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# Law Trends & News

Practice Area Newsletter

FALL 2009
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## Chair's Note

Dear Division Member:

Below is the first issue of *Law Trends* for the 2009–10 bar year. As always, the editors believe 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 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.

In this issue, we have several estate planning articles, articles on some litigation trends, and things to look for in negotiating a commercial lease. Also in this issue are articles of interest to young lawyers, including what to do in a first interview with a client, how to conduct yourself during discovery, and many more. We are also continuing this year with our articles about practice tips for the solo and small firm practitioner.

With this issue, *Law Trends* is now in its sixth year. We hope you agree that with each issue, *Law Trends* continues to provide meaningful articles for each of you. We trust that this issue, like the others, will be helpful to you in your daily practice. I encourage you to take just a few moments to read the list of articles below. Of course, the issue 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

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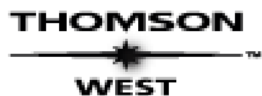


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newsletter, please contact Jim Schwartz at attyjls@aol.com. Jim is now in his sixth year as editor-in-chief, and I thank him for his work and dedication.

Best regards,
James M. Durant, III
*Chair, General Practice, Solo & Small Firm Division*

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### Featured Author

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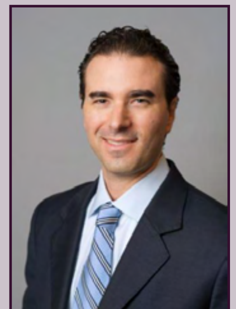

**Bradly S. Shear** is managing partner of the Law Office of Bradley S. Shear, LLC, located in the Washington, D.C. metropolitan area. His practice focuses on estate planning, entertainment law, and social media law. Bradley has blogged and lectured about the need for a social media executor when creating an estate plan. His nationally recognized blog, http://www.shearsocialmedia.com, is the leader in discussing legal issues that affect social media content providers and users. Bradley can be reached through his website at http://www.shearlegal.com or at 240-743-8880.

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## Expanding the Pie in Employment Mediations

*By Nancy Maisano*

Mediation of employment disputes offers an excellent opportunity for creativity in generating options for resolution. Nontraditional or nonmonetary issues that address the underlying interests of one or both parties increase value in a negotiation or "expand the pie" in an otherwise distributive bargaining session. While good strategy for mediation includes discerning the underlying interests

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of both your client and opposing party, too often nonmonetary interests are not adequately explored in this analysis.

Employment disputes have a profound impact on the lives of the parties. As a result, underlying issues that are not necessarily legal or monetary may serve as barriers to settlement in employment mediations. Full resolution and more satisfying outcomes in mediation result from negotiations that include direct discussion of the parties' underlying interests and settlement components that address those interests.

For example, in a sexual harassment case involving a woman who had PTSD due to earlier sexual abuse and was severely traumatized by the work environment, the employer agreed as a component to the monetary settlement amount to pay plaintiff's future psychotherapy bills up to $10,000. In a disability discrimination discharge case set in a very small town in a rural area, plaintiff could not accept leaving her employment after 30 years without a retirement party. In addition to the settlement amount, the employer agreed to host a retirement party for plaintiff and to give her the company's traditional retirement gift—a riding lawn mower. In an age discrimination/constructive discharge case involving a high level executive, as part of a severance package, plaintiff agreed to be available to work as a consultant on a contractual basis to alleviate defendant's business concerns during the acquisition of another entity.

The parties' underlying interests in any given mediation vary greatly and provide opportunity for the advocates and mediator to be creative in identifying options for resolution and expanding the pie for bargaining. The following is a nonexclusive list of non-traditional or nonmonetary components of resolution in employment mediations:

### *Reputation Concerns*

- Confidentiality clause with enforcement mechanisms
- Nondisparagement clause
- Agree on content of statements to press
- Joint press release
- Change basis of employment separation from termination to resignation or layoff
- Expunge (or seal) negative personnel records
- Agree to oppose public disclosure requests for sensitive documents relating to plaintiff

- Destroy all copies of investigator's flawed report and all supporting documents
- Agree on announcement to other employees regarding the separation/ departure of plaintiff

### *Payment*

- Agree to specifically characterize settlement amount for tax purposes
- Payment of bonus or other delayed monetary component of salary
- Structured payment of settlement amount to minimize tax consequences and/or accommodate defendant's cash flow concerns
- Deposit of settlement amount to education fund or other annuity with tax benefits to employee
- Contribute portion of settlement amount to charity of plaintiff's choice
- Contribute to pension/retirement account
- Payment of future therapy/medical costs
- Reimburse future tuition costs
- Reinstate annual leave/sick leave for severance payout

### *Plaintiff's Future Employment*

- Letter of recommendation (positive information only about plaintiff's performance)
- Neutral reference letter (dates of employment, position held)
- Agree on response to inquiries from prospective employers
- Identify specific individual to respond to reference calls from prospective employers
- Agree on date of employment separation
- Outplacement assistance
- Renegotiation of noncompete agreement
- Notification of future job openings with defendant

### Policy Changes/Remedial Measures

- EEO training or other training to perceived offenders/management
- Institute/improve process to handle discrimination complaints or accommodation requests

- Institute/improve process for reporting and investigating harassment complaints
- Institute and disseminate religious accommodation policy and request procedure
- Investigate and take appropriate disciplinary measures against perceived offenders
- Appoint high level manager to remain involved to monitor and prevent similar problems
- Post/disseminate antidiscrimination policies/procedures

### *Other Claims*

- Mutual release
- Agree not to challenge claim for unemployment benefits or workers' compensation benefits
- Agree to facilitate eligibility for long-term disability benefits or medical retirement
- Agree to assist in future litigation

### *Emotional/Relational*

- Apology (written or oral)
- Employer's recognition or acknowledgement of difficult outcome for, or impact on, plaintiff
- Direct conversation between parties at mediation

### *Employment Status*

- Reinstatement to former position
- Hire plaintiff as contractor for finite projects
- Reinstate/transfer plaintiff to a different position as reasonable accommodation
- Employ accommodation consultant to identify potential disability accommodations
- Agree not to reapply or accept reemployment with defendant
- Continue employment status with new title for finite period to assist in job search
- Continue employment status without pay until vesting of retirement benefits

- Agree to retain seniority status and avoid break in service for future employment

### *Transition*

- Inventory of and return of company property by plaintiff
- Continued assistance and cooperation by plaintiff to train replacement
- Agree on timing and manner of removal of plaintiff's name from employer's website
- Agree on wording of automatic reply to e-mails sent to plaintiff's email address with employer and agree to timing of ending functionality of plaintiff's email address

### *Benefits and Perks*

- Continue health insurance coverage at employer's expense or payment of COBRA benefits
- Continue employee benefits and perks (i.e., gym membership, employee discount)
- Provide company services/products at no cost (i.e., free annual cruise on defendant cruise line)
- Continue access to professional development training offered to current employees
- Certificate of appreciation recognizing plaintiff's long tenure
  Company sponsored retirement party

*Nancy Maisano, founder of Maisano Mediation, LLC in Seattle, has worked exclusively as a mediator since 2001. Nancy has mediated more than 700 federal and state employment discrimination claims and other employment-related claims including wage and hour violations, breach of contract, FMLA and whistleblower violations. She can be reached at Nancy@MaisanoMediation.com.*

### Note

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## Attorneys, Meet GINA

*By Scott H. Husbands*

On May 21, 2008, the federal government added yet another acronym to the vocabulary of employment lawyers, human resource administrators, and countless other professionals: GINA (the Genetic Information Nondiscrimination Act). GINA aims to protect insurance policyholders and employees from discrimination based on genetic information. If you are a

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general practitioner or employment lawyer, you will need to get to know GINA.

You will hear more about GINA in the coming months as Title I of GINA, which relates to healthcare coverage, just took effect in part on May 22 and will be fully in effect by May 21, 2010. Title II of GINA, which relates to employment, took effect on November 21, 2009.

GINA's journey from drafting to enacted law was a long one (almost 13 years according to one group), and its eventual passage was considered a major victory by groups that closely follow genetic research issues. As genetic testing becomes more commonplace, GINA will no doubt play a prominent role in our legal careers.

Prior to GINA's passage, many state legislatures had passed similar legislation. Like other federal legislation, GINA sets a floor for states. No state may provide less protection than GINA requires. But, federal regulators certainly won't blink if your clients decide to provide more protection than it mandates.

According to the U.S. Department of Health and Human Services (HHS), Title I of GINA generally prohibits health insurers or health plan administrators from requesting genetic information of an individual or an individual's family members. It also prohibits use of the same information to make decisions about coverage, rates, or preexisting conditions.

Title II of GINA prohibits most employers from using genetic information for hiring, firing, promotion, or any other decisions regarding terms of employment. Employers with fewer than fifteen employees can take a deep breath though—they're excluded from GINA's Title II employment-related requirements; such employers should still beware as they may not be excluded from coverage under similar state laws.

GINA is not retroactive, which means that it will be inapplicable to acts or omissions that predate its applicable effective dates. Any future acts or omissions that are based on information collected before its effective dates can still create problems. With that in mind, it will be important to help our clients develop top-down, bottom-up, and side-to-side comprehensive approaches to managing sensitive genetic information and collection practices. We should help them to review all current forms and processes to make sure they are compliant.

Know the exceptions to GINA's employment-related requirements and GINA's general definitions. These were a major focus of the U.S. Equal Employment Opportunity Commission's (EEOC's) proposed regulations, which required

comment by May 2009. Exceptions include, among others, employers that inadvertently request genetic information, FMLA-required practices, and DNA testing for law enforcement. Keep a close eye out for announcements relating to EEOC's final regulations.

GINA will undoubtedly touch many of our careers if its state-based versions haven't already. As lawyers, we should understand the ins and outs of GINA to make sure our clients' practices are consistent with federal (and state) required minimums. Additional information on GINA is available from HHS at www.hhs.gov and EEOC at www.eeoc.gov.

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**Note**

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## Separation Pay and IRC Section 409A: A Little Planning Can Go a Long Way

*By Amber K. Quintal*

Deferred compensation, which is often an element of a severance package, can have unanticipated tax implications. Particular attention should be paid to draft and operate the deferred compensation plan so that it will be consistent with Internal Revenue Code Section 409A (section 409A) and the Final Regulations

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thereunder, either by complying with the rules of section 409A or by meeting an exception to section 409A. Section 409A applies generally to all nonqualified plans1 that provide for the deferral of compensation. Under the Final Regulations, a plan generally provides for the deferral of compensation if, under the plan, a service provider (such as an employee) has a legally enforceable right to compensation during a taxable year that is or may be payable in a later taxable year. Many plans that provide for separation pay may fall within this broad definition of a nonqualified deferred compensation plan, which can have severe tax consequences for the service provider if the plan violates the rules under section 409A.

## If the Plan Is Subject to Section 409A

If the plan is subject to section 409A, it must be both written and operated in compliance with the section 409A rules. Generally, section 409A requires (i) distributions occur only upon specified permissible payment events, including separation from service, (ii) no acceleration of distributions is allowed, except as provided by the Final Regulations, and (iii) qualified deferral elections. Distributions to key employees of public companies from plans subject to Section 409A must be delayed for at least six months after separation from service. If the rules are violated, the service provider is subject to (i) income tax on the amount deferred for the current year and all prior years in which the amount was not subject to a substantial risk of forfeiture, (ii) a penalty tax of 20 percent of the amount deferred, and (iii) interest at 1 percent over the underpayment rate starting from the date the amount was not subject to a substantial risk of forfeiture.

To avoid the difficulty of continually ensuring that the plan is written and operated in compliance with section 409A, many plans are written specifically to be within either a short term deferral or a separation pay plan exception to section 409A.

## Short-Term Deferral Exception

The “short-term deferral exception” excludes from compliance with section 409A compensation that is paid within 2½ months of the end of the service provider’s (or service recipient’s) taxable year in which the compensation was first no longer subject to a substantial risk of forfeiture. This exception is most likely to apply to separation pay agreements that are executed close to the time of the separation from service where the payments are made within a short time of separation.

### Separation Pay Plan Exception

The "separation pay plan exception" applies only to involuntary or "good cause" separations or separations as part of a window program. The amount of the payments under the plan cannot exceed the lesser of two times (i) the individual's annualized compensation from the tax year preceding the year of separation, or (ii) the qualified plan compensation limit ($245,000 in 2009). All payments under the plan must be made no later than December 31 of the second calendar year following the year of termination. The separation pay plan exception is often referred to as the "two years, two times rule" due to these limitations. The separation pay plan exception applies only to compensation that is conditioned on separation from service and does not apply to compensation the service provider could receive without separating.

The Final Regulations contain a safe harbor under which certain "good reason" separations will be treated as involuntary separations, if the separation occurs within two years of the existence of one or more specified conditions. The full list of the good reason conditions within the safe harbor can be found in Treas. Reg. section 1.409A-1(n)(2)(ii)(A). The service provider must provide notice within 90 days of the existence of one or more conditions to the service recipient, who then must have at least 30 days to cure the condition. Also, the amount, time and form of the payment upon the "good reason" separation must be substantially the same as those for employer-initiated involuntary terminations.

### Conclusion and Recommendations

When drafting agreements or plans that provide for separation pay, attention should be paid to whether the plan will be subject to section 409A or will be written to fall within an exception. If the plan is subject to section 409A, it must be written and operated fully in compliance with the Final Regulations. The penalties for any violations of the section 409A rules are severe. Consider whether the plan could be drafted to fall within either the short term deferral exception or separation pay plan. If the plan is designed to fall within the separation pay plan exception and will provide for payments upon "good reason" terminations, consider using the safe harbor within the Regulations for additional assurance that the "good reason" termination will be treated as an involuntary separation by the IRS.

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## Endnote

1. A severance package would generally be a "nonqualified plan." A "qualified plan" is a plan that qualifies under ERISA, such as an IRA or a 401(k).

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# Understanding Franchise Law

*By Leslie D. Curran*

Few franchise law practitioners come out of law school plotting a course to help the next great franchise system expand globally. Most likely, this is because few new attorneys and law students have ever even heard of franchise law or understand what franchise attorneys do on a day-to-day basis.

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Franchising is a business model that companies use to expand their brand or system. If a company plans to use franchising to expand, the company that has developed a system and name will grant a third party the right to operate a business under the system and name in exchange for the third party paying certain fees. The Federal Trade Commission (FTC) and a number of states have enacted legislation that regulates the sale of franchises and the relationship between the franchisor and its franchisees. Generally speaking, a franchise practice representing franchisors focuses on advising franchisors on the regulatory requirements, drafting franchise agreements and related agreements, counseling franchisors on day-to-day issues that arise in connection with working with franchisees, and counseling franchisors on dispute-related issues.

Before addressing laws and regulations that are unique to franchising, franchise attorneys often find themselves advising companies on corporate and trademark issues. For example, a company considering franchising may wish to form a new entity to offer franchises and must decide what type of entity to form, how to organize it, and what organizational documents are necessary. Because franchisees buying into a system will want the unrestricted right to use the name and mark used by the system, a franchise attorney often will work with the franchisor to obtain federal registration of a trademark.

Franchise attorneys must also become familiar with the patchwork of federal and state laws that require franchisors to disclose certain information to franchisees before a franchise is sold. The disclosures are included in a disclosure document, which is similar to a prospectus for a security. The FTC Rule, promulgated in 1979, did not preempt more protective state laws, and 15 states enacted laws that regulate franchise sales. Among other things, the state laws require some additional disclosures and prohibit certain agreement provisions (i.e., choice of law, choice of forum, governing law). Eleven states require franchisors to submit a copy of the disclosure document to the state regulatory authority for review and approval before the franchisor can sell franchises in that state. These states are known as "franchise registration states." In addition, eight states require that all advertising of franchise offerings be filed with the state before use. Most of these states place restrictions on the types of claims that can be made in the advertisements (such as the franchisor cannot refer to the franchise as a safe investment).

Because the purchase of a franchise often involves a substantial investment of capital by the franchisee, a number of states have also enacted laws to protect the franchisee and its investment. These laws are referred to as "franchise relationship laws" and restrict, among other things, termination of the franchise

relationship, refusing to renew the franchise agreement upon expiration, and transfer of the franchise. For example, under many of these laws, a franchisor is prohibited from terminating a franchise unless the franchisor has good cause and has provided the franchisee an opportunity to cure.

Franchise practitioners spend a considerable amount of time drafting and negotiating agreements between the franchisor and its franchisees and between the franchisor and third parties, such as vendors and suppliers. The franchise agreement between the franchisor and the franchisee is the cornerstone of the franchise relationship and is likely to be in place for a number of years. While no two franchise agreements are identical, most include provisions such as the grant of a trademark license, the right to operate the franchised business, payment of fees, terms of the rights granted, limitations on how the franchisee can use the franchisor's trademarks, operational standards and specifications, restrictions on products and services that the franchisee may offer, reporting requirements, default, termination, post-termination obligations, restrictions on competition and disclosure of confidential information, and procedures for dispute resolution.

Finally, as with any business relationship, there is a dispute resolution component to a franchise practice. Franchise litigation attorneys typically deal with claims such as violations of franchise sales laws or franchise relationships laws, misrepresentations during the franchise sales process, failure to pay amounts due, failure to make required refunds, and failure to provide support. Franchisors typically try to control litigation somewhat with contractual provisions that require the franchisee to submit certain claims to mediation or arbitration or require the franchisee to litigate only in a specific forum.

Perhaps the most rewarding part of being a franchise attorney is working with businesses on a broad basis to help solve a wide variety of legal issues as a company expands. For a new attorney considering a legal practice that focuses on helping emerging and mature businesses, this might be the right niche!

**Ready Resources**
*Fundamentals of Franchising*. Third Ed. 2008. PC # 5620126. ABA Forum Committee on Franchising. To order, visit http://www.ababooks.org.

*Leslie Curran is a partner at Plave Koch PLC (www.plavekoch.com) in Reston, Virginia. She has practiced in the field of franchise law for more than nine years representing domestic and international clients in franchising, licensing and distribution matters across diverse industries. You can reach Leslie at 703-*

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**Note**

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## Location, Location, Location: Same-Sex Relationship Rights by State

*By Daniel R. Pinello*

The number one rule in real estate—location, location, location—also applies to the relationship rights of same-sex partners in the United States. Where lesbian or gay couples live will determine what rights they have, and those rights vary greatly depending on the couples' home states. Attorneys should understand the

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different legal regimes regarding same-sex couples to advise their affected clients adequately.

Five jurisdictions (Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont) currently authorize civil marriage for same-sex partners, and the District of Columbia Council is poised to add the nation's capital to that list. Last month, however, Maine voters repealed a marriage-equality statute that the Pine Tree State legislature and governor adopted in May.

Even though New York does not permit same-sex nuptials within its own borders, the Empire State presently recognizes the marriages of lesbian and gay pairs validly performed in other jurisdictions.

Another five states have broad relationship-recognition laws (typically termed "civil unions" or "domestic partnerships") that extend to same-sex couples all or nearly all of the rights and responsibilities given to married couples under state law: California, Nevada, New Jersey, Oregon, and Washington. Four other states provide limited relationship recognition: Colorado, Hawaii, Maryland, and Wisconsin.

New Mexico and Rhode Island do not regulate the recognition of same-sex relationships one way or another.

Despite some states recognizing same-sex marriages or relationships, the 1996 federal Defense of Marriage Act (DOMA) specifies that no state is required to honor same-sex marriages performed elsewhere. In addition, DOMA limits federal marital benefits to opposite-sex couples. Hence, married gay and lesbian pairs in, say, Massachusetts may not file joint federal income-tax returns or receive Social Security survivor benefits.

Ten state constitutions have been amended to include "Mini-DOMAs" (limiting marriage to one man and one woman): Alaska, Arizona, California, Colorado, Mississippi, Missouri, Montana, Nevada, Oregon, and Tennessee. Another ten states have statutory (but not constitutionally based) Mini-DOMAs: Delaware, Hawaii, Illinois, Indiana, Minnesota, North Carolina, Pennsylvania, Washington, West Virginia, and Wyoming. The distinction between statutes and constitutional amendments is important, of course, because the former are easier to repeal than the latter.

Nineteen state constitutions have been amended to incorporate "Super-DOMAs" (denying all forms of relationship recognition to same-sex couples): Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana,

Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. Alaska and Montana have statutory Super-DOMAs.

As these lists suggest, many states have passed both statutes and constitutional amendments limiting marriage to opposite-sex couples. Virginia, for instance, has both narrow and broad statutory marriage bans in addition to a constitutional amendment. Moreover, some state law may not be consistent. A 2006 amendment to the Wisconsin Constitution, for example, says that "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." Yet in 2009, the Wisconsin Legislature (with the consent of the governor) adopted a domestic-partner registry that extends to same-sex couples "certain dependent or survivor benefits for employee benefits, health and mental health and after-death decision making, probate matters, property matters, and motor vehicle titles." The Wisconsin attorney general has refused to defend the state's new domestic-partnership law in court, saying that it creates a legal status "substantially similar" to traditional marriage.

The difference between Mini-DOMAs and Super-DOMAs is especially noteworthy with regard to their impact on same-sex couples. The Virginia Constitution, for example, states:

> Only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

More comprehensive language designed to limit the relationship options of lesbian and gays pairs would be difficult to imagine.

The Virginia provision is far more ambitious than, say, California's now notorious Proposition 8 of 2008, which states: "Only marriage between a man and a woman is valid or recognized in California." This language left in tact the comprehensive statutory system of domestic partnerships that grants virtually all of the rights and responsibilities of civil marriage to same-sex couples in the Golden State. Likewise, despite the passage of Measure 36 ("It is the policy of

Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage") in 2004, the Oregon Legislature three years later enacted full civil unions for gay and lesbian couples.

Accordingly, the objectives of Super-DOMAs are substantially greater than those of Mini-DOMAs such as Proposition 8 and Measure 36. While the latter speak just to marriage and are silent about relationship arrangements such as civil unions, domestic partnerships, and reciprocal benefits, the former aspire to insure that same-sex pairs can be nothing other than complete legal strangers to one another. In short, Mini-DOMAs preserve the word "marriage" exclusively for opposite-sex couples, but not necessarily the attributes of civil marriage. Whereas, the goal of Super-DOMAs is to restrict the word *and all of its attributes* to heterosexual pairs. Thus, lesbian and gay couples in California domestic partnerships or in Oregon civil unions inherit from each other under state intestacy law, may adopt or sue for custody of or visitation with minor children of the couple, and enjoy a plethora of other rights comparable to those of civil marriage, regardless of the constitutional Mini-DOMAs. Yet same-sex pairs in Super-DOMA jurisdictions like Virginia may not benefit from any such attributes of marriage.

Even constitutional statements less absolute than Virginia's language have substantial bite. Although Michigan's provision (known as Proposal 2) is more succinct ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose"), the Michigan Supreme Court nonetheless interpreted the words "or similar union for any purpose" to require the denial of health insurance benefits to the same-sex partners of state employees. *National Pride at Work, Inc. v. Governor of Michigan* (2008). The high court held that Proposal 2's language was unambiguous and thus prevailed, despite the fact that Citizens for the Protection of Marriage, the Michigan interest group responsible for placing the amendment on the 2004 ballot and its primary supporter in the ensuing campaign, published and distributed a brochure explaining that the measure would not preclude public employers from offering health-insurance benefits to their employees' domestic partners. The Michigan result can be particularly difficult for such partners if they do not have their own jobs that provide comparable health insurance coverage.

Super-DOMAs also have a great impact when same-sex partners are the biological parents of minor children being raised by them as Super-DOMAs

typically eliminate the availability of second-parent adoptions for lesbian and gay couples. As a consequence, some public employees in Michigan may not even be able to provide health coverage to their children.

I have documented instances of other varieties of direct loss to gay and lesbian couples in the Wolverine State. The first involves housing rights. Oakland University is a public institution in the northern Detroit suburbs that provides employee housing near campus. Oakland faculty or administration members and their families can purchase homes in the designated area that have restrictive covenants limiting transfers of the properties to people affiliated with the school. Should the faculty member or administrator die, his or her spouse may continue to live in the house until the spouse's death. A lesbian tenured professor and her partner made an offer on one such home and secured a mortgage to finance it. Then Oakland informed them that, because of Proposal 2, in the event of the faculty member's death, the surviving partner would have to leave the home before the end of the calendar year.

In another instance, a graduate student at a Michigan public university who was a residence hall director asked whether her partner could move in with her. Even though opposite-sex couples cohabited in the units, the school's vice president for student affairs determined that Proposal 2 prevented the lesbian pair from doing so.

A particularly interesting illustration of another Super-DOMA effect concerns the denial of inheritance rights. I interviewed a lesbian couple where one of the women is an heiress to a substantial family trust fund. She and her two brothers are the principal beneficiaries of the trust. Their grandmother, knowing the granddaughter to be a lesbian, designed the trust to provide that only the legal spouses of her grandchildren would receive trust payments. Accordingly, should the heiress predecease her partner of 20 years, the latter would receive nothing from the family trust. Indeed, the two grandsons and their wives approached the trustees and said that they were willing to include the lesbian partner as a beneficiary of the trust. But the trustees refused. Even if the lesbian couple were married in Massachusetts (where they have a vacation home), Proposal 2 would still deny inheritance rights to the heiress's partner because the family trust is governed by Michigan law.

The information in this article should assist counsel in helping same-sex couples understand their rights under their states' laws so they can make informed decisions about how their location deeply affects their relationships, families, and finances.

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**Note**

**The GP/Solo Division publishes several books on related issues, and Division members receive a special discount on such purchases. See: [put in hyperlinks for both these books: Estate Planning for Same-Sex Couples and Gay, Lesbian, and Transgender Clients: A Lawyer's Guide.**

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## Civility: A Rational Approach to Combat Discovery Abuse

*By Jeffrey S. Becker*

One of the most frustrating, and often painstaking, chapters of litigation is discovery. It is during this time that we as attorneys attempt to uncover every shred of evidence to defeat our adversary's case while contemporaneously trying to safeguard information that could undermine our own client's position. It is while walking this tightrope that many attorneys neglect to pay heed to their local rules of civil procedure, ethical guidelines, and most importantly, the golden rule: do unto others as you would have them do onto you. As a result, production requests are often bombarded with thousands of irrelevant pages to sift through, or alternatively, result in production of a single document.

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Similarly, interrogatories are countered with more frivolous objections than they are substantive answers, and depositions frequently turn into shouting matches. Thus, at the end of the day, we as attorneys often find ourselves standing before a judge seeking resolution of our disputes in the same way squabbling children cry to their parents after a petty fight. It is for this reason that we, as learned counselors of law, should take preliminary steps to counter abuses of discovery civilly before running to a judge. The following roadmap may assist you in resolving discovery disputes amicably, and if unsuccessful, will create a record that may improve your success on any discovery-related motions.

### Outline Your Concerns

When attorneys receive utterly unresponsive discovery production, their first inclination often is to *write* something—usually an angry or threatening letter to opposing counsel or a motion to compel. This initial reaction is half appropriate; if you are unsatisfied with an adversary's discovery response, the first thing you should do is pull out a piece of paper and write down everything you believe is deficient with that response. Do not filter yourself. Get your frustrations onto a notepad or computer screen, but do not send it to opposing counsel or the court. This exercise is just for you, and will help collect and organize your thoughts so that you can adequately articulate your issues to opposing counsel. You should also rank the importance of each category of information sought from your adversary and the likelihood that, should a motion to compel become necessary, your request for that information would be successful.

### Pick Up a Phone and Call

Before sending a letter or email to opposing counsel, pick up the telephone and call him in an attempt to work through your issues. This type of communication allows your opponent to explain "in person" why he responded to your discovery the way he did. It may clear up an innocent misunderstanding, or simply give both of you an opportunity to talk through your issues and reach an agreement on how to rectify the issue. Attempting to resolve discovery disputes with an actual conversation is much more effective than simply writing a letter. An attorney who receives a letter likely will respond in kind, thereby fostering a "letter writing campaign" whereby neither attorney actually speaks to the other until frustrations have elevated and any hope of swift resolution is lost. It is for this reason that most jurisdictions mandate that some conference take place between attorneys concerning discovery disputes before a motion to compel may be pursued. Even if no such rule exists in your jurisdiction, you should consider starting with a phone call.

### Create a Paper Trail

Of course, not every discovery dispute can be resolved with a simple phone call. For this reason, you should always follow up your telephone conversation with a letter confirming the substance of your discussion. Should your conversation with counsel be successful, iterate in your letter what you and counsel agreed to, setting deadlines for future compliance or production. If your conversation with counsel was unfruitful, explain in your letter exactly what issues you believe continue to exist, but do so with a respectful and reasonable tone. Always assume a judge will eventually read this letter attached to a motion of some sort. You do not want a judge's first impression of you to be that of an unreasonable, angry, or threatening attorney. Rather, your letter should articulate your position in such a way that the judge will see that you attempted to work through your issues with counsel in a reasonable manner before bringing the issue before the court.

### Follow Up

If a deadline presented in your initial letter to counsel passes without response, you should immediately follow up with a subsequent letter to counsel indicating that you attempted to resolve your discovery issues reasonably through both a personal conversation and written correspondence, both to no avail. Explain that it is your belief discovery disputes such as this one should be rectifiable without court intervention, and that you request once more that counsel attempt to work reasonably with you in resolving this issue. Reiterate your concerns, again in a respectful manner, and set a final deadline by which you expect counsel to address your concerns in writing. This follow-up letter serves two very important purposes. First, it hopefully will encourage opposing counsel to communicate with you so as to avoid ending up on the wrong side of a motion to compel. To the extent this does not happen, this letter also completes a paper trail evidencing your attempt to thrice resolve discovery issues in a reasonable manner.

### Write a Reasonable Motion

Although the above information is meant to assist you in combating discovery abuse without judicial intervention, it also is suggested with an eye towards an eventual motion to compel. Should it become necessary to file such a motion, make sure that you present not only the legal basis for your requested relief, but also establish that you have been overtly reasonable in attempting to resolve your dispute. Attach your letters to the motion as exhibits that highlight your

numerous attempts to work with opposing counsel. Reread your initial brainstorming notes and reassess what information you need produced the most. Remember, just because you may be entitled to certain information does not mean that you should ask the court to compel its production. It is often more effective to compel production only of the information you truly need rather than throwing the kitchen sink before a judge. The court will appreciate this fact, which may result in a more favorable ruling.

By its nature, litigation is an adversarial process. Discovery, however, is a two-way street. Find ways to resolve disputes in a civil manner before resulting to heated letters or motions. You will hopefully find that taking the high road is more effective than the alternative.

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# A New Addition to the Alternative Dispute Resolution Practitioner's Toolkit: The Exploration of Restorative Justice and Practical Implementation

*By Artika R. Tyner*

Alternative dispute resolution (ADR) practitioners have a toolkit of skills that can be used to resolve and manage conflicts in a constructive manner while creating workable, durable solutions. These tools may include: arbitration, mediation, and negotiation; additionally, restorative justice can also be used as an effective conflict management tool. Restorative justice focuses on the interrelatedness of the human experience and offers an alternative framework for resolving conflict and the resulting harm. Restorative justice seeks to address

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the question of how to "make things right." For example in the criminal context, the process of "making things right" includes: identifying the harm suffered by the victim, holding the offender accountable for the harm, and restoring interpersonal relationships within the community. It offers all key stakeholders an opportunity to repair the harm suffered as a result of the criminal offense and create a social contract to build a harmonious community and strengthen the social fabric of the community. This restorative process may occur in a victim impact panel, sentencing circle, or community conference.

Restorative justice can also be used in many other contexts to address conflicts. Depending on the legal context and nature of the conflict, there are a variety of restorative justice tools that may be used. There are three key practical models of implementation, which include: *family group conferencing* (decision-making meeting that builds upon the resources of family and the greater community), *victim/offender dialogue* (a face-to-face meeting with victim of a crime, or surviving family member/s and the offender who committed the offense/crime), and *circle process* (draws key stakeholders together to solve problems, establish support, and build connections). Overall, restorative justice draws upon principles of community-building, reconciliation, and peacemaking. Through the practical implementation of restorative practices, key stakeholders are drawn together to resolve a conflict collectively and address the future impact of the conflict. Hence, restorative justice tools can be used in facilitating dialogues, managing conflicts, and building communities.

This article will deal principally with one area of restorative justice tools—the circle process. It will provide practical tips on how to use the circle process for facilitating restorative dialogues and offer examples of other restorative justice models.

### Circle Processes and Restorative Dialogue

In your practice, you may be faced with the challenge of resolving a family dispute, mediating a workplace conflict, or advising your client in a criminal matter. You may discover that engaging in a restorative dialogue could aid in the process of gaining a deeper understanding of your client's position and transforming the conflict into a resolution. The circle model can aid you in the process of facilitating a restorative dialogue. It can be utilized in a variety of ways for reaching decisions and addressing a harm/wrong. The restorative dialogue takes place in a circle seating arrangement. The circle format is essential because it breaks down any notions of hierarchy within the dialogue, thus creating a sense of equality and respect. Each participant is equally valued

in this storytelling process because, as Kay Pranis once wrote, "every person has a story and every story has a lesson to offer." Circle processes create an opportunity for the story of each participant to be shared and to discover answers to unresolved issues, like, What is the root cause of the conflict? What is the impact of the conflict on each individual? What needs to happen to make things right and repair the harm? As these questions are explored, participants are engaging in consensus building as they explore methods for addressing the underlying conflict that resulted in the harm.

During the circle process, a talking piece is used that circulates as each person shares his or her story and perspective. The talking piece is chosen by the group and may have a symbolic meaning based on cultural practices or shared values. As the talking piece is passed around the circle, each participant is given uninterrupted time to share his or her story. This format promotes full participation and active listening. The talking piece is passed around the circle as the restorative dialogue continues to emerge.

### Key Tips for Facilitating a Restorative Dialogue

In preparing to facilitate a circle process and serve as a circle keeper, there are a few key things to keep in mind. Circle keeper and restorative justice facilitator, Crixell Shell, offers four practical tips to aid you in the process. First and foremost, *preparation is key* for the success of a restorative dialogue and circle. As a circle keeper, it is important for you to research the background of the group participating in the circle. This is essential in order to formulate the purpose of meeting and understand the context of the conflict. During this process, you will need to find out the reason for the circle, the composition of the group, logistics (where the circle will take place), and the relationships of the people involved. You should also begin collecting talking pieces and other items to make the circle a safe and comfortable atmosphere.

Additionally, you will need to prepare each participant. Begin by providing a premeeting with the participants, during which you explain restorative justice and the model that will be used. Also, discuss the format of the circle and the process. When the circle process begins, the circle keeper should check in with all participants. Initially, the talking piece should be passed around the circle to allow participants to introduce themselves and express how they are feeling.

Second, *set the stage* by developing ground rules and identifying key values of the circle participants. As the circle keeper, you must create an atmosphere that fosters trust and makes people feel safe. To do this, circle keepers rely on

guidelines or rules of engagement. Guidelines are the "rules" of the circle. The guidelines are reached by consensus and everyone should feel comfortable with them, the circle keeper can give a few suggestions to start the process. Examples include: be respectful, do not interrupt others, allow for the ability to request a caucus, and so forth. After the guidelines are established through consensus, they should be posted so everyone in the circle can refer to them as needed. Also, circles offer an opportunity to build a sense of community; therefore, it is essential to identify the shared values of all participating. Common values may include respect, honesty, and fairness.

Third, circle keepers should *remain flexible*. Circle keepers have to remember that although the circle has a purpose, it can move in many different directions. The restorative justice process is organic and constantly evolving. It is important to give a voice to all members in the circle and empower them to use their voices. Also, remember as the circle keeper you can redirect the circle when talking piece returns to you.

Finally, the time spent in circle should have a deliberate end that is referred to as *closing*. It will help all participants to leave with a sense of closure and finality. This is true even if the participants plan to meet again.

For additional guidance related to circle processes, you may consider reading *The Little Book of Circle Processes* (Pranis) or visit the International Institute for Restorative Practices website at http://www.iirp.org/.

### Conclusion

Using circles to create restorative dialogues is only one example of the power of restorative justice tools. Restorative practices can also be used in a variety of ways in your practice. Examples may include: family law/manage family conflicts (family group conferencing), employment law/workplace conflict (talking circles), and international law/national conflict (peacemaking circles). The possibilities are endless! As you begin to explore restorative justice further, you will find that this new addition to your toolkit of skills is indispensable and valuable for managing and resolving conflict. These tools will aid you in moving beyond conflict management to transformation and restoration.

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## Ten Things Your Expert Neglected to Tell You

*By Francisco Ramos, Jr.*

"I refuse to answer that question because the answer may incriminate me." No attorney wants to hear his witness assert his Fifth Amendment right against self-incrimination. And certainly no attorney wants his expert to assert such a privilege. However, if you fail to do your due diligence, you may find the expert you hired has a checkered past, and the case you built on his or her shoulders is about to collapse.

First, you owe yourself and your client the duty to ask your prospective expert the tough questions. Be up front with him. Let him know that you ask all your

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prospective experts some tough questions. You do not mean to offend him, and he should not be offended. Let him know that you, someone you know, or someone you read about had a bad experience with a seemingly qualified expert and because of that experience, you go through a thorough list of questions just to avoid any surprises. After you're done with the interview, you are not done with your due diligence. Go online, go to colleagues, and expand your investigation to ensure the expert has no skeletons in his closet. As to your questions, they will help you find out the following that the expert neglected to tell you:

**"I am a convicted felon."** Yes, your expert may have a criminal past. He may have been guilty of crimes that undermine his credibility. A simple online background search can get you the answers you want.

**"I am a person of interest in a federal investigation."** It is easy enough to find out if an expert is a convicted felon. But what if he is a yet-to-be-convicted-felon? Just ask him. And by the way, do Google searches for your experts, and check the websites for the local papers where they reside to see if they have received any negative press.

**"I lied on my curriculum vitae."** Yes, sometimes experts fudge their resumes. And yes, they are naïve, or arrogant or just pain dumb enough to think no one will find out. If your expert lied on his resume, his credibility is shot. Who is going to believe what he says about whether a given product is defective, when he lied about what degrees he earned or what course work he took? If there is anything that raises any red flags on his CV, ask him about it. And ask him the ultimate question, "Are there any issues on your CV I should be concerned about?"

**"My professional license was suspended."** "So Mr. X, has your license ever been suspended, revoked, curtailed, or been the subject of an investigation?" Just ask. Also, he may belong to a board, organization, or association that keeps track of such suspensions and makes them available to the public. Take the time to look and confront the expert with what you find.

**"I collapse like a deck of cards at trial."** There are experts, and then there are experts. There are those experts who look great on paper, but when they take the stand they wilt like a dandelion. You need to ask them how often they have testified at trial and the verdicts in those cases. Then ask for the attorneys who retained them in those cases and ask them how the expert performed on the stand.

**"I have a bit of a temper."** Some experts are prima donnas. Some have short fuses. Some are temperamental. Some are impossible to get hold of. You need to spend some time with your expert and gauge his personality. Is he going to be easy to work with, or does he have an ego, personality, or character flaw with which you will have to contend? Ask for references of other lawyers who have retained him and ask them how easy (or difficult) this expert was to work with.

**"My opinions have changed."** Your expert may have already addressed the very issue central to your case in a prior case. In fact, he may have once held an opinion that is just the opposite of his opinion in your case. You need to ask him whether his opinions have changed or evolved and ask for the names of the cases where he tackled the same issue and get his report or deposition from that matter. Odds are opposing counsel is going to get his hands on that report or deposition.

**"My opinions have been disqualified."** Find out if he has ever been the subject of a Daubert challenge, and if so, whether the challenge proved successful. Has a court ever limited or struck his opinions? Has a court ever stated he was unqualified? Make sure to do a Westlaw search to see if any appellate decisions have criticized the expert.

**"I don't think you're going to like that article I wrote."** You hire experts because they are leaders in their fields. As experts, they often have been published and have taken positions in the articles they have written. You need to ensure those positions are not contrary to yours. Ask him what articles he has written on your topic, review them, and make sure they support, not undermine, you case.

**"I cost a fortune."** On the front end, find out what the expert is going to cost. In fact, ask what he generally charges for cases such as yours. Be up front regarding what records you want him to review, what testing you want him to perform, whether you need a report, and when you need it. After you're honest with him about what you want, press him to be honest with you about what his final bill will be. Clients hate big expert bills, and juries are suspicious of them.

Your expert is there to help your case, not undermine it, and nothing undermines your case more than an expert with a secret that affects his credentials or credibility. Take the time to ask the hard questions. You will be surprised how often you will come across an expert who is not what he seems to be and who can hurt your case with who he really is. A little legwork can help you avoid retaining such an expert and retain the right one for you, your client,

and your case.

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**Note**

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# How Do You Mediate a Criminal Case?

*By Jean Whyte*

Mediation and other forms of dispute resolution are becoming more commonplace in the criminal sector. The criminal mediation program in Anne Arundel County, Maryland is an internal program of the State Attorney's Office (SAO) consisting of one mediator and one case manager. Since 1983, the program has been assisting the SAO and the citizens it serves to resolve criminal cases prior to trial. The program continues to thrive with an average of 250–400 cases being resolved through mediation each year. Mediation assists the parties, the prosecutor's office, the courts, and the public to save time, money, and

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frustration. By discussing their interests, concerns, and developing agreements in a confidential setting with the assistance of an impartial mediator regarding their conflict, parties often experience more satisfaction and achieve long-term resolution that avoids escalation and resolves problems.

### Selecting Criminal Cases for Mediation

Clearly, not all criminal matters are appropriate for mediation. Although mediated in some victim-offender programs, felony cases or serious misdemeanors rarely lend themselves to mediation. Conversely, minor misdemeanors, particularly involving individuals who have some form of a relationship, often benefit from mediation. Assault, trespassing, malicious destruction of property, harassment, telephone misuse, arson threats, and theft are examples of criminal disputes frequently referred to mediation. Family members, business associates, and neighbors are examples of groups that typically gain more by participating in mediation to address their grievances. Cases referred to the mediation program originate from several different sources. The majority of cases referred to mediation are carefully investigated by a specific screening unit within the SAO to initially determine whether mediation is a plausible option. If domestic issues are present, the victims' assistance program plays a role in deciding whether a case should proceed to mediation. Prosecutors may refer cases on their docket to mediation. Criminal defense attorneys familiar with the program may recommend cases for mediation. Judges may refer parties to mediation when they appear for trial. On occasion, members of the public seek to refer their own dispute to mediation. The mediation program performs the final screening function to assess whether a case is mediation-appropriate. Cases approved by all applicable screeners are then scheduled for mediation. Should the case fail to meet any screener's criteria, the matter is discussed internally and any case ultimately rejected for mediation proceeds to prosecution. Incidents of domestic violence, physical injuries, and the parties' criminal history are examples of factors that influence a decision about whether to mediate a case.

### Who Participates in a Criminal Mediation?

The parties named in a criminal complaint and the mediator are the primary participants in the criminal mediation session. The defense attorney's participation in the criminal mediation session is an attorney-client decision. If attorneys do accompany their clients to mediation, they usually assume a more passive role in the mediation process itself as compared to their clients. Prosecutors do not participate in the mediation session. The mediation process

is voluntary for the victim and the defendant. Either party may elect to bypass mediation and proceed to prosecution.

### When and Where Does Criminal Mediation Occur?

Criminal mediation always takes place prior to trial. The SAO sends to the parties and their attorneys, if applicable, a letter and brochure about mediation. The letter requests that recipients contact the mediation program to discuss the option to mediate. When parties contact the program, the case manager or mediator describes the mediation process, fields questions, and if the party is agreeable, schedules the mediation session. Mediation sessions occur at various times throughout the day on all business days. The program identifies a mutually convenient time, date, and location for mediation to occur. Written confirmation notices are sent out to all anticipated attendees. Mediation sessions are held at the SAO office in a private conference room. When there is delay in scheduling a mediation session, prosecutors and defense attorneys typically jointly consent to a postponement of the trial date to permit more time for mediation to occur. Judges are often willing to grant such a request.

### How Does the Criminal Mediation Process Work?

When a criminal matter is referred to the mediation program, the case manager performs the initial screening function. The mediation program has access to any information compiled by the SAO, including attorney case files, charging documents, screening unit data, prior criminal history records, police reports, and any other pertinent information on file. Related cases and the prior legal history between the parties is examined. The mediation program screens both the victim and defendant within the criminal and civil legal system. The mediator then performs the last internal screening to finally determine if a case is appropriate for mediation. Cases that are rejected for mediation travel the traditional channels to trial. During the mediation, the mediator welcomes the parties, introduces the mediation process, and addresses any other important items or questions. After the introduction, the mediator presents the parties with a consent form to review and sign expressing their willingness to participate in mediation. In a confidential setting, each party is then given an opportunity to offer their perspective, share any concerns, and identify their interests or needs with regard to the matter. Important issues are discussed more thoroughly and an option-building phase follows. Parties discuss various options or ideas for how the situation could be resolved. The ideas generated are then evaluated more critically to determine if they are acceptable and realistic solutions. Once the parties have developed and finalized their resolutions, the

mediator commits their agreement to writing, which both parties sign. If all parties consent, a mediation agreement may include a requirement that counseling or treatment programs be completed by a certain date. The parties receive a copy of their mediation agreement, and the mediator retains the original agreement document. With the exception of the written mediation agreement, all communications associated with the mediation screening, scheduling, and the mediation session are confidential.

### What Happens After Criminal Mediation Occurs?

Following the mediation session, but prior to the scheduled trial date, the mediator meets with the prosecutor assigned to the case to share the content of the parties' written agreement and provide a recommendation for case disposition. Cases that resolve through mediation may be subject to one of two possible legal case dispositions. A case may receive a nolle prosequi disposition or be placed on an inactive docket. The final decision with regard to case disposition rests with the prosecutor. The prosecutor may file a disposition immediately with the court or close out the matter in person on the trial date. In the latter case, the mediator provides the prosecutor with a folder containing copies of the written mediation agreement for the prosecutor and the court. Under either scenario, parties are usually excused from appearing for court on their trial date.

### Why Are Criminal Cases Mediated?

Like civil cases, the stakeholders to a criminal matter may all benefit from exposure to mediation. The parties receive a confidential forum to air their grievances, discuss the matter thoroughly, and have a unique opportunity to design their own resolutions. Many parties fear the trial experience and the harsh consequences that may flow from it. Others may feel frustrated or overwhelmed by the complexities of the criminal justice system. Mediation allows parties to steer their own course with respect to their dispute and create win-win outcomes. As with civil cases, criminal mediation frequently saves parties time, money, and aggravation. Mediation may prove advantageous not only to the parties, but also to the prosecutors. Insufficient evidence, unpredictable witnesses, lack of information, risk of disappointing outcomes for victims, or any other factor that may render a case difficult to prove at trial may make mediation a more attractive option. In some cases, victims may gain something (perhaps more valuable) through engaging in the mediation process rather than an adversarial judicial proceeding that risks an uncertain result. The judicial system, yet another important stakeholder, is positively affected by

criminal mediation. On the trial date, the prosecutor provides the court with a written copy of the parties' mediation agreement. The court places the agreement on the record to conclude the court's review of the matter.

Criminal mediation can save the judicial system considerable time, resources, and expense. Research has shown that individuals who participate in criminal mediation are less likely to re-encounter the criminal justice system.

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**Notes**

The *Maryland Judiciary's Mediation and Conflict Resolution Office* (MACRO) offers grants to Maryland State's Attorneys' Offices to start or expand criminal mediation programs. MACRO was created by and is chaired by the Honorable Robert M. Bell, Chief Judge of Maryland's highest appellate court. According to Chief Judge Bell, "Criminal mediation can often get to the root causes of ongoing conflicts that otherwise reappear before the courts over and over again. In mediation, the participants may find permanent solutions by agreeing to certain forms of relief that the courts are prescribed from providing."

"How Do You Mediate a Criminal Case?" by Jean Whyte, 2006, published by the ABA Section of Criminal Justice, *Criminal Justice Section Newsletter*, Vol. 15, No. 1, Fall 2006, at 12–13. ©2006 by the American Bar Association. Reprinted With permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

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## Two Lawsuits Seek to Block Project Approvals Based on Failure to Mitigate Climate Change Impacts

*By Steven Jones*

• Past Issues

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In two separate lawsuits, the Center for Biological Diversity (CBD) and the Utility Consumers Action Network (UCAN), a utility rate-payer group, have sought to block implementation of both a timber harvesting project and a power line project based on the failure to mitigate for climate change impacts.

In the first case, filed on August 12, CBD sought an injunction to prevent the California Department of Forestry and Fire Protection from allowing logging of more than 400 acres of forest in Butte and Tehama counties in the Sierra Nevada. A copy of CBD's Petition for Writ of Mandate can be viewed at this link.
In the second case, CBD and the UCAN filed a petition for review in the California Supreme Court, seeking review of the California Public Utilities Commission's approval of San Diego Gas & Electric's proposal to construct a 123-mile long transmission line, contending that the PUC's failure to condition approval of the line on a requirement that it transmit a certain percentage of power produced from renewable sources violated the California Environmental Quality Act (CEQA).

### Opposition to Logging Based on Failure to Consider Project-Specific GHG Impacts

CBD's lawsuit seeking to prevent approval of the logging plan is the first legal challenge to a forestry project based on alleged climate change impacts. The logging proposal was made by Sierra Pacific Industries, which is seeking approval to harvest 431 acres in Butte and Tehama counties pursuant to a Timber Harvest Plan filed with the California Department of Forestry and Fire Protection (California Forestry).

The plan was approved by California Forestry based on the conclusion that "aggressive reforestation, enhancement of conifer site occupancy, genetic improvement, thinning, etc., can and will improve productivity on managed lands, balancing other resource values and providing positive benefit from a climate perspective." California Forestry concluded that, over a 100-year time frame, because new trees would replace those that had been harvested, "the Department does not anticipate a significant impact on carbon sequestration attributable to forest management."

CBD challenged the Department's approval on the grounds that it violated CEQA by failing to examine greenhouse gas (GHG) emissions on a project-specific basis. CBD also asserted a claim under California's Forest Practice Act. In a press release issued in conjunction with the filing of the case, CBD's counsel, Jan

Chatten-Brown, stated: "The law is clear that agencies must look at greenhouse emissions of the specific project they approve. The Department of Forestry cannot escape this mandate by simply claiming the project's impacts will be offset elsewhere, which is in any case, a dubious claim."

In addition to attacking the THP for its failure to undertake project-specific climate change analysis, CBD relied heavily on the State of California's statutory requirements to reduce GHG emissions state-wide, citing the California Legislature's adoption of Senate Bill 97 in 2007, which requires the state Office of Planning Research to prepare guidelines "for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions as required by [CEQA]," and the California Global Warming Solutions Act of 2006 (AB 32), which requires reduction of emissions of greenhouse gas to 1990 levels by 2020. In addition to those two statutes, on March 6, 2009, the California Attorney General's Office issued guidance that "[State agencies] should evaluate at least one alternative that would ensure that the [agency] contributes to a lower-carbon future." *See* Petition for Writ of Mandate at 4-7.

In its THP, Sierra Pacific relied on analysis of the company's greenhouse gas emissions over all lands owned by the company, as opposed to the specific project for which the THP was prepared.

### Opposition to Transmission Line Based on Failure to Impose Conditions Requiring that Power Transmitted by Line Come From Renewable Sources

CBD's second challenge was directed at the "Sunrise Powerlink Transmission Project," which was proposed by San Diego Gas & Electric Company in 2005 and approved by the California Public Utilities Commission (PUC) in December 2008. Here again, CBD based its opposition to the project on an alleged failure to comply with CEQA and asserted that the PUC's decision document did not account for the impact that construction of the transmission line will have on global warming. The petition was filed in the California Supreme Court because the Supreme Court has original jurisdiction of appeals seeking review or reversal of PUC decisions. Cal. Public Resources Code § 21168.6.

### Background

The approved route for the Sunrise Powerlink line is 123 miles long; it was one of nine different alternatives considered in an Environmental Impact Report (EIR) prepared for the project pursuant to CEQA, including several alternatives that did not involve construction of a new transmission line at all. Verified

Petition for Writ of Mandate at 2-3. The project was first reviewed by an administrative law judge, who found that "the significant environmental impacts of [the transmission line] Alternatives strongly militate against authorizing construction of any of them." *Id.* at ¶ 10, p. 3. Based on these impacts, the ALJ concluded "that the potentially significant construction-related GHG impacts from Sunrise can only be justified if there is an assurance that the line will deliver significant amounts of renewables, rather than fossil fired resources." *Id.*

The Assigned Commissioner to the proceeding wrote an alternative decision, concluding that one of the proposed routes could be approved with conditions, including enforceable measures that would assure that the line would deliver significant amounts of renewable energy as a means of reducing GHG emissions. *Id.* at ¶ 11, p. 3. A third proposed decision was also prepared by one of the other PUC Commissioners. This decision departed from both the ALJ's proposed decision and the Assigned Commissioner's proposed decision by removing any mitigation for GHG impacts. It was this decision which was ultimately adopted by the PUC, over the objection of CBD. *Id.* at ¶¶ 12, 13, p. 4. According to CBD, it was only after the EIR was certified that the PUC attempted to argue that regulatory constraints made the renewable energy requirement infeasible. CBD's Supporting Memorandum of Points and Authorities, filed as part of its Petition, at 16.

### CBD Argued that Requiring the Line to Carry Some Percentage of Renewable Energy was a Feasible Mitigation Measure Required by CEQA

In its petition, CBD argued that "one of the primary objectives of the Sunrise Line was to facilitate the development of renewable energy and that requiring the line to carry some amount of renewable energy was a feasible mitigation measure." As a result, according to CBD, the PUC violated CEQA when it certified the EIR for the project without analyzing whether conditioning approval on the line carrying some amount of renewable energy would mitigate the GHG impacts from the project. *Id.* at ¶¶ 36–38, pp. 7–8.

CBD argued that "to the extent a renewable energy requirement was analyzed in the EIR at all, it was narrowly framed as an all or nothing proposition . . . [and rejected because] SDG&E [could] not guarantee that the line will carry only renewable power." Memorandum of Points and Authorities at 20 (quoting General Response to public comments from the EIR). This was not, however, the approach taken by the assigned commissioner in her decision—she proposed conditioning approval for the project on "SDG&E [procuring] a minimum

cumulative total of 3,500 GWh/year of Imperial Valley renewables to be delivered over the Powerline upon energization or soon thereafter, but no later than 2015." *Id.* at 25 (quoting proposed decision by Commissioner Grueneich).

Rather than adopting a renewable power condition, the PUC relied on SDG&E's voluntary commitment to develop solar and geothermal resources in the Imperial Valley. CBD argued that this commitment fell short of the requirements of CEQA, since it was not enforceable. However, California has adopted renewable portfolio standards which are binding on SDG&E and which require the utility to increase its use of renewable power by at least one percent of its retail sales annually, until its reaches 20 percent by 2010, though the RPS does not identify specifically where that power is to come from, or how it is to be transmitted. According to the PUC's website on the RPS, SDG&E currently obtains 6.1 percent of its power from renewable sources.

In statements issued simultaneously with the filing of the petition, CBD's counsel argued that the Powerlink project would lead to construction of new fossil-fuel generation plants, which would result in more GHG emissions requiring mitigation under CEQA.

### Conclusion

Lawsuits challenging public infrastructure projects or permit approvals solely on GHG grounds have been anticipated for some time, and it is almost assured that this type of litigation is bound to continue, particularly in states like California which have substantive mitigation requirements in their environmental review statutes. Unlike NEPA, which only requires a "hard look" at identified impacts, statutes like California's CEQA and Washington's SEPA require mitigation for known impacts. It is this substantive environmental review authority which provides the basis for CBD's claims, and it is likely that this sort of litigation will increase as environmental groups and other project opponents look to these statutes as their weapon of choice.

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## Tenant's Remedies for Landlord's Unreasonable Refusal to Consent to a Sublease

*By Ruth A. Schoenmeyer*

• Past Issues

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Good news! Someone is interested in leasing space in your client's building. Unfortunately, the transaction is a sublease, not a direct lease, and even though your client's lease with the lucky sublandlord prohibits your client, as landlord, from unreasonably withholding his consent to the sublease, he impulsively sends a letter to the tenant refusing to consent to the sublease, without giving any explanation as to why he will not consent. Later, he panics and calls you to see how much his letter might cost him. The purpose of this brief article is to answer that question.

## Property Law Versus Contract Law

As an initial matter, you'll want to know whether the state in which the property is located considers a lease to be a conveyance of an interest in property or a contract. The majority of states still consider a lease to be a conveyance, and a tenant's duty to pay rent absolute. In those states, if the lease is silent as to whether the landlord may withhold its consent to a sublease unreasonably (i.e., the relevant section simply provides that tenant may not sublease without first obtaining landlord's consent), then landlord may withhold its consent arbitrarily. In contrast, states that regard leases as contracts impose upon landlords and tenants a duty of good faith and fair dealing, and landlord's agreement not to unreasonably withhold consent to a sublease is read into the lease.

## Possible Remedies

A tenant's cause of action for a landlord's unreasonable withholding of consent will depend in part upon whether the state's courts consider the lease to be a contract or a conveyance. If it is a contract, the tenant might bring a cause of action for a breach of the contract in lieu of a tort such as intentional interference with contractual relations. In *Parr v. Triple L & J Corp.*, 107 P.3d 1104 (Colo. App. 2004), the court applied the "economic loss" rule, that is, if tort claims are based on contractually imposed obligations (e.g., the obligation not to unreasonably withhold consent to a sublease), then contract—not tort—law provides remedies for economic losses. The *Parr* court also allowed a tort claim for emotional distress, however, and further noted that although punitive damages would not normally be allowed for a breach of contract claim, the court was allowed to award punitive damages because there was also an award for emotional distress. Other courts are not as concerned with distinguishing between breach of contract and tort claims. (See *Campbell v. Westdahl,* 715 P.2d 288 (Ariz. Ct. App. 1985), a case in which the jury seemingly arbitrarily divided

the $72,752 award to tenant for landlord's unreasonable withholding of consent to an assignment into a $5,750 breach of contract award and a $67,000 award for intentional interference with contract.) Regardless of whether an unreasonable withholding of consent is deemed to be a breach of contract or a tort, some of a tenant's possible remedies against a landlord are as follows:

1. Lease Termination. Some cases hold that tenant may terminate the lease. In *Ringwood Associates Ltd. v. Jacks of Route 23, Inc.,* 379 A.2d 508 (N.J. Sup. 1977), the court held that where a landlord refused to consent to a tenant's request to assign, apparently because the landlord wanted to lease space to the assignee directly for higher rent, tenant was entitled to vacate the premises and stop paying rent, because "a substantial breach of a material, mutually dependent covenant in a bilateral contract excuses the injured party from further performance." *Id.*at 514. Other cases hold that a tenant is not released from performance of his duties under the lease following landlord's unreasonable withholding of consent. See *Campbell v. Westdahl,* 715 P.2d 288 (Ariz. Ct. App. 1985).

2. Specific Performance. Some courts grant specific performance (i.e., landlord must consent to the proposed subtenant). See *Hedgecock v. Mendel,* 263 P. 593 (Wash. 1928).

3. Damages. Some of the categories of damages owed to tenant are as follows:

a. Lost bargain. This category of damages can be significant if, for example, the proposed sublease was in conjunction with a proposed sale of tenant's business. A tenant is also sometimes entitled to reduce rent by the amount of sublease rent tenant would have received.

b. Excess subrents over prime rent. We should all be as lucky as the tenant in *Assocs. Commercial Corp. v. Bayou Mgmt., Inc.,* 426 So. 2d 672 (La. Ct. App. 1983). He found a subtenant who was willing to pay a higher rent than the prime lease rent, and the court awarded the tenant the excess rent as damages after landlord unreasonably withheld its consent to the sublease.

c. Exemplary damages. Occasionally, the court finds the landlord's actions to be so egregious that the court awards the tenant exemplary damages. See *Parr v. Triple L & J Corp.,* 107 P.3d 1104 (Colo. App. 2004).

d. Damages for Emotional Distress. Again, see *Parr.*

e. Attorneys' Fees and Costs. These are generally awarded when the lease

specifically includes a prevailing party provision or attorneys' fees are granted by statute.

Sometimes, the damages due to a tenant when a landlord unreasonably withholds consent can be quite significant. A case that should strike terror into the heart of all landlords (including our impulsive consent-refusing client) is *Toys "R" Us, Inc. v. NBD Trust Company of Illinois,* No. 88 C 10349, 1995 WL 591459 (N.D. Ill Oct. 4, 1995).In that case, tenant requested landlord's consent to sublease, and landlord refused to consent without requesting any information regarding subtenant's finances or plans to use the space. Later, landlord offered a number of reasons for withholding consent, but it appeared that landlord actually wanted to lease space to tenant's subtenant directly. The court rejected the landlord's pretexts for withholding its consent and ultimately awarded tenant $1,575,754.40 in damages, $640,016.50 in attorneys' fees, and $84,208.45 in litigation expenses. One of the noteworthy aspects of the court's opinion is that the court assumed, for purposes of calculating damages, that both tenant and subtenant would have exercised their options to extend their lease terms, because where there is any uncertainty with respect to lease renewals, the court noted, the tenant is favored.

### Limitation of Remedies

Of course, a landlord can limit a tenant's remedies in its lease by providing that a tenant's sole remedy for a landlord's failure to consent to a proposed assignment or sublease is to bring an action for declaratory judgment or specific performance, and in such event, no damages will be awarded. The court in *Gladliz, Inc. v. Castiron Court Corp.,* 677 N.Y. S.2d 662 (N.Y. Sup. Ct. 1998) noted that such a provision was specifically bargained for in the lease in question, and saw no reason why the clause shouldn't be upheld. In that case, the language read as follows:

> Wherever Landlord in this lease agrees not to unreasonably withhold his consent, it is understood and agreed that Tenant's sole remedy in connection with any refusal on the part of the Landlord to give its consent in writing shall be limited to bringing an action for declaratory judgment or for specific performance and in no event shall Tenant bring an action for damages against the Landlord or shall Landlord be liable to the Tenant for the Landlord's refusal to grant its consent.

*Id.* at 664.

Tenants with negotiating power should strike this language or, failing that, provide for some sort of summary proceeding to resolve the issue of whether landlord has unreasonably withheld its consent, because a tenant is pretty certain to lose its potential subtenant long before a lawsuit concludes. Certainly, *Ernst Home Ctr., Inc. v. Sato,* 910 P.2d 486 (Wash. Ct. App. 1996), a case in which a landlord finally agreed to allow retail tenant Value Village to sublease a portion of a shopping center midway through a lawsuit to determine whether landlord had unreasonably withheld its consent is the exception rather than the rule. A potential subtenant is probably as patient as Value Village was in that case only when something about the space in question is extremely unique (which is probably more common in the retail context than in the office context).

**Conclusion**

An ounce of prevention is worth a pound of cure. Haste makes waste. Act in haste, repent at leisure. Insert additional tired maxim here. Given how significant the damages for a landlord's unreasonable withholding of consent can be, a landlord should plan ahead by either (a) negotiating a limitation of tenant's damages for landlord's unreasonable withholding of consent in its lease with a tenant, or (b) determining whether it can reasonably withhold consent before it sends a letter denying consent.

**Cases**

Please followthis link to a chart that describes the cases mentioned in this article, along with a few other cases. Many of the cases involve an assignment rather than a sublease, but the general rules with respect to consent should be the same. I gratefully acknowledge the assistance of Erik Jarmusz in researching case law and preparing the chart.

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**Note**

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# Enforceability of Prepayment Premiums: Language Does Matter!

*By John C. Murray*

- **Past Issues**

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The Circuit Court of Cook County, Illinois, recently entered an interesting ruling on the enforceability of a commercial-loan prepayment provision. *See Cornerstone Leased Drugstores LLC v. Wells Fargo Bank Northwest, NA,* Circuit Court of Cook County, Illinois, No. 07 CH 04352 (June 19, 2009). The case was decided solely on the basis of the meaning of the contractual language regarding prepayment contained in the (identical) mortgage notes executed by Cornerstone Leased Drug Stores LLC (Cornerstone) in connection with 42 25-year mortgages on properties located in 16 states. The court agreed with the defendant, Wells Fargo Bank Northwest (Wells Fargo, which served as trustee for the five institutional lenders who actually loaned the money and were designated as trust-beneficiaries) with respect to its calculation, under each of the notes, of the reinvestment yield under the prepayment provision and the conversion to a monthly yield as provided by the provision. This article will summarize and analyze the court's decision and discuss its relevance for commercial mortgage lenders.

### Analysis of Decision

The court summarized the issues as follows: there are two portions of [the prepayment provision] that are critical to the resolution of the dispute between the parties. The first is part (i) of the definition of "reinvestment yield," and in particular the parenthetical statement: "(or such other display as may replace such displays on the Bloomberg service or any other generally available service)." The second is contained within the definition of "prepayment consideration" providing the method of calculating the total amount of the remaining payments due under the note: "such sum to be determined by discounting (monthly on the basis of a 360-day year composed of twelve 30-day months). *Id.* at p.3.

The prepayment premium was to be calculated (pursuant to the applicable provision) by reference to the "reinvestment yield," which, as stated in the provision,

> means the yield to maturity of either (i) the yield reported as of 11:00 A.M. (New York City time) on the date of calculation on the display designated USD on the Bloomberg Financial Markets Screen (or such other display as may replace such displays on the Bloomberg service or any other generally available service) for actively traded U.S. Treasury securities having a constant maturity equal to the remaining average life of the Note, or (ii) if such yields shall not be reported as of such time or the yields reported as of

> such time shall not be ascertainable (including by way of interpolation), the Treasury Constant Maturity Series yields reported for the latest day for which such yields shall have been so reported as of the Business Day next preceding the Determination Date in Federal Reserve Statistical Release H-15 (519) (or any comparable successor publication) for U.S. Treasury securities having a constant maturity equal to the remaining average life of the Note as of the Determination Date: provided however, if no maturity exactly corresponding to the remaining average life of the Note shall appear therein, yields for the two most closely corresponding reported maturities (with one being shorter and the other longer) shall be calculated pursuant to the foregoing sentence and the Reinvestment Yield shall be interpolated from such yields on a straight-line basis (rounding in each of such relevant periods, to the nearest month). All such prepayments must occur on a Business Day.

Cornerstone subsequently refinanced the loan and exercised its right to prepay in the summer of 2006. However, on the stipulated date for calculation of the prepayment premium (August 16, 2006), a "matched" Treasury security that would mature on the maturity date of the loan (March 3, 2019) did not appear on the Bloomberg USD screen. The parties then agreed, as per the language in the prepayment provision, to interpolate the prepayment consideration using the two most closely corresponding reported U.S. securities, one shorter than March 3, 2019, and one longer. But the parties disagreed on whether they could only look to the Bloomberg USD screen to ascertain such interpolation based on the U.S. Treasury securities most closely corresponding to March 2019 (as argued by Wells Fargo), or whether the parties could look to different screens for such purpose (as argued by Cornerstone). The court ruled in favor of Wells Fargo, noting that "Paragraph 6 [the prepayment provision] of the Notes, while admittedly complex, is not ambiguous." *Id.* at p. 5. The court further noted that: "The plain language of the note anticipates the possibility that changes might occur over the course of those 25 years, but does not provide the parties with an alternate financial markets screen from which to obtain information on the interest rate borne by U.S. Treasury securities." *Id.* at p. 7.

Cornerstone also argued that the reinvestment yield should have been calculated on a semiannual, rather than a monthly, basis. But after carefully reviewing the language in the prepayment provision, the court agreed with Wells Fargo that in order to be consistent with the terms of the notes, the reinvestment yield had to be calculated on a monthly basis. According to the court:

> Since the discount factor is comprised of the "Reinvestment Yield plus 50

> basis points," the Notes direct the parties to apply the Reinvestment Yield as if it accrued monthly, and then to add 50 basis points to that number. The word monthly in this section of the note provides the clear and unambiguous direction for that calculation. As such, there is no issue of material fact . . . and Wells Fargo's Motion for Summary Judgment is granted.

*Id.* at p. 7.

The basic purpose of a yield-maintenance prepayment provision in a commercial real estate loan document is to provide a fee to the lender that will compensate it for the difference between the original interest on the loan and the yield available from U. S. Treasury instruments at the time of prepayment. The prepayment clause in the *Cornerstone* case provided that "the Notes direct the parties to apply the Reinvestment Yield as if it accrued monthly, and then to add 50 basis points to that number." This adding of basis points, which is not all that common any more in connection with prepayment premium provisions in commercial mortgage-loan documents, was probably done by the lender to blunt any argument that prepayment based on U.S. Treasury instruments without the addition of such basis points would constitute a "windfall" for the lender. But this specific language (certainly not a bad idea) had no bearing on the court's ruling, which was based strictly on contractual interpretation. This was not a true "yield maintenance" case where the validity or enforceability of such a clause in general was questioned. For years, institutional lenders such as insurance companies have used "yield maintenance" clauses to calculate prepayment premiums, and such clauses are considered the industry norm. *See* Richard F. Casher, *Prepayment Premiums: Hidden Lake Is a Gem*, 19-9 ABI J. 1 (Nov. 1, 2000):

> A yield-maintenance clause typically assumes that the prepayment premium and the prepaid principal will be invested in U.S. Treasury securities (Treasuries) that will mature at the same time as the prepaid loan and that the dollars so invested will return the same yield that the insurance company would have realized had its loan not been prepaid. Treasuries are used as the reinvestment norm because there exists no standard commercial mortgage loan rate, given the uniqueness of each commercial loan and the inherent difficulty (if not impossibility) of identifying an identical or similar loan; in contrast, the market for treasuries is deep and highly liquid.

*See also* Restatement (Third) of Property: Mortgages section 6.2, comment a (1997):

> The primary purpose of [prepayment] clauses is to protect the mortgagee against the loss of a favorable interest yield . . . . Prepayment may also result in further losses, such as the administrative and legal costs of making a new loan . . . and in some cases additional tax liability.

## Conclusion

The *Cornerstone* case (at least at the trial level) once again clearly illustrates the importance of clarity in the drafting of a mortgage prepayment provision, and in this case it would appear the lenders (and their counsel) did it right. The borrower had contended that it was overcharged by $2,260,000 based on the defendant's calculation (the total prepayment amount paid to Cornerstone, pursuant to Wells Fargo's calculation, was $20,621,812). The court noted in its ruling that there was no ambiguity and therefore no need to examine parol evidence. (*See also Friedman v. LaSalle Nat'l Bank*, 2004 Ohio 2205 (Ohio App. 2004), at P21 ("[t]he prepayment provision is clear on its face and unambiguous. Therefore we will not consider the parol evidence [the borrower] advances")). The court's ruling in *Cornerstone* highlights the fact that a mortgage prepayment provision should be carefully, clearly, and comprehensively drafted so that its meaning is clear and there is no ambiguity that may open the door to a challenge by a clever borrower. The general rule is that any ambiguity will be construed by a court in the borrower's favor when the lender has drafted the loan documents. *See, e.g., Littlejohn v. Parrish*, 163 Ohio App. 3d 456, at 27–28 (2005) (holding that mortgage, which provided that there was no prepayment penalty but that any prepayment was subject to the mortgagee's approval, imposed duty of good faith and fair dealing "when one party has discretionary authority to determine certain terms of the contract"; court refused summary judgment for mortgagee and remanded case for further proceedings). The moral of the *Cornerstone* case: Language does matter! [Note: The judgment entered in favor of Wells Fargo in the *Cornerstone* case was fully dispositive of the case, and Cornerstone had 30 days in which to file a notice of appeal (unless a posttrial motion was filed within that time, in which event the notice of appeal would be due 30 days after disposition of the posttrial motion). The author is uncertain, as of the date of this article, whether either such event has occurred or will occur.]

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## Note

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## Another Nail in the MERS Coffin: Arkansas Court Rules That MERS Was Not a Necessary Party to a Foreclosure Action in Which MERS Served As Lender's Nominee on the

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## Senior Deed of Trust

*By Kathleen E. Kraft*

On March 19, 2009, the Supreme Court of Arkansas determined that Mortgage Electronic Registration Systems, Inc. (MERS) was not a necessary party to a foreclosure action involving the foreclosure of a junior mortgage, where MERS was not the true beneficiary of the senior deed of trust nor was specifically authorized by the lender to act on the lender's behalf in the foreclosure proceedings. *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas*, – S.W.3d –, 2009 Ark. 152, 2009 WL 723182 (Mar. 19, 2009). Coming in on the heels of *Landmark National Bank v. Kesler*, 40 Kan. App. 2d 325, 192 P.3d 177 (2008) (also finding that MERS was not a necessary party to a foreclosure action), *Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas* places MERS on unstable ground in mortgage foreclosure actions.

In 2003, Jason Lindsey and Julie Lindsey entered into a deed of trust on a one-acre lot in Benton County, Arkansas, to secure a promissory note from Pulaski Mortgage. The deed of trust listed Pulaski Mortgage as the lender, Jason and Julie Lindsey as the borrowers, James C. Ernst as the trustee, and MERS as the beneficiary "acting 'solely as nominee for Lender,' and 'Lender's successors and assigns.'" In 2006, Jason and Julie Lindsey granted a mortgage on the same property to secure a second promissory note from Southwest Homes of Arkansas ("Southwest Homes"). In 2007, Southwest Homes filed a Petition for Foreclosure in Rem against the Lindseys under the mortgage and listed the Lindseys, the Benton County Tax Collector and "Mortgage Electronic Registration System, Inc. (Pulaski Mortgage Company)" as respondents. Southwest Homes served Pulaski Mortgage, but did not serve MERS. A decree of foreclosure was entered in April 2007, and the property was auctioned to Southwest Homes. The sale was approved in May 2007. In 2008, MERS learned of the foreclosure and moved for relief. The circuit court denied MERS's motion, and MERS appealed.

MERS argued that it held legal title to the property and therefore was a necessary party to any action regarding title to the property. Although the deed of trust indicated that MERS held legal title and was the beneficiary and nominee of the lender, it also provided that all payments were to be made to the lender, that the lender would make decisions on late payments, and that the lender held all rights to foreclosure. The borrowers never made payments to MERS and MERS did not service the loan in any way. MERS simply provided

electronic tracking of ownership interests in residential real property security interests. Still, MERS asserted that it held bare legal title because it held the authority, as an agent of the lender, to exercise the rights of the lender, regardless of who the lender may be under the MERS electronic registration.[1]

The court found that MERS did not hold legal title under the deed of trust and therefore was not a necessary party to the foreclosure action initiated by Southwest Homes. In its decision, the court described the relationship between parties to a deed of trust—the borrower, who conveys legal title to the trustee; the lender, who is the beneficiary of the deed of trust and holds the indebtedness secured by the deed of trust; and the trustee, who takes legal title and whose duties are limited to undertaking foreclosure upon default and reconveying the deed of trust upon satisfaction of the underlying debt. Because MERS was not the trustee under the deed of trust, the deed of trust did not convey legal title to MERS. Also, MERS was not the beneficiary of the deed of trust, although so designated in the deed of trust, because it did not receive the payments on the underlying debt.

Chief Justice Jim Hannah authored the opinion. Justice Danielson authored a concurring opinion, in which Justices Imber and Wills joined. Justice Danielson's concurring opinion discusses the Kansas Appellate Court opinion in *Landmark National Bank v. Kesler.*

### Endnote

1. The court specifically rejected this argument, stating, "We specifically reject the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act."

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### Note

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# Standards for Determining What Constitutes Reasonable Grounds for Landlord Withholding Consent Or Conditioning Consent to a Request by Tenant to Sublease

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## Office Space

*By Tami P. Daniel*

The following is an overview of the standards under which a commercial landlord may refuse or condition consent to a request by a commercial tenant to sublease all or part of its office space in which the parties have agreed in the lease that the landlord's consent cannot be unreasonably withheld. Not discussed here is where the lease provides that a landlord's consent may be withheld in its sole discretion. Also not discussed is whether there is an implied duty on the landlord to act reasonably in "silent consent" clauses (i.e., leases that require landlord's prior consent but are silent as to sole discretion or not unreasonably withheld); nor does it cover either leases that state with specificity the grounds under which landlord's refusal or conditioning of consent is deemed reasonable; or retail or residential leases. Rather, this articles deals soley with a typical clause contained in a lease for *commercial office space* and states:

> *Tenant shall not assign this Lease or sublet all or any part of the Premises without the prior written consent of the Landlord, which consent shall not be unreasonably withheld.*

Specifically, this article will focus on requests by tenants to sublease the premises, not assign their interest in the lease.

**General Discussion**

Tenants generally believe that a suitable sublessee is any party which (i) is ready, willing and able to sublease the space and (ii) meets commercially reasonable standards. Landlords tend to look closely at the subtenant and the impact the existence of the sublease might have on the landlord's business/profitability.

Whether or not a landlord unreasonably withholds consent, and therefore may be subject to damages, will be judged on the basis of the particular facts and circumstances of the case. The court will determine whether *this particular landlord* breached its lease by unreasonably denying a request by *this particular tenant* to subleasing *this particular space* to *this particular subtenant*.

The fundamental question is: Has the landlord demonstrated *reasonable grounds* under the specific circumstances for withholding or conditioning consent? It is up to the trier of fact to apply a meaning to what are *reasonable grounds* for refusing consent based on the evidence presented.

The term *reasonable* in this context means that the grounds for refusing consent:

a. Cannot be arbitrary, which was defined in a Texas case, *Webb v. Dameron*, 219 S.W.2d 581 (Tex.Civ.App., Amarillo 1949), as a decision made without "a fair, solid and substantial cause or reason." The court in this case further stated that although a decision is wrong, it is not necessarily arbitrary.

b. Cannot be based upon personal taste, sensibility or convenience. *Broad & Branford Place Corp. v. J.J. Hockenjos Co.*, 132 N.J.L. 229, 39 A.2d 80 (Sup. Ct. 1944)].

Most decisions place the burden of proving that the landlord acted unreasonably on the tenant, and the restatement supports this position. Further, the tenant has the burden of furnishing information to the landlord to demonstrate that the subtenant is acceptable and the landlord is not bound to request information from the tenant to assist the landlord in making its decision. See *D'Oca v. Delfakis*, 636 P.2d 1252 (Ariz. Ct. App. 1981).

The Landlord has a duty to process the information given by the tenant in a timely manner and failing to do so may result in a finding of unreasonable withholding of consent. In *Parr v. Triple L&J Corp.*, 107 P.3d 1104 (Colo. Ct. App. 2004), the court rejected the defendants' argument that they did not refuse consent, but rather delayed giving a response to their tenant, and held that delaying consent is tantamount to withholding.

**Specific Scenarios/Case Law**

Objective standards of measurable criteria that relate to the landlord's interest in preserving the value of its property will likely pass the "reasonableness" test. If any of the objective standards are not met such that the landlord is not assured of all the benefits of the bargain under the prime lease OR if the existence of the sublease could have a detrimental effect on the value of the property, then it is reasonable for landlord to refuse consent.

In Fernandez v. Vazquez, Fla.App. 397 So.2d 1171 (1981), the court cited the objective standards to be considered:

a. Financial responsibility of the proposed subtenant.

b. The "identity" or "business character" of the subtenant or its suitability to the particular building:

(i) is the subtenant someone with whom the landlord has been involved in legal disputes;

(ii) is the tenant already a tenant in the building and would subleasing mean that other vacant space not leased;

(iii) is the subtenant not in keeping with the standards of the building or is a government agency or department;

(iv) would the subtenant's use place a greater burden on parking or elevators.

c. The need for alteration of the premises. (Note: In *Time, Inc. v. Sidney Tager*, 260 N.Y.S.2d 413, 46 Misc.2d 658 (1965), the court found for the landlord of the Time-Life Building who had no objection to the identity of the subtenant but yet refused consent because landlord had an interest in not having its building subdivided into smaller spaces.)

d. The legality of the proposed use;

e. The nature of the occupancy—office, factory, clinic.

Refusing consent based on subjective standards will likely fail the "reasonableness" test. These involve any refusal to consent or conditioning of consent as a negotiating tactic to improve the landlord's economic position or as a means to gain economic advantage over what landlord has bargained for under the prime lease. Subjective standards also involve refusal based on the personal taste of the landlord. Examples of subjective standards include:

1. Conditioning consent on:

a. increasing rent to market rent of building.

b. tenant paying landlord excess rent over the prime lease rent.

c. requiring that sublease rent not be less than the market rent of the building.

d. payment by tenant of a fee unrelated to economic risk.

2. Refusing consent because the proposed subtenant was a tenant in another building owned by the landlord. In *Krieger v. Helmsley-Spear, Inc.*, 62 N.J. 423, 302 A.2d 129 (1973), the court found for the tenant holding that it was unreasonable for landlord to refuse consent because the proposed subtenant was a tenant of another building owned by landlord and would create a

vacancy in that other building. The court found that "the clause is for the protection of the landlord in its ownership of that particular building, not general economic protection."

3. Refusing consent to sublease space for a specific use that is counter to the landlord's principles. In *American Book Company v. Yeshiva University Development Foundation, Inc.*, 297 N.Y.S.2d 156 (1969), the tenant requested consent to sublease space to Planned Parenthood-World Population. The landlord refused on the grounds that doctrinal differences would make it difficult to coexist in the same building. The court held that the institution is bound by the same standards of commercial responsibility as any other commercial property owner.

## Best Practices for Landlords

### *Standards for Approval*

Include in the lease sublease section a provision listing the standards for approval which, if any are not met, it shall be deemed reasonable for landlord to withhold its consent, including: (a) tenant is in default at the time of the request; (b) the subletting would cause landlord to be in violation of its obligations under another lease to which landlord is a party; (c) landlord has sued or been sued by the proposed subtenant; (d) the proposed subtenant has a smaller net worth than tenant had on the date of the lease; (e) the sublease will result in there being more than one subtenant of the premises; (f) the proposed subtenant's business will impose a burden on the building's parking facilities or elevators, greater than the burden imposed by tenant; (g) the proposed subtenant refuses to enter into a written sublease agreement providing that it will comply with all of the terms and conditions of this lease for the term of the sublease; (h) the use of the premises by the proposed subtenant will not be identical to the use conducted by tenant; (i) the subtenant is a governmental or quasigovernmental agency or department; (j) any guarantor of this lease refuses to consent to the subletting; (k) the proposed subtenant is an existing tenant of the building or is negotiating with landlord for the lease of space in the building; (l) the subtenant is involved in a business which is not in keeping with the then current standards of the building; or (m) Landlord is marketing space in the building at the time of tenant's request and the terms of a proposed subletting is at a rent less than the fair market rental rate in the building at the time of tenant's request to sublet.

### *Excess Rent*

Incorporate a sublease fee provision whereby landlord is entitled to receive from

tenant, as additional rent, 50 percent (or 100 percent if all or a substantial part of the premises is being sublet) of all amounts received by tenant from the subtenant (including sublease rent, key money and payment by the subtenant to the tenant in excess of market value for services, e.g., sharing of mail rooms and photocopy machines, and sale of office furniture and equipment to the subtenant) in excess of the amounts payable to landlord under the prime lease, after first deducting all of tenant's costs incurred in connection with the sublease, e.g., brokerage commissions, legal fees, alterations paid by the tenant, cash inducements, rent subsidies, lease assumption costs and moving allowances.

**Sample Clause:**

> *Landlord shall be entitled to receive from tenant (as and when received by tenant) as an item of additional rent one-half of all amounts received by tenant from the subtenant in excess of the amounts payable by tenant to landlord hereunder (the "sublease fee"). The sublease fee shall be reduced by the reasonable brokerage commissions and legal fees actually paid by tenant in order to sublet a portion of the premises. "Sublease fee" shall mean all base rent, additional rent or other consideration of any type whatsoever payable by the subtenant in excess of the base rent and additional rent payable by tenant under this lease. Sublease fee shall also include, but not be limited to, key money paid by subtenant to tenant in connection with the sublease, and any payment in excess of fair market value for services rendered by tenant to the subtenant or for assets, fixtures, equipment, or furniture transferred by tenant to the subtenant in connection with such sublease.*

### *Recapture Provision*

Incorporate a landlord recapture right which grants landlord the option to terminate the lease with respect to the portion of the entire premises sought to be sublet with appropriate adjustment of rent and right to construct partitions to sever the spaces.

**Sample Clause:**

> *Notwithstanding anything to the contrary contained in this lease, landlord shall have the option, by giving written notice to tenant within thirty (30) days after receipt of any request by tenant to sublease space in the premises, to terminate this lease with respect to said space as of the date thirty (30)*

*days after landlord's election. In the event of a recapture by landlord, if this lease shall be canceled with respect to less than the entire premises, the base rent, and additional rent and the number of parking spaces tenant may use shall be adjusted on the basis of the number of rentable square feet retained by tenant in proportion to the number of rentable square feet contained in the original premises, and this lease as so amended shall continue thereafter in full force and effect, and upon request of either party, the parties shall execute written confirmation of same. If landlord recaptures only a portion of the premises, it shall construct and erect at its sole cost such partitions as may be required to sever the space to be retained by tenant from the space recaptured by landlord. Landlord may, at its option, lease any recaptured portion of the premises to the proposed subtenant or to any other person or entity without liability to tenant.*

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**Note**

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## Paper Cut: Best Practices for Avoiding the Sting of a Paperless Law Office

*By Todd C. Scott*

Here's a question for attorneys with an established small firm practice: if you had to start over and develop a new law practice tomorrow, what would you do differently?

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For many lawyers in Iowa, this hypothetical question became all too real in June 2008 when several storms pummeled the state, causing unprecedented flooding and tornado damage, and ultimately displacing over 240 lawyers after their offices became uninhabitable.

In nearly every circumstance involving a firm caught in a storm disaster, the lawyers from these firms found that old and new client files are the most vulnerable of the firm's assets. If you have never seen client files that have been exposed to flood waters you may be surprised to find how quickly the files become an immediate and total loss. If the files are exposed to relatively clean water, mold growth will quickly break down and decay the documents.

Clean water is not usually the normal condition of flood waters. In the case of one lawyer from Blackhawk County, Iowa, flood waters forced sewage to back up into the firm's basement file storage area, contaminating all the firm's closed files dating from 1991 to 2003. The County authorities quickly ordered the contents of the basement, including the files, to be removed and buried in a nearby landfill. The lawyer never even had the chance to make a list of the files being carried down the road by a front-end loader for burial.

Sadly, just a few weeks earlier, a tornado with winds exceeding 260 miles-per-hour tore through nearby Parkersburg, Iowa, lifting buildings off foundations, turning cars into missiles, and tearing the bark off trees. Files stored in steel file cabinets held up considerably well after being retrieved from the muck of a nearby field. But it's usually not the open, active client files that are stored in protective cabinets every night, and the whereabouts of many of those files are still being determined over a year later.

For Iowa lawyers affected by the spring storms of 2008, the answer to the question, "What would you do differently if you were forced to start a new law practice tomorrow?" usually includes a resolve to start scanning and storing client documents. New attorneys starting their law practices often remark that scanning file documents and storing them digitally seems like a natural thing to do. For lawyers affected by disaster and never again want the duty of informing clients that their file may have been permanently lost or destroyed, the decision to start scanning and storing electronic file documents seems like a no-brainer too.

There are many good reasons for lawyers to scan and store electronic copies of documents, and preserving all your client information electronically in case a disaster hits is primary among them. However, lawyers who scan and save client

documents digitally should be mindful of their duties regarding the safe preservation of electronic client information. Understanding how a good network system operates is important to help preserve confidential client information from accidental dissemination as well as maintaining the data safely, no matter what happens to the firm.

One of the advantages of preserving documents digitally is that the data can easily be stored in multiple locations. A single CD-RW disc can store over 20,000 letter-size documents, and it is a great way to conveniently start preserving electronic documents. But the key to all good backup/restore systems for computer networks is to put some distance between the storage media, and the computer where it came from. Online backup services like Mozy (www.mozy.com) and Carbonite (www.carbonite.com) automatically backup your firm's data offsite and offer secure, encrypted, unlimited file backup for about $5–$50 a month.

Along with finding a secure method of backup, lawyers who store their client documents digitally have an enhanced duty to protect the confidential nature of the information that is being scanned. Network firewalls are more important than ever for these firms in order to prevent unauthorized access to the confidential client information that is being scanned and saved on every file. Scanning and saving client information is a decision by the firm to exponentially grow the amount of electronic data the firm retains regarding their clients; therefore, every precaution should be made to preserve the security of that data including building and testing network firewalls, as well as implementing strong-password policies within the firm to keep out hackers.

A question that is usually foremost on the minds of lawyers implementing a document scanning set-up is, "How long should I keep the paper documents after I have scanned them to the electronic file?" The answer may vary from firm to firm, but it usually depends on the comfort level of the firm, as well as the purpose for the decision to start scanning firm documents.

For most firms, the decision to start scanning file documents is born out of a desire for long-term file preservation and storage convenience. These firms are more likely to amend their file retention policies to allow for the destruction of the paper file soon after the legal matter has concluded and it has been confirmed that all documents relating to the matter have been digitized and stored electronically. Firms that aggressively pursue scanning set-ups to create a near-paperless working environment will routinely scan incoming documents upon arrival at the firm, and retain the paper document in a 30-day folder,

whereupon at the end of 30 days the paper document is permanently destroyed.

In all cases, attorneys must examine the length of time the paper document is to be retained after it is scanned into the system, and set forth an established policy for document destruction within the firm. Firm employees should know the difference between original client documents, which are the property of the client and can never be destroyed without the client's prior written consent, and ordinary file documents. Additionally, the method of document destruction must be one that forever preserves the confidential nature of the file documents. Simply taking the scanned documents to the trash dumpster is not a reasonable method for getting rid of client documents.

Whether you wish to practice law in a near-paperless set-up, or you simply want to scan documents as a top-level backup system for your files, it is important to include safe policies for securing and storing your scanned data. Be mindful that a backup of the data is being stored safely off-site, the network security parameters are intact and up-to-date, and any paper being destroyed is done so confidentially. The rewards of a paperless firm can be great, and included in the reward should also be the peace of mind that your client information is safe no matter what comes blowing through the firm.

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# Seven Questions You Must Ask When Choosing an LPO Provider

*By Kevin Chern*

Legal process outsourcing (LPO) can provide exactly the agility a small firm or solo practitioner needs, making it possible to service as many clients as come through the door without paying unnecessary overhead or getting wrapped up in extensive administrative responsibilities. Outsourcing can improve return on

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investment, eliminate worries about absenteeism and productivity, reduce training and administrative burdens, and shift responsibility for employment taxes, insurance premiums and the like to an outside provider.

Last year, the American Bar Association Standing Committee on Ethics and Professional Responsibility explicitly acknowledged the value of outsourcing in a formal opinion, removing any lingering doubts about whether and how outsourcing could be conducted ethically. But deciding to outsource is only the first step. Whether or not outsourcing is profitable, whether it saves time or creates additional frustrations, whether or not ethical concerns arise—in general, how beneficial outsourcing can be to your law firm—depends on choosing the right provider for your needs. Choosing the right LPO provider means asking the right questions, of prospective providers and of yourself and your staff.

### Does the LPO Provider Have the Right Subject-Matter Expertise for Your Practice?

One of the primary purposes of outsourcing is that it takes training and administration off your plate. Of course, you'll be reviewing the work product of your LPO provider, but if you've found the right provider, you won't have to provide extensive direction in the specifics of your practice. If working with an LPO provider is labor-intensive and requires extensive feedback, much of the benefit of handing off those tasks will be lost. Ask specific questions to ensure that the staff who will be working on your cases have the specific training and experience necessary to work effectively in your practice area.

### Who Is Actually Handling Your Work on a Day-to-Day Basis?

When a company is trying to win your business, you'll see the best and the brightest. But the principals you meet with to close the deal aren't going to be personally handling your cases. The people you usually don't meet during the selection process are the most important when it comes to the quality of service you'll receive, so make sure you know who they are. Before making a decision about the provider, find out what kind of training is provided to the people actually processing your work, where they're located, what credentials are required and what kind of supervision they receive.

### How Does the Process Work, From Beginning to End?

Make sure to establish clear expectations about what you are expected to deliver to the LPO provider, through what channels and in what format. And, of course,

know what you can expect in terms of turnaround time and the final product. Further, remember that you have an ethical obligation to ensure that the work is handled competently and professionally, and that your clients' confidentiality is adequately protected. Know exactly what happens to your file, and who it passes through, between the time it leaves your hands and the time the finished product is returned to you for review.

### How Transparent Is the Process?

Find out whether your case file goes in one end of a dark tunnel and comes out the other, or whether you'll be able to observe the work in progress. Again, consider your ethical obligation to supervise work handled by non-attorneys and make sure that you have access to do so effectively. Some technology-enabled providers offer real-time access to documents and progress notes, so that you can monitor work-in-progress just as you would in your own office. In fact, virtual monitoring can be easier than in-office monitoring, if your provider offers one convenient location where you can track all of your cases.

### What, Exactly, Are You Getting for Your Money?

LPO serves many purposes, not the least of which is to allow you to adapt on the fly to fluctuating support needs. In the end, though, the bottom line is your bottom line. Find out exactly what tasks the provider will be taking off your plate, and factor in any added time investment required to work with the provider. Then assess the value of those services in terms of both time and money: know how much staff time you'll be freeing up, what costs you'll be saving, and what opportunities those savings open up for you. Outsourcing might increase your profits on a per-case basis. On the other hand, it might lower per-case profits slightly but allow you to handle a higher volume of cases with the same time investment. Either way, know exactly what the return on your investment will be and how to make the most of it before making a decision about which pieces of your process to outsource.

### What Is the Range of Services Offered by the Provider?

One of the key benefits of outsourcing should be flexibility; as your needs change, you can increase or decrease your use of outside services, so that you're not paying for help you don't need or, alternatively, finding yourself short-handed at critical times. Whether the change in your need for outsourcing is caused by variation in your caseload or changes in your human resources (i.e., staff vacations, extended absenteeism, turnover), you should have the flexibility to shift your reliance on the provider. Make sure that your provider offers a

broad enough range of services to adapt to your growing and shifting needs.

### How Flexible Is Your Contract?

Once again, the name of the game is adaptability. Outsourcing can save you from unnecessary overhead and allow you to pick up speed quickly when your caseload increases significantly, but only if your provider is prepared to make quick changes to accommodate your changing needs. Not only do you need a flexible agreement, but assurances that your provider has adequate staff and processes in place to keep pace with your workload as it ebbs and flows.

With the right research and planning, outsourcing can improve law firm return-on-investment, free up staff time to handle higher level tasks, and allow easy adaptability as your firm grows or business fluctuates. But, as in any other area of your business, jumping in without complete information can lead to wasted time, wasted money, and unexpected frustrations. Taking the time to gather the right information up front may well determine the value of your LPO experience.

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# Today's Legal Market Demands Broad Business Solutions

*By Daniel Cherrin*

Today's legal market demands a broad range of business solutions lawyers can provide their clients. A strategic communications plan can prove to be an extremely helpful tool law firms can provide their clients. For example, in today's 24/7 media culture, companies lack access to and control over the media who cover their industry and to the people that talk about them online.

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In addition, businesses often find themselves navigating a complex environment that requires dealing simultaneously with litigation, governmental and regulatory actions, media scrutiny, and public perception. Oftentimes business strategy demands a multidisciplinary approach of legal action, public relations, and government relations. Knowing where these issues converge can help protect your reputation and enhance your position in the marketplace.

For example, new court rules were recently unveiled in Michigan directing jurors not to Twitter about the case before them or to turn to the Internet for information beyond that which was presented to them in the court. Social media is becoming more than a tool for us to use to stay in touch with friends: it is becoming a new area to look out for our clients' interests and/or a new medium to promote our practice.

Also, in just seven months, Congress has passed a number of key bills that have been enacted by the president, including the economic stimulus package, expansion of SCHIP, Pentagon acquisition reforms, and other key reforms. Congress is in the midst of tackling a number of difficult issues, including energy and climate legislation, health care reform, FY 2010 appropriations, the reauthorization of the transportation bill, financial regulation, food safety, and immigration reform—all of which will affect our legal practice.

As a result, attorneys should extend their services beyond the courtroom and into the court of public opinion or legislature. If attorneys will not provide such services, then they should build strategic partnerships with public relations firms and/or lobbyists. To meet the needs of today's businesses, lawyers will need skilled advice regarding how to position their clients before the media or in front of the legislature, while legally protecting their clients.

For example, seeking PR counsel is an important aspect of representing clients in high-profile cases. Even if the issue is a small matter, there is no way we can tell how public opinion can or will shape the outcome of a case. Therefore, in engaging PR counsel:

- Have the lawyer retain the PR firm as opposed to your client directly, to try to preserve attorney-client privilege;
- The PR counsel should consult with the client only in the presence of an attorney and first talk things over with the attorney to seek their support and buy-in for the PR strategy.

Once a PR firm is engaged, they will (depending on the strategy):

- Asses the situation, review any media to date;
- Create key messages;
- Create talking points for key audiences including, staff, vendors, clients, and the media;
- Using the key messages, educate and sensitize the media to mitigate damage or control the story;
- Facilitate interviews; and
- Diligently work to preserve and protect your client's image in the public eye.

"An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client." See *Gentile v. State Bar of Nevada* (Kennedy opinion) 510 U.S. 1030, 1043 (1991). Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation in the court of public opinion

In today's fast-paced environment, where it may take years to build up one's reputation and only seconds to destroy it, a lawyer's role as advocate extends to managing his or her clients' reputations inside and out of the courtroom.

*Daniel Cherrin, an attorney, is the former communications director/press secretary for Detroit and to Detroit Mayor Kenneth V. Cockrel Jr. He is now president of North Coast Strategies, which provides cutting-edge practical advice where government action or inaction, litigation vulnerability, or complex regulatory requirements will impact your reputation and bottom line. You can reach Cherrin at dcherrin@NorthCoastStrategies.com or 313-300-0932.*

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## Disability Insurance to Protect Your Most Valuable Asset

*By Reneé Leskiw*

Despite the common assumption that the sum of your worldly possessions and investments is your most valuable asset, for most people it is simply not true. The fact is, more than investments, possessions, and even your business, a person's most valuable asset is usually his or her ability to earn an income.

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Losing that income due to an unexpected disability could create a financial hardship for your family and force a drastic change in your standard of living.

For example, a 30-year-old currently earning an annual income of $100,000 is at risk of losing more than $11 million dollars over the course of his or her working years if affected by a total disability and unable to work. (Calculation based on an annual 6 percent increase in earnings and is a hypothetical example for illustrative purposes only.)

The good news is that preparing for a total disability by purchasing disability insurance protection is probably the best way to protect your future income and help ensure you can provide for your family if you lose your ability to work.

### Who Should Consider Disability Insurance?

The risk of becoming disabled is significant. According to the most recent statistics from the 2009 edition of the National Safety Council's *Injury Facts, there are 3,000 disabling injuries in America every hour during the year*. Additionally, only 30 percent of all workers in private industry are covered by long-term disability income insurance, according to the American Council of Life Insurers.

In order words, in this country the probability of becoming disabled sometime during an individual's working years is substantial, and the unavailability of employer-provided long-term disability insurance affects 60 percent of employees.

Disability insurance helps ensure that a substantial portion of your income—typically from 50–70 percent— would continue if you were to become ill or injured and unable to work for several weeks, months, or even years. Benefit payments are made to the insured directly, providing money to help pay ongoing living expenses and keep retirement, education, and savings intact.

### Types of Disability Insurance to Consider

When researching the types of disability insurance protection you may need, it is first important to consider the areas of your life that may be affected by a loss of income. There are many to consider, but as a solo or small firm practitioner, the three most significant may be: your and your family's immediate financial need, your future financial security, and the strength of your firm or business.

#### *Immediate Financial Need*

If the primary breadwinner in your family were to lose his or her income on a long-term basis, what sacrifices would have to be made in order to compensate for that loss? All families would be affected financially and forced to make choices. Some families would be required to move or make dramatic lifestyle changes. Others would simply be unable to meet their financial obligations.

Long-term disability insurance can help safeguard you and your family against the financial pressures that accompany a total disability by providing monthly income at the coverage level you select. After the initial waiting period you choose at the time of application, payments are made directly to the insured to help cover the costs of everyday living expenses, and since you pay the premium yourself—instead of your employer paying it on your behalf—your monthly benefit payment should be tax free. Be sure to consult your tax advisor to confirm the plan you select is eligible for such tax benefit.

If you would be financially uncomfortable living without your income on a long-term basis, you should consider long-term disability insurance.

### *Future Financial Security*

Unfortunately, along with the loss of employment and income, another consequence of total disability is the lost ability to afford contributions into retirement savings vehicles. Even if you could afford just contributions, you may not be allowed to make them, as qualified plans require that contributions be made from earned income. If you are an employee of a firm that matches contributions, you also lose the benefit to “match.” All this may impact your standard of living throughout retirement.

Retirement contribution disability insurance can help you continue funding your retirement savings in the event of a loss of income due to total disability. These plans try to mirror your existing level of contributions to qualified retirement saving accounts such as an IRA, up to a certain level. Benefits can be in addition to personal disability insurance, depending on the carrier, and are usually directed to a preselected retirement savings account until age 59½, the usual minimum age to begin withdrawals without a tax penalty.

If maintaining your retirement savings contributions could become difficult if your income was lost due to a disability, a retirement contribution disability insurance plan could help ensure your retirement financial stability.

### *Strength of Your Firm*

As a solo or small firm practitioner, your personal efforts are directly responsible for generating the income necessary to pay the bills, maintain a staff, and remain in business. If you share a practice, what would happen to your clients if you suffered a total disability? Would your partners be able to continue until you got back to the office? Would you lose a valued staff member because you were not earning the fees needed to pay salaries?

Personal disability plans may help your family with the loss of your income, but they probably won't cover your monthly office expenses. Professional overhead expense plans will help protect your practice and your assets, to help ensure that your business will continue to operate without you.

Plans vary, but most pay you benefits in the events of a total disability to be used directly toward office expenses such as rent, nonlawyer staff salaries utilities, lease of office equipment, even accounting fees or professional memberships. Benefits are based on your current monthly financial obligation, up to a certain level, and are payable in the event of a qualifying disability, after an initial waiting period, for a specified length of time.

### Three Working as One

The advantages of insuring all the financial responsibilities in your life that may be at risk in the event of a total disability are obvious. With protection for the immediate and long-term financial needs of you and your family, and your business needs, you can have the peace of mind that comes with being properly prepared for the unexpected.

### The ABE Difference

The American Bar Endowment offers insurance exclusively for ABA members, with plans tailored to provide quality, affordable insurance from trusted insurers:

> The ABE-sponsored Group Long-Term Disability Income Protection plan, available exclusively for ABA members, offers up to $12,000 in monthly benefits sent directly to you following a qualifying total disability, with benefits that can continue until age 65 (up to 2 years for qualified disabilities that occur on or after member age 63 or for mental illness). In addition to providing the level of coverage that meets your needs—in $100 increments—this plan provides your own occupation protection, providing full benefits for up to five years if you are completely unable to perform the material duties of your regular job (including your particular specialty of law, if applicable). You

may also choose your own waiting period (60, 90, 180 or 365 days) and the optional Cost of Living Adjustment (COLA) Benefit which increases your benefit by an additional 3 percent for up to 5 years after your claim begins, to keep help pace with living costs.

The ABE-sponsored Retirement Contribution Disability Insurance plan, available exclusively for ABA members, gives you the choice of benefit amounts to mirror your current level of retirement contributions, including any matching amounts from your employer, up to $3,500 per month. Benefits for a qualifying disability may continue until age 65 (up to 2 years for qualified disabilities that occur on or after member age 63 or for mental illness), and include your own occupation protection; providing benefits for up to five years if you are disabled due to sickness or injury and are unable to perform the substantial and material duties of your regular occupation, including your specialty in the practice of law—not just "any job."

Many disability policies set a limit on the percentage of pre-disability income that they will replace. This plan will not be counted toward that limit on other disability plans available through the ABE. Check with your disability carrier to be sure that it will do the same.

The ABE-sponsored Professional Overhead Expense Insurance plan, exclusively for ABA members, can provide monthly benefits of up to $10,000, depending on your regular operating expenses, for up to one year. Benefits can be used to pay normal business expenses such as: rent, utilities, nonattorney employees' salaries, rental, lease or depreciation of office equipment, accounting fees, professional memberships, postage and stationery, and even interest payments on outstanding eligible business debts.

When ABA members participate in ABE-sponsored insurance plans, such as the Long-Term Disability, Retirement Disability, or Professional Overhead Expense plans, they have the unique opportunity to support the good works of the legal profession by donating any experience credits/dividends to the ABE to help support its charitable work in the field of law. Members who donate to the ABE make a difference. These funds, after administrative expenses, are the primary source of ABE's charitable grants to fund research, education and public service in the field of law. Insured members who donate their dividends are helping to meet their professional and public responsibilities, as well as obtaining valuable coverage for their families.

For more information regarding ABE-sponsored disability insurance protection,

through the Long-Term Disability Insurance plan, the Retirement Disability Insurance plan, or the Professional Overhead Expense plan, contact the ABE at 800-621-8981, or research available plans online at: www.abendowment.org/bp.asp.

Long-Term Disability Insurance and Retirement Disability Contribution Insurance plans are underwritten by The United States Life Insurance Company in the City of New York. Professional Overhead Expense insurance is underwritten by New York Life Insurance Company on policy form GRM.

**Note**

Established by the American Bar Association in 1942, the American Bar Endowment is a §501(c)(3) not-for-profit organization which, among other activities, provides all ABA members the unique opportunity to get quality, affordable insurance from trusted insurers, while giving back to the good works of the legal profession.

*Reneé Leskiw is the executive director of the American Bar Endowment.*

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# Expand Your Client Base With Group and Prepaid Legal Services Plans

*By William R. Go*

Lawyers don’t need anyone to tell them that the economy is bad. Solo and small firm practitioners are caught firmly between their rising expