Barbara lived in another state. She called frequently but was unable to visit much or to help with the care of her mother. On the mother's death, the mother's will left her entire estate to Alice. A prior will that the mother executed before the father's death gave the estate to the father, or if he predeceased the mother, divided the estate equally between the two daughters.

Alice thinks that the result under the will is fair because she cared for her mother for many years. Alice thinks that Barbara does not need the money and that Barbara does not deserve a share of the estate. Barbara is hurt by her mother's will. She thinks that if her mother loved the daughters equally, she would have divided the estate equally. She thinks Alice convinced her mother to leave the estate to Alice.

Barbara talks to a lawyer about what she can do. The lawyer first considers the legal issues around whether the will disinheriting Barbara is valid. The lawyer looks for evidence of undue influence and lack of mental capacity. Several facts raise suspicions about the will and about whether Alice unduly influenced her mother to execute a new will. The mother was in declining health, she lived with Alice, and Alice had both the motive and opportunity to influence her mother. Other factors, such as when the mother executed the will, whether the mother was under medication and whether witnesses can speak about the mother's mental capacity, could be important. After gathering this information, the lawyer might be able to put together a case of undue influence by Alice and lack of the mother's testamentary capacity. The facts, however, may be difficult to establish. Alice may have neighbors who can testify that the mother told them repeatedly that she was thankful for Alice's care and that she would reward Alice in her will. The will does not give property outside the family and could be

viewed as rewarding Alice. The evidence will likely go both ways, and it will be difficult to predict the outcome in court.

If Alice and Barbara litigate the case, one of them will win and the other will lose. In addition, they will lose their relationship with each other, at a time when they have lost their mother and would otherwise benefit from family connections. They will also face legal bills and the emotional strains of litigation.

After reviewing the facts, weighing the legal arguments and considering the potential benefits of mediation for these particular parties--repairing the sibling relationship and addressing the emotional issues involved in this dispute--Barbara's lawyer might suggest mediation. Even if Alice thinks that she would win in a lawsuit, she may be willing to mediate to avoid the litigation and because she cannot be sure of the outcome in court. Barbara may be willing to mediate for the same reasons.

Assuming Alice and Barbara agree to mediate, they will meet with the mediator, either with or without their lawyers present. If the lawyers are not present at the mediation, the parties most likely will agree to have their lawyers review any agreement that they reach before they sign it. The mediation process may benefit the sisters in a number of ways. During the mediation each sister will have a chance to tell her story and will listen to her sibling's story. Barbara may be able to understand the sacrifices that Alice has made and the toll that the years of caring for their mother took. Alice may be able to understand Barbara's hurt feelings and her distress over feeling that their mother did not love her. Alice may even be able to soothe those hurt feelings by telling Barbara that their mother did love both daughters but changed her will in gratitude for the care Alice provided and not because she loved Barbara less. The daughters may be able to reach an agreement on dividing the property, for example, by agreeing that Barbara will take some sentimental items or a small share of the estate. In addition to whatever Alice and Barbara agree to do with the property in the estate, they will have opened channels of communication and may be able to build a better sibling relationship. The result may well be a "win" for both of them.

Although this example provides a best case scenario for mediation, the example is not unrealistic. Many probate conflicts could benefit from mediation rather than litigation.

Conclusion

Mediation will not be desirable in every case, but the personal and family

aspects of probate make this area of the law particularly appropriate for mediation. Lawyers practicing in this area should familiarize themselves with the benefits of mediation and be able to recommend it to their clients when appropriate.

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Taxation
Checklist For Fiduciary Income Tax Pick-Ups

By Jonathan G. Blattmachr and Arthur M. Michaelson

Estate of: _____

Tax Periods: _____

1. Are administration expenses duplicated on the 1041 and 706?
__Yes __ No __N/A

2. Are broker's commissions deducted from the proceeds of sale (or as an adjustment to basis) on the form 1041 schedule D?
__Yes __ No __N/A

a. If yes, are they also deducted on the 706?
__Yes __ No __N/A

3. Is the estate deducting expenses or reporting income attributable to property that was specifically bequeathed or jointly owned?
__Yes __ No __N/A

4. If an adjustment to the value of property has been made on the 706, has a corresponding adjustment been made to the basis of the property for purposes of sale or depreciation?
__Yes __ No __N/A

5. If the estate has sold or liquidated property, were sufficient steps taken by the decedent before death so that the proceeds of sale or liquidation are IRD?
__Yes __ No __N/A

a. If yes, was the decedent's basis before death and not the value per the 706

used on the 1041?
__Yes __ No __N/A

6. Did the estate make a distribution of capital gains (on other than the sale of unproductive assets or natural resources)?
__Yes __ No __N/A

7. Has the estate received the following items or IRD:
__Yes __ No __N/A

a. salary, fees, compensation, alimony?
__Yes __ No __N/A

b. accrued dividends and interest?
__Yes __ No __N/A

c. increment on U.S. Savings Bonds?
__Yes __ No __N/A

d. accrued interest on flower bonds?
__Yes __ No __N/A

e. royalty income?
__Yes __ No __N/A

f. death benefits?
__Yes __ No __N/A

g. mortgages or note receivables of an installment obligation?
__Yes __ No __N/A

If yes, were these items reported on both the 706 and 1041?
__Yes __ No __N/A

8. If the decedent was a partner and he died before the end of the partnership's taxable year, has the estate allocated the income between the IRD portion and the non-IRD portion?
__Yes __ No __N/A

9. Pecuniary Bequests: Were they funded with items of appreciated property, including such IRD items as installment obligations?
__Yes __ No __N/A

10. Fractional Bequests: Has there been a non-pro rata funding of this bequest among the several beneficiaries?
__Yes __ No __N/A

11. Has there been a sale, transfer, or cancellation of an installment obligation received from the decedent?
__Yes __ No __N/A

12. In computing the estate tax deduction (691c), has an adjustment been made for:
__Yes __ No __N/A

a. DRD items (691b)?
__Yes __ No __N/A

b. the § 1202 deduction?
__Yes __ No __N/A

c. the martial and charitable deductions?
__Yes __ No __N/A

d. the allocation between estate and beneficiaries?
__Yes __ No __N/A

13. Charitable Deduction: Is it authorized under the governing instrument (e.g., decedent's will) for an exclusive charitable purpose?
__Yes __ No __N/A

14. Was an income distribution deduction taken for a distribution to beneficiaries of a trust under the decedent's will by the Estate?
__Yes __ No __N/A

(By-Pass Distribution)

15. Was an income distribution deduction taken for a distribution to a split-interest charitable trust?
__Yes __ No __N/A

16. Was there a 1041 pick-up?
__Yes __ No __N/A

Caution: An affirmative answer to questions 1, 2a, 3, 6, 9, 10, 11, 14, or 15; or a negative answer to questions 4, 5a, 7a, 8, 12, or 13 indicate that you will have a possible audit issue.

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On The Drawing Board: New ADA Access Rules

By Tobie Hazard

Most employers are familiar with Title I of the Americans with Disabilities Act, which prohibits discrimination in employment against persons with disabilities. Less familiar to most employers is Title III of the ADA. Title III requires that "places of public accommodation" and "commercial facilities" be designed, constructed or altered so that they are accessible to the disabled. A "place of public accommodation" is a privately owned business that provides commercial goods and services to the public. Retail stores, hotels, restaurants, banks, and service establishments are all public accommodations. "Commercial facilities" are those intended for non-residential use and whose operations affect commerce. Such facilities include factories, warehouses, office buildings and most other workplaces.

Public accommodations and commercial facilities designed or constructed after January 26, 1993, or altered after January 26, 1992, must comply with certain regulations published by the Justice Department known as the ADA Architectural Guidelines for Buildings and Facilities, or "ADAAG." ADAAG sets technical specifications for certain elements of a facility, like entrances, paths of travel, bathrooms, primary function areas, parking, and elevators. Additionally, ADAAG contains "scoping" standards to specify how many accessibility features must be incorporated and under what circumstances these features are required. For instance, ADAAG requires that at least 50 percent of all public entrances must be accessible. Full compliance with the ADAAG standards for new buildings or altered areas is mandatory except in limited cases where compliance is structurally impracticable, disproportionately expensive, or, in the case of historic properties, cannot be achieved without substantially impairing the facility's historic features.

The ADAAG standards were first issued in 1991. On July 23, 2004, the U.S. Access Board, an independent executive agency charged with developing ADA accessibility standards, issued comprehensive changes to the ADAAG. While

the changes have yet to be issued as binding regulations by the Justice Department, business owners, landlords, tenants, contractors and architects should all familiarize themselves with the proposed revisions to the ADAAG, as well as with their overall obligations under Title III of the ADA.

Title III Primer

Under Title III of the ADA, the degree of accessibility to a covered facility depends on the date of the design and construction of the facility. For example, places of public accommodations (but not commercial facilities) built before January 26, 1993 are required only to remove architectural barriers to disabled access where such removal is “readily achievable.” Whether barrier removal is “readily achievable” depends on the difficulty and cost of the barrier removal. That standard, in turn, requires an analysis of all circumstances: the nature of the changes; the covered entity’s type, size and financial position; and any cost/benefit burden placed on the entity.

In the case of places of public accommodation and commercial facilities built after January 26, 1993, such facilities must be readily accessible to and usable by individual with disabilities in full compliance with ADAAG standards, except where the requirements are structurally impractical to meet. The “structurally impracticable” exception is very narrow and will apply to only certain terrain characteristics which prevent incorporating accessibility standards. For example, constructing a building on stilts over marshland and making it accessible to wheelchair users may be “structurally impracticable.” Of course, this does not prevent the facility from having other accessible features. Wheelchair accessibility may be structurally impracticable for a building built on stilts, but that does not relieve the owner from designing the building to provide for access to individuals using crutches or the sight and hearing impaired.

If a place of public accommodation or commercial facility built before January 26, 1993 is altered, the alterations must comply with the construction standards in ADAAG to the maximum extent feasible. Alterations would include remodeling, renovation, reconstruction, historic restoration, and changes or rearrangement of structural parts or elements or in the configuration of walls. Excluded from this definition are normal maintenance items, like painting, rewiring electrical systems or asbestos removal, which do not ordinarily affect a building’s usability. If the altered area is an area of the facility that contains a “primary function,” then the “path of travel” to that area—that is, the passage by which the primary function area is approached, entered and exited—as well as restrooms, water fountains and telephones serving that area must be readily accessible. A “primary function” is a major activity of which the facility is intended. “Primary areas” would include the dining area of a cafeteria, the

meeting room in a conference center, or the assembly and production room of a manufacturing plant.

Many business owners who lease space—like retail tenants in shopping malls—wrongly assume that the owner of the property is solely responsible for ADA Title III compliance. In truth, both the landlord and the tenant of a public accommodation have full responsibility for complying with Title III. While Title III does permit a landlord and tenant to allocate responsibility in the lease for ADA compliance through, for example, indemnification provisions, such allocation does not affect their liability under the ADA. Furthermore, employers who are involved in or have control over the design, construction or alteration of their facilities may thereby become liable if the design, construction or alteration does not comply with ADAAG requirements. For example, a manufacturer who hires a contractor to build a facility according to the manufacturer's specifications will be liable under Title III if the contractor fails to comply with ADAAG design and construction guidelines.

Proposed ADAAG Changes

The most significant change in the new ADAAG concerns employee work areas. The existing guidelines require that for covered facilities there must be an accessible route to an employee work area which allows employees with disabilities to approach, enter and exit the area. Disability advocates claimed that the current ADAAG only gets a person with a disability to the door of a work area and denies that person access through the work area and to his or her assigned work station. To address that problem, the new ADAAG guidelines require that there be an accessible circulation route within work areas that are larger than 1,000 square feet. Among other things, the new ADAAG guidelines set the required width for such routes, door-closing speeds, the force required for opening doors, and the permissible slopes of such circulation routes.

Under the existing ADAAG regulations, any newly constructed facility or alteration to an existing facility that affects the facility's "primary area" must ensure that the paths of travel to that area are readily accessible. Acknowledging that many multi-use buildings may have multiple primary areas, the new ADAAG clarifies that "primary" does not necessarily mean "the one and only." For example, a hospital may have many primary areas, such as operating rooms, labs, and nurses' stations. For new construction or alterations to a multi-use facility, the ADAAG rules require that all such areas have accessible paths of travel and, depending on the size, circulation routes as well. Changes to the restrooms, water fountains and telephones serving those areas will also be required.

Business owners, landlords, and tenants—as well as the contractors and architects they hire to design, build or renovate their facilities—should review and incorporate the new ADAAG changes in connection with their designs and construction plans. The new ADAAG will, if nothing else, have an impact on the usability of space that is being built or modified. Unless the new ADAAG guidelines are considered and incorporated into current design and construction plans, covered businesses may face expensive alterations and retrofits to their facilities once the ADAAG changes become law.

