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# Law Trends & News

**Practice Area Newsletter**

March 2008
Vol. 7, No. 1



## Chair's Note

Dear Division Member:

Below is the second issue of *Law Trends* for the 2007–08 bar year. As always, this is a very exciting issue, and I am very happy to present it to you. As with prior issues, this e-newsletter includes articles, checklists, and other valuable practice information and practical tips, all from each of our substantive practice areas in the General Practice, Solo & Small Firm Division. This issue also highlights some emerging areas, some interesting checklists, and much more.

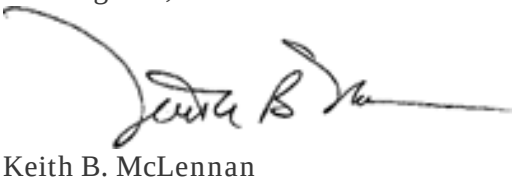
With this issue, *Law Trends* is now in its fourth year. We hope you agree that with each edition, *Law Trends* continues to provide meaningful articles for each of you and continues to improve. We trust that this edition, like the others, continues to be helpful to you in your daily practice. I encourage you to take just a few moments to read the list of articles included below. Of course, it is yours to download and keep as a reference for the future. And, as in the past, you can either download specific articles, or you may download the entire newsletter by clicking the PDF link.

There are many Division members integrally involved in putting this e-newsletter together. Their hard work and dedication are certainly present. I thank them for producing this issue for the Division.

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

I hope to see you at the GP|Solo Spring Meeting in New Orleans!

Best regards,



Keith B. McLennan
*Chair, General Practice, Solo & Small Firm Division*

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### *Featured Author*

**Vincent DePillis** is a founding member of Real Property Law Group, PLLC, a Seattle law firm with a practice limited to commercial real estate transactions and financing. He has a wealth of experience in working on complex, mixed-use developments, often involving condominium structures. He enjoys the challenge of working with unusual sites and negotiating business solutions.

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## Business Law



## Asset Purchaser Sanctioned for Destroying Documents

*By James P. Menton, Jr.*

A buyer purchases assets from debtors in Chapter 11 and assumes certain liabilities. The buyer is later sued for failing to pay assumed liabilities. There is no trial. Instead, a $1.88 million default judgment is entered against the buyer as a sanction for destroying the seller's financial records three years before the litigation began. An unwelcome and costly result for the buyer, and no doubt not what the buyer expected when purchasing the assets or when the suit began. But

that is what happened to the buyer in *Quintus v. Avaya, Inc. (In re Quintus Corp.*), 353 B.R. 77 (Bankr. D. Del. 2006).

The decision highlights what can go wrong for buyers when dealing with assumed liabilities and records maintenance. This article discusses this recent decision and then provides some practical suggestions for buyers and their counsel to consider.

**The *Quintus* Decision**

The Chapter 11 debtors sold substantially all of their assets to Avaya, Inc. (Avaya). The purchase agreement provided for Avaya to assume certain of the debtors' liabilities not to exceed $30 million and to maintain the debtors' records. The later-appointed Chapter 11 trustee sued Avaya for breach of contract and unjust enrichment for failing to pay certain assumed liabilities. During discovery, Avaya failed to produce the debtors' general ledgers from the closing date, subledgers, and vendor files. The parties moved for summary judgment. Avaya sought dismissal of the complaint. The trustee sought damages for breach of the purchase agreement and judgment against Avaya as a sanction for destroying records critical to the trustee's case.

The court granted, in part, Avaya's motion for summary judgment and dismissed the trustee's unjust enrichment claim, reasoning that a binding contract between the parties existed that adequately addressed their rights and duties. The court granted, in part, the trustee's motions for summary judgment and for sanctions, concluding that entry of judgment against Avaya as a sanction was warranted.

Regarding the sanctions aspect of the decision, the court determined that Avaya had a contractual duty to maintain the debtors' general ledgers, subledgers, and vendor files but destroyed them. The court found that Avaya deliberately deleted the debtors' electronic records to give itself more computer space. The court also found that Avaya had not paid all assumed liabilities when it destroyed the records and that, as a result, it should have anticipated litigation over its failure to comply with the purchase agreement.

The court determined that the trustee was prejudiced by the destroyed evidence and that the severe sanction of entry of judgment against Avaya was warranted. In reaching its decision, the court indicated that Federal Rule of Civil Procedure 37, incorporated into adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7037, authorizes a court to sanction a party for failure to comply with a discovery order. The court also indicated that a court's inherent

power to oversee litigation provides authority to sanction a party for failing to produce relevant documents.

The court noted that, prior to sanctioning a party who has destroyed evidence, the court must consider: (1) the degree of fault of the party who destroyed the evidence, (2) the degree of prejudice suffered by the opposing party, and (3) what degree of sanction is necessary to avoid substantial unfairness to the opposing party and to deter such conduct by others in the future.

In reaching its decision, the court concluded that all the debtors' books and records, including the general ledger, subledgers, and vendor files, were relevant to the trustee's claims and should have been preserved and produced in discovery. The court also concluded that Avaya did not merely alter evidence but destroyed it, and that the destroyed evidence went to the heart of the trustee's suit. The court entered a default judgment against Avaya in the amount of $1.88 million. Avaya has appealed the decision.

**Practical Considerations**

The *Quintus* decision is a cautionary tale for those interested in purchasing assets, whether in the seller's bankruptcy, or otherwise. Buyers in transactions involving the purchase of assets and the assumption of liabilities may want to consider the suggestions below in connection with their own deals in an effort to avoid the outcome in *Quintus*.

- Specify the assumed liabilities and the records relevant to determining what liabilities were assumed and what assumed liabilities remain unpaid.
- Perform due diligence regarding the seller's records and arrange sufficient capacity to maintain them after the closing for the applicable retention period.
- Designate a person responsible for maintaining the seller's records and notify key personnel of their retention and need for preservation until notified otherwise.
- Provide provisions in the transaction documents authorizing destruction of the seller's records after the retention period. Consider providing for disposal of records before expiration of the retention period under enumerated circumstances such as full payment of all assumed liabilities.
- If disposal of the seller's records before expiration of the retention period is not addressed in the transaction documents, seek separate arrangements with the seller in writing to dispose of records before such period expires.
- When you know or reasonably should know that there will be a dispute over compliance with the purchase agreement, retain counsel to advise you on

related matters, including any alleged failure to maintain documents.

- If a lawsuit or other proceeding is commenced, consider whether settlement may be a reasonable and cost-effective alternative to defending against the lawsuit or proceeding and the risk of loss and potential sanctions. In other words, settlement rather than litigation may be an appropriate resolution to the matter for your business.

**Anticipate the Unexpected**

Buyers purchasing assets naturally face challenges in the transaction. One challenge they may not anticipate when the transaction closes is subsequent litigation involving their document destruction and the entry of terminating sanctions against them. The *Quintus* decision is a reminder that such unanticipated events can and do occur. Buyers may want to consider the practical suggestions above in their own deals in an effort to avoid litigation of the kind involved in *Quintus*. Whether following the suggestions would have the desired effect depends on the circumstances of each particular case and remains to be seen.

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*James P. Menton, Jr., is a litigation attorney specializing in business litigation, bankruptcy, and creditor rights. He is a partner with Peitzman, Weg & Kempinsky LLP in Los Angeles, California. The views expressed in this article are solely those of the author.*

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## Business Law



## Only If You Want to Get Paid . . .

*By Ed Poll*

Every business, including The Business of Law®, is driven by a three-part cycle:

- Win the work (the marketing function)
- Do the work effectively and efficiently (the production function)
- Get paid (the collections function).

These three functions are distinct and separate. Most lawyers are familiar with and capable in marketing and production, but they fail to grasp the importance of collections. They feel a false sense of security as they pile up billable hours, but don't realize the danger in the uncollected cash that those hours represent. Bounced checks, failure to receive timely or full payment, client insolvency—these all can ultimately result in a lawyer's bankruptcy.

However, lawyers can control fee collection to a greater degree than they usually believe is possible. When an attorney agrees to perform services for a client, the lawyer *and* the client are entering into a two-way bargain. The attorney promises to perform legal services that meet or exceed the standard of the community and the expectations of the client, and the client agrees to pay for legal fees and disbursements in accord with the terms of the written fee agreement. Lawyers can take a variety of practical steps to ensure that clients keep their promise.

**Defining the Relationship**

If the client pays each bill every month like clockwork, the relationship is working. If, however, the client owes a great deal of money and shows very little inclination to pay it, the relationship is clearly on the rocks. Shared expectations, effective communication, and dependable follow-through by lawyer and client all define the kind of good relationship that results in collecting a higher percentage of your billings. Despite what some lawyers think, the two are tied together. You truly have a good relationship with your client only when the client's account receivable is up to date. Delinquent accounts generally indicate that the client doesn't respect you, is attempting to hoodwink or undercut you, is dissatisfied, or considering disciplinary action against you.

**Perspectives on Debt**

In large firms, when such a troubled relationship develops, the overall cost of an individual bad debt to each partner is minimal. Lawyers in small firms or in solo practice see an immediate reduction of take-home pay. Large and small firms alike often continue to work for the nonpaying client in the misguided hope that continuing the relationship means getting paid and receiving referrals in the future. However, clients respect firmness and a businesslike approach, and generally do not go out of their way for lawyers they disrespect.

**Walking Away**

If a fee payment impasse develops, the lawyer cannot ethically cease

representation when the client will be prejudiced—for example, by withdrawing within 60 days of a court date. In the ABA's Code of Professional Conduct, Rule 1.16 ("Declining or Terminating Representation") allows lawyers to withdraw if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." If you try to withdraw without adequate communication on and careful records of the client's billing and payment performance, the result may be a state bar disciplinary action requiring future "involuntary servitude" (or pro bono work) to fulfill your ethical obligations toward the client.

**Collection Policy Establishment**

Law firms are not the victims of their delinquent clients. Attorneys and law firms cause their own collection problems by failing to establish collection policies, to explain the policies from the start of an engagement, and to enforce those policies consistently during the engagement. Lack of a firm-wide written collection policy can lead a firm to financial disaster. While the collection policy need not be part of the engagement letter's fee agreement, the engagement letter should clearly state the consequences to the client for failure to honor the agreed-upon payment commitment. Your written policy must detail how to keep track of when clients are behind on their payments, and how to contact clients when they are late with payments.

**Collection Policy Tips**

Assume that every client will be a collection problem. That way, you will be well-armed with a variety of signed—and initialed—agreements, which will demonstrate the client's advance knowledge and acceptance of the costs incurred. It is vitally important that you move quickly to collect any overdue accounts. One study shows that a bill that is more than 60 days past due can still be collected about 89% of the time. However, that drops to a 67% likelihood of collection after six months, and to a 45% likelihood after one year. Train your staff to let you know quickly about who is not paying their bills so that you can take immediate and necessary action

**Collections Policy Details**

Your collections policy should cover in usable electronic form everything from the beginning of the relationship with the client to the payment of the final bill.

Hire a collections manager, or designate a staff person, to handle all the details of the collections policy, including:

- Credit terms (when to inquire about unpaid balances, when to stop work if payment stops)
- A sample fee agreement, to be modified as necessary
- Collection terms, including guidelines on when and how to engage a collection agency
- Incentives for lawyers to have a high collection percentage on the fees they bill (called realization rate) and enforcement actions against those partners who lag on collections (such as withholding compensation, or deducting collection expenses from it).

**When Clients Don't Pay**

Consistent with the Rules of Professional Conduct, stop work for clients who do not pay. That step should focus the client's attention on the problem. Ask the client what he or she would like you to do to resolve a billing dispute. Listen carefully to the suggestion. Generally, price is not the issue with clients. Therefore, lawyers should resist discounting their fees. However, in a collection situation, it is important to do whatever is necessary to resolve the conflict. Clients who argue about overbilling are often just angling for a discounted bill. If, after all other efforts to collect have been exhausted, the client is merely interested in a fee discount, give it. Do it to get rid of the matter—and the client. That way you are not paying collections staff to keep flogging the matter, and are much less likely to be sued for malpractice.

However, if the client has earlier agreed to pay the full amount, do not later cut the fee. This sort of price shenanigan is quite popular during the month of December with clients of large law firms. Clients agree to pay their large bills in order to wangle huge discounts because the remuneration system for partners is based upon how much has been collected by the end of the year. Any bills collected in January do not count for another 11 months. Some of these clients have gotten into the habit of attempting to discount their lawyers' fees for every matter.

**Taking Charge**

It should be apparent that collection is an active process, and a vital one—the last step that closes the circle in any engagement. The agreement between client and lawyer isn't complete until you get paid. The process only works when you

make it work.

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*Ed Poll, J.D., M.B.A., CMC is the author of 11 books, including the seminal works* Attorney & Law Firm Guide to the Business of Law, *2nd ed. (ABA),* Selling Your Law Practice: The Profitable Exit Strategy, *and his newest,* Disaster Preparedness & Recovery Planning for Law Firms: A LawBiz Management Special Report.

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## Business Law



## The Impact of a Fraudulent Transfer on a Mortgage Lien and How to Minimize or Avoid the Consequences

*By Richard G. Gertler*

It is not uncommon for a lender to fund a loan to property owned by one spouse. There exist many plausible reasons why one spouse only would be in title, including but not limited to estate planning, taxes, divorce, and protection against future creditors of the nontitled spouse. This article addresses the concerns a lender might have where the underlying transaction between the spouses constitute a fraudulent transfer under either state law or under section

548 of the Bankruptcy Code. Additionally, this article will explore the preventive measures a lender should take to avoid the impact a fraudulent transfer may have upon its lien.

Essentially, a fraudulent transfer occurs where there has been an inadequate conveyance of consideration for the transfer of one spouse's interest in real property to another. Although this is not limited to transactions involving real property or for transactions as between spouses, for the purposes of this article, we will use a transfer of real property as between a husband and a wife as our example. An action to set aside a fraudulent transfer is generally brought by a creditor seeking to enforce its judgment against the nontitled spouse. The judicial remedy for a fraudulent transfer is an order that would set aside the transfer, which places title to the property back into the names of the husband and wife. The effect is that the rights of the judgment creditor to effectuate its lien to the judgment debtor's interest has been restored. A tell-tail sign that a fraudulent transfer may have occurred is when the deed or related tax documents cite no consideration or nominal consideration.

The law of fraudulent transfer affect not only the rights of the immediate transferee, but also those of subsequent transferees and lien holders. This is best illustrated by a bankruptcy case entitled *In re: Sandra Altmeyer*, 268 BR 349 (W.D.N.Y., 2001). Frank and Sandra Altmeyer were the joint owners of certain real property by tenancy-by-the-entirety (the property). While owners of the property, both Frank and Sandra were encountering financial and marital difficulties. Sandra moved out of the property and Frank applied for a loan to refinance the property for the purpose of paying down his debts. The property appraised for $92,000, and the lender issued a commitment for $73,600. Prior to closing, a quit claim deed was prepared and executed by Sandra, which cited consideration of "one and no more dollars." Of the $73,600 loaned, approximately $32,000 went to satisfy the previously existing mortgage, with the balance used to pay debts, approximately $17,000 of which were joint debts. At the time Sandra executed the quit claim deed, she was insolvent. Subsequently, Sandra filed for relief under Chapter 7 of the Bankruptcy Code. The Chapter 7 trustee appointed to the case commenced an adversary proceeding seeking an order: (1) to set aside the transfer of the property as between husband and wife; and (2) to set aside the mortgage lien on the property as against the wife's equity interest in the property. After careful analysis and consideration, the court granted the trustee's motion. As a result of this determination, the mortgage lien of the lender was voided to the extent it impaired the equity Sandra conveyed by execution of the quit claim deed. The

court did not, however, impair the mortgage lien so far as it encumbered the original half interest of Frank. Although the court proceedings did not include the sale of the property, it seems likely that the lender did not get paid in full on its mortgage lien.

The court considered several factors in reaching its conclusion. In this case, New York law imposed a requirement of inquiry regarding real estate transactions that cite nominal consideration. The lender must make a reasonable inquiry into the solvency of the transferor at the time of the transfer. Additionally, the lender's attorney prepared the quit claim deed. His knowledge as to the examination of title is attributed to the lender. Although nominal or no consideration might be indicative of a fraudulent transfer, it is not determinative of the issue. A transfer by a solvent transferor without consideration might not constitute a fraudulent transfer. As best stated by the court, "Prospective mortgagees are asked not to avoid all lending to those who acquire title for nominal consideration, but to make prior inquiry about its fraudulent character."

The court proposes a practical solution for lenders to avoid this potential problem. To demonstrate good faith or to negate a suggestion of knowledge of a voidable transfer, the lender should first obtain an appropriate affidavit from the nontitled spouse confirming his or her solvency, that he or she have assets which are reasonably adequate as capital for any anticipated transactions or businesses, that he or she do not anticipate incurring debts beyond their ability to pay, and that he or she has no intent to hinder, delay, or defraud any person or entity to which he or she was or would become indebted.

A lender, by implementing a few simple procedures, may limit its entanglement with a fraudulent transfer situation. Ownership by only one spouse should raise a red flag to inquire as to the consideration paid for transfer of title. If the consideration for transfer of title between spouses is nominal, the lender should seek to obtain an affidavit from the nontitled spouse as to his or her solvency at the time of the transfer. For further protection, documentation to show solvency should be obtained and annexed. Additionally, lenders should advise their counsel to avoid the preparation of quit claim or other deeds as between the spouses unless an appropriate affidavit has first been obtained. Perhaps lender's counsel should seek to oversee this procedure rather than chance having the borrower's counsel prepare documentation that may later be determined as inadequate. A small amount of prevention will minimize the risk of having the mortgage lien voided.

*Richard G. Gertler is a partner of the firm Thaler & Gertler, LLP, located in Westbury, New York, and concentrates his practice in the areas of real estate, commercial litigation, bankruptcy, and business law. His firm's website is www.ThalerGertler.com.*

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## Business Law



## Food Safety Issues With Imported Food

*By Lynne R. Ostfeld*

More than half of the food products eaten in the United States come from other countries. In view of the well-publicized problems with our food during the past few years, whether it was produced locally or outside the country, it is not an unnecessary question to ask how well these products are watched, investigated, and regulated. A simple answer is that all food products coming from foreign countries must meet the same requirements as American products.

Ever since 1906 and the book *The Jungle* by Upton Sinclair, which described the horrible conditions in the Chicago slaughterhouses, at least processed food has been regulated. With the adoption of the Bioterrorism Act in 2003, even greater attention is being paid to the safety of our food. All foreign food production plants wishing to export to the United States must be registered with the United States. There must be an electronic notice five days in advance when food products will be imported into the United States. This is in addition to the country going through a rather rigorous evaluation to ensure to the Food Safety and Inspection Service (FSIS), within the Department of Agriculture (USDA), that the method of surveillance of food production in another country is equivalent to ours and that monitoring of food production is continuous.

The USDA has several internal agencies that supervise the safety of imported food products, including the FSIS, which has responsibility for meat, fowl, and certain egg products. The Animal and Plant Health Inspection Services (APHIS) checks the arrival of food products to the United States to determine if the food products come from a country allowing only healthy and sanitary products to be sent to the United States. If APHIS thinks that there may be a threat to our animal and plant agriculture, it requires a reinspection by the FSIS.

The Food and Drug Administration is responsible for ensuring that other food products, as well as drugs and cosmetics, are made under sanitary conditions and not mislabelled.

All of these agencies work with Customs and Border Protection (CBP), within the Department of Homeland Security, to coordinate the monitoring of food brought into the United States.

Food processors must follow Good Manufacturing Practices (21 CFR 110), which require producers to develop and follow a plan called the Hazard Analysis Critical Control Points (21 CFR 123.6).

Analysis of food safety spills over from what may be strictly a scientific analysis to something more judgmental or political. Besides disagreements over the use of genetically modified organisms (GMO), the United States and the European Union also have disagreements over what qualifies a product to be deemed safe and made under sanitary conditions. The United States considers the presence of insect parts, etc., as being a sign of an unsanitary condition in production; the EU looks at these foreign materials as being an issue of quality, and their presence is excluded in the evaluation of the sanitary condition of the plant. Apel, Tolerance of Food Contamination in Europe, Agricultural Law Update, Vo. 24, No. 2, Feb., 2007.

The principal laws governing the product and sale of food are: Federal Food, Drug, and Cosmetic Act (FFDCA), Federal Meat Inspection Act (FMIA), Poultry Products Inspection Act (PPIA), Egg Products Inspection Act (EPIA), Food Quality Protection Act (FQPA), Food Allergen Labeling Act (FALCPA), Public Health Service Act (PHSA).

The laws and procedures governing the importation of food can be found much more fully at the following web sites:

- Code of Federal Regulations
- Food Defense Acronyms, Abbreviations and Definitions
- National Agricultural Law Center at the University of Arkansas
- National Center for Food Safety and Technology
- Office of the United States Trade Representative
- United States Department of Agriculture
- Animal and Plant Health Inspection Service (APHIS/USDA)
- International Safeguarding
- APHIS: Import and Export
- Food Safety and Inspection Services (FSIS/USDA)
- Regulations and Policies
- International Affairs
- Import (to the U.S.) Information
- Equivalence Process
- Certified Countries & Establishments
- U.S. Port of Entry Procedures
- Labeling Guidance
- United States Department of Homeland Security (DHS)
- United States Customs and Border Protection
- Customs Rulings
- Duty Rates
- Record Keeping/Informed Compliance
- United States Department of Health and Human Services

- United States Food and Drug Administration (FDA)
- Good Manufacturing Practices (21 CFR 110)
- Registration of Food Facilities
- Prior Notice of Imported Foods
- The Bioterrorism Act of 2002
- Center for Food Safety & Applied Nutrition
- Hazard Analysis and Critical Control Point
- United States Environmental Protection Agency
- United States International Trade Commission; 2004 U.S. Tariff and Trade Data

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*Lynne R. Ostfeld is a solo practitioner in Chicago with an associated office in France. Her general practice includes business law, civil litigation, and probate and estate planning. Fluent in French, she is legal advisor to the French Consulate in Chicago. The progeny of thrifty Midwest farmers, she has expertise in international and domestic agribusiness and is adjunct professor of international agribusiness law at The John Marshall Law School.*

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## Business Law



## I Bring My Dog to Work

*By Lloyd D. Cohen*

I bring my dog, Mizzen, to work with me. She is a one-year-old AKC-registered schipperke, which my wife and I occasionally show as a hobby. At first, I didn't want to bring Mizzen to work because I was anxious about my professional image, but it has been a great experience because the animal humanizes me.

If a client is overstressed, I often suggest that we take a moment to visit

Mizzen. Even if our dog break is only a few minutes long, it permits an interlude in which we can converse like regular people. Then, when we return to the legal issues, everything somehow feels a little better. Likewise, if I find a phone call to be difficult, I can refocus by taking my own dog break. Mizzen is not perfect, and sometimes she adds to the stress. I am still feeling the pain of staring into a frozen computer screen after finding that she who was supposed to be sleeping on my feet had instead chewed through my loosely hanging keyboard wires.

Lloyd Cohen with his dog, Mizzen

Mizzen makes me take two walks a day. Sometimes this is the only exercise that I get. Amazingly, people are friendlier when you are with a dog. By walking her, I am getting to know the commuters and resident who live in my office neighborhood. Smokers ostracized from the indoors find my dog walks pleasant entertainment to puff by. Also, she regulates my day. About 6:00 p.m. she starts barking as if to say, "You may want to work late but I want to go home and get fed."

My dog represents an ideal to me. That ideal is the notion that we who are in small firms should be able to customize our workspace and workstyle in a way that makes the practice of law more livable and enjoyable. This notion seems foreign only to lawyers. I see my children and their colleagues (who are all in their 20s and getting careers) making lifestyle choices. However, I needed a dog to convince me of the importance of work-life balance.

Views about life balance are evolving, and these days how we choose to work and live is always changing. For me, even though I read the work-life articles, none really sunk in until I got a dog. I thank my dog for making me more human.

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*Lloyd D. Cohen is a 28+ year solo who is practicing a lot of bankruptcy and a little estate-planning/probate in Columbus, Ohio.*

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## Estate Planning



## Shariah and Estate Planning

*By Shahzad Q. Qadri*

In the post-September 11 world, the term *shariah* has been rampantly used throughout the media. While shariah has been widely discussed, little focus has been put on explaining the significance and relevance of this body of law. In a nutshell, shariah is an all-encompassing area of the law that deals with many aspects of day-to-day life, including politics, economics, inheritance, banking, business law, contract law, sexuality, and social issues.

Given that Islam is one of the fastest growing religions in the United States, with an approximate population of five to eight million Muslim Americans,[1] legal

practitioners throughout the country are scrambling to understand the basic principles of shariah.

Muslims in the United States are generally made up of a fairly affluent and educated group of people. It is estimated that the Muslim American community retains the purchasing power of approximately $170 billion dollars. As the first generation of American Muslim immigrants reach retirement, one of their primary concerns is estate planning.

Islamic societies are generally what we may call willless societies. Traditionally, Islamic nations do not require a will for the disposition of property upon one's death. Shariah mandates the shares of each heir, payment of debts, and obligations and the general distribution of the estate. In the event an individual has left behind a will, he or she is only entitled to devise one-third of his or her estate after the payment of the debts and obligations, as he or she wishes.[2] The remaining two-thirds shall be distributed according to the mandates of shariah. However, should the heirs choose to comply with the terms of the will, they are certainly free to do so.

However, more and more Muslims in the United States are realizing the importance and necessity of having a will in place. As such, the concept of documenting the disposition of one's assets is a fairly new concept for Muslims at large. While one may argue that the laws of intestacy in most, if not all, States allow for the disposition of property without the necessity of a will; unfortunately, these laws of intestacy do not take into consideration the principles of the Islamic faith. This issue exists across the board, whether we are dealing with states such as Washington, which adheres to the principles of community property, or separate property states such as Massachusetts.

For example, in a state adhering to the principles of community property, generally the share of the surviving spouse includes all of the decedent's community property and, at a minimum, one-half of the net separate estate if the intestate is survived by issue. However, under the principles of Islamic law or shariah, the proportionate share that a surviving spouse is entitled to inherit is contingent on several factors including but not limited to (1) is it the husband or wife that is inheriting? (2) how many children is the decedent survived by? (3) what is the characteristic of the property (i.e., did the wife receive it as inheritance, or was it gifted to her by her spouse during the marriage)? Further, the concept of community property is nonexistent in the principles of shariah. Despite this, financial security is assured for women under shariah. A woman is entitled to receive unlimited marital gifts, which can include properties.

Additionally, any properties and income derived from those properties are the exclusive and separate property of the woman, even after marriage. No woman is required to spend any portion of her property or income on her household. Upon the death of her spouse or in event of a divorce, such acquired property remains as the exclusive property of the woman.

Another example is that under the laws of intestacy in most states, surviving children all receive an equal share. Under shariah, sons receive twice as much as the daughters. However, other elements of shariah are in sync with the Washington State laws of inheritance. Take, for example, the slayer statutes. The slayer statue in Washington states in pertinent part "No slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent." Similarly, the shariah provides that "One who kills a man cannot inherit from him." All Islamic jurists agree that intentional or unjustifiable killing according to shariah is a bar to inheritance.

**Solutions to Shariah**

This article is neither aimed at addressing the fairness of such distributions nor the reasons behind such provisions, but rather to examine the issues that the Muslim communities in the United States face today when dealing with issues pertaining to inheritances. The Muslim community is having to find ways to reconcile the laws of their respective states with the shariah. For practicing Muslims, their faith is interwoven with their daily lives. It is essential for them to find harmony between shariah and laws of the United States. In an effort to do this, they are turning to estate planning practitioners to find a solution. One of the key fears among Muslims is the fear that their will may be deemed null and void upon their death as being in violation of local statutes. As such, it is becoming increasingly important for practitioners not to only understand the Islamic laws of inheritance but also the Islamic culture. In order for an attorney to be able to competently advise a Muslim client on the ramifications, consequences and solutions to shariah-created issues, it is essential that the practitioner have some understanding of the principles of shariah.

Understanding Islamic wills (or rather, shariah-compliant wills) and Islamic estate planning is a very complex area of law that will require practitioners to utilize creative ways to sync shariah with local laws. Creativity will not only require drafting immensely detailed wills but also the use of other tools such as property agreements, trusts, prenuptials, postnuptials, and gifts.

There are estimated to be nine to 12 million Muslims living in the United States.

A growing Muslim community will require lawyers to have at the very least the basic understanding of Islamic estate planning and will undoubtedly require lawyers to look beyond the legal culture and step into foreign territory to ensure that they are able to serve this particular community, effectively keeping in mind the specific religious needs.

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[1] As the U.S. census does not collect data on religious affiliations, the number of Muslims is a mere estimate.

[2] Dr. Abdul Hai A'Rfi, *Islamic Law of Inheritance* (First Ed. 1994).

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*"Shariah and Estate Planning" by Shahzad Q. Qadri, published in Washington State Bar Association Bar News, November 2007. Reprinted with permission.*

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## Estate Planning



## Shariah and Marriage Contracts

*By Shahzad Q. Qadri*

It is estimated that approximately nine to 12 million Muslims live in the United States today. While Muslims have always been a part of American Society, it has only been over the past few decades that they have emerged as a culturally distinct body of Americans. One of the most important ways in which Muslims now express their identity is in the courtroom, and since the 1970s there has been a steady growth in U.S. cases involving Muslims and Islamic law. This is partly due to immigration from countries that apply the shariah, and also because second generation Muslims and converts are now more confidently asserting their legal rights. As the Muslim population increases, it is becoming

increasingly important for lawyers and the judiciary alike to try to understand the mysteries of the Islamic faith and address legal issues that specifically arise out of Islamic culture and beliefs.

While some religions allow its followers to easily segregate their "worldly" life from "spiritual/religious" life, Islam has failed to follow suit. A Muslim's day-to-day life is intricately intertwined with his or her religious beliefs and teachings. A separation of the two is not only difficult but virtually impossible. Islamic states have addressed this issue by implementing a body of law derived from the Qu'ran and Hadith's,[1] which is known more commonly as the shariah. The literal translation of shariah means *way* or *path*. Shariah is the legal framework that regulates and provides guidance to a Muslim on how to conduct his or her private and personal affairs. However, shariah is not simply limited to the regulation and guidance of an individual's personal affairs; it is in fact much more expansive and regulates businesses, governments, and states.

While no American Muslim expects any legislator to implement or codify the shariah, a basic understanding has become imperative as American Muslims continue to lead their lives in accordance with the mandates of the Qu'ran, hadiths, and shariah. The practices are more readily visible in the arena of marriage and divorce in American Muslim community.

The marriage contract is not a sacrament in the Islamic faith. It is in fact a civil contract between the bride and groom, which is entirely revocable. Both parties must mutually agree and enter into this contract. Both the bride and groom have the liberty and authority to define various terms and conditions and make them a part of the contract. Ideally, the contract should be negotiated in the same manner as inviduals negotiate any other transactions, setting forth all the terms and agreements before entering into the marriage. Properly negotiated marriage contracts not only address personal rights but also delve into property rights, inheritance rights, and issues dealing with divorce. Although this is a right that has been afforded to the parties, unfortunately, especially within the Indian subcontinent, the right is more often than not waived by the bride's family. While Islamic laws provide for a complete and comprehensive contract, the unfortunate fact remains that the majority of couples execute a one- to two-page preprinted contract provided by the government or some religious authority. Even within that contract, the section that seeks to discuss the specifics and agreements between the parties is crossed out. In essence, if properly executed, the marriage contract in fact can serve as a prenuptial agreement of sorts (although several American courts have classified them along the lines of an antenuptial agreement). A review of a properly executed marriage contract by

the judges and lawyers can in fact prove to be an invaluable tool in resolving ambiguities, issues, and disputes.

However, some U.S. courts have been quite reluctant to enforce the marriage contracts, stating several reasons, which include (1) the contract was invalid as it was done right before the marriage, which constituted duress in the eyes of the court; (2) parties did not have reasonable time to review the contract with independent attorneys; (3) terms of the contract were inequitable, and (4) stating that such contracts are contrary to public policy.

One of the most interesting, yet problematic concepts within the Islamic marriage contracts is the concept of the *mahr*. Muslims who marry according to Islamic custom, whether abroad or in the United States, negotiate a mahr provision as part of a nuptial contract. For a marriage contract to be valid under Islamic law, the bride's right to the mahr cannot be waived.

Contrary to people's understanding, the mahr is not a "bride price." In a case out of Ohio, the judge refused to uphold the terms of the marriage contract, stating that it violated public policy. The judge was quoted as saying "slavery is over in the U.S.; if Islamic marriage law says women are sold into marriage, then we will not enforce it in this country." It was later discovered that the judges ruling was based on "expert" testimony where the expert testified that mahr is the bride price. To avoid such misconstrued rulings, it is becoming increasing important for the legal community in the United States to at the very least understand the basics of Islamic culture.

The mahr exclusively belongs to the wife, and is not a payment of any sorts to her family or relatives. The exact translation of the word *mahr* is quite problematic, although often rendered into English as *dower* it fails to convey the actual concept, as such it is perhaps preferable to use the word *mahr*. However, the term *mahr* can be loosely translated as a *marriage gift*. This requirement of the gift is considered a mandate from god and is prescribed in the Qu'ran. The Qu'ran states in pertinent part "And the women (on marriage) their mahr as a free gift" (Qu'ran 4:4).

The mahr is a token commitment of the husband's responsibility and may be paid in cash, property, or movable objects to the bride herself. The amount of mahr is not legally specified; however, moderation according to the existing social norm is recommended. Today, the mahr has become a symbol of one's wealth, social standing, and status within their community. The mahr may be paid immediately (muajjal) to the bride at the time of marriage, or deferred (muakhkhar) to a later date, or a combination of both. The deferred mahr,

however, falls immediately due in case of death or divorce. In the case where a husband dies without having fulfilled the obligation of the mahr, the wife may either waive her right to the mahr or sue her husband's estate for the outstanding amount of the mahr. In the event the husband dies without fulfilling his obligation as to the payment of the mahr, it becomes a debt against his estate and has priority against all other claims.

However, the mahr never becomes an issue unless there is a divorce proceeding. Contrary to popular belief, Islamic law affords a woman as much right as a man to a divorce. In the event of a divorce, several factors are considered to determine whether or not the wife is entitled to the mahr. The primary factor that is considered is who initiated the divorce (talaq). In the event the husband is in fact the petitioner, then the wife is entitled to the full amount of the mahr. However, where the wife has petitioned for the divorce (khula), she forgoes any claim to the mahr.

Even where the wife has initiated the divorce (khula), she is entitled to maintenance and support during her waiting period (iddah). Upon dissolution of a marriage, the woman has a three-month waiting period, known as the iddah. During this period she cannot marry anyone, and her ex-husband is responsible for any and all financial support, including providing her a residence. In the event she is pregnant at the time of the dissolution, the waiting period is extended to include the duration of the pregnancy and ends upon delivery of the child. However, in some circumstances where the wife has initiated the divorce, the woman may still be entitled to the mahr. This is an exception to the rule; in such cases the woman seeks a judicial divorce for harm (dharar) without losing any of her entitlement to the mahr. Dharar does not necessarily have to be physical torture or abuse; verbal abuse or even infidelity can suffice to justify dharar.

While this article is not exhaustive of the intricacies of the Islamic marriage contract, it is intended to provide a brief overview and understanding to legal practitioners. As the Muslim population grows within the United States, it will become increasingly important for lawyers to understand the intricacies of Islamic law and provide solutions to this emerging group of Americans that will allow them to reconcile their religious beliefs with our laws.

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[1] Hadiths-are teachings and practices of the Prophet Muhammad. These are not mandatory or obligatory practices as they are not the word of god, but are practices that are recommended. Muhammad was the prophet who is credited with the advent of the Islamic faith.As the U.S.

census does not collect data on religious affiliations, the number of Muslims is a mere estimate.

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## Estate Planning



## Fido, Stay! With Me! Pet Trusts and Pet Protection Documents

*By Rachel Hirschfeld*

**The greatness of a nation and its moral progress can be judged by the way its animals are treated.**

*—Mahatma Gandhi (1869–1948)*

The first question in pet protection documents is "who owns the pet?" Why is that so important? Well, get divorced or split from your domestic partner or roommate and see! Because pets are classified as property in the eyes of the law, they are often the foundation of long court battles. So, it's a good idea to have an agreement governing ownership.

Pet owners can now create legally recognized and enforceable instruments that preserve the continuity of care for pets when their owner is unable to care for them or dies.

Today, American homes house more than 88 million cats and 75 million dogs and treat pets more like family than ever before. Because pets are an essential part of their owners' lives, it is not uncommon to find animals traveling with their owners as well as sharing their beds. In 2007, Americans spent an astounding $41 billion a year on their pets and by 2010 are expected to spend $52 billion yearly.

Sadly, pet owners often do not address the crucial issue of who will care for their pets when they are no longer able to do so. The consequences of failing to provide for a pet's transitioning and continuing care can be harsh.

Too often, the pet will end up with neither a home nor a family. Although in some instances family or friends consider the pet a dear member of the household, and will continue to care for the pet, in most cases there is no one left who is able or willing to care for the pet. Generally, pets end up in shelters where in 2007 almost four million dogs and cats were euthanized—nearly 9,600 per day.

In either circumstance, the owner may feel more secure with an enforceable document than with a pledge or handshake as the foundation for a pet's continued care. Additionally, because pets are property, ownership and the transition thereof makes the switch smoother for all involved with an official record of the owner's intent.

**Types of Pet Protection Documents**

*The Pet Trust*

A pet trust provides detailed pet care instructions and directs the disbursement and management of the fund in the trust throughout the pet's life. This allows the pet owner to control amounts and schedule of disbursements.

One of the best reasons to establish a pet trust is that a pet trust can help keep the pet and owner together, whether the owner requires in-home care or moves to an assisted living facility or nursing home.

A further benefit of establishing a pet trust is that the trust funds will not be subject to probate. Therefore, the pet's care is not delayed by court action or inaction. Furthermore, because they are not subject to probate, pet trusts are not

public documents.

*Wills, Health Care Proxies, and Powers of Attorney*

The efficacy of pet trusts and estate planning documents that include pet protection can be enhanced by drafting wills, health care proxies, and powers of attorney with enforceable provisions concerning the care of animal companions. It is important to keep in mind that wills operate only after the pet owner's death, while health care proxies and powers of attorney operate only before a pet owner's death. By contrast, pet trusts operate both during the pet owner's life and after the pet owner's death.

**Top 10 Pet Protection Document Tips**

1. **Ask the Client Who Owns the Pet**

   All advisors, lawyers, accountants, financial professionals, and other counselors and consultants should ask their clients whether they have any pets. Before proceeding, determine who is the owner of the pet. If the pet is owned jointly or there is even a chance that someone else has an interest in the pet, determine this first and work out the ownership before proceeding with any other documents. Thus, a client *must* first answer the important question of who owns the pet.

2. **Life and Death**

   The pet owner may become unable to care for one or more aspects of the pet's life, yet not be legally incapacitated as defined in guardianship statutes. For example, an owner may want the pet guardian to act because she has difficulty remembering whether or not she fed her cat. An arthritic greyhound owner may want the pet guardian to begin acting, in a partial role, when he can no longer adequately exercise the dog. If the word "incapacity" is used in the documents to describe the owner's possible mental state, it may trigger, or be used as evidence in, a guardianship proceeding.

3. **It's All in the Details**

   Identify the pet by color, size, shape, breed or mix, markings, any other salient physical characteristics, habits, and personality. Leave detailed instructions, based on the pet's routine and preferences, about all aspects of the pet's care, such as food brands and specific flavors, amounts and feeding times, housing, grooming, medical care, toys, boarding, walks, exercise, and socialization. Provide contact information for groomers, walkers, and other

service providers and determine who should receive veterinarian reports. Direct that pets who have bonded with each other be kept together. Finally, consider including instructions concerning the pet's eventual cremation or burial, and memorial.

4. **Decide How Much to Put in Trust**

   The amount placed in trust can be large or small. First determine how much it costs you to keep your pet. Factors to consider include: type of pet, age, health, anticipated lifespan (especially important for species with long lifetimes such as some birds or reptiles), lifestyle (including the types of expenses usually incurred for food, grooming, boarding, kennel fees, sitters, walkers, and toys and travel), number of pets, cost of living and inflation, and possible reimbursement for extraordinary expenses such as the installation of a fence around the pet guardian's property.

   However, because disgruntled heirs may challenge the terms of a trust or will that leaves a substantial amount for the benefit of a pet, and because many state statutes permit the court to reduce the amount of funds or property in a pet trust if that amount substantially exceeds the amount required for the intended use, it is important to explain in detail (with examples of past expenses) why the amount left for the pet's care is reasonable.

5. **Choosing Trustee and Defining His Powers**

   The trustee should be an animal lover. Because the trustee's role is to distribute funds to the pet guardian for use for the care of the pet, it is important that the trustee agrees with the owner's spending habits even though the trustee, in his fiduciary capacity, has a legal obligation carry to out the terms of the trust.

   Consider giving the trustee the power to choose a guardian for the pet in the event that all designated pet guardians are unavailable. Depending on the size of the trust and the relationship of the parties involved, the trustee could even be given the power to purchase a residence for the pet and its guardian. Permit the trustee to remove the pet guardian and replace him with the successor guardian, without the necessity of court intervention. Because some states permit the trust to exist only up to 21 years, and many pets could outlive their trusts, the trustee or pet guardian (assuming the pet's owner is not able to prepare and execute it because of disability) should be entitled to write another pet protection document or pet trust, consistent with the intent of the existing pet protection document or pet trust, if the pet

or its issue are still alive, in order to continue to protect them.

6. **Choosing a Pet Guardian**

   The guardian may keep the owner's pet or care for the pet along with the owner. The owner should choose an individual who knows and likes the pet or likes pets in general. Conversely, the guardian should be someone whom the pet likes. It is important to allow the pet guardian to exercise discretion when faced with new circumstances, as long as that discretion is exercised in the pet's best interests. Name as many alternate pet guardians as possible, in case prior pet guardians are unable to act.

7. **Pet Retirement Homes**

   Regardless of how many pet guardians and back-ups are named, the owner should name a retirement home (and a back-up retirement home) to care for the pet. The organization acts as a temporary or permanent pet guardian in the event all previously named pet guardians are unavailable or unable to act and can assist in finding a new family home for the pet.

8. **Provide an Incentive**

   To encourage compliance with the pet owner's wishes, pet owners should consider naming as *pro rata* beneficiaries of the trust remainder any facilities that keep the owner and pet together during the owner's disability or until the owner's death.

9. **Putting Plans Into Effect**

   The pet owner should be allowed to trigger the enforcement of the pet trust and other pet protection documents at any time.

10. **Sign on the Dotted Line**

    All pet documents should be signed by the owner, guardians, and, if there are trustees, by them as well.

**No Matter What, We Are Family**

Pets are increasingly valued members of the modern family, and, as such, pet trusts and pet protection documents are ideal tools to use to help owners and their pets remain together, to ensure that pets are well-cared for, and to establish procedures for legally transitioning pet ownership.

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*Rachel Hirschfeld is a nationally recognized expert on pet protection documents whose*

*mission is to ensure that every companion animal has a secure future and that no pet who has found a loving home will ever be abandoned again. You can contact her through her websites, www.pettrustlawyer.com and www.mypetprotection.com.*

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## Estate Planning



## Administrator of a Probate Estate: Duties and Responsibilities

*By Kenneth A. Vercammen*

The procedures in an estate administration may take from six months to several years, and a client's patience may be sorely tried during this time. However, it has been our experience that clients who are forewarned have a much higher tolerance level for the slowly turning wheels of justice.

The following is a portion of the duties of an administrator:

**Some of the Duties of the Administrator in Probate Estate Administration**

1. Conduct a thorough search of the decedent's personal papers and effects for any evidence that might point you in the direction of a potential creditor;
2. Carefully examine the decedent's checkbook and check register for recurring payments, as these may indicate an existing debt;
3. Contact the issuer of each credit card that the decedent had in his or her possession at the time of his or her death;
4. Contact all parties who provided medical care, treatment, or assistance to the decedent prior to his or her death;

The attorney for the administrator will not be able to file any estate or inheritance tax return until it is clear as to the amounts of the medical bills. Medical expenses can be deducted in determining the amount of any inheritance tax.

In a Supreme Court case, *Tulsa Professional Collection Services, Inc., v. Joanne Pope, Executrix of the Estate of H. Everett Pope, Jr., Deceased*, the court held that the administrator/personal representative in every estate is personally responsible to provide actual notice to all known or "readily ascertainable" creditors of the decedent. This means that it is the administrator's responsibility to diligently search for any "readily ascertainable" creditors.

**Other Duties of the Administrator**

*In General*

The administrator's job is to (1) administer the estate—i.e., collect and manage assets, file tax returns and pay taxes and debts—and (2) distribute any assets or make any distributions of bequests, whether personal or charitable in nature, as the deceased directed (under the provisions of the will). Let's take a look at some of the specific steps involved and what these responsibilities can mean. Chronological order of the various duties may vary.

*Probate*

The administrator must "probate" the will. Probate is a process by which a will is admitted. This means that the will is given legal effect by the court. The court's decision that the will was validly executed under state law gives the administrator the power to perform his or her duties under the provisions of the will.

An employer identification number (EIN) must be obtained for the estate; this number must be included on all returns and other tax documents having to do with the estate. The administrator should also file a written notice with the IRS

that he or she is serving as the fiduciary of the estate. This gives the administrator the authority to deal with the IRS on the estate's behalf.

*Pay the Debts*

The claims of the estate's creditors must be paid. Sometimes a claim must be litigated to determine if it is valid. All estate administration expenses, such as attorneys', accountants', and appraisers' fees, must also be paid.

*Manage the Estate*

The administrator takes legal title to the assets in the probate estate. The probate court will sometimes require a public accounting of the estate assets. The assets of the estate must be found and may have to be collected. As part of the asset management function, the administrator may have to liquidate or run a business or manage a securities portfolio. To sell marketable securities or real estate, the administrator will have to obtain stock power, tax waivers, file affidavits, and so on as the case may be.

*Take Care of Tax Matters*

The administrator is legally responsible for filing necessary income and estate-tax returns (federal and state) and for paying all death taxes (i.e., estate and inheritance). The administrator can, in some cases, be held personally liable for unpaid taxes of the estate. Tax returns that will need to be filed can include the estate's income tax return (both federal and state), the federal estate-tax return, the state death tax return (estate and inheritance), and the deceased's final income tax return (federal and state). Taxes usually must be paid before other debts. In many instances, federal estate-tax returns are not needed as the size of the estate will be under the amount for which a federal estate-tax return is required.

Often it is necessary to hire an appraiser to value certain assets of the estate, such as a business, pension, or real estate, because estate taxes are based on the "fair market" value of the assets. After the filing of the returns and payment of taxes, the Internal Revenue Service will generally send some type of estate closing letter accepting the return. Occasionally, the return will be audited.

*Distribute the Assets*

After all debts and expenses have been paid, the administrator will distribute the assets. Frequently, beneficiaries can receive partial distributions of their inheritance without having to wait for the closing of the estate.

Under increasingly complex laws and rulings, particularly with respect to taxes, in larger estates an administrator can be in charge for two or three years before the estate administration is completed. If the job is to be done without unnecessary cost and without causing undue hardship and delay for the beneficiaries of the estate, the administrator should have an understanding of the many problems involved and an organization created for settling estates. In short, an administrator should have experience.

At some point in time, you may be asked to serve as the administrator of the estate of a relative or friend, or you may ask someone to serve as your administrator. An administrator's job comes with many legal obligations. Under certain circumstances, an administrator can even be held personally liable for unpaid estate taxes. Review the major duties involved before you accept such a responsibility.

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*Kenneth A. Vercammen is a Middlesex County, New Jersey, trial attorney who has published 125 articles in national and New Jersey publications on probate and litigation topics. He is chair of the ABA General Practice, Solo & Small Firm Division's Estate Planning, Probate & Trust Committee.*

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## Family Law



## The Globalization of Family Law

*By David Starks*

The world continues to grow smaller and economies continue to expand globally. Your client's legal issues have continued to grow more complex, and, like everything else, family law has gone global. In today's world, it is very possible for a couple that was born, raised, and married in Washington to now be living and operating a business in Germany with children attending school in France and have property or financial accounts in all three. If that marriage goes bad, is there a best place for it to go bad?

### Prenuptial Agreements

Often, a good divorce starts with a good prenuptial agreement. Not surprisingly, there are significant differences in the enforceability of prenuptial agreements throughout the world. Although most U.S. states have some aversion to enforcing prenuptial agreements, they will generally do so provided certain conditions are fulfilled. But every country is different. Because of that difference, family law attorneys practicing internationally often have their clients get into "mirror agreements," which are prenuptial agreements drafted with identical terms, each referring to the laws of a different jurisdiction, and each "mirroring" the other. One such agreement, using the laws of the country most likely to enforce that agreement, is made primary.

**Divorce**

Of course, every country handles divorce differently, too. When a client comes in seeking advice regarding a divorce, multijurisdictional litigation requires not just determining which countries are available, but also determining which jurisdictions are most advantageous to the client's major concerns. If the decision is to pursue a divorce in the United States, forming a global strategy for the client might mean seeking a state or federal receivership order and then ratification of that order in the other jurisdictions, allowing the receiver to take control of the marital assets wherever those assets may be situated in world.

There are problematic divorces that cause further confusion: religious divorces, such as the "triple talaq" (the Islamic divorce practice wherein the husband simply states his wish to divorce three times), and "quickie" or "migratory" registry office and bilateral divorces, requiring only spousal consent and limited paperwork. The legal effect of these divorces in any country other than the country rendering the actual divorce is difficult to determine quickly, and can later raise potentially unexpected issues.

**Child Custody**

Custody of children remains the most contentious of family law issues. International custody litigation takes many forms, but one of the most common is "abduction," where one parent takes the children and moves to another country without the other parent's, or a court's, approval. Perhaps the most common international child abduction litigation occurring within the United States at any given time involves application of the Hague Convention on the Civil Aspects of International Child Abduction, which the United States and numerous other countries have adopted. The Convention is intended to prevent parents from unilaterally moving children across international boundaries for the purpose of finding a more sympathetic court and to prevent harms "thought to follow when a child is taken out of the family and social environment in which its life has developed."

Also in play in international abductions are each state's Uniform Child Custody Jurisdiction and Enforcement Act. Washington State's UCCJEA, for example, explicitly extends the application of its provisions to the international arena and calls for recognition and enforcement of foreign custody decrees under most circumstances. Therefore, the same policies and practices that prevail in the United States with respect to custody decrees of sister-states should prevail with

respect to foreign decrees.

**Enforcement of Support Judgments and Orders**

People from every corner of the world come to the United States not just to get their piece of the American Dream, but also to escape their financial difficulties. Each state's Uniform Foreign Money-Judgments Recognition Act provides a statutory basis for registration and enforcement of foreign judgments. As of 2001, 30 states had adopted the UFMJRA which provides a streamlined process for registering a foreign judgment and thereafter acting to enforce it as though it were any other judgment.

Additionally, every state has adopted the Uniform Interstate Family Support Act, which explicitly extends its provisions beyond sister-states to the support judgments and orders of foreign countries. Because the UIFSA allows for recognition of administrative, quasi-judicial, and judicial orders, it provides wide latitude to enforce orders made in countries with very different legal systems than those in the United States. It also allows for the imposition of a new judgment for any unpaid support to date.

Domestic relations law remains in near constant flux both here in the United States and abroad. But one thing remains certain: many of your clients, whether you are a family lawyer or not, will have family law issues, and family law has gone global. Just knowing what a U.S. court is likely to do in a given circumstance is only part of an ever-growing and challenging puzzle.

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## Litigation



## Frequently Asked Questions Regarding Alternative Dispute Resolution: Commercial Arbitration and Mediation

*By David J. Abeshouse*

Alternative Dispute Resolution (ADR) has been called “The Courtroom of the Twenty-First Century,” yet it seems misunderstood by most lawyers and

businesspeople, to their disadvantage. We examine below several Frequently Asked Questions to introduce this potentially useful arena, and urge that this be a steppingstone to further study and practical application, for the benefit of counsel and client alike. Discussion here focuses on business or commercial ADR as practiced before the major national forums such as the American Arbitration Association and the National Arbitration Forum. Note that significant procedural and substantive differences may exist in ADR processes applicable before other forums and in other areas of dispute such as personal injury, labor, consumer, and matrimonial.



**For starters: What is alternative dispute resolution (ADR)?**

Simply put, ADR includes arbitration (binding), mediation (consensual), conciliation, early neutral evaluation, and other binding and nonbinding means of resolving disputes without resorting to court. ADR is appropriate for many types of cases and clients, and is far superior to court litigation in many (but not all) instances. We limit our focus here to arbitration and mediation, the two most common forms of ADR.

**What are the main differences between arbitration and mediation?**

Arbitration is essentially a less formal trial conducted privately before a panel of one or three (usually) neutral arbitrators who may or may not be retired judges. It is a binding process, resulting in the arbitrator's award, which can be converted to a judicial judgment and enforced as such.

Mediation, in contrast, is a nonbinding form of confidential settlement negotiation, facilitated by a trained impartial (neutral) outside mediator, who leads the parties (usually assisted by their counsel) to reach a voluntary resolution that is confirmed in a written agreement. The mediator helps the parties identify issues, explore options, mend fences constructively, and reach a mutually acceptable outcome. Mediators do not decide or determine issues (unless asked to serve an evaluative role), but may assist the parties in exploring alternative solutions they might not have considered on their own. The parties ultimately control the decision whether to settle and the terms of any resolution.

**What are some of the principal considerations in selecting whether to have a case determined through arbitration as contrasted with court litigation?**

A provision in the parties' written agreement may require that all disputes arising out of or relating to that agreement be resolved by arbitration. There, the

parties lack any real choice whether to litigate or arbitrate (unless they stipulate mutually to waive the provision). Conversely, even where there is no applicable contractual arbitration clause, and no other mandate for arbitration, the parties can consent in writing to submit their dispute to arbitration. Thus the decision whether to arbitrate can be made either before or after the dispute has arisen, but in either event it typically requires agreement. An advantage to arbitration is that the parameters that can be specified in the governing arbitration clause are virtually limitless, including identifying the governing forum and applicable rules, number of arbitrators, their qualifying expertise and experience, how much discovery may be conducted, available remedies, the locale of the hearing, whether the award will be "bare" short form or expressly and fully reasoned, and many other criteria.

Arbitration is intended to be more streamlined and faster (and therefore less expensive) than court litigation. Arbitrators (who usually are part-time contractors engaged in another profession such as law, accounting, architecture, or engineering) tend to have smaller case dockets than judges, and can focus more closely and with greater familiarity on controlling individual cases.

Arbitrators usually are selected from specialized panels, based on their knowledge and experience. Other than those judges who preside over specialized parts (matrimonial, criminal, and the like), jurists usually are generalists, hearing a variety of cases in broadly divergent substantive areas. Arbitration has no juries.

In arbitration, counsel for the parties have a say in selecting the arbitrator(s) on the panel; in court, "judge-shopping" is frowned upon, to say the least.

Each phase of an arbitration case typically proceeds more quickly than in litigation, and there usually are fewer phases in arbitration (for example, fewer motions). Arbitration encompasses a more streamlined pretrial informational and documentary discovery process, based on the governing arbitration clause and the discretion of the arbitrator. Less discovery, and less discovery motion practice, substantially diminishes the cost and duration of the process.

Arbitral evidentiary hearings usually proceed in a somewhat less formal manner than in most court trials. The testimony of witnesses and admission of documentary evidence is not necessarily subject to all the strict legal rules of evidence, within the discretion of the arbitrator. Arbitrators generally render their binding decisions more quickly than judges.

Arbitration entails greater finality than litigation; arbitral awards generally are

not subject to appeal or vacatur except in relatively rare circumstances (such as the arbitrator's demonstrable fraud or bias, exceeding the scope of granted authority, or in some jurisdictions a manifest disregard of unassailable legal authority cited by the parties). Judicial review of arbitral awards is extremely limited and narrow. Where you desire a meaningful opportunity to pursue an appeal, arbitration may not fit the bill as well as resort to the courts.

Commercial arbitration awards are not public, and do not serve as precedent. This can be advantageous where a party engaged in repetitive disputes does not want to "make law."

The bulk of United States Supreme Court decisions over the past decade adjudicating issues pertaining to arbitrability or the scope of arbitration squarely favor arbitration over litigation. Thus, it is endorsed by our highest court, and is likely to become more prevalent in future.

**What are some of the principal considerations in selecting whether to have a case resolved through mediation?**

Mediation is a collaborative rather than combative process. It allows parties to express themselves (to "vent") in a way that neither their "day in court" (with its evidentiary admissibility rules) or even arbitration (with its emphasis on adjudicating fast, fair justice) can permit. This "venting" process often directly and rapidly leads to settlement of disputes.

Mediation can be undertaken consensually even during the course of a litigation or arbitration proceeding. It often is the sole realistic escape route for parties mired in expensive and time-consuming battle. Mediation frequently can terminate a lengthy dispute in one or two sessions, proving extremely cost-effective and beneficial to the attorney-client relationship.

Mediation tends to set the stage for preserving, rather than ending, relationships. Parties who have successfully mediated a dispute (even after commencement of litigation or arbitration), often find themselves able to do business together in future. When one side wins after an adjudicated process, however, that prospect almost always disappears.

It often would be wrong for counsel to surmise that they simply could start a litigation or arbitration and then readily move the matter into settlement mode. A mediator, in contrast, can add considerable value to the negotiation process, employing training, skills, leverage, perspective, and structure that counsel alone lack. Many litigators do not realize this until they actually have been

through the process with a skilled mediator.

One of the principal benefits of mediation is that it allows the parties—through a process led by the neutral facilitator—essentially to customize the resolution of their conflict, often employing facts and considerations that would not be deemed relevant to adjudication of a matter by a judge or even by an arbitrator. Mediation can employ tax costs or savings, "soft dollars" techniques, the "swing" between wholesale and retail price, tangentially related agreements, continuing relationships, and other exogenous aspects to effectuate creative settlements, whereas those factors would have no place in more formal proceedings.

**What are some of the most common myths about arbitration?**

*Myth: "Arbitrators simply 'split the baby,' rather than award parties what they deserve, so why arbitrate?"* Emphatically, this is not so. At best, this is historical artifact; most likely, it is a misconstruction (not surprising, as so many people confuse arbitration with mediation). Formal independent studies demonstrate conclusively that arbitrators rarely award in the 50% range or otherwise merely compromise between the arbitrating sides' positions. Modern arbitrator training specifically warns against simply compromising by "meeting in the middle."

*Myth: "Arbitration is too expensive."* Similarly, not so. Arbitration does tend to be more "front-loaded" in terms of cost: The parties pay a more substantial initial filing fee to the arbitral forums than they do to file a case in court, and they pay refundable deposits for arbitrator compensation relatively early in the case (a component absent from litigation, where compensating the judges beyond their governmental salaries is, like judge-shopping, discouraged in all jurisdictions). However, the overall cost is substantially diminished in most cases, because the process is so considerably streamlined and shortened. (Note: Lawyers need not fear decreased incomes due to ADR: Shorter duration of proceedings allows for greater caseloads, and happier clients lead to great word of mouth, so the bottom line is enhanced rather than reduced.)

**When might ADR be a bad idea?**

Simply put, shy away from ADR when its advantages are inapplicable to your situation, or when its distinctions from litigation may operate to your client's disadvantage. Some examples:

- ADR is less appropriate when you need a temporary restraining order or preliminary injunction to maintain the status quo pending resolution of the matter. Although many arbitral forums have rules providing for "interim

measures," these generally are not as readily enforceable as judicial injunctions. However, a party to an arbitration can seek a judicial injunction in aid of arbitration, typically to preserve the status quo pending arbitration. An analogous situation exists with respect to enforcing certain subpoenas.

- ADR is inappropriate when you want to set favorable judicial precedent that will be publicly disseminated; however, be very certain of the merits of your case, or the undesired effect of adverse judicial precedent may result.
- ADR may be less appropriate when you need to ensure the ability to conduct significant discovery.
- ADR may be less appropriate if you believe your adversary cannot endure expensive, protracted litigation.
- ADR may be inappropriate when you "inherit" a poorly conceived and poorly drafted arbitration or mediation clause in an agreement; you are contractually bound to governing language that may be ambiguous, logistically impractical, difficult to enforce, or otherwise problematic. (The cure: Try to renegotiate the clause for the greater good of all parties to the contract; in the alternative, consider seeking a declaratory judgment.)

**How can I go about proposing mediation to my adversary without appearing weak?**

More than 95% of all commercial litigations resolve before trial. In much the same fashion that one side in a dispute must raise the prospect of settlement before negotiations can commence, counsel can broach the notion of mediating the dispute. This can be done prelitigation or midlitigation, depending on the case. Indeed, it arguably is less of a "show of weakness" to be the one suggesting submission of the dispute to an independent facilitator who may to some extent evaluate the respective merits of the parties' positions. Proposing mediation also demonstrates a willingness to negotiate but within a structure that follows some procedures. It can be proposed from a position of strength as a pragmatic prospective solution to what otherwise might become a quagmire for both sides. Cases tend to diminish in value over time, particularly as costs are incurred. As mediation has become more accepted, it is easier to propose. The proof is in the proverbial pudding: Formal surveys and individual mediator reports alike demonstrate that greater than 80% of commercial disputes that voluntarily submit to mediation successfully resolve the matter.

ADR alternatives are appropriate means toward resolution of the substantial majority of commercial disputes. Practitioners who ignore this fruitful arena do so to the detriment of their practices and their clients.

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## Litigation



## Some Considerations When Electing to Process for Permanent Residence via Adjustment of Status As Opposed to Consular Processing

*By Neil S. Dornbaum and Kathleen M. Peregoy*

Sometime before one reaches the final phase of processing an employment

based immigrant petition, it is time to determine whether to complete the process in the United States through an application for adjustment of status filed with the United States Citizenship and Immigration Services (USCIS) or through issuance of an immigrant visa at a United States Consulate abroad. Most employment-based applicants physically present in the United States have the choice of pursuing either route, and therefore they must carefully consider each, to assess their relative advantages and disadvantages to make a well-reasoned decision on how best to proceed.

This article will identify some of the differences between the two processes that may bear on that decision, and offer some guidelines for discussion of the issue with clients. These guidelines are intended to help sharpen the focus of clients sufficiently to assist them in making the best choice for their particular situation. In review of the following discussion points and on reflection, you will see that there is no right or wrong selection, because many factors will affect, positively or negatively, the determination of the best course of action for each individual client. As with any legal issue, the choice made in each case will depend on the particular facts and circumstances in which the client finds him or herself. This article is organized in a checklist format that notes some of the advantages and disadvantages associated with each alternative, marked with a plus (+) or a minus (−) designations for ease of reference.

At the outset you must determine if the client is eligible to adjust. For example, foreign national crewmen, aliens in transit without visas, and aliens who entered under the visa waiver program pursuant to 8 CFR section 212.1 ( c ) as well as conditional resident investors under INA section 216 may not adjust status unless they are immediate relatives of United States citizens. Generally aliens who have engaged in unauthorized employment after January 1, 1997 are also ineligible; as are individuals who have failed to maintain legal status in the United States, including those who have violated status on prior visits to the United States who can also be disqualified from eligibility to adjust. Assuming, however, that adjustment is an available option, we can proceed to evaluate both adjustment and consular processing.

**Adjustment of Status**

*Processing Time*

(+) Where concurrent filing of the I-140 and I-485 is possible, adjustment of status may be faster.

*Medical Requirements*

(+) Completed in the United States. Individuals schedule examinations before a USCIS-approved doctor.

(+) Option to partially complete and submit application, for example, in pregnancy, the ability to complete when child is born.

*Interview Requirements*

(+) Most cases are approved by the USCIS Service Center without interview, but USCIS reserves the right to refer individual cases to the local district office for interview.

(+) If the case is referred for an interview, an attorney can be present.

(+) There will be no additional expense to travel to interview, because most interviews are waived. If an interview is scheduled, it will be held in district office where the principal and all family members reside.

(+) Flexibility in changing appointments, if needed.

**Consular Processing**

*Processing Time*

(+) In the event of quota retrogression, or if one is unable to make concurrent filings, or in the event of backlogs at the service center, consular processing may be faster.

*Medical Requirements*

(–) Medical exam is completed overseas by a consular approved doctor prior to appointment. (Generally must be completed 1–14 days prior to the appointment. This will extend the time one must be in the foreign country to complete the paperwork.

(–) No option for partial completion.

*Interview Requirements*

(–) An interview is always required in consular processing. The individual may be quizzed on his or her knowledge of job duties, employment and grounds of inadmissibility.

(–) There is no right to attorney representation at most consulates.

(–) Requires travel by the principal and all family members to the United States Consulate in the country of nationality (or last residence) requiring purchase of tickets and travel arrangements for principal applicant and family members at significant additional cost.

*Availability of Employment Authorization*

(+) Employment authorization is available to the principal, spouse and family members within approximately 90 days after filing for adjustment of status.

(+) Obtaining employment authorization may eliminate the need to extend nonimmigrant status during the pendency of the adjustment application, as well as the cost of the filing and attorneys' fees.

*Possibility of Portability to Enable Alien to Accept New Employment*

(+) Under AC21, employment-based adjustment applications are not required to remain employed with their sponsoring employer if USCIS does not adjudicate their applications within 180 days. They may leave that employer for a similar position and continue their case. Note the advantage here in the event of involuntary separation from a job, for example, in a layoff. (Caution: Current USCIS interpretation requires I-140 to be approved and I-485 to have been pending more than one hundred and eighty (180) days to benefit from portability).

(+) In the event of a merger, acquisition or sale of business unit after 180 days only requires a letter to USCIS notifying them of the change.

(–) Little or no flexibility in changing appointments and appointments are scheduled on short notice.

*Availability of Employment Authorization*

(–) No employment authorization is available during pendency of consular processing.

(–) *Must* continue to maintain nonimmigrant status during the pendency of processing or risk being out of status and accruing time toward the 3/10 year bars.

*Possibility of Portability to Enable Alien to Accept New Employment*

(–) No portability available; the individual must remain employed until the visa is issued.

(–) In the event of a merger, acquisition or sale of business unit, a new I-140 petition will need to be filed with USCIS and must be found to be a successor in interest.

*Travel Out of the United States*

(+ / -) Upon filing of an application for adjustment of status, applicants may have restrictions on travel outside the United States unless they are in H or L status. Applicants other than H/L holders must file for and receive advance parole permission prior to departure, or their adjustment application will be deemed abandoned. (Processing of an advance parole will average 30–120 days).

(+) Applicants for adjustment of status can travel under advance parole or may continue to use their existing H/L visas to return to the United States.

(+) There are no immigrant intent issues when traveling with advance parole.

(–) Applicants traveling on parole will normally be sent to secondary inspection upon returning to the United States prior to admission, to confirm identity and admissibility.

(+) Parole is valid for multiple entries and is a significant advantage for Chinese nationals whose visas are limited as to number of entries and duration of validity.

*Age Out For Children*

(+) If a child is near age 21, adjustment of status (especially concurrent filing may protect the child better than consular processing as to the right to continue processing after the child reaches 21).

*Travel Out of the United States*

(–) Must continue to maintain nonimmigrant status to travel abroad and could face delays in securing nonimmigrant visa abroad prior to return to United States.

(+) Consular applicants are able to travel without restriction assuming they have a valid visa for travel.

(–) During the pendency of application, the applicant must continue to maintain nonimmigrant status to return to the United States.

(–) Consular applicants can be denied nonimmigrant visas because of issues of immigrant intent after filing an immigrant petition.

(+) Consular applicants returning on valid nonimmigrant visas are normally not referred to secondary inspection.

*Age Out For Children*

(–) If a child is near age 21, there is no guarantee that the appointment will be scheduled before the age out occurs, therefore, adjustment of status may protect the child better than consular processing.

*College Applications/In-State Tuition*

(+) Merely having applied to adjust and providing a receipt notice may help in obtaining in-state tuition rates.

*Family Abroad*

(–) If the family (spouse and children) is outside the United States, principal will need to obtain permanent residence, process an I-824, prior to scheduling of consular appointment for the family, which will delay their entry.

*Marriage*

(+) In the event of long-range marriage plans timing may be easier with adjustment than with consular processing to make sure the marriage can take place in advance of the grant of permanent residence.

*Additional Document Requirements*

(+) No police certificates required.

(+) Medical exam submitted with filing.

(+) If a documentary problem is found, USCIS will request additional material and/or refer for interview. Applicant retains right of employment authorization and travel during continued pendency of processing.

*College Applications/In-State Tuition*

(–) It is unclear if having applied for an immigrant visa at the consulate is of similar persuasive force.

*Family Abroad*

(–) If the family (spouse and children) is outside the United States, principal will need to obtain permanent residence, process an I-824, prior to scheduling of consular appointment for the family, which will delay their entry.

*Marriage*

(–) Consular interviews are scheduled on short notice and not easily rescheduled, so it may not be possible to complete the marriage when planned.

*Additional Document Requirements*

(–) Police certificates are required from all countries where the applicant has lived for more than six months since age 16. This can be quite burdensome.

(–) Medical exam completed overseas at consular approved doctor prior to appointment. (Generally must be completed 1–14 days prior to appointment).

(–) If a documentary problem is found, the foreign national may need to remain abroad until issue is resolved.

*Delays*

(+) If grounds of inadmissibility is found or a security check delay occurs, applicants are able to remain in the United States and continue working until waiver is processed or security check cleared.

*Waivers and Appeals*

(+) If an applicant is subject to grounds of inadmissibility for which a waiver is available; it is preferred to process in the United States.

(+) The possibility of appeals and judicial review exists in the event of an adverse decision under the adjustment (Immigration Court, BIA and Federal Court).

*Delays*

(–) If a ground of inadmissibility is found or a security check delay occurs, the foreign national may be stranded outside the United States until the issues are resolved.

*Waivers and Appeals*

(–) There is no similar right of review in consular matters. Denial of an immigrant visa at a consular post, based on questions of fact, is essentially nonreviewable, although questions of law are reviewable through the Department of State Advisory Opinion Section. If a waiver of a ground of inadmissibility is required, processing time could be significant without the ability to return to the United States until the final waiver is granted.

(–) There is no possibility of appeal or judicial review if the case is processed

abroad.

**Conclusion**

As a general observation, processing time seems to have been the main determining factor for most individuals when considering adjustment as opposed to consular processing. Over the last several years though, the choice of adjustment of status or consular processing appears also to be impacted greatly not as much by personal factors but by the economy. With the economy causing layoffs and force reductions, maintaining one's job security and the security net of the AC21 portability provisions have prompted more individuals to file for adjustment and forego what might be shorter processing times via consular processing. Employers also seem to prefer that their employees opt for adjustment of status because it provides more predictability in that employees do not have to leave projects at a critical time for an indefinite period to complete medical examinations and attend a consular interview, especially when adjustment results in only a small number of referrals for actual interview and most individuals will be approved outright without interview.

As can be seen from above, many competing factors must be considered when choosing between consular processing and adjustment of status. Each applicant must weigh the relative importance of processing times, potential travel limitations, work authorization for themselves and family members, portability, travel costs, subjecting themselves to medical examinations in a foreign country, participating in an interview outside the United States, whether they plan to travel during the pendency of the application, whether their visa classification or country of nationality limits their ability to travel, additional documentary requirements, and the other issues they face that are unique to their situation. Because the existence of all of these factors can affect their choice, counsel should take care to discuss each of them with the client and to consider them all when attempting to guide the client to the right decision for his or her particular set of circumstances.

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## Litigation



## Are You Prepared to File Your H-1BS for Receipt by USCIS on April 1, 2008?

*By Neil S. Dornbaum and Kathleen M. Peregoy*

Employers will be able to file cap-subject H-1B petitions for receipt on April 1, 2008, requesting an effective start date of October 1, 2008. It is anticipated that

if efforts in Congress to increase the cap fail or do not materialize, then any delay in filing beyond April 1, 2008, could result in the potential loss of the H-1B, and consequently, the employee's ability to work. The cap has been a major issue in that it has been reached in eight out of the last 11 years. Since the number of H-1Bs available was reduced (in Fiscal Year 2004) from 195,000 down to 65,000, in each succeeding year employers have had to deal with a significantly reduced filing time frame. In 2006, the H-1B cap opened on April 1 and was exhausted on June 28th. This represented only a 58-day filing period. In 2007, the H-1B cap was exhausted on the first day of acceptance of submission, April 2, 2007.

Regarding the H-1B in general, U.S. businesses utilize the H-1B program to employ foreign workers in specialty occupations that require theoretical or technical expertise in specialized fields, such as scientists, engineers, or computer programmers. As part of the H-1B program, the Department of Homeland Security (DHS) and the Department of Labor (DOL) require U.S. employers to meet specific labor conditions to ensure that American workers are not adversely impacted, while the DOL's Wage and Hour Division safeguards the treatment and compensation of H-1B workers.

Employers must plan accordingly to work within the cap. With the significant number of filings expected due to the strong economy for 2008, and the experience during the past two years when the cap was reached earlier each time, we urge employers to identify and contact immigration counsel, with potential employees' credentials, as soon as possible so that their paperwork can be prepared and ready to file on or as close to April 1, 2008, as possible. We encourage employers to identify candidates early so that counsel can assess whether they are qualified for the H-1B as early as possible in 2008. Please remember that candidates must have a bachelors' degree or the equivalent at the time of filing. A candidate who does not have the qualifications *on the date of filing* will not qualify for receipt on April 1, 2008, even if they expect to have them shortly thereafter. This is a significant problem for students for whom an offer will be made but who will not graduate until May or June 2008. In this scenario, we once again encourage you to contact immigration counsel as soon as possible so that they can provide support to your human resources department in assisting in the decision whether employees can realistically assume they can be employed in H status, whether and when to file an H, setting realistic start dates, and planning a "gap" strategy if necessary.

Please also note that in addition to the H-1B cap for employees with a bachelors' degree or the equivalent, there are an additional 20,000 cap numbers set aside for candidates with U.S. Master's or Ph.D. degrees. These additional 20,000

numbers allowed for filing for U.S. Master's and Ph.D. holders through the end of April, and provide an additional 30 days or so in which to file for H-1B status. This year the U.S. Master's/Ph.D. degrees cap is expected to be reached even earlier, however.

Remember that individuals who already hold H-1B status and were previously subject to the H-1B cap are "cap exempt" and, although they must still file an H for the new employer, may file an H to transfer from one employer to another at any time and do not need to await the April 2008 filing date.

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## Litigation



## ICE Increases Enforcement Against Employers: Benefits of an Internal I-9 Audit

*By Neil S. Dornbaum and Kathleen M. Peregoy*

The U.S. Immigration and Customs Enforcement (ICE), the enforcement division of the U.S. Department of Homeland Security (DHS) on immigration

cases, has recently increased interior immigration enforcement. These enhanced efforts include targeting employers of undocumented or unauthorized employees for audit/investigation. The enforcement mechanisms against employers include not only civil fines, but potentially criminal charges and federal asset forfeiture of the tools or instrumentalities of these crimes.

**Recent Arrests Include Nationwide Operations**

Some of the increased efforts have been reported by the news media, including a nationwide search of the various facilities of the country's largest pallet company. That search extended to more than 26 states and, according to an ICE press release, resulted in criminal charges against seven current and former managers of the corporation for conspiring to transport, harbor, encourage, and induce undocumented individuals to reside in the United States for commercial advantage and private financial gain. From the description provided by ICE, the particular employer's violations were pervasive. More than half of the 5,800 workers on the payroll had invalid Social Security numbers or had numbers with names that did not match the names registered with the Social Security Administration. More than 1,000 foreign nationals were apprehended.

**DHS's New Get-Tough Approach**

ICE has proclaimed a new, tougher approach to employer violations. DHS Secretary Michael Chertoff proclaimed that DHS "has no patience for employers who tolerate or perpetuate a shadow economy. We intend to find employers who knowingly or recklessly hire unauthorized workers and we will use every authority within our power to shut down businesses that exploit an illegal workforce to turn a profit."

**Benefits of an I-9 Audit**

To try to determine if there are worker documentation issues that an employer's ordinary I-9 process did not uncover, an I-9 audit by immigration counsel is recommended.

In light of the fact that tougher enforcement is anticipated to be ongoing and the fact that potential penalties include back wages, civil money penalties, and possible debarment from all future approvals for at least one year, the cost for an on site I-9 audit is negligible.

The wisdom of engaging counsel to conduct a private I-9 audit becomes

apparent when one considers these potential benefits:

1. A private audit will reveal many correctable errors that could result in fines that would be quite costly if discovered in an ICE/Labor Audit.
2. Correcting errors in advance of an ICE/Labor Audit not only minimizes liability by reducing the number of "problem" I-9s that could trigger fines, but also would be a mitigating factor and may even be a good faith defense.
3. An I-9 audit can be done thoroughly and at a pace set by the employer, rather than by an investigator, who will provide short notice and an immediate date for disclosure of records. Therefore, it lessens the drain on company resources associated with the type of last-minute preparation normally required on receipt of an inspection notice, which may require production of all I-9s on three days' notice.
4. A private audit will identify common errors that might have been made by managers or others completing the I-9 forms and identify areas where additional training of managers and HR representatives as to IRCA's verification and documentation requirements is needed.
5. A private audit will identify systematic problems in the company's existing IRCA compliance program if any exist (for example, to retain necessary records, failure to reverify when required, etc., which can be remedied, thus mitigating or eliminating penalties should an audit be required by the government).
6. A private audit will catch errors early on, and permit corrections or amendments to the I-9s that cannot be made later—for example, after an employee is terminated.

If you have decentralized the company's I-9 process or not reviewed it for more than a year, now is the time to consider a private audit in light of government enforcement initiatives.

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## Litigation



## Just Phoning It In: Not a Good Idea

*By Brian T. Hermanson*

Have you ever had the brilliant idea that instead of actually going to court that you would instead just call your appearance in? How about making that call when your client is facing a prison sentence?

I would think most of us would agree that not standing next to our client when he or she is at a plea hearing is unthinkable. But let's think about it as the United States Supreme Court did in *Wright v. Van Patten*, 552 U.S._____(2008), decided on January 7, 2008.

The defendant was attending his plea hearing at which the judge was going to be sentencing the defendant. Van Patten was originally charged with first-degree intentional homicide, but he pled no contest to a reduced charge of first-degree reckless homicide. For whatever reason, Van Patten's attorney was not present in the courtroom during the plea hearing, but was able to take part in the hearing by way of a speaker phone.

At the hearing, the judge sentenced Van Patten to the maximum sentence of twenty-five years. Van Patten then hired other counsel and sought to withdraw his no contest plea. Van Patten claimed that his counsel's physical absence from the plea hearing had violated his Sixth Amendment right to counsel.

While the United States Supreme Court denied the appeal of Van Patten, a close review should be conducted of the actions of an attorney and the phoning in at an important step of a criminal action.

This was a case where there obviously was not an agreement as to sentencing. We would all agree that a hearing that will determine how many years your client will spend in jail is a critical step of the litigation and one at which a defendant has a right to be represented by counsel. I think most persons would agree that an attorney would be much more effective if present at the hearing rather than on the phone somewhere. There is no way counsel a client during the course of the hearing or to observe the nuances in the courtroom if the courtroom cannot even be seen.

Attorneys have argued that, in order for them to be effective, they must be able to have their client present. This allows for the attorney and his client to write notes to each other, to discuss the issues as the case proceeds, and for the client to have some level of confidence that the attorney is there watching out for his or her best interest. If the lawyer is not present, it would seem to seriously impair the ability of the attorney to communicate with the client, the state, and the judge. It seems to suggest that the attorney simply does not have time to be present to represent his or her client.

I am somewhat surprised that this plea hearing wasn't simply postponed until counsel could attend, but I am sure the defendant and the counsel's concern rose to new levels when the defendant received the maximum sentence under the law.

Can competent representation be done by phone? While the lawyer may be very skilled and well informed as to the law, the ability to be as persuasive and effective when not actually before the court is up for debate. Although doing a scheduling conference by phone may be completely appropriate, your client's freedom is not on the line during a scheduling hearing. When the question of one's liberty is at stake, every bit of the lawyer's skill and persuasiveness must come into play. To take a risk that you would be less effective because you are not able to attend the hearing may not be acceptable.

There is a reason that the saying suggests that a person is "just phoning it in." It means that whatever is going on is not important enough to merit the attendance of the person. While everyone would agree that the sentencing phase of a criminal case is a critical stage of the proceeding, would they not agree that the criminal defense lawyer is a critical player in that process? I would think that none of us want one of our cases to make it to the United States Supreme Court because of our failure to make it to a hearing in person.

While the trend in our practice is that it is getting more and more difficult to make every case on our calendar, I think most of our clients feel better when they see their advocate come through the door. In my opinion, we should give them at least that level of comfort.

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# Law Trends & News

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## Real Estate



## Tips for Nonresidential and Mixed-Use Condominiums

*By Vincent B. DePillis*
Featured Author

### 1. Mixed Use Condominiums Are Steadily Increasing in Number

New housing starts in urban areas are now more commonly in condominium form than in fee ownership form. There just isn't enough land for everyone to have fee ownership. Many of these condominiums include a significant commercial component. Small businesses, looking for the appreciation, security of tenure, and control of overhead, are buying the commercial units in such condominiums. These units

***Featured Author***

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are also attractive for passive investors, because the condominium association handles all of the building management. And in more and more cases, we see major retailers, especially grocery stores, purchasing or leasing the ground-level portion of these mixed use projects.

For the real estate practitioner, however, any kind of mixed-use condominium transaction poses quite a bit of danger, because most of us are not aware of all of the pitfalls.

**2. Use Issues**

One of the biggest issues in mixed-use projects arises out of conflicts between residential and commercial uses. Residential owners are often not prepared for the noise and smell issues that arise in living over a pizza parlor, a grocery store, or a neighborhood pub. When you represent a commercial buyer or tenant, make sure that the declaration does not contain vaguely worded provisions about "nuisances" that could permit the residential owners to hamstring the legitimate operations of the commercial occupants.

**3. Parking**

In large mixed-use projects, there are usually separate garages with separate security. The key issues here are whether the unit owners can charge for parking, validate parking, use parking revenue to offset expenses, and so forth—all of the issues that you will be familiar from in dealing with standard retail and office development. The difference is that you will be dealing not with the landlord, but with the condominium association. Make sure that the landlord/ condominium owner will have the right under the condominium declaration to deliver the parking rights that the commercial unit owners need.

In small mixed-use projects, the problem tends to be access—there may be several spots reserved for the commercial unit owner and its clients, but no separate security gate. The commercial unit owner may want the garage to be open for its clients, the residential unit owners may want it closed for security. There is no easy resolution for this conflict. Just be aware that a commercial unit owner may not have the ability to insist that the garage remain open.

**4. Cost Recovery**

Form leases typically pass through 100% of landlord's costs in connection with the property (proportionately based on relative square footage). Powerful or

well-informed tenants negotiate limitations on these pass throughs—for example, for capital improvements, and so forth. In the condominium context, it is easy to overlook the exclusions, because they are buried in the condominium budget and the assessment. The lease may simply say that condominium assessments are a permitted operating cost. If the tenant does not challenge this, the condominium's special assessment for roof repair, its legal bills for collecting delinquent assessments, the cost of replacing the defective dryvit skin—all are passed through to the tenant—a result the tenant may not be expecting.

A related issue is to determine whether the condominium documents appropriately distinguish between residential and commercial expenses. Does the commercial unit owner pay a share of the concierge for the residential owners? What about the cost of residential deck and balcony repair? Should that be a commercial expense?

**5. Building Modifications**

Commercial users often need to modify the building (outside the unit) to accommodate their particular use. They may need to install signage, HVAC equipment, communications equipment and so forth. All of this requires the consent of the condominium association, unless the declaration specifically permits such installations. The landlord/unit owner may not have the right to deliver what the commercial tenant needs in this respect.

**6. Lease Form Issues**

It may be apparent from the above discussion that standard lease forms are often not properly adapted to a condominium context. Don't let your clients, landlord or tenant, lease a condominium unit without carefully thinking through the effect of the condominium context on the standard lease boilerplate.

**7. Changing the Rules of the Game**

In reviewing condominium documents for a prospective buyer or tenant in a mixed-use condominium, be aware that the documents can be amended by vote of the owners—and often the residential owners have a majority interest. Is the commercial unit owner appropriately protected against a power play by the residential owners? For instance, could the residential owners pass a regulation that probibits evening or early morning deliveries, thereby crippling the operations of a grocery store tenant? You should look for text that specifically prohibits declaration amendments and regulations that adversely impact

commercial units, except with the commercial unit owners' consent.

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## Real Estate



## Investigating Real Estate Scams: What to Look For

*By Arnettia S. Wright and Devona K. Wade*

### Foreclosure Rescue Scams

- Are mortgage payments behind?
- Have foreclosure proceedings commenced?
- Is the "helper" unsolicited?
- Is there a "temporary" title change?
- Can the buyer stay in the home?
- Is there a leaseback arrangement?
- Did the buyer pay the homeowner fair market value?

### Mortgage Elimination

- How much does it cost to use the service?
- How quickly does the mortgage “go away”?
- Are there promises of loopholes?

**Home Improvement Fraud**

- Is there a home improvement loan?
- In whose name is the loan?
- Does the person who took out the loan own the property?



**Equity Skimming**

- How much is the mortgage on the property?
- Does the mortgage reflect fair market value?
- How much did the buyer pay the seller for the property? Is it the same as the mortgage?

**Illegal Flipping**

- When was the property purchased?
- When was it sold?
- Does the selling price reflect fair market value?
- Does the selling price reflect the appraised value based upon an independent appraiser?

**Equity Fraud**

- Whose name is on the mortgage or loan documents?
- How much equity is there in the property?
- How much is the property worth?

**Fraudulent Loan Origination**

- What is the credit score upon which the loan terms are based?
- What is the buyer’s debt-to-income ratio?
- What is the selling price of the property?

- What is the monthly mortgage?

**Land Fraud**

- Is the offer to purchase the land unsolicited?
- How long has the seller owned the property?
- Has the property been inspected?
- What is the asking price for the land?
- Does the asking price reflect the fair market value?

**Rental Fraud**

- Is there a “satisfaction of loan” recorded in the land records?
- Research the authenticity of the satisfaction by contacting respective parties.
- Was the satisfaction filed by the renter of the property?
- Are there any other encumbrances against the property?
- Did the renter take out any loans against the property?

**Straw-Man Scheme**

- Is there a third party involved in the transaction who orchestrates the deal?
- Is the loan based upon the credit history of a “middle man”?
- Does the “middle man” sign over the deed to the property to the third party?
- Does the “middle man” receive a small percentage of the proceeds of the sale?

**Counseling Agencies**

- Is the offer to help unsolicited?
- Is the agency promising to assist with saving money on the mortgage?
- Can the information be obtained from a free source?
- What is the agency’s fee for the services obtained?

**Predatory Lending**

- Is there a promise of a loan for “no money down” or “no credit check”?

- Have other lenders been consulted?
- What is the fair market value of the property being purchasing or refinanced?
- What is the interest rate of the loan?
- What are the fees and penalties associated with the loan?

**Aggressive Sales**

- Is the property in danger of foreclosure or governmental sanctions?
- What is the fair market value of the property?
- What other options are available to the “troubled party”?
- Where there any conveyances to the company/individual that is going to help the troubled party?

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## Real Estate



## Telecommunications Checklist

*By Gerry Lederer*

As a service to real estate professionals and their counsel, since 1998, I have periodically assembled a checklist of action items that such professionals should consider in response to legal and technological developments in the communications area impacting real estate. This article should not be considered legal advice, nor does it create an attorney-client relationship. Still, what follows is my best thinking on issues and developments of note. In this article, unless specifically noted, the words tenants and residents are interchangeable. Should you disagree with any conclusion or suggestion, or would simply like to add to the discussion, email glederer@millervaneaton.com. All such comments will be incorporated into future checklists which may be found at REsources. There are also a number of free downloadable forms and model communications available on the site.

**1. Conduct a Tenant Needs Survey**

Real estate professionals can never know too much about tenants' needs, especially their communications and IT needs. The only way to avoid being surprised by a tenant's technology needs is to ask what they need beforehand. As IP-enabled services (VoIP, IPTV) and wireless delivery mechanisms (WiFi, WiMax, etc.) gain market acceptance, property professionals need to know their tenants' technology needs now more than ever.

You also need to understand the basics of these services. For instance, while you can dial 911 on all VoIP devices, not all devices have an E-911 feature. E-911 provides the geographical locating information a traditional phone relays to the local emergency operator. VoIP phones will also not typically operate when the electricity is down. You might suggest tenants retain a single traditional landline or cell phone, if for no other reason than to call 911 in the event of an emergency or loss of power.

**Additional Insights:** Visit REsources for a tenant survey.

**2. Conduct a Physical and Legal Audit of Your Telecomm Space**

A physical and legal audit tells you what telecommunications space you have available in your easements, risers, and on your rooftops. It will also tell you who, if anyone, has a preexisting right to those spaces, including providers pursuant to state access laws. Such an audit is especially important if you have any bankrupt providers that have equipment on your property. You should also determine what space you have available to accommodate the wires and equipment of a telecommunication service provider (TSP) that might like to serve your building/community. The need to be in compliance with the "abandoned" wires rules also supports the need for annual physical audits.

**Additional Insights:** Visit REsources for a model survey.

**3. Learn About IP-Enabled Services (IPES)**

The digitization of voice, video, and data transmissions by means of "Internet protocol" and improvements in technology that permit all three services to be provided over a single wire are changing the face of the communications world. Internet protocol enabled services (IPES) are provided over a high-speed connection, typically provided by your local cable or phone company. In some new developments, these services are being offered by private fiber providers that assemble service providers to ride on the host network.

The biggest benefit of IPES to real estate professionals is that they provide the ability to offer choice without the need to run another wire into your building or through your community.

VoIP, or "voice over Internet protocol," is poised to challenge, if not supplant, the local and long-distance phone industry. IPTV will increasingly be available from the new AT&T to compete with traditional cable companies in the offering of video entertainment, while Verizon will compete by means of its new fiber to the home (FTTH) deployments.

There are downsides to IPES. Power and emergency identification are just two that we mentioned above. Real estate professionals need to understand the impact the migration from traditional voice to VoIP, or from cable to IPTV, will have on your bottom line or the bottom line of any communications marketing partners you may have. It is not unrealistic to believe that bundled services such as VoIP and IPTV will render separate offering of these services obsolete before 2010.

Finally, real estate professionals should investigate how IPES services might be incorporated into your business operations.

The FCC has a whole website dedicated to the issue.

**4. Understand the Rules on "Abandoned" Wires. Make Sure Your Tenants and Vendors Comply**

The wires which tenants have left in your raised floors, walls, and ceilings, as well as the unused cabling residing in your risers, are no longer merely a nuisance. They may now render your building out of code and jeopardize your fire insurance. Changes in the 2002 and 2005 editions of the National Electric Code (NEC) make it a violation either to have abandoned wires in your building's risers/plenums or to use any wires not specified by the NEC. For a detailed paper on what constitutes an abandoned wire and what are some of the proactive steps you can take, read *Changes in National Electric Code Affect Leases and Agreements* available from my web page.

**5. Amend Your Leases and Licenses to Address Abandoned Wires in the Tenant's Suite**

Once you have identified and addressed existing abandoned wires, implement policies that prevent the abandonment of wires in the future. You may choose to

employ security deposits or other means to address such concerns. At a minimum, you should amend your lease forms to require the removal of wires or payment of a fee sufficient to cover the removal of such wires. For more details and suggested language for leases, read *Changes in National Electric Code Affect Leases and Agreements*, which may be downloaded from my web page.

**6. Know the Differences in Rules Governing Inside Cable Wires Versus Inside Telephone Wires**

The FCC's rules governing telephone wires (47 C.F. R. § 68.105) and cable wires (47 C.F.R. § 76.804), and the right of building owners to take possession of either, are very different[1]. Cable operators retain greater autonomy over their cable wires than a telecommunication provider retains over its telephone wires. For instance, under the inside telephone wire rules cited above, a building owner has the right to move the demarcation point to the minimum point of entry and may rely upon state law to establish the price at which it may acquire inside telephone wires. Under the rules governing cable wires, a building owner may take steps regarding cable wires only if the owner has reserved that right at the time (s)he entered into the access agreement with the cable operator.

The FCC and the courts have been very aggressive in reading cable agreements and the cable wire rules to promote access to cable wiring as a means to promote competition in cable. In *CSC Holdings, Inc. v. Westchester Terrace at Crisfield Condominium,* 235 F. Supp. 2d 243 (S.D.N.Y. 2002), the Southern District of New York ruled that the FCC rules apply only when an incumbent provider is about to be ejected from a building. Thus, the rules do not apply as long as the cable operator had a right to serve even one tenant in the building in question. A month later, in *Time Warner Entertainment Co., L.P. v. Atriums Partners, L.P.,* 232 F. Supp. 2d 1257 (D. Kan. 2002), aff'd 381 F.3d 1039 (10th Cir. 2004), the court disagreed with the *CSC Holdings* court's conclusion. The *Atriums Partners* court found that the *CSC Holdings* court had failed to recognize the distinction between 47 C.F.R. § 76.804(a), building-by-building disposition of inside wiring, and 47 C.F.R. § 76.804(b), unit-by-unit disposition of inside wiring. It held that section 76.804(b) presumes that the incumbent cable provider may continue to provide service on a unit-by-unit basis while competitive providers serve other units. Thus, when a subscriber terminates service, the cable operator can be required to abandon, remove, or sell the home run wiring that serves that particular unit at the request of a homeowners' association (or presumably the building owner) even though the cable operator may have legal authority to continue to serve other units. Furthermore, the

*Atriums Partners* court held that the Kansas mandatory access statute did not provide a basis for Time Warner to refuse to abandon, remove, or sell the requested home run wiring. *See also CoxCom, Inc. v. Picesne Real Estate Group*, No. Civ. A. PB 02-1537, 2003 WL 22048781 (R. I. Super. Ct. August 21, 2003).

The FCC in 2003 issued an order modifying its existing rules in two ways that may benefit property owners. The Commission found:

> In the event of the sale of "home run wiring" in a Multi Dwelling Unit ("MDU"), the wiring must be made available to the MDU owner (or a *new* provider selected by the owner) during the 24-hour period before actual service termination by the incumbent. *Id*.¶ 3. (Home run wiring is the wire that runs from a subscriber's unit in an MDU to the building's minimum point of entry. 47 C.F. R. § 76.800(d)).

**7. Understand Sheetrock and Accessibility**

One of the biggest issues facing developers and managers that seek to introduce a competitive provider into their developments is at what point may they access the existing wiring. The FCC has ruled that you access the wiring at a point it is accessible. The Commission further determined that home run wiring located behind sheet rock is physically inaccessible for purposes of determining the demarcation point between home wiring and home run wiring. This conclusion was successfully challenged by the cable industry.

The conclusion was not so much rejected by the D.C. Circuit Court of Appeals in *Nat'l Cable & Telecoms. Ass'n v. FCC, 8*9 F. App't 743 (D.C. Cir 2004), as much as the court told the FCC that it failed to build a sufficient record to arrive at the conclusion.

In *Telecommunications Services Inside Wiring – Customer Premises Equipment,* CS Docket No. 95-184, FCC 07-111 (rel. June 8. 2007), the FCC reinstated the FCC's original determination. The effect of the order is to subject wiring behind sheetrock to the same FCC regulations as wiring inside individual single family residences and apartment units. Technically, the ruling allows apartment residents to acquire wiring outside their units, and the FCC seems to think this will help them promote competitive choice. In reality, use by residents is highly unlikely (and would be legally troublesome). The more practical benefit is that apartment building owners and community associations will now be able

to obtain access to the same wiring without going through the cumbersome procedures in the FCC's cable home run wiring rule.

The order does not in any way suggest that the FCC has mandated access to buildings.

Visit REsources for an examination of various courts' opinions on the application of the "Home Run" wire rules. They have been generally supportive of promoting competitive choice.

**8. Do Not Grant Access "Easements" to Telco or Cable Providers**

Real estate counsel could best serve their clients in these days of integrated service providers seeking access to their buildings and developments by ensuring that clients understand the differences among a lease, a license, and an easement. Although the author prefers to employ a license, others have made persuasive arguments for a lease.

TSPs, including cable multiservice operators, competitive local exchange carriers, and some Bell companies, are submitting easements rather than licenses for access to buildings. Easements are less desirable for owners than licenses for several reasons. Unlike an access license agreement, which conveys limited business rights to the telecommunications service provider, an easement confers a property right upon the carrier. Armed with such a property right, a TSP will be difficult, if not impossible, to control. Courts have issued conflicting opinions as to whether a cable operator has a right of access, under section 621 (a)(2) of the Communications Act, to easements.

Several courts considering the issue have held that the Cable Act grants cable companies a federal right to use both public and private easements. *Cable TV Fund 14-A, Ltd. v. Prop. Owners Ass'n Chesapeake Ranch Estates, Inc.*, 706 F. Supp. 422, 433-34 (D. Md. 1989); *Mumaugh v. Diamond Lake Area Cable TV Co.*, 456 N.W.2d 425, 428 (Mich. Ct. App. 1990).

However, in 1992, the Eleventh Circuit held that section 621(a)(2) authorizes a franchised cable company's access to easements on private property only when the owner of the property has dedicated the easements for the general use of any utilities. *Cable Holdings of GA., Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 610 (11th Cir. 1992). The district court had ruled that section 621(a)(2) grants cable operators the right to access any easements, even those granted by the property owner to a particular entity. The Eleventh Circuit ruled that such an interpretation would make section 621 unconstitutional, as it would require a property owner to grant access without providing just compensation. The court

applied a different interpretation of section 621(a)(2) as permitting a franchised cable operator to access private easements only when the owner has dedicated the easement to general utility use. *Id.*at 610. *See* also *Media Gen. Cable, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993).

The *Cable Holdings* case also stands for the proposition that granting an easement in favor of the ILEC may render space in the client's building accessible utility space. See *Cable Holdings* at 608-609. The 9th Circuit has taken a different interpretation that section 621 of the Cable Act does not grant a provider the right to couse private easements. *Cable Arizona Corp. v. Coxcom, Inc.*, 261 F.3d 871 (9th Cir. 2001).

**9. Learn The FCC's "Otard" Rules and That They Apply to More Than Just Satellite Video Services**

The secret of wireless communications is that they are anything but wireless. The installation of the telecomm and power wires required to support wireless devices are a real challenge to real estate professionals that will only become more acute in the future.

The challenges will come in the form of legal and physical limitations. The law is developing before our very eyes at the FCC and in state courts on these issues. Unlike its treatment of inside cable wires, the FCC has not been friendly to property owners in this area.

Since May 25, 2001, the FCC has limited governmental and nongovernmental restrictions on a consumer's ability to install an antenna for transmitting or receiving fixed wireless signals, or receiving multichannel video programming signals. The FCC's rules, cited as 47 C.F.R. § 1.4000, have come to be known as the Over the Air Reception Devices rules or "OTARD" rules.

In order to garner the FCC's protection, an OTARD must be:

1. Not more than one meter (39.37") in diameter;
2. Installed in an area for which the consumer has a property interest (a valid lease suffices); and
3. Installed in a site under the exclusive control of the consumer, i.e., it can not be a common area such as the roof or exterior wall of a multiple dwelling unit or office building.

The FCC and the Courts have reviewed matters involving the OTARD rules no less than ten times. Visit REsources for a collection of the decisions. Courts have

tended to find for the real estate interest while the FCC has tended to find for the OTARD user.

The FCC does provide two safe harbors for banning or limiting the deployment of an otherwise legal OTARD device: safety and historic preservation purposes. From the OTARD matters that have been litigated at the FCC, these safe harbors are ports that have not easily been reached. *See, e.g.*, *In re Victor Frankfurt*, 16 FCC Red. 2875 (2001).

Most recently, the FCC extended OTARD protections to Part 15 devices such as WiFi or WiMax devices in its *MassPort* decision (ET Docket No. 05-247, released 11/1/2006).

**10. Dealing With Dead Zones: In-Building Wireless Still Not Worth Real Estate's Investment, But In-Building Boosters for First Responders May Make Sense and May Be Required by Law**

The radio signals that make cell phones, PDAs, and public safety radios work are greatly reduced when passing through organic barriers (such as a tunnel or a mountain) and inorganic dense construction materials (think building walls). The result of this reduction in signal strength is that parts of your buildings are dead zones to wireless communications.

One fix for these dead zones is an "in-building" wireless or "signal booster" network that serves to create a mini cell tower within your building to counter any reductions in signal strength.

In the past, I have taken a controversial position that investing in such systems based upon the likelihood of financial reward was not a good investment for the real estate owner. Furthermore, should you invest in such a system, demand that it be a neutral host system that provides access to all carriers. I stand by both of those recommendations and believe history has proved my position to be correct.

The issue of in-building boosters to assist first responders is a very different question.

A major finding of the 911 Commission was that the first responders in the Twin Towers could not hear one another because of the lack of signal coverage in the high rises. The Twin Towers are not alone in lacking signal coverage. This will be increasingly become an issue for real estate professionals at the local level.

Some local governments, following the lead of the 911 Commission, are adopting

in-building signal strength standards (see chart at the link below for examples). The challenge to the real estate industry will be to ensure that the ordinances or code changes enhance public safety communications networks and not vendors' bottom lines. As one vendor's web page taunts, "[P]rivate building owners naturally resist, so local codes and ordinances have become the vehicle to . . . mandate deployments of signal boosters."

This same vendor estimates that "the relative costs of implementing a signal boosters system for building is between $0.15 and $0.30 per square foot," or, in their words, "less than the cost of trash pick up."

Unlike most building codes, the "in-building booster" ordinances or building specifications that are being adopted today mandate the requirement on all eligible buildings, not just new construction or major renovations. The code of the City of Burbank, California, is cited as the very first signal booster requirement. It provides:

> [N]o person shall maintain, own, erect, or construct, any building or structure or any part thereof, or cause the same to be done which fails to support adequate radio coverage for City emergency service workers, including but not limited to firefighters and police officers.

No definitive list of communities that have adopted such ordinances exists to my knowledge, but I have seen a list of no less that 40 communities and the list appears to be growing.

**11. Know Where Mandatory Access Rules Stand in Your State and the Impact Franchise Relief for Telcos Might Play**

Despite the bankruptcies of leading proponents of mandatory access, the issue has not gone away. There are efforts ongoing in the Congress, at the FCC, and in state legislatures to mandate access to buildings.

As of today, only Texas, Rhode Island, and Indiana have imposed mandatory access in favor of *telephone* companies to office buildings and MDUs. There are, however, 18 states and the District of Columbia[2] where some form of "mandatory access" rules are in place in favor of the local *franchised cable* operator.

It remains unknown whether the mandatory access rights currently enjoyed by

franchised cable operators will be extended to telephone companies if Congress or an individual state adopts telco franchise-free legislation. In part, that answer will depend on whether the state statute requires the entity be franchised by the local government as is the case in Pennsylvania[3].

There is also the practical question of whether the entity, be it a cable or phone company, is limited in a mandatory access case to provide only cable service. For instance, if a telephone company is granted access to provide cable in a building over the owner's objection, can the owner legally prevent the telephone company from offering phone service? A second legal question is whether the property owner has breached an exclusive contract with an existing provider if the owner provides providing access to the telephone company as required by law.

Visit REsources for updates on where things might stand in your state.

**12. Stay Abreast of Developments Impacting Your Ability to Execute Exclusive Contracts**

Despite having banned exclusive contracts between office building owners and common carriers[4], the FCC has not extended the prohibition to residential properties. The Commission has on more than one occasion declared that exclusive agreements in the residential setting can be procompetitive[5]. However, the Commission is currently examining where and when a real estate owner might enter into exclusive contracts. Speculation is that exclusives contracts could be banned in an October 2007 order[6] (See dockets 99-217, 96-98, 95-184 & 92-260).

**13. Understand COLR and Compensation Rules**

Prior to the Telecommunications Act of 1996, carriers of last resort often enjoyed exclusive local franchises, such that building owners and developers faced with the practical necessity of providing telecom services to their tenants had no option but to grant access to the incumbent carrier. In some states, building owners operated under the threat, if not the actual exercise, of eminent domain powers by existing telecommunications carriers to obtain access. Therefore, while a tradition, it is incorrect to treat existing carriers as invited guests. In fact, using Carrier of Last Resort (COLR) as a means to open a building owner's property to the carriers would compound potential Fifth Amendment issues.

A new issue is being debated in Florida where the COLR is stating that not only are they entitled to access developments, but are entitled to provide any service, regulated or unregulated, to the property. Should a property owner have the temerity to tell the COLR that it is limited to provide regulated services, the COLR is threatening not to provide services.

On March 13, 2007 the Florida Public Service Commission rejected these arguments in two important petitions.

1. *BellSouth Petition for COLR Relief (Nocatee Development)* – Limiting COLR to voice service in a development where competitor has been granted exclusive video and data rights does not rise to level of good cause for COLR relief, but may require developers/homeowners to make contributions in aid of construction.
2. *Embarq Petition for COLR Relief (Treviso Bay)* – Limiting COLR to voice service in a development where competitor has been granted exclusive video and data rights, and homeowners dues are used to pay for those services, does not rise to the level of a good cause waiver.

**13. Make Sure Clients Understand Bankruptcy Law and the Limitations on Self-Help**

TSPs once flooded with cash are now cash-poor or broke. Real estate counsel must assist property professionals to protect their constituents in the event of a TSP business failure: the building owner, the tenants, and the property professionals themselves. The plan of attack must ensure that:

- The building owner is protected from potential losses in revenue as well as from liens placed against the building by the subcontractors of the TSP;
- The tenants are protected from the loss of telecommunications services; and
- The property professionals are protected from themselves as they seek to engage in self-help.

Some suggestions on how such a plan may address these needs:

- Draft access agreements that require a letter of credit and also establish a priority position for abandoned property. Language might require in the event of the abandonment of telecommunications service facilities, the building owner may order the TSP to promptly remove the facilities from the building and restore the building to its prior condition or may declare the ownership of such facilities to have been abandoned and forfeited to the building.
- Police the title of the building to see if the TSP's subcontractors have registered mechanic's liens against the building.

- A TSP will likely continue to pay its rent. But if a TSP fails to make payment either before or after filing for bankruptcy, depending on the exact language used in the letter of credit, the building owner may be able to recover any unpaid license fees and other debts from the letter of credit.

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[1] See *In re Telecomms. Servs. Inside Wiring; In re Implementation of the Cable Television Consumer Prot. And Competition Act of 1992,* Report and Order and Second Further Notice of Proposed Rulemaking , 13 FCC Red. 3659, 3680-3693, ¶¶ 39-67 (1997), *modified in part and affirmed in part*, First Order on Reconsideration and Second Report and Order, 18 FCC Red. 1342 (2003).

[2] The jurisdictions and the cite to their laws are: Connecticut (Conn. Gen. Stat. § 16-333a) (1975), Delaware (26 Del. C. § 613)(1983) (only if utility easements also exist), District of Columbia (D.C. Code § 43-1844.1) (1981), Florida (Fla. Stat. § 718.1232) (1982) (condos only), Illinois (55 ILCS 5/5-1096) (1993), Iowa (Iowa Code § 477/1) (1977), Kansas (K.S.A. § 58-2553) (1983), Maine (14 M.R.S.A. §6041) (1987), Massachusetts (Mass. Ann. Laws ch. 166A, § 22) (1995), Minnesota (Minn. Stat. § 238.23) (1983), Nevada (Nev. Rev. Stat. Ann. § 711.255) (1987), New Jersey (N.J. Stat. § 48:5A-49) (1982), New York (NY Pub Ser § 228) (1995), Ohio (ORC Ann 4931.04) (1998); Pennsylvania (68 P.S. § 250.503-B) (1993), Rhode Island (R. I. Gen. Laws, § 39-19-10) (1993), Virginia (Va. Code Ann. § 55.248, 13:2) (1997), West Virginia (W. Va. Code § 5-18A-1) (1995), and Wisconsin (Wis. Stat. § 66.0421) (2001).

[3] See PA Stat. 68 §250.501-B(5), which defines "operator" as "the operator of a CATV system holding a franchise granted by the municipality or municipalities in which multiple dwelling premises to be served [are] located."

[4] See FCC Order No. 00-366, In the matter of Promotion of Competitive Networks, First Report and Order, WT Docket No. 99-217 (rel. Oct. 25, 2000). The rule reads:

> No common carrier shall enter into any contract, written or oral, that would in any way restrict the right of any commercial multiunit premises owner, or any agent or representative thereof, to permit any other common carrier to access and serve commercial tenants on that premises. 47 C.F.R. § 64.2500.

[5] See, e.g., FCC Order No. 97-376, In the Matter of Telecommunications Inside Wiring, Report and Order et. al, CS Docket No. 96-184, MM Docket No 92-260, rel. October 17, 1997.

[6] As recently as February 1, 2007, FCC Chairman Martin stated: "We will continue to take steps to remove regulatory impediments to the entry of new service providers into the video market by, for instance, *ensuring that consumers living in apartment buildings are not denied a choice of cable operators*" (Emphasis added). Testimony Prepared for Full Senate Commerce Committee Hearing on Accessing the Communications Marketplace: A View From the FCC delivered by Chairman Martin is available at www.fcc.gov.

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