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An Overview of Opportunities (and Pitfalls) in the Federal Historic Preservation Tax Credits Program

By Stephen J. Day

I. Introduction

Since 1976, the Federal Historic Preservation Tax Incentives program has quietly played a major role in real estate development involving historic landmark properties. The IRS Code, at Sections 38 and 47, includes provisions for the "historic rehabilitation credit" which can be utilized in connection with "qualified rehabilitation expenses" for renovations of "certified historic structures." This Historic Tax Credits program has spurred the redevelopment of more than 30,000 historic properties in the United States. Over $30 billion in rehabilitation dollars have been associated with these projects, providing approximately $6 billion in tax credits for investors.

In Seattle, recent historic rehabilitation projects have generated substantial Historic Tax Credits for the benefit of project developers, including the following:

● The Smith Tower renovations, with over $28 million in qualified expenses, creating the potential for approximately $5.6 million in tax credits;

● Pacific Medical Center (Amazon.com headquarters), with approximately $21 million in qualified expenses and $4.2 million in potential tax credits;

● The Seaboard Building, a mixed use office/retail/residential building in Downtown Seattle, including over $20 million in rehabilitation expenses and the potential for more than $4 million in tax credits generated for the benefit of investors.

In spite of these success stories, projects like these have not been widely replicated in Seattle. While the Historic Tax Credits program has been very

prominent in other parts of the United States, Seattle area developers have not played a major role in using the credits. Part of this is explained by the sheer volume of qualified historic properties in cities such as New York, Chicago and San Francisco. Also, the tax credits rules and process can be complicated, the documentation can be extensive and the program is not well-suited to every project or development scenario. But this does not explain the whole story behind Seattle developers' infrequent use of the tax credits, especially when you consider the fact that developers in Spokane (a city with a much smaller pool of historic properties) have surpassed Seattle developers in the use of the tax credit program in recent years.

This uneven use of the Historic Tax Credits in Seattle and other cities is due (at least in part) to a general lack of familiarity with the details of the program. And there are many intricacies and many traps for the unwary that must be avoided if Historic Tax Credits are to be fully realized for a project. Still, this particular tax credit (along with the affordable housing tax credit, discussed in the accompanying article by Joe McCarthy) presents one of the few significant tax credit advantages that remain available to real estate developers after the 1986 code changes eliminated most tax credits for real estate investors.

This article summarizes the basics of the Historic Tax Credits program, gives an overview of which redevelopment projects are eligible, how developers can take advantage of the program, and some recurring legal and tax challenges involved in using the credits.

II. Basic Parameters of the Historic Preservation Tax Credits Program

A. What is the Historic Tax Credits Program? This program, administered jointly by the U.S. Department of the Interior (through the National Park Service) and by the Department of the Treasury (through the IRS), makes tax credits available to developers that rehabilitate qualified historic buildings. As set forth in Internal Revenue Code (IRC) § 47(c)(3)(A), qualifying buildings must be "certified historic structures" defined as: (a) buildings listed on the National Register of Historic Places; or (b) buildings that contribute to a National Register Historic District or another qualifying local historic district. Treas. Reg. § 1.48-12 (d). A tax credit equal to 20 percent of the "qualified expenditures" in the renovation of certified historic structures may be allocated to the developer entity. So if a developer entity spends $5 million on qualified expenditures for a project, there could be $1 million in tax credits available to directly offset income taxes owed by that entity or one or more of its members/partners.

B. Who Uses the Tax Credits? The Historic Tax Credits are used by owners

(or long term lessees) of certified historic structures. Historic Tax Credit utilization by individuals is very limited, due in large measure to the passive activity loss provisions introduced in the Tax Reform Act of 1986. *See* IRC § 469 regarding passive activity provisions and phaseout of credits. However, taxable corporations regularly take advantage of the credits to reduce their income tax liabilities. A typical arrangement, then, is to bring a corporate tax credit investor entity into the development entity as a member and allocate the tax credits to that investor, in exchange for cash. The tax credit investors pay anywhere from 50 cents to 90 cents on the dollar for the tax credits, depending upon such variables as size of the deal, the local market, project parameters, etc. This arrangement can be extremely positive for the developer: the tax credit investor comes into the project early and contributes cash at a crucial point in the project. In exchange, the credits (which are typically not useful for the developer) are allocated to this corporate entity. Entities that are affiliates of lenders are common users of the credits, (although the single biggest user/ investor involved with Historic Tax Credits today is Exxon Mobil Corporation).

C. What is a "Certified Rehabilitation" of a Historic Structure? As a prerequisite to utilizing historic tax credits, the proposed rehabilitation work must be certified by the Secretary of the Interior as being in conformance with the Secretary of the Interior's standards for rehabilitation. *See* IRS § 47 (c)(2)(B) & (C); Treas. Reg. § 1.48-12(d). This certification and review process is administered through the National Park Service (NPS), in conjunction with the State Historic Preservation Officer (SHPO) in each State. Application for certification of a rehabilitation is made to the NPS through the SHPO. The SHPO reviews the applications for certification and forwards its comments and recommendations to the NPS for final approvals. In general, in order to be certified, the rehabilitation must be consistent with the historic character of the structure and/or the applicable historic district. The defining historic features and character of the structure must be maintained and not destroyed or compromised by the rehabilitation work.

D. Tax Basics.

1. "Substantial Rehabilitation." In order to get a project into the Historic Tax Credit arena, the project must be "substantial." "Substantial rehabilitation" is defined in Treas. Reg. section 1.48-12(b)(2)(i) and includes projects that involve qualified costs in excess of the larger of: (a) the adjusted basis of all owners of the building; or (b) $5,000. The adjusted basis is generally described as the property purchase price, less the costs of the land, less any depreciation taken to date, plus the cost of any improvements made since the purchase. These costs must be expended within any 24-month period ending with or within the tax year that the Historic Tax Credits are claimed.

2. "Qualified Expenditures" are defined in Treas. Reg. § 1.48-12 (c) and IRC § 47 (c) (2) (B) and can include a wide range of hard and soft costs associated with the building work. The total dollar value of the qualified expenditures is critical, because the total amount of tax credits is calculated as 20% of this value. Qualified expenditures can include costs of construction, along with certain developer fees, consultant fees (including legal, architectural and engineering fees), if added to the basis of the property. Costs that are not included in the qualified expenditures include property acquisition costs, new additions to the historic structure or other new buildings, parking and landscaping costs.

3. Building Uses. To qualify for the Historic Tax Credits, the building must be depreciable, so it must be income producing or used in a business. Rental housing, commercial and industrial uses all qualify. Owners of condominium housing units can utilize the tax credits provided that the unit is held for income or is used in a business or trade. An owner's personal residence will not generate Historic Tax Credits. See IRC § 47 (c) (2) (A).

4. Building Users. There are also limitations on the types of users for the restored historic property. For example, tax exempt entities cannot lease more than 35% of the rentable area in a rehabilitated building unless the lease terms are limited in length and there are no purchase options at the end of the term. There are also restrictions on sale and leaseback arrangements with tax exempt entities. The tax exempt user rules are complex and must be analyzed carefully on a project by project basis. IRC § 47 (c) (2) (B) (v); Treas. Reg. § 1.48-12(c) (7); IRC § 168 (h).

5. Claiming the Credit. The Historic Tax Credits are generally claimed in the taxable year that the rehabilitated building is "placed in service," which essentially means the date that the rehabilitation work has been completed such that a certificate of occupancy has been issued. For projects that have never been removed from service, this would be the date that the project work is completed. Any excess credit not claimed in the initial tax credit claim can be carried forward for up to 20 years and carried back 1 year. IRC § 47 (b); Treas. Reg. § 1.48-12(f)(2); Treas. Reg. § 1.48-12(c) (3) and (6).

6. Transferring or Allocating the Credits. Historic Tax Credits cannot be "sold" without selling the corresponding interest in the real estate. Only owners of the real property (or long term lessees; see below) can be allocated tax credits. But in practice the use of the Historic Tax Credits are often allocated differently to one or more members of the ownership entity (such as an LLC), so

long as the percentage allocation of the tax credits matches the members' interests in profits for tax purposes.

7. How Long Must the Tax Credit User Own the Property? An owner that claims the Historic Tax Credits must retain ownership of the property for at least five years after the date the project was placed in service, or the tax credits will be subject to recapture.

8. Recapture of the Credits. Historic Tax Credits can be recaptured if the project is sold before the end of the minimum five year holding period or if the property ceases to be income-producing. These recapture rules are laid out in IRC section 50(a). Recapture can also take place if the project ceases to comply with other transfer or leasing restrictions imposed under the program or if the project is physically altered such that it no longer complies with the approved rehabilitation improvements. *See also* Treas. Reg. § 1.48-12(f)(3). The amount of the credit recapture is calculated on a sliding scale based on how much of the minimum five year holding period has elapsed at the time of noncompliance.

III. Challenges/Opportunities in Using the Credits

A. The Tax Credit Investor. A recurring challenge in using the tax credits is in identifying the partner entity that can utilize the credits and joining that entity with the developer in a partnership arrangement (usually an LLC). But this is a challenge that can also present real opportunities. For example, lenders have substantial tax liabilities that can be reduced by using the tax credits. An affiliated entity of a lender can act as a member in a development LLC and can be allocated the tax credits. An affiliate of that same lender can provide loans for the development project, perhaps on more favorable terms than another lender that does not have the tax credit incentive to lend on the project. This investor is typically interested primarily in taking advantage of the tax credits and in getting out of the project as soon as possible, with as little risk as possible.

B. Choice of Development Entity Type. The pass-through tax scheme of limited liability companies make the LLC the typical entity of choice for Historic Tax Credit developers, allowing the tax credit advantages to flow to individual members. The single entity structure is the most common structure for simpler projects, where the "developer" entity and the tax credit investor entity are members of a single LLC. In larger, more complex projects, a master tenant lease structure has also been used, where the owner/developer will pass through the tax benefits to a master tenant entity that leases the entire building

from the owner/developer.

C. Put/Call Provisions. As mentioned above, an owner that is allocated the tax credits must remain in title for at least five years after the project is placed in service. To accommodate this five year window, the development agreement will typically include put/call (buy/sell) provisions that set out a mechanism for the developer to buy out the tax credit investor. Caution is required in drafting these agreements to avoid an IRS characterization of these arrangements as a disguised sale, thus potentially invalidating the tax credit allocation.

D. Allocation of the Tax Credits. There are also potential pitfalls involving the allocation of the tax credits by the investor party. In general, the percentage allocation of the tax credits should match the profits interests of the parties. If one party is allocated all of the tax credits over the five year period that the tax credit investor remains an owner in the project, then that investor will be allocated all or nearly all of the profits interests. To accommodate this, and to compensate the developer partner for its participation in the project, the company will typically pay development fees or other distributions to the developer entity. Cash flows do not necessarily match the profit/loss allocation percentages. At the end of the five-year tax credit recapture period, profit/loss ratios are typically revised to allocate greater profits to the developer.

E. Leasing to Tax Exempt Entities. As mentioned above, leasing space in a certified historic structure to tax exempt entities is possible so long as the lease does not fall into the category of “disqualified leases” as defined in the IRC § 168 (h)(1). There are several factors in that code section that must be analyzed for each individual situation, including requirements that the lease term be less than 20 years, the lease cannot occur after a sale of the property from the lessee to lessor, the lease cannot include an option to purchase or a fixed or determinable purchase price for the property, along with limits on financing involving tax exempt financing. These limits are generally not applicable if in the aggregate no more than 35% of the rentable floor area in the historic building is leased to tax exempt entities.

F. Leasing to Taxable Entities. Taxable lessees may be eligible to claim Historic Tax Credits provided that the lease term is at least as long as the recovery period under IRC § 168(c), currently 39 years for non-residential property and 27.5 years for rental residential real property. See also IRC § 47 (c)(2)(B). If the lease term is less than this minimum recovery period, the full tax credit is not available but is instead reduced prorata based on a formula tied to the length of the lease as compared with the recovery period and based on the fair market value of the rehabilitated lease property. See Treas. Reg. § 1,48-4(c)(3).

V. Are the Historic Tax Credits Worth the Effort? Not all historic property redevelopment projects are natural candidates for tax credit utilization. If for whatever reason the developer cannot or will not endure the designation and certification process, or the project does not fit the tax credit criteria, or if the developer cannot structure the deal to bring in the tax credits investor, then the project will not work as a tax credit venture. Also, if the project does not involve at least $1 million in qualified rehabilitation expenditures, the transactions costs involved will likely make it infeasible as a tax credit project. But for those projects that involve certified or certifiable historic structures (and this category is broader than one might think, and getting broader every year), where the development strategy can be flexible, where the rehabilitation is substantial and where the tax credits investor can be identified that fits with the specific development strategy for the project, the historic tax credits can make the difference between a project that will pencil and one that won't.

VI. A Note of Caution. The Historic Tax Credits rules are complicated and involve many interrelated parts. This brief summary is intended only as a general introduction to the subject. Project developers and investors should seek ongoing advice and counsel from experienced legal and tax advisors for any Historic Tax Credits project.

VII. Resources

The National Park Service web site at www.nps.gov includes numerous links to sites that include information on the various stages of the National Register process and Historic Tax Credits program. The IRS web site at www.irs.gov also has links to sites that focus specifically on tax aspects of the program. Stephen Mathison is also a great source of information as the administrator of the Federal Investment Tax Credit Program for the State of Washington, through the Office of Archeology and Historic Preservation.

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Toxic Torts: An Overview

By N. Kathleen Strickland

Background

Toxic comes from the Greek word meaning, “of, relating to, or caused by a toxin; toxin is defined as, “a poisonous substance produced by metabolic activities of a living organism that is usually unstable, very toxic when introduced into tissues and usually capable of inducing antibodies. A tort is defined as, a “wrongful act for which the injured party can recover damages in a civil action.

We just finished seven arduous years of litigation in a *Civil Action* type toxic tort case involving groundwater contamination in Southern California. The case was fiercely defended with motions made and granted for change of venue, writs taken and accepted, trips to the appellate court and the Supreme Court on issues of pre-emption and regulatory jurisdiction, judicial assignment challenges made and granted, demurrers made and granted, punitive damages and stigma claims for property damages struck, and many dismissals granted for plaintiffs failure to answer pending discovery in the form of questionnaires.

The cases began with over 1000 plaintiffs, filed by two very experienced and well financed plaintiffs’ firms, with 8 cases in one group and 6 cases in another group, later consolidated into one case group, in Central Civil West. At the time of this writing, the case total has dropped from 100 cases to approximately 540 cases.

Even with extremely experienced plaintiffs counsel, defense counsel and a judge, the lesson learned after seven years is that the case it just too large. The size and complexity of the case created administrative challenges all sides. There were over 70 defendants sued by over 1000 plaintiffs. Within the defendant grouping there were industrial defendants, municipalities, regulated water purveyors and non-regulated water purveyors. The case became an

organizational nightmare for all counsel, but more so for plaintiffs' counsel. In an attempt to minimize costs and share expenses, approximately 65% of the industrial defendants organized into a Joint Defense Group. Nevertheless, the size of the case caused all parties to feel that they were moving an elephant down the football field. And, after two years post-Supreme Court remand, we are still in the first quarter of the football game.

Case Management

Plaintiff's perspective : These cases are very very expensive for plaintiffs' counsel to undertake and difficult to prove. Before filing a toxic tort case, make sure you can afford to take it because it will be a long road. Funding the litigation usually will take opening lines of credit. The expense comes in administering "the case" over the long-term and in retaining multiple layers of experts.

Causation is key. Before you begin, you better have the causation evidence locked in solid and be able to withstand a *Bockrath* challenge to your complaint. The defendants will insist that you not only tell them what toxins of their client caused which specific illness in your plaintiff but also show a causal nexus, either in pleading per *Bockrath* or closer to trial in a *Cottle* hearing.

Recalling the definitions quoted above, plaintiffs must prove that there is a poisonous substance, which was very toxic when introduced into tissues. That is called DOSE, meaning that the toxic substance actually penetrated the tissue in some fashion: inhalation, ingestion or through dermal contact. Secondly, they must prove that it belonged to a particular defendant and that it caused the "tort"--the injury, which is the second part of our definition of toxic tort. Experts are needed in water distribution, above and below ground, toxicology, epidemiology, industrial hygiene plus all the attendant medical specialties and subspecialties. Plaintiffs counsel must be sure that they can survive a *Daubert* challenge or there is no reason to pursue the case.

Defendants' perspective : Organization and cooperation are key. It is extremely beneficial to form a joint defense group and be an active participant in the tasks performed by that group. The court will ordinarily encourage defendants to join such a group because it is the only way the court can effectively manage so many defendants and the case. There are definite cost savings for defendants who participate in a joint defense group through sharing the expense of experts and the efficient division of labor through reducing redundant effort. "Freeloaders", the non-working members of the group, can be a problem for defendants in such a group, but they will be caught unprepared at trial if those

doing the majority of the work settle out. A trial lawyer should be placed at the helm of such a group because a mass toxic tort case is not an EPA administrative case. It needs to be prepared for trial through the eyes of someone who has been there before.

Group alliances formed in the EPA proceeding can be disruptive to the functioning of the joint defense group, bogging down the ability of the joint defense group to make decisions and move forward. If possible, it is best not to have any EPA proceeding pending while the toxic tort case is ongoing. It is also best to clear all coverage issue without filing declaratory relief actions as such actions may produce evidence damaging to the toxic tort case.

The court's perspective: Our jurist, well regarded for his expertise in handling large, complex civil litigation, often remarked that this is the largest, most complex toxic tort case he has presided over. The court conducted monthly status conference to avoid motion practice. There, he would talk through the issues with counsel, issues which were teed-up in the required monthly joint status conference submissions. Unresolved issues, post liaison counsel "meet and confers" would be resolved by decisions rendered on the record and posted thereafter in minute orders on the court ordered website, Verilaw. Liaison counsel was appointed by both sides as spokespersons for the group. We were one of three liaison counsel for the industrial defendants.

The court did a great job managing the case. There was a master complaint filed and master answers submitted post scheduled demurrer hearings. Joint briefs were submitted by all parties. Discovery is controlled by the court. The court permitted an initial round of court approved discovery by plaintiffs limited to obtaining documents from each defendant as well as inquiring about insurance information, the nature of each defendants' business and history of chemical use at the site. Defendants were permitted to propound a questionnaire to all plaintiffs. The court gave plaintiffs a year to answer the questionnaires, dismissing those who, after an extension or two, failed to answer. The court randomly selected bellwether plaintiffs from each case groups, as well as preference plaintiffs, to continue into the next round of discovery prior to selection of trial groups. Motion practice and expert depositions will follow, culminating in a *Daubert* hearing.

Lessons Learned

In this case, the stay had the effect of running the statute of limitations for plaintiffs, thereby limiting the ability of other lawsuits to be filed in the intervening seven years. This represented the elimination of a serious threat to

defendants who saw this as potential serial litigation from a Basin with over one million residents. Our firm lead this effort from the beginning with the taking of the first writ culminating in an opinion from the California Supreme Court entitled *Hartwell v. Superior Court (2002) 27 Cal.4 th 256.*

Taking the case to the PUC was a brilliant idea of the regulated water purveyor defendants which would not have impacted the outcome in #1 above unless the court had granted our writ requesting a stay of all proceeding while the PUC investigation into water quality served by the water purveyor defendants was pending.

The findings and conclusions of the PUC investigation into water quality has and will continue to impact the toxic tort case, for both the water purveyor and industrial defendants.

Time has worked in defendants favor. The case began seven years ago and discovery is just now beginning against the bellwether and preference plaintiffs. Expert discovery has yet to begin. The first round of good faith settlement motions are set for next month. If these motions are granted, this will represent the first monies that we are aware of that plaintiffs will collect in these cases.

In conclusion, it is a testament to both the size and complexity of these cases that after seven years, the cases are just beginning discovery—they are just too large. If you are plaintiffs' counsel, you should either file smaller cases or be prepared to fund the litigation for the long haul through at least the causation/ *Daubert* hearing. If you are defense counsel, you will need to organize the defense group in order to efficiently and effectively move the case forward toward those *Bockrath, Cottle and Daubert* hearings. If you are the court, you will need patience, experience, skill and initiative to manage the case and all these lawyers in your courtroom.

Ms. Strickland, a partner at Holland & Knight, LLP would like to thank Donald Ramsey, H. Larry Elam and Devin Courteau with whom she worked on these cases and who contributed to this article.

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Collaborative Law – The Potential Downside Of The Latest Trend In Marital Dissolution

By Karen A. Rose and Jonathan W. Wolfe

Collaborative law emerged in the 1990s and, along with traditional litigation and mediation, provides an additional forum for family dissolution. Collaborative law practitioners hope to provide a more civilized process that achieves results through negotiation sessions. Under a collaborative law approach, lawyers and clients agree to commit to negotiation – as opposed to litigation – as a method of resolving family disputes. This is accomplished through a "disqualification agreement," entered into by all the parties and their lawyers, whereby lawyers are disqualified from representing parties in litigation should either party choose to litigate. Proponents believe that the disqualification agreement prevents lawyers and their clients from running to court at the first sign of trouble and keeps them fully focused on the negotiation process.

Collaborative law proponents tout it as a "kinder and gentler" process, which achieves results faster and more cooperatively than through litigation. It may very well be that – when circumstances allow. Collaborative law assumes that divorcing parties, armed with collaborative lawyers, are capable of working cooperatively together and that the outcomes they achieve by agreement are superior to those achieved through litigation. These assumptions may not hold true in real life. In most circumstances, it is unrealistic to expect divorcing parties, who are often angry and hurt, to put these feelings aside and enter into a cooperative negotiation process. A party who enters the process in good faith may later find themselves footing the bill for new legal counsel when the other party remains unyielding in negotiations.

The notion of "forced" negotiation, as embodied by the disqualification agreement, is risky in the divorce context. It may be irresponsible for lawyers to enter into such an agreement from the outset. As the case proceeds, it may reveal that such an agreement either was not necessary, or was not in the

client's best interest. Most disqualification agreements apply to lawyers and any jointly retained experts, including their work product. More than simply creating incentives not to litigate, the disqualification agreement poses a coercive element, particularly where clients have expended significant amounts of time and money in the process. Collaborative theorists conveniently overlook the fact that sometimes negotiations *should* break down. This is especially true in situations where parties do not have equal bargaining power.

Collaborative law proponents may believe that the issue of unequal bargaining power is "solved" by the fact that each party has representation. However, lawyers are not exactly zealous advocates in the collaborative law forum; far from it, they have irrevocably agreed not to litigate on behalf of their clients. This raises a host of ethical dilemmas (most obviously, the notion of refusing to follow orders from irrational clients), which are difficult to overlook. Moreover, the informal discovery standards may work against the party with lesser resources and less information. For example, one can imagine a situation where the party with greater financial assets enters into the collaborative process in order to take advantage of informal discovery practices and then refuses to negotiate in good faith. The weaker party is locked into negotiation and also left without the safeguards of court-ordered discovery.

The role of the collaborative lawyer is certainly an uneasy one. Stuck somewhere between mediator and advocate, the primary role of a collaborative lawyer seems to be to protect the process – not the client. Admittedly, some clients need more protection than others. In the rare event when both parties are equal negotiators and have equal access to information, collaborative law may in fact be a preferable method for dissolution than traditional divorce, one that saves clients time, money, and better preserves relationships. For these candidates, the collaborative approach is a welcome addition to family law. In the usual case where parties have disparate resources and unequal information, collaborative law may achieve less desirable outcomes than through traditional litigation.

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Driving and the Older Adult

By Joanna Lyn Grama

The sixty-five and older age group is the fastest growing segment of the U.S. population. By 2020, more than 40 million older adults will be licensed drivers.[1] Encouraging an older adult, particularly a client, that it may be time to more carefully regulate their driving, or perhaps quite driving altogether can be a daunting task.

Media stories regarding tragic accidents involving an older adult driver are sobering. However, it appears that older adult drivers may be more of a danger to themselves on the road than to others. Drivers over the age of sixty-five have higher per mile crash death rates than all other drivers other than teen drivers.[2] Drivers over age 65 who are injured in motor vehicle crashes are more likely than younger drivers to die from their injuries.[3] For older drivers, the rate of fatalities increases significantly after age 70.[4] Yet, concerns regarding an older adult's diminished driving capabilities remain.

Driving is oftentimes synonymous with independence and talking with clients and their loved ones about driving issues is difficult. Such conversations must remain positive and must be sensitive to the fact that if an older relative stops driving he or she may feel isolated, depressed, or a burden to those relatives who will take on driving or chauffeuring duties.

One of the first tasks that needs to be completed before a conversation is initiated is an objective assessment of the older adult's driving capabilities. Have there been recent traffic tickets or accidents? Are other warning signs present such as a general failure to obey the rules of the road (turning without signaling, ignoring stop signs or red lights)? Does the older adult have trouble seeing? Is the older adult's reaction time slowed or does he or she drive too fast or too slow for the conditions? Does the older adult have an illness such as dementia or Alzheimer's disease that may impair thinking (judgment) ability; or

does the older adult take medications that, either alone or in conjunction with one another, may make driving more dangerous? If such behaviors or conditions are present, then it might be time to have a serious discussion with the older driver about driver safety.

Surprisingly, some older drivers are likely to agree that their driving needs some assessment. The AARP offers a Driver Safety Program to all motorists age 50 or older, which was specially designed for the older motorists. (http://www.aarp.org/life/drive/). While not necessarily dedicated to older drivers, many states also offer driver impairment programs geared toward strengthening driving abilities.

If an impaired older adult cannot be persuaded to give up driving or to modify or restrict their driving in order to be a safe driver, then often state drivers licensing authorities must be contacted as a last resort to keep the roadways safe. Most states have procedures to report unsafe or otherwise impaired drivers. While the programs are not aged based, they may be used to remove an unsafe older driver from the roadways.[5]

In Indiana, for example, if the Bureau of Motor Vehicles has any information that has come to its attention during an application for or renewal of a license "that the applicant does not apparently possess the physical, mental, or other qualifications to operate a motor vehicle in a manner that does not jeopardize the safety of individuals or property"[6] then the bureau may make an examination of the driver's license applicant or renewal applicant. Information includes the apparent physical or mental condition of the license or renewal applicant. This provision in Indiana law could be invoked in instances in which an older adult has difficulty passing the eyesight requirement for a driver's license. This however, does not catch those already licensed drivers who can automatically renew their driver's license over the telephone or through the Internet (a simple task in our technologically advanced age).

Indiana does have a mechanism for the examination of allegedly unsafe licensed drivers. Similar to the licensing/renewal provision, the Bureau may also require an already licensed operator to submit to an examination if the Bureau has good cause to believe that the driver is incompetent or otherwise not qualified to hold a driver's license.[7] In this scenario, the driver must submit to an examination upon at least 5 days written notice. Bureau remedies after an unsuccessful examination include suspension or revocation of the driver's license or the issuance of a license subject "to restrictions considered necessary in the interest of public safety."[8] Failure to submit to an examination requested by the Bureau can result in suspension or revocation of driving

privileges.[9] Procedures to appeal any decision by the bureau of motor vehicles are in place.[10]

Driving on a suspended, revoked, or canceled license can be risky business. Not only is the driver subject to state traffic and criminal law (and its ramifications) for driving on a suspended or revoked license, but insurance may not cover damages caused by a person who is knowingly driving on a suspended or revoked license. Personal liability for damages (or injury or death) could be very real.

Like many other parts of an elder law practice, rather than having an immediate "legal" solution to give to our clients and their families regarding an older adult's continued driving, the elder law attorney must be willing to counsel clients and their families about what to look for with respect to impaired driving, steps to take to eliminate unacceptable risk, and the ramifications of impaired driving.

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[1]A.M. Dellinger, J.A. Langlois , G. Li, *Fatal Crashes Among Older Drivers: Decomposition of Rates into Contributing Factors*, 155 Am. J. Epidemiol, Vol. 3, 234-41 (2002).

[2]Insurance Institute for Highway Safety, *Fatality Facts, Older People:2003* (visited March 7, 2005) <http://www.iihs.org/safety_facts/fatality_facts/olderpeople.htm>.

[3] *Id*.

[4]United States Department of Transportation, Federal Highway Administration, *Older Driver Safety Facts and Statistics*, (visited March 7, 2005) < www.safety.fhwa.dot.gov/older-_driver/older_facts.html>.

[5]If statistics were available, it would be very interesting to see how may drivers reported under impaired driver reporting policies were actually older adult drivers and what the suspension/revocation rates are for such drivers with reference to other drivers reported as impaired.

[6]Ind. Code § 9-24-10-6 (2004).

[7]Ind. Code § 9-24-70-7

[8]Ind. Code § 9-24-10-7(b)(C)

[9]Ind. Code § 9-24-70-7(c).

[10]Ind. Code § 9-24-10-8

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Understanding the Four C's of Elder Law Ethics

By Laurence J. Cutler , Robin C. Bogan

Shouldn’t you be included? After all, you might be very involved in helping him or her with important matters. Perhaps you even arranged this appointment. There are several reasons why lawyers need to meet with your family member or friend alone for at least part of the case evaluation process, so please don’t be alarmed or offended. Family involvement is very important, but to understand the way legal services are provided to elder or disabled clients, it may help first to understand the “Four C’s” of elder law ethics that lawyers are required to follow. We are happy to discuss these ethical guidelines or any other aspect of our legal services. Above all, we seek to promote the dignity, self-determination, and quality of life of your loved one.

Client Identification.

First, all lawyers have an ethical obligation to make it very clear who their client is. The client is the person whose interests are most at stake in the legal planning or legal problem. The client is the one—the only one —to whom the lawyer has professional duties of competence, diligence, loyalty, and confidentiality. This is especially important in elder law, because family members may be very involved in the legal concerns of the older person, and may even have a stake in the outcome.

It is possible, in some circumstances, for more than one family member to be clients of the same lawyer. This is common with married couples. However, in most of our cases, we will identify the elder or disabled person as our client. We will do this regardless of who is paying the bill.

Conflicts of Interest. Second, lawyers have an ethical obligation to avoid conflicts of interest. This means that, in most situations, a lawyer may only represent one individual. For example, when legal planning involves property, such as a family home, in which several people have an interest, these interests

are actually or potentially conflicting. Sometimes joint representation is possible, even with potential conflicts of interest, but it is more likely that we will be representing only the older person whose interests are at stake. We find that we do the best job for the older person by representing only him or her. This is especially true when the older person wants to discuss a power of attorney, a will, or planning for long-term care.

Confidentiality. Third, lawyers have an obligation to keep information and communications between our client and us confidential. That Your parent or other elder relative is getting legal advice. means that we cannot share client information with other family members without the client's approval. Some clients want all information shared and family members involved in discussions. Some merely want family members to be given general updates. Some want complete confidentiality. It differs from person to person.

In all cases, we strive to keep our clients—and whomever they choose to involve—fully informed of the issues, options, consequences, and costs relevant to their concerns, and to be responsive to their goals and objectives.

Competency. Fourth, lawyers have special ethical responsibilities in working with clients whose capacity for making decisions may be diminished. Lawyers must treat the impaired person with the same attention and respect to which every client is entitled. This means meeting privately with the client and giving him or her enough time to explain what he or she wants.

"But Mom's not going to be able to explain (or understand, or remember) everything!" you might say. We find that most older people who come here are able to tell us what the problem is and how we can help. Sometimes we'll need to ask relatives for details such as addresses or dates or phone numbers, but even people in the early stages of Alzheimer's disease can usually communicate well enough to give us direction.

Assessing a client's capacity to make decisions is part of our getting to know the client. While most clients can explain a problem and what it is they want, there will be some clients who cannot. Speaking privately allows us to find this out. When family members answer all the questions, it makes it difficult for us to determine our client's level of understanding.

There will be times when we conclude that a client does not have the legal capacity to complete a requested document, such as a power of attorney or a will. If that happens, we will not be able to assist with that particular task. We may, however, be able to explore other options.

If a client is unable to make decisions due to diminished capacity, and is at risk of serious physical, financial, or other harm, the ethics rules require us to consider actions to protect that client. This may include consulting with others to assess the client's situation or taking steps to preserve a legal or personal interest of the client. As we decide what steps to take, we will be guided by our client's wishes and values and best interests, and we will do our best to intrude as little as possible on his or her right to make decisions.

The Ethical Rules Make Practical Sense, Too.

Being clear about whom we represent, meeting alone with the client, respecting confidentiality, and assessing client capacity protect the family, as well as the client. For example, you've probably heard of a will or power of attorney being challenged. It is not uncommon to find cases claiming that family members or others had "undue influence" over the older person, and that they benefited unjustly from decisions that were made. Family and friends who maintain some distance from the legal counseling and document signings are less likely to be accused of undue influence.

We don't want our clients' choices, and the documents they sign, to be undone one day in the future because we allowed family members to be too involved in the matter. That's probably the kind of court case you, too, would rather avoid.

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Decoding 'The Black Box' with Expert Advice

By Timothy D. Lange

Investigating causation of an automobile accident is routine for many trial lawyers. In most instances, sufficient details of the accident can be gathered from the client, police report, witness accounts, and photographs of the scene or site of the accident. In more complicated cases, physical evidence of the crash may require more in-depth study: an accident reconstructionist's personal inspection of the particular injuries and involved vehicles, roadway, and objects can prove invaluable. [1]

A relatively new tool in accident analysis exists, however, with inclusion of the "black box" in select vehicles manufactured since 1994. Engaging a qualified expert to recover data captured by this new tool in a crash may greatly enhance your ability to both accurately understand and reconstruct the accident.

The "Black Box," *aka* Event and Crash Data Recorders

Industry terminology varies, though the National Highway Traffic Safety Administration (NHTSA) refers to the devices commonly called "black boxes" as Event Data Recorders (EDRs). Many manufacturers refer to the devices as Crash Data Recorders (CDRs). These devices essentially record technical vehicle and occupant-based data at the moment of an impact, and, in some cases, for a brief period of time prior to a triggering event. This being the case, the "black box" may provide critical evidence of what happened immediately before and during an accident.

Do Not Delay—Preserving the Data is Time Sensitive

The recorders will trigger when preset physical conditions nearing those sufficient for the airbag to deploy are met—"waking-up" and recording data. Extraction of the data after the event is time sensitive. In general, if an airbag

deploys, the unit will permanently write and capture data. Therefore, if that unit is to be replaced when the vehicle is repaired, measures must be taken to collect and preserve the unit and its data. Losing the unit loses the data. Likewise, if the vehicle is involved in an accident in which the airbag is not deployed, the recorder may still trigger during this “non-deployment event.” It will write data from a non-deployment event and retain that data for a limited time period. In some units, that period consists of 250 engine-ignition cycles. Low-impact collisions, therefore, will require early retrieval of the recorder to prohibit loss of the data upon ignition at the 251st start after the collision.

The Information Available Varies Significantly by Vehicle

Data recorders varies by manufacturer, make, and model. Some units are more advanced than others. The “crash pulse” is recorded in seemingly all recorders —this relates to the Delta V at the time of the crash. The wealth of data recorded may include:

- lateral acceleration
- longitudinal acceleration
- vertical acceleration
- deceleration
- heading
- vehicle speed
- engine speed
- seat belt status
- braking input
- steering input
- gear selection
- delta v

• turn signal status

• brake light status

• head/tail light status

• hazard light status

• brake system status

• ABS status

• stability control status

• environmental conditions

• cruise control status

• throttle position

• airbag deployment criteria

• airbag deployment time

• airbag deployment energy

• time between airbag non-deploy and deploy event

• ignition cycle count at investigation and event times.

Some (nearly all GM) units also record data from five seconds prior to the crash. NHTSA has required new buses and motor coaches manufactured after January 1, 2003, to incorporate very advanced systems capturing most of the data referenced above.

Access to the Data is not Publicly Available from All Manufacturers

The recorders vary by both the manufacturer of the vehicle, as well as the model/year of the vehicle. Specialized knowledge and equipment are required to extract and interpret the data preserved. Some manufacturers have, however, elected to keep the process of extraction and interpretation of the data

proprietary. Attempts can be made to require these proprietary manufacturers to extract, preserve, and provide the data in an understandable format. An accident reconstructionist providing information for this column advised that his experience in obtaining help from proprietary manufacturers has shown that they are not always receptive to such requests. [2] In direct actions like product liability cases involving the manufacturer of the vehicle, it is easiest to require production of the data in an understandable format through discovery. In cases between third parties (in which the manufacturer is not a party), the task of requiring the non-party manufacturer to participate can be much more difficult and expensive.

Vertronix Corporation's Crash Data Retrieval System

General Motors, Ford, Isuzu and Saab are current industry leaders in manufacturing recorders with information accessible to the public. Vertronix Corporation manufactures and sells a crash data retrieval system that integrates with recorders from these manufacturers. [3] The system retrieves information from select 1994-2005 GM vehicles, 2001-2005 Fords, 2000-2005 Isuzu's, and 2005 Saabs.

The retrieval system permits the download of data from the airbag module to a laptop through a specialized cable-—which varies by airbag module model. It can also be downloaded through the diagnostic link connector on certain vehicles, which is typically located under the dashboard. The system sells for $2,495, with added costs of software and cable updates when necessary. The Vertronix system will generate a report with easy-to-read graphics and charts from the data extracted. If the involved vehicle is covered by the Vertronix system, retrieving the data will be fairly easy if you employ a qualified reconstructionist or other expert.

As always, when engaging an accident reconstructionist or other expert to assist you in obtaining "black box" data, be advised to seek references from fellow KATA members or other counsel having previously worked with the expert. Use KATA's ListServ to network and discover helpful information about the person under consideration. Request references and background information on any expert with whom you are interested in working. Confirm the pertinent schedule of fees and document terms concerning payment and billing before engagement. Clearly convey your case timetables with respect to discovery and trial, and leave ample time for the scheduling and preparation of this expert for his or her discovery and trial depositions. Remember, experts can make or break your case. Choose wisely!

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1 *Expert Advice* featured accident reconstructionists in the March/April 2002 issue of *The Advocate*. Copies may be obtained by request to KATA or the author.

2 Kevin Johnson is an accident reconstructionist graciously providing research and information to the author for this work. Kevin works with event data recorders regularly, including the Vertronix, Inc. devices used by GM, Ford, Isuzu and Saab. Kevin is employed with Wolf Technical Services, Inc. and may be reached through his firm's website of *wolftechnical.com.*

3 Vertronix Corporation has a considerable amount of information relating to its crash data retrieval system available on its web site at *vertronix.com*, including an informative PowerPoint presentation on the system.

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Direct And Cross-Examination: A Different Perspective?

By Joe C. Savage and Cory M. Erdmann

Much has been written and spoken about direct and cross-examination. We know you have conducted several, if not many, of both and know the case law, the rules of procedure and the "feeling" of the court room. This look at direct and cross-examination, however, may put both in a different perspective and give you some ideas you may use in future trials.

DIRECT EXAMINATION IS PARALLEL TO THE OPENING STATEMENT. CROSS-EXAMINATION IS PARALLEL TO THE CLOSING ARGUMENT

1. Direct Examination and Opening Statement

Except for a hint of things to come in jury selection, the opening statement is the first occasion for the jury to learn the essence of the case. A good opening statement introduces the theme of the case, gives a chronology of the facts, and tells the jury what they will ultimately decide.

A good opening is not argumentative because it doesn't state inferences to be drawn from the facts, but it is persuasive because it does carefully organize the presentation of the facts. It is an opportunity for the witnesses, through one attorney, to "tell the story." The focus is the story, not the attorney. The story is not just told, it is shown through actual and demonstrative evidence.

A good direct examination is similar. The witness fits into the theme of the case. The witness gives a chronology of the facts. The direct examination is persuasive, not because it is argumentative, but because of its manner of presentation. It is the opportunity of the witness to tell his or her story. The witness, not the attorney, is the star. Use of actual and demonstrative evidence enhances the story and makes it more memorable.

Thus, the good direct examiner asks short, direct, open questions. The witness answers by narrative, story-telling answers. The attorney stands out of the way of the witness and the jury, perhaps even behind the jury, so that the witness must look at or over the jury to see the attorney. The attorney is subservient, almost unnecessary. The witness is paramount, the star. The attorney says little. The witness says a lot.

Through short questions, the witness unfolds the story in a chronological way. For example, in a personal injury case, the plaintiff gives a personal history, an educational history, a marital and family history, a medical history, a work history, events prior to injury, the injury, events post injury, the medical treatment, the current condition, the medical expenses, the lost time from work, the medical future, the impairment, the effect on family, and the effect on plans for the future. The plaintiff's doctor gives his or her qualifications, the first time seeing the plaintiff, the history obtained, the physical examination, all special tests and studies, the differential diagnosis, treatment options, treatment selected, the actual diagnosis, causation, the progress of treatment, the current condition, the inability to work, the prognosis, future medical needs and expenses, impairment, and future pain and suffering.

Witnesses are ordered so that their effect on the total story is maximized. Often the plaintiff or the plaintiff's doctor should go last, not first. The opening statement, of course, allows the attorney to weave the stories of the various witnesses into the whole cloth of the open, which can't be done with each witness. But the order of witnesses should be chosen with the organization of the opening statement in mind.

2. Cross-examination and the Closing Argument

The closing argument is the last occasion for the jury to learn why they should find liability and award substantial damages. A good closing argument reiterates the theme of the case, gives a summary of the facts, and tells the jury what it should decide. It is argumentative in that it states inferences which should be drawn from the facts and therefore why certain facts should be believed over others. It is an opportunity for the attorney to tell the jury the story they should believe. Because the story is in conflict, the story is not really important. It is the credibility of the attorney trying to convince the jury what to believe that's important. Credibility of the attorney is enhanced by use of actual and demonstrative evidence, which are essential to the art of persuasion.

A good cross-examination is similar. It makes the witness admit or focus on the plaintiff's theme of the case. It tells the jury what it should decide. It is

argumentative. It states inferences which should be drawn from the facts and therefore helps to persuade the jury which facts it should believe. The attorney, not the witness, is the star. Use of actual or demonstrative evidence may be vital.

Thus, the good cross-examiner asks long, narrative, leading questions. The witness answers yes or no. The attorney stands in the center of the court room, often directly in front of the jury, so that the argument/question of the attorney is the focus. The witness is subservient, almost unnecessary. The attorney is paramount, the star. The attorney says a lot, the witness says little.

To be sure, the attorney must argue in a question and answer format. But that is simple. The attorney makes the argument directly to the jury, just as will be done later in the closing argument, and then the attorney turns to the witness and asks “isn’t that true?” or “you agree with that, don’t you?” or “that’s a fair statement, isn’t it?”

The very heart and soul of an effective cross-examination is in selecting those arguments where it doesn’t matter whether the witness agrees or not. If the witness agrees, great. If the witness doesn’t agree, the jury will still believe the argument for other reasons.

What are these other reasons? They may be numerous. For example, the witness may have previously agreed with your argument in a prior deposition or statement, and you can impeach. The witness may have previously agreed in some article or book, and you can read it. The witness may have previously acknowledged an article or book as authoritative, and that literature agrees with your argument, and you can read it. The witness may have never agreed with your argument and never will, but your argument is based upon physical facts, such as the marks on the pavement or the damage to the vehicles, or based on physics, such as the mathematical relationship of time, speed and distance. The witness may have never agreed with your argument and never will, but good old common sense is on your side.

If you can’t win your argument in front of the witness, don’t cross-examine on that point. Save your argument for the closing when no witness is present to argue with you. Do not just rehash what this witness has already said on direct. The witness has hurt you once. Shame on you if you let the witness hurt you twice.

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Toward More Successful Mediation

By Brandy Carestia Cutting

Mediation presents parties with a unique opportunity to reach a final settlement of their claims, contrasted with the risk and uncertainty of further litigation, trial, and appeal. Our clients, who possess the most knowledge about their conflicts and have the greatest interest in resolving them, are best equipped to fashion a solution to their problems. Consequently, mutually acceptable resolutions crafted through mediation almost always result in higher client satisfaction than protracted litigation.

In addition to the sense of accomplishment derived from personally shaping the resolution of their claims, our clients also reap benefits of early settlement including avoiding additional expense, time, stress, and often disappointment on both sides that result after a verdict.

This unique opportunity for negotiated settlement is now mandatory in nearly all Montana jurisdictions prior to trial, and often prior to a trial setting, as well as in the appellate process. The following suggestions are intended to assist lawyers in making the mediation process more successful for their clients.

Prepare your clients

A client's expectations upon commencing mediation play a crucial role in the mediation process. We should explain to our clients that mediation is an informal, confidential, negotiation process involving a neutral third party mediator who will discuss the pertinent issues, facts, and law with the parties in an effort to promote resolution. We should also advise that the process requires time and effort and that negotiation involves compromise on both sides before a settlement can be attained.

To increase the likelihood of settling claims, it is most important, however, not to inflate our clients' expectations. Potential settlement should be considered in

light of two important, though not always equally weighted, questions: (1) What is the likely jury verdict range if the case is tried?; and (2) What are the parties able to do today to resolve the case that could/will avoid the risks of proceeding?

Although jury verdicts are often difficult to predict, it is useful to pinpoint a likely verdict range to contemplate in analyzing settlement proposals. Most often, however, the second question, i.e. what is "doable today," is most instrumental in reaching resolution. What compromises the parties are or are not able to make and what are logical courses of action in light of all risks often dictate the settlement and may not be related to the estimated outcome at trial.

In light of these questions, it is imperative that the parties discuss the weaknesses, as well as strengths, of their cases with counsel, and further, that the parties are advised not to draw any firm lines with respect to settlement upon entering the mediation process. Because logical solutions are often revealed through the mediation process, our clients are best served when we remind them of the importance of keeping an open mind.

Be candid

Candid and objective discussion of needs, exposures, and risks in a confidential setting with the mediator increases the likelihood of a successful result. "Positional bargaining" by lawyers, which may include high demands or low offers, the use of threats and bluffs, and being secretive about true needs or exposures, slows the mediation process and makes ultimate resolution more difficult. Accurate information plays a critical role in whether the mediation process is ultimately successful.

Outcomes are more favorable when we are frank about not only the strengths of our cases, but the weaknesses as well. Lawyers, accustomed to acting as advocates for our clients, often present the "trial portrait" of the case to the mediator. Remember, winning at mediation is finding a solution to resolve conflict. It helps our clients favorably conclude their cases when we acknowledge the smudges in the portrait.

It is also beneficial to confidentially inform the mediator of any limiting practical considerations or any other unique circumstances that might influence the outcome of a case. Of *23 course, the mediator must have demonstrated his or her sincerity in fairly trying to bring the parties to a mutually acceptable resolution and must have earned their confidence through his or her conduct and efforts in order to have this important information shared. Confidentiality should be stressed and the mediator should not disclose any information to the

other side without first obtaining authority to do so.

Make recommendations

Providing clients with recommendations during the mediation can be a powerful catalyst in settling claims.

Parties to litigation frequently feel helpless in the litigation process and dependent upon their lawyers, insurers, and ultimately an unfamiliar judge and jury. Mediation allows clients to meaningfully participate in the resolution of their claims. Clients gain a sense of empowerment from the knowledge that they are able to take control of the outcome of their cases and bring them to finality. Shaping an acceptable and permanent solution to their problems often results in a real sense of accomplishment.

At the same time, clients often depend upon counsel to assist them in making decisions. After all, a lawyer's most important role is to provide his or her clients with advice and guidance. Sometimes this includes assisting our clients in reaching a conclusion that is in their best interests but that may be difficult for them to embrace.

It is especially important to help guide clients who are unfamiliar with the litigation process or who might have strong opinions about their cases. A lawyer's recommendations, coupled with a mediator's skilled exploration of the issues and clarification of beneficial options, often results in the resolution of difficult cases.

Choose a skilled mediator

Although some cases will settle no matter what the mediator does and some cases will never settle no matter what the mediator does, many cases settle because of what the mediator does.

Some mediators assume a very passive role, allowing the parties to navigate their paths in the process. Others are more actively involved, using their knowledge, skill, and repertoire of techniques to guide both sides to resolution. If the parties appear to be at impasse, a mediator who is able to accurately assess and analyze the reason for impasse and use appropriate advanced mediation techniques may well put the mediation back on course.

Such advanced techniques may include a simple statistical analysis of risk, methods for saving face and addressing unmet interests, mediator proposals,

and other creative techniques developed for the particular situation.

A mediator who is also adept at building rapport and putting participants at ease is preferable. A mediator's sincerity and ability to empathize pave the path to settlement.

Establishing trust and credibility among the parties and their representatives is key in the effectiveness of a mediator's techniques.

In some cases, a client's ability to identify with the mediator increases the client's trust in the mediator, which increases the mediator's ability to help the client. Sincere mediators proficient at building rapport, experienced in advanced techniques, and actively invested in the process will certainly increase the probability that the case will settle. It is this author's hope that the information discussed herein will assist lawyers in leading their clients to more successful resolution of their claims through mediation.

Brandy Carestia Cutting is an attorney-mediator at the Missoula office of Carestia & Cutting Alternative Dispute Resolution Services. She is admitted to both the Montana and California state bars and has litigated, negotiated, and settled claims in California and Montana for the past five years. She trained as a mediator in courses by the Attorney-Mediators Institute and Association for Conflict Resolution and has been involved in the mediation of approximately 200 claims in Montana over the past two years. She can be reached at (406) 543-1923.

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Case Management Systems: Practical Tips for Implementation Success

By Ross L. Kodner, Esq

There is no question today that case management systems can literally transform the most disorganized law practices into super-efficient legal services delivery engines. Firms that effectively implement case management software systems consistently report: (1) higher profitability due in part to a reduction of previously wasted non-billable time looking for case information, (2) increased client satisfaction with firm response time to case status-related inquiries, (3) reduced "aggravation factor" and related increase in perceived quality of law practice life. Firms that haven't so effectively deployed case management products loudly proclaim them as the bane of their existences, not to mention the culprit responsible for far less money in the firm's coffers. So what are the differences between these two widely varying experience sets? It's all in how you roll it out and integrate it into the firm's workflow. Let's explore the factors that contribute to successful case management rollouts in firms of all sizes.

I. Your Must Get Consensus and "Buy In" From the Participants

Before you ever begin the process of selecting case management software, you need to educate everyone in the firm about exactly what it is, what it does, and how it will change the workflow and work practices.

You must first answer the question: "What is a case manager?" That is perhaps the easiest issue to address since the answer is almost literally, "a piece of software that does everything." Case management programs are literally the "kitchen sinks" of the legal software world, tracking all sorts of law firm information including:

- Case information about each of your matters - everything from party contact info to counsel, to courts, experts and witnesses, to tracking fact

patterns and issues and case strategies.

- Calendaring, docketing and tickler systems as well as to-do list managers.
- Conflict of interest searches - light years ahead of the time-tested but terrifying method used by many firms where a lawyer sticks their head out of their office and shouts down the hall "Yoohoo! Has anyone ever heard of so and so?"
- Case notes, logged as you work your files - instead of endlessly proliferating sticky notes.
- E-mails and documents related to your cases - a centralizing source for all work product coming into the firm or flowing out.
- Firm administrative information - as important as tracking client-related matters since every firm's single most important client is...itself!
- Custom information for document assembly - the vast array of information tracked and stored by a case manager can be extracted and "flowed into documents.
- Portabilizing (a new word) case information - whether via laptop or Palm or Pocket PC, or between main office and branch office or a lawyer's home computer, all the information stored and tracked by the case management system can be accessible to everyone in the firm, from anywhere at any time - fulfilling finally the core idea of the "virtual law practice."

Once the definitional question has been addressed, the next question to anticipate is "Why would our firm want a case manager?" The answer is found in the responses to the first question about what a case manager is and does. Who wouldn't want those kinds of capabilities in their practices? Who wouldn't want to cut their non-billable time wasted every day looking for case-related information or documents that can only otherwise be found in the inevitably misfiled paper file? Who wouldn't want to be able to answer client questions when they call instead of having to put them off and return their calls at a later time? Who wouldn't want to be able to rapidly generate more routinized documents like client correspondence, releases, motions, pleadings, and settlement agreements with better consistency and quality control than the typical "hunt for the "*" and replace it method"? Who wouldn't want to virtually eliminate the stressful situations where one of the lawyers turns the office

upside down scrambling to find a paper file? So the "why" question tends to answer itself.

It is also advisable to anticipate and be prepared to address the inevitable question: "We have Outlook/GroupWise/Notes already - aren't those good enough case management programs?" That's like asking, "We have a 40 year old Radio Flyer wagon with three wheels and a broken handle? Can't we use that as our company car?" Seriously, it is as dramatic a comparison as that statement.

As to what you give up by opting for a "generic" personal information management system like Microsoft Outlook (which given its propensity to be the number one target for security exploitation and attention by criminals who write computers might be better titled, "Lookout") or Novell GroupWise, if you consider a modern case manager like Time Matters, PracticeMaster or Amicus Attorney, for example, the functional chasm between the two classes of software is vast:

A key issue case calendaring v. people calendaring. Outlook and most PIMlike (Personal Information Manager) systems can easily only do the latter calendaring dates by individual people. They are simply not oriented to tracking multiple people who may be together working on a case and want to see a "case calendar" this can be an enormous issue that can waste huge amounts of people time in the office having to look at multiple calendars and jump back and forth. For example, let's say that on a major medical malpractice file your office is handling, you've got one partner in charge, an associate assigned to do what associates do best (everything your partners don't want to do :)), a paralegal and the firm's investigator/medical researcher. By associating these four people together in a scheduling group in a program like TimeMatters, Amicus Attorney or PracticeMaster, you can then quickly get a case calendar view at any time and see what all four people are doing on the file. This may win an award for the Rhetorical Question of the Year but . . . isn't that MUCH easier than having to compare four separate calendars?

Case information tracking - Outlook doesn't track much legal case managers track enormous amounts of information. As previously indicated, this ranges the spectrum from:

* Related party contact information.

* Court/administrative body info.

* Opposing counsel info.

* Facts of the case.

* A chronology of case related events as well as the case "flow" once the suit is filed and the REAL fun begins.

* A case to do list with a system of sophisticated and impossible to ignore "alerts" (malpractice carriers LOVE this!)

* "Date chaining" capabilities that permits series of related events to be tied together and automatically counted and posted (i.e., using a Statute of Limitations date as a key date and automatically counting back and posting 1, 7, 30, 60, 90, 180, and 365 day ticklers, or alternatively, a trial date and counting back all the dates on a typical trial court scheduling order and three ticklers for each) these can save literally hours of posting time and reduce manual date miscounting errors, not to mention the ability to move the entire "chain" if a trial gets bumped.

* Conflicts related items for conflicts searching.

And all this information is very easily searchable, printable, Palmable, etc.

* Document management - while I tend to feel most firms are still better off with separate document management products (an entirely separate discussion let's keep on track here for a bit), there ARE some helpful capabilities for attaching documents to cases and being able to launch them while looking at ... and thinking about ... the case being worked on. Such capability doesn't exist with generic personal information managers.

* Conflicts checking - how many small firms have a system for checking for conflicts of interest when a new case is opened that is about as sophisticated as standing out in the hall and yelling "Anyone ever heard of ABC Corporation?" If there's no answer, the case is accepted because the conflicts check" is done. The problem of course is that is the day that the partner who just finished a suit against ABC Corp.'s holding company is out fly fishing sans pager and cell phone ... thus ... silence from the end of the hall. Malpractice carriers just HATE that method . . . they really, really do. In legal case managers, conflicts checking is actually an incredibly powerful text search system, scouring every scrap of case information in your system, down to the level of individual time slip entries! Generic personal information managers and conflicts searches? 'Fraid not.

* Integration with billing systems like TABS, PCLaw, Jr., Timeslips, QuickBooks Pro, etc. for passing client/matter information back and forth and also for passing time entries from the case manager to the billing system. Typically a couple of months of captured time that would otherwise fall between the cracks should pay for the ENTIRE case management implementation ... easily in many cases. And this doesn't even begin to consider the efficiencies gained by the reduction of duplicative information entry. There is no such functionality with generic personal information managers.

* Easy integration of contact info with your word processor - With case managers, there is relatively easy integration of address/contact info into WordPerfect or Word documents as an example, my company has long used a set of WP macros we call the "MicroLaw Legal Macro Library for WordPerfect and Word" (www.microlaw.com/cle/wpindex.html). While customized for each firm, the essential core macros are the same the "Smart Correspondence" macro can pull addresses right from TimeMatters, for example, into Word as part of a process of inserting inside or cc/bcc addresses on correspondence we've not been able to accomplish that in any way approaching "simplicity" with the Outlook/WordPerfect combination although I suspect it MIGHT be possible with VBA programming (but of course, VBA opens my clients to a serious macro virus threat too ...)

* Document assembly – building "smart documents" treating the mass of information stored and track by a legal case manager as the perfect repository for assembling routinized documents, you can integrate with Word or WordPerfect, with or without HotDocs for comprehensive document assembly. To NOT do this is utterly illogical for routine documents where little changes content wise other than the client names, counsel names, captions, etc.

* The Timeline/Chronology function - in TimeMatters, for example, this shows the progress of work on a case and lets you see a pattern or chain of case events - incredibly useful (although be sure to look at CaseSoft's new TimeMap tooit's seriously cool stuff specifically for this purpose ... for that matter, firms should certainly look at CaseMap also as a more free-form approach to overall knowledge management, of which I believe case management is a subset I would refer the firm to an article I coauthored with Sheryn Bruehl on Knowledge Management in the February/March 2000 issue of "Law Office Computing" magazine (www.lawofficecomputing.com).

* Synchronizing with laptop/remote systems far more easily than Outlook is accessible ... the ability in Time Matters and Amicus Attorney, for example, to send a remote update file to a branch office PC, a mobile lawyer's laptop or a

partner's home PC system, via plain 'ole email is nothing short of ingenious.

At this point, it should be very clear that generic personal information managers like Microsoft Outlook, Novell GroupWise and their genre are clearly not the functional equivalent, or even a suitable replacement for, legal case management systems.

The next step is get consensus on the "team reasons" for implementing the case management software. Smart firm Technology Committee heads and Managing Partners who might be the advocates of case management anticipate and answer the most important question for everyone in the firm: "What's in it for me"? You must be able to clearly demonstrate the personal benefits of case management software to every class of person in the firm. Failure to do so will mean that roadblocks will appear. Sometimes these roadblocks may be entirely insurmountable. At best, these obstacles can undermine the success of the project; at worst, they can derail the project and turn it into an expensive disaster for which someone will have to take the blame. Instead, focus on what makes different people tick and what are the right "buttons" to push to get the "buy-in" you seek. Examples include:

* Partners - bill more time during the same length workday and make more money.

* Managing Partners - making more money is always a good thing but staying out of trouble is equally important - case managers help lawyers avoid malpracticing by making it difficult to miss deadlines and make it easier to keep clients apprized of case statuses.

* Associates - respond to clients' and partners' requests faster which makes you look good.

* Paralegals - respond to clients' and partners' requests faster which makes you look good and also reduces stress.

* Firm Administrators - a Godsend for tracking otherwise disparate information such as equipment leases and depreciation schedules, tracking lawyer CLE attendance, logging staff vacation time and other human resource information, monitoring legal research subscriptions, tracking equipment maintenance.

All of these tie into primary concerns of each group of participants in the case management process. Case management satisfies very basic and very motivating needs for everyone in the firm. But the typical lawyer or legal

assistant will not arrive at this conclusion on their own - they need to be educated and led to see these expected results. Once the revelations occur, you'll be hard-pressed to rein in the enthusiasm everyone will demonstrate.

II. Deciding on a Case Management System

For most law practices, it is neither economical or logical to try and decide on a case manager without outside assistance. Representing yourself "pro se" in making case management decisions would be like one of your clients deciding to handle a corporate merger on their own you just know that it's going to be a very expensive disaster!

There are many qualified case management experts and resources available to assist in this process. A collection of the continent's most capable legal technology consultants is found at LawCommerce's website. A group called T3: Top Tier Technologists is the first independent association of legal technology consultants. Membership is a restricted based on a selective and critical peer review process to determine qualifications. Many of the group's members have significant case management expertise. Information on the T3 Network can be seen at www.lawcommerce.com/t3.

If you are interested in a specific case manager, the major companies generally have a roster of qualified and in many cases, certified consultants who can assist with planning, customizing and deploying their software. See, for example, TimeMatters consultants info at www.timematters.com/sales/consult1.htm and Amicus Attorney consultants info at www.amicusattorney.com/partners/index.html. Note that these may not be independent advisors necessarily, but they will be able to assist with the specific program for which they are certified. If you seek independent guidance, be sure to specifically verify that qualification.

Books and periodicals are great sources of information. One of the leading publications on the topic of legal case management is Andrew Adkins' recently published book entitled "Computerized Case Management Systems: Choosing and Implementing the Right Software for You" with info available at www.abanet.org/lpm/catalog/5110409.html. Law Office Computing magazine also features a major case management review article every year in their December/January issue (www.lawofficecomputing.com).

Attending legal technology CLE conferences that feature case management-focused education is another effective approach. National conferences include LegalTech (information at www.legaltech.com), ABA TECHSHOW (www.

techshow.com), LegalWorks (www.glasserlegalworks.com) as well as many state bar sponsored functions. Case management is a hot topic and it is likely you will find a multitude of available sessions.

Watch for case management-related articles online as well. Current examples include Oklahoma consultant Sheryl Cramer's article about "Shopping for a Case Management System" on LLRX.com (specifically at www.llrx.com/features/casemanagement.htm) and fellow Oklahoman, Jim Calloway's article that makes "The Case for Case Management Systems" in the online version of the Oklahoma Bar Journal at www.okbar.org/barjournal/featurestories/fs011202calloway.htm. Finally, my own materials about "Turning Chaos into Cases: Small Firm Case Management System"; CLE materials created for Minnesota CLE at www.microlaw.com/cle/casemanindex.html#cm1. All are great primers on the

process of reviewing different case managers and determining which makes sense for your specific practice mix.

III. Building Your Planning Team: "Plan" is NOT a Four Letter Dirty Word!

Nothing is more important than planning. This "techno.truth" cannot be overstated when the subject is case management systems. Unlike many other software applications you might deploy in your practice, with case managers, you can't just click "install" and expect instant productivity miracles.The key to case management success is acknowledging that such a project is similar to managing a complex litigated case for one of your clients. Think of it as a multi-step process, spread over a period of time where the talents and efforts of a number of people in the practice will be coordinated. And all that coordinated effort is directed at winning the case for the client. But in this situation, the case is the "case management project" and the client you're going to win for is none other than . . . YOUR OWN FIRM!

Start the process by build an implementation team your "Case Management SWAT Team." Pick a cross section of people from the firm so you have representation from a variety of perspectives. This means that there should be a partner (at least one in a smaller firm - in a larger firm there might be a partner from each practice department). There should be an associate or perhaps more than one in a larger firm. Associates see the process of case handling from a different viewpoint than partners and have much to offer in this process. Include your firm's administrator as well as the head of your technology committee (you do have a technology committee, don't you?). Include a paralegal and legal assistant from each practice group. And include your consultant who is helping

guide you through the implementation process.

Your Case Management SWAT team should then develop an action plan, plotting out the timeline of the entire process. Your consultant, who may be the veteran of many case management implementations in many different kinds of practice has experiences that can and should be tapped at this stage. In a sense, it is the same as sitting down with a legal pad, or a "thought processor" such as CaseMap (www.casesoft.com) and outlining the skeletal structure of the process from beginning to end. Allow at LEAST 30 days to arrive at an action plan of how to best configure and rollout your new case manager. Don't worry about filling in every minute detail in your action plan outline - much of what happens will be fleshed out along the way.

Which leads us to . . .

IV. Training: Think Backwards for Success!

With most software in the average law practice, you install it and then learn it. A basic process most of us have been through more times than we care to remember - it feels like one of the core principles of using our technology systems. Not with case managers! With case management systems, the process is precisely backwards - 180 degrees opposite! You first need to learn the program, and THEN you can install it!

Your case management implementation team has to take time to learn the software in order to determine the best configuration approaches, develop a comprehensive training plan that fits your firm, your schedule and your practice approach, and also to decide when to activate advanced capabilities like document assembly systems. This is impossible to plan and coordinate unless there is a fairly deep understanding of the software. Of course, getting to this level of comprehension without physically installing the software may be impractical or even impossible. Systems like TimeMatters and most other products can be installed in a "demo" or "tutorial" mode allowing the firm to work through the key functions of the program and its "flow" using canned demonstration data files.

It can be very cost-effective to utilize your consultant in providing a detailed overview of the program and explaining the level of customizability that exists within each major area of the software. A morning of such review can help the Case Management SWAT team really supercharge its action plan creation process and better direct the ensuing discussions about the initial configuration and customization of the program to best fit the firm's practice approach and

workflow patterns.

V. The Paper Process: Documenting Your Practice "Flow"

Before you even think of how to configure a new case manager, first document the "flow" of your practice. For most firms, this exercise in and of itself will have significant long-term value. In many cases, the procedures related to file management, case handling, case closing and archiving may have been the product of a long-deceased founding partner who learned his/her approach from their mentor who wrote a procedure sheet in 1947 - when mimeograph technology was all the rage.

Document your work flow by writing out checklists. These should document all your procedures from case intake and file opening to the file closing/archiving process. Step by step - everything you do, who does it and then let it sink in. Your SWAT team should read it and re-read it together. Use an LCD projector and flash it on your whiteboard in huge characters. Then tear it to pieces - critically look at every step and ask "why do we do that" and "can we remove that step." The goal is to SIMPLIFY the processes. Fewer steps equal fewer mistakes equals less people time to accomplish things equals lower cost of operation equals higher profits while also providing more timely and higher quality services to your clients. In other words, target your processes towards the pinnacle of all law practice goals: better, faster, cheaper . . . and with less stress and aggravation in the process.

Decide how you need to streamline your procedures on paper first, before you ever try and do it with your case management system. Once you've worked together to understand your procedures and have streamlined them and agreed on them, you're ready to translate these processes and work flow steps into automated form using your new case management software - which leads us to the next step . . .

VI. Customize! Customize! Customize!

Case managers like TimeMatters, Amicus, ProLaw, PracticeMaster and the raft of other products are "techno.chameleons;" programs that can adapt to any area of law practice and ultimately look as if they were custom-written to fit that particular area of practice. Using a case manager in its "plain vanilla" configuration is like trying to be happy with a new suit that is four sizes to big and a color you can't stand . . . it will feel lacking and a poor fit - and looking at it and wearing it every day will start to make you angrier and angrier.

The key is to become tailors - software tailors. One of the most impressive characteristic of mainstream case managers today is the extent to which they can be relatively easily customized: twisted, molded, and modified to fit your workflow and your practice needs - dictated by the areas of practice your firm focuses on. Customization can include adding to or modify common screens for tracking matter information, contact/address information, date entry screens, how conflict of interest information related to adverse parties is tracked. Case managers generally permit you to build powerful automated date "chain templates" and "assembleable" documents by area of practice. All of these areas need attention as part of the preparation process.

Can customization be done after the fact, months later after the firm has been using the software? Certainly. But more successful implementations consider as many of these issues as they can predict and anticipate in advance so that the new software fits like a glove the first time its lawyers and staff "slip it on." This leaves a positive impression on the entire firm and encourages use and even creates a sense of excitement and anticipation about the learning process. This is far preferable to the alternative - grumbling people who question the selection of the software and whether it will ever save more time than it takes to learn it and use it.

VII. Summary: Tips for Case Management Rollout Success

PLAN! PLAN! PLAN! PLAN! PLAN! Capitalize it! Write in 12 foot tall blinking neon letters! Failure to adequately plan the entire process typically leads to one thing - a miserably failed project and someone who will be the scapegoat for a costly mistake. So don't make the mistake - PLAN AHEAD! Failing to plan is like failing to prepare for trial - walking in the day of trial without knowing the facts, without having any witnesses, with no questions to ask and never having met your client. A total disaster. No different a result should be expected if you slap a case manager on your system, unveil it to your staff the next morning and say "Voila! Our new case manager - now can someone calendar my dates and get my trial brief done in the next hour?"

GET HELP! Case managers, no matter which product is being considered, have nearly endless setup, configuration and usage options. How can you intelligently choose the best way to set these up by the "random" approach? You need to know the product or you need someone to guide you.

BUILD A TEAM! Involve both lawyers and staff in the planning and training process.

DON'T SKIMP! The cost of acquiring the software is the tip of the iceberg. Just as with the "Titanic", not knowing about the 7/8 of the iceberg that was invisible below the surface led to disaster, failing to understand that most of the cost and effort in the process takes place AFTER you've bought the software will lead to disaster - or at best, a completely mediocre implementation. Get the outside help you need - don't do case management pro se if you don't have the internal experience.

TEACH! TEACH! TEACH! TEACH! There are no magic bullets here you need to devote enough time to learn to use the product. Otherwise, you're wasting your money!

The bottom line is that case management software is the long-awaited "killer legal app." But it can only fulfill high expectations if you understand and follow the key steps for implementation success. Don't waste even one more day hemorrhaging otherwise billable time subsidizing your inefficient workflow processes! Take the case management path today - no time like the present!

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Processing An Insurance Claim - Part II

By Jonathan G. Stein

I. Introduction

In Part I the theme was helping the client find insurance. Once the client has insurance, the rest is easy, right? Unfortunately, not. Insurance is different than most other products that a client will purchase. The client gets nothing. At least, the client gets nothing physical except a piece of paper. The insurance industry trains new employees by telling them that the insured, your client, has purchased a promise and it is the employee's job to make sure that the insured gets what is promised.

What is actually promised? The insurance company promises to pay all covered first party claims in a timely manner and to defend and indemnify all third party cases. The insurance company promises to act with the utmost good faith towards their insured. But, this really only happens once - when the insured has a claim. Claims adjusters have a saying: "We are the only contact with an insured after they buy the policy, and then its only because something bad happened." In order to help your client through this bad experience, you need to know what is available to your client.

II. Claims

Now that you have helped your client obtain insurance, what do you do when there is a claim. A law school professor, a retired judge, from the midwest, once asked this in an insurance law class. A student raised his hand, and when called on, proudly and confidently answered "Sue the insurance company." The professor chuckled, shook his head, politely nicknamed the student "Flamingo" and asked if anyone else might have an answer. The correct answer was soon given -

report a claim to the client's insurance agent. While this story is humorous, it does point out that most attorneys do not know what to do when their client suffers a loss.

The size of the loss is one factor in determining what needs to be done. On a small loss, the client can probably handle it without assistance. Anything under a few thousand dollars, maybe even up to $10,000, the client should be able to resolve with the insurance adjuster, and, with some insurance companies, possibly even the insurance agent. Of course, you should be prepared to offer assistance if the matter is not quickly resolved. Some of the assistance may be in getting forms, such as a Sworn Statement in Proof of Loss, notarized, assisting the client in locating a CPA to review the books, or providing the insurance company with documents such as incorporation papers, leases, or other legal documents. Larger losses can be more of a problem.

First party losses such as theft, fire and vandalism may require some assistance. There are a variety of sources available for clients. The first line of defense should be the attorney who has helped the client so far. If you have been involved with the client in choosing insurance products than you have familiarity with the policy, the agent, and can best assist the client. You may act as a liaison between the client and the insurance company. Just as on a smaller loss, you may provide documents. You should also be present if the client is asked to give a statement or a statement under oath.

However, if the loss is larger, more complicated or requires some specialized knowledge, than you need to bring in some true experts. The ABA Journal can be a resource to find experts. (TRIAL, the magazine of ATLA, a plaintiff's association, also lists excellent experts, as does the Defense Research Institute monthly magazine.) If you cannot find an expert in these sources, go to your list of attorneys who specialize in insurance coverage and see if they have some contacts - or find an insurance adjuster turned attorneys. If none of these sources work for you or the client, and the client needs someone, you may need to contact a public adjuster.

Public adjusters are licensed insurance adjusters who work only for insureds. The public adjuster usually take a percentage of the total loss, similar to a contingency fee agreement on a personal injury case. But, for a busy client, a client who needs to be involved in the business, or a client with a substantial loss, this service can be worth many more times than the cost. Public adjusters can be found at the National Association of Public Insurance Adjusters (www. napia.org). As with any recommendation, due diligence should be completed on the public adjuster. One or more of these sources should be able to help your client avoid a less than full recovery on a first party insurance claim.

On third party losses, the use of counsel becomes more important. If your client is involved in an automobile accident, has a slip and fall on the premises, or another third party case, the quick involvement of counsel can make all the difference. Sometimes clients do not want to report a claim to the insurance company. However, you can advise them of the importance of timely reporting and make sure that the claim is timely and accurately reported, as is required by the insurance company. (Failure to report a claim timely may result in a denial of coverage.) You can also direct any investigation, in conjunction with the insurance adjuster, and thus preserve attorney work product privileges that may be applicable. But, more importantly, you can protect your client's interest from start to finish.

Once your client suffers a third party loss, there is a chance of litigation. Even if you are not a litigator, you may want to bring in a litigator to help your client. While most insurance policies provide that the insurance company elects counsel, not all policies do. If your client's policy allows the client to choose counsel, then quickly bringing in trial counsel experienced in litigation will allow trial counsel to be involved every step of the way and potentially save time and money. If the policy allows the insurer to choose counsel, then the client may still have someone looking out for their interests - especially important in a consent to settle policy. Additionally, in consent to settle policies, someone will need to advise the insured whether they should give consent to settle. Further, a conflict of interest may develop with the insurer or the client may not understand the process. All of these situations present an opportunity for you to provide counseling and insight to your client. These add value to your service.

III. Conclusion

Clients, hopefully, do not go through the claims process often. It is a new and frustrating process for them. Your guidance, your expertise, your knowledge of when to bring someone else in, all provide an important service to your client. This is a process though which only the brave tread alone.

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Avoiding the Hammer of a Spoliation Inference: Preservation of Electronic Communications

By Michael E. Adler, Esquire

Lawyers representing clients that may become involved in litigation must act promptly when he or she becomes aware of a potential claim. Failure to take "reasonable precautions" may later result in severe penalties, including monetary sanctions and adverse inferences. Given the recent notoriety of a series of decisions in the Southern District of New York in the Zubulake v. UBS Warburg case, consultation with clients, to determine whether circumstances exist that require action to preserve evidence – particularly electronic discovery, or e-discovery -- should be considered immediately.

One of worst things that can happen in litigation is a finding of spoliation, or a spoliation inference given to a jury. Spoliation is defined generally as the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. A New Jersey court recently wrote: "The duty to preserve potentially relevant evidence is an affirmative obligation that a party may not shirk. When the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to place a 'litigation hold' or 'off switch' on its document retention policy to stop the destruction of that evidence." Courts will consider four factors: (i) whether the evidence is in the party's control; (ii) there is actual suppression or withholding of the evidence; (iii) the evidence was relevant to claims or defenses; and (iv) it was reasonably foreseeable that the evidence would be discoverable.

Upon awareness of a potential claim, counsel should implement a "litigation hold" on its document retention policy concerning e-mails and other electronic documents. Information technology departments must become involved in the process to alter automatic deletion rules, which allow e-mails to become inaccessible or to be deleted, so that documents can be preserved. The entire

universe of electronic files must be considered – are there shared directories? Back-up tapes? Counsel must understand their client's electronic systems.

A detailed memorandum should be sent to all employees who may have discoverable information. Here is one example, but it should be carefully tailored to the appropriate situation:

_____ was recently sued with respect to _____ with _____. In connection with defending the law suit and the pursuit of counterclaims, _____ is required to preserve all documents and information relating to the actual or potential issues in dispute. Accordingly, we need to gather up files (including electronic files) relating to _____ and related matters.

Also you must immediately cease all destruction, discarding or deletion of documents, information and files (including electronic files) relating to _____ and related matters, and to this extent _____'s document retention policy is suspended until further notice. You also should immediately inform any employees you supervise (including administrative assistants) of the situation and the need to preserve the relevant documents and information. For this purpose, the term "documents" includes final documents, drafts, correspondence, handwritten notes, videotapes, audio tapes, computer files, disks and emails.

If your email system has automatic purging, you must print out any relevant emails (with attachments) before they are purged. You will be notified when normal document retention procedures may be resumed.

We will coordinate with you soon as to the next steps in the document and information collection and response process. In the meantime, if you have any questions concerning whether a particular document should be retained, please err on the side of saving the document. If you have any questions concerning this email, or receive any inquiries from third parties regarding this matter, please contact _____.

REMOVAL, TRANSFER, ALTERATION, DISPOSAL OR DESTRUCTION OF DOCUMENTS COVERED BY THIS DIRECTIVE IS PROHIBITED BY YOU WITHOUT PRIOR WRITTEN APPROVAL BY ME.

Along with *Zubulake* and a series of other, similar cases, it represents an apparent trend in the courts, even before new, proposed rules concerning discovery of electronic data become effective, to impose harsh sanctions on parties that fail to take *effective* precautions to preserve electronic data, such as

e-mails, when they become aware that a claim may be asserted, even before litigation is actually commenced. Even if a party is merely negligent in failing to preserve such evidence, and even if there is no proof of “bad faith” in the destruction of such evidence, these cases suggest that some courts may nevertheless sanction that party, if the destroyed evidence can be shown to be relevant. Foresight, thought planning, and coordination and coordination will save money in the long run and avoid the risk of discovery sanctions.

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Registering a Federal Trademark

By Debra C. Scheufler

Trademark law originally arose out of the concept of fraud and deceit and its purpose was to protect the public from counterfeit merchants. The concept was that consumers should have confidence that a product sold under a certain name should be of the quality expected of all products sold under that name. This common law concept still protects the public and merchants from unfair competition federally and in most states.

Trademark protection, codified under the federal Lanham Act, has expanded to protect tradenames (under which services are marketed), and trade dress, which applies to the distinctive appearance of product labels.

Trademark will be used herein to mean trademarks and service marks.

Registering a trademark, at first glance, appears to be a relatively simple process. It requires a completed application, a specimen and a statutory filing fee. The specimen is a separate page depicting the printed words, and/or a drawing if the mark is pictorial, sought to be registered. The United States Patent Trademark Office ("USPTO") website offers an online application process, where credit card payment is accepted, and the necessary specimen is submitted via e-mail. Alternatively the trademark application form and specimen may be printed out and mailed in. The filing fee is only $325.00 per class of goods or services if submitted online and $375.00 per class if submitted by mail.

The process is, however, a bit more complicated than filling out an application and submitting the appropriate fee. The first challenge arises in the choice of applying based upon use in commerce or "intent to use." The applicant's mark must either be in use commercially in connection with goods or services, or the applicant must assert an intent to use in commerce.

An application based on use is examined for registrability under the Lanham Act, then published in the USPTO Gazette, and if it is not challenged within 30 days of publishing, it will be registered. This process can take one year at a minimum.

Applicants may wish to reserve a mark for a period of time, prior to use in commerce in order to “reserve” a mark while ramping up development of a product or service. The intent to use application procedure allows this. If the mark is deemed registrable after examination a Notice of Allowance is issued and the applicant has six months to show use in commerce, a necessity for registration. As a practical matter, the USPTO will grant at least one, and often several, six-month extensions upon further application. The result is that the applicant may have as long as four years before it must demonstrate use in commerce. Each request for an extension of time requires an additional $100.00 filing fee.

If the mark is not registered for some reason, the applicant forfeits all filing fees, so it is important to determine whether the mark is protectible to the extent possible before filing an application. Marks will be rejected if they are deemed descriptive, immoral, deceptive, or disparaging to any person, entity or governmental body, or if they are confusingly similar to an existing mark, whether registered or pending registration.

One of the most common reasons for rejection is that the mark is descriptive of the product or service it represents. For instance “The Cook Book Store” is not registrable as it merely describes the product sold, however “Something’s Cooking” is fanciful and not merely descriptive, so it may be registrable as a mark for a cookbook store. As well, names that merely describe the geographic location where the product or service is sold are not registrable unless they have acquired a “secondary meaning” *and* the products or services are sold in locations other than the one designated in the name. As an example, “Denver Chocolates” would not be registrable as the name of a chocolate candy store located only in Denver, but it may be accepted for registration if it has acquired a secondary meaning, that is if it has been used in commerce long enough for the public to always think of that particular company when the name Denver Chocolates comes up, and if Denver Chocolates has locations other than in Denver.

Even if a mark is fanciful, meaning composed of words or features that are non-descriptive, odd or arbitrary, it will be rejected if it infringes on a senior user. Therefore it is prudent to obtain a comprehensive trademark search before beginning the registration process. Applicants can search the USPTO website

for registered or pending marks that may cause infringement problems, but common law senior users can challenge a new applicant as well. A simple internet search can rule out the more obvious common law senior users, however not every name or mark in use can be found on-line. National and international searches may be obtained for a reasonable fee from Thomson & Thomson and other search services. The search results will list any exact match as well as use of components of the desired mark in all 50 states, federally registered or pending marks, and even internationally if desired. When evaluating search results, the standard to keep in mind is “confusingly similar.” Even if the exact mark is not in use, a similar mark, particularly if used in the same or similar class(es) of goods will not be registered. For instance, the mark “New Idea Magazine” would infringe on a senior mark “Idea Magazine.”

If a word or phrase in the mark is too common, the applicant must disclaim the right to use that particular word or phrase out of context of the entire mark. In the example given above, the applicant would disclaim the exclusive right to the word Idea not in connection with the rest of the mark. If this waiver is not included in the application, the assigned examiner will request that such a disclaimer is filed prior to publication in the USPTO Gazette. One way to get a common or descriptive word or phrase registered is to include some kind of graphics or logo with the words, in which case the mark which contains words that might be rejected on their own may be registrable as a whole with the logo.

Once the applicant decides on a name or mark, the application is filed with the specimen depicting the proposed mark and the appropriate filing fee. The applicant must decide how many classes of goods and/or services in which to register the mark. A list of classes is available on the USPTO website. At some point after the application is submitted, often several months, an examining attorney is assigned to the application. During the examination process, an applicant may receive several communications from the USPTO examining attorney. Examining attorneys are typically responsive and accessible by telephone to answer applicant questions. It is important to respond timely to letters from the examining attorney as the registration may be deemed abandoned if the applicant is not appropriately responsive.

When the mark is finally published in the USPTO Gazette, challengers have 30 days to file an opposition to publication. This is an administrative proceeding adjudicated by the Trademark Trial and Appeal Board. The opposition must state why the opposer would be damaged if the opposed mark is registered. If the opposer shows senior use in commerce, that it has expended considerable resources in marketing its name or mark, and that the applicant’s mark is the same or confusingly similar to the opposer’s mark it will likely prevail in its opposition. The applicant must answer the opposition and the Board will set

dates for pleadings, discovery and oral argument if appropriate.

Marks that prevail through the examination and publication process will be registered. A trademark is valid for ten years following registration as long as an Affidavit of Use and the appropriate filing fee is filed between the fifth and sixth year following registration, and within the year before the end of every ten-year period after the date of registration. The registrant may file the affidavit within a grace period of six months after the end of the sixth or tenth year, with payment of an additional fee. Additionally the registrant must file a renewal application within the year before the expiration date of a registration, or within a grace period of six months after the expiration date, with payment of an additional fee.

The USPTO website is a great resource for attorneys filing trademark applications, or dealing with opposition proceedings. The Lanham act is also available in full at http://www.law.cornell.edu/uscode/15/usc_sec_15_00001052----000-.html.

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Driving and the Older Adult

By Joanna Lyn Grama

The sixty-five and older age group is the fastest growing segment of the U.S. population. By 2020, more than 40 million older adults will be licensed drivers.[1] Encouraging an older adult, particularly a client, that it may be time to more carefully regulate their driving, or perhaps quite driving altogether can be a daunting task.

Media stories regarding tragic accidents involving an older adult driver are sobering. However, it appears that older adult drivers may be more of a danger to themselves on the road than to others. Drivers over the age of sixty-five have higher per mile crash death rates than all other drivers other than teen drivers.[2] Drivers over age 65 who are injured in motor vehicle crashes are more likely than younger drivers to die from their injuries.[3] For older drivers, the rate of fatalities increases significantly after age 70.[4] Yet, concerns regarding an older adult's diminished driving capabilities remain.

Driving is oftentimes synonymous with independence and talking with clients and their loved ones about driving issues is difficult. Such conversations must remain positive and must be sensitive to the fact that if an older relative stops driving he or she may feel isolated, depressed, or a burden to those relatives who will take on driving or chauffeuring duties.

One of the first tasks that needs to be completed before a conversation is initiated is an objective assessment of the older adult's driving capabilities. Have there been recent traffic tickets or accidents? Are other warning signs present such as a general failure to obey the rules of the road (turning without signaling, ignoring stop signs or red lights)? Does the older adult have trouble seeing? Is the older adult's reaction time slowed or does he or she drive too fast or too slow for the conditions? Does the older adult have an illness such as dementia or Alzheimer's disease that may impair thinking (judgment) ability; or

does the older adult take medications that, either alone or in conjunction with one another, may make driving more dangerous? If such behaviors or conditions are present, then it might be time to have a serious discussion with the older driver about driver safety.

Surprisingly, some older drivers are likely to agree that their driving needs some assessment. The AARP offers a Driver Safety Program to all motorists age 50 or older, which was specially designed for the older motorists. (http://www.aarp.org/life/drive/). While not necessarily dedicated to older drivers, many states also offer driver impairment programs geared toward strengthening driving abilities.

If an impaired older adult cannot be persuaded to give up driving or to modify or restrict their driving in order to be a safe driver, then often state drivers licensing authorities must be contacted as a last resort to keep the roadways safe. Most states have procedures to report unsafe or otherwise impaired drivers. While the programs are not aged based, they may be used to remove an unsafe older driver from the roadways.[5]

In Indiana, for example, if the Bureau of Motor Vehicles has any information that has come to its attention during an application for or renewal of a license "that the applicant does not apparently possess the physical, mental, or other qualifications to operate a motor vehicle in a manner that does not jeopardize the safety of individuals or property"[6] then the bureau may make an examination of the driver's license applicant or renewal applicant. Information includes the apparent physical or mental condition of the license or renewal applicant. This provision in Indiana law could be invoked in instances in which an older adult has difficulty passing the eyesight requirement for a driver's license. This however, does not catch those already licensed drivers who can automatically renew their driver's license over the telephone or through the Internet (a simple task in our technologically advanced age).

Indiana does have a mechanism for the examination of allegedly unsafe licensed drivers. Similar to the licensing/renewal provision, the Bureau may also require an already licensed operator to submit to an examination if the Bureau has good cause to believe that the driver is incompetent or otherwise not qualified to hold a driver's license.[7] In this scenario, the driver must submit to an examination upon at least 5 days written notice. Bureau remedies after an unsuccessful examination include suspension or revocation of the driver's license or the issuance of a license subject "to restrictions considered necessary in the interest of public safety."[8] Failure to submit to an examination requested by the Bureau can result in suspension or revocation of driving

privileges.[9] Procedures to appeal any decision by the bureau of motor vehicles are in place.[10]

Driving on a suspended, revoked, or canceled license can be risky business. Not only is the driver subject to state traffic and criminal law (and its ramifications) for driving on a suspended or revoked license, but insurance may not cover damages caused by a person who is knowingly driving on a suspended or revoked license. Personal liability for damages (or injury or death) could be very real.

Like many other parts of an elder law practice, rather than having an immediate "legal" solution to give to our clients and their families regarding an older adult's continued driving, the elder law attorney must be willing to counsel clients and their families about what to look for with respect to impaired driving, steps to take to eliminate unacceptable risk, and the ramifications of impaired driving.

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[1]A.M. Dellinger, J.A. Langlois , G. Li, *Fatal Crashes Among Older Drivers: Decomposition of Rates into Contributing Factors*, 155 Am. J. Epidemiol, Vol. 3, 234-41 (2002).

[2]Insurance Institute for Highway Safety, *Fatality Facts, Older People:2003* (visited March 7, 2005) <http://www.iihs.org/safety_facts/fatality_facts/olderpeople.htm>.

[3] *Id*.

[4]United States Department of Transportation, Federal Highway Administration, *Older Driver Safety Facts and Statistics*, (visited March 7, 2005) < www.safety.fhwa.dot.gov/older-_driver/older_facts.html>.

[5]If statistics were available, it would be very interesting to see how may drivers reported under impaired driver reporting policies were actually older adult drivers and what the suspension/revocation rates are for such drivers with reference to other drivers reported as impaired.

[6]Ind. Code § 9-24-10-6 (2004).

[7]Ind. Code § 9-24-70-7

[8]Ind. Code § 9-24-10-7(b)(C)

[9]Ind. Code § 9-24-70-7(c).

[10]Ind. Code § 9-24-10-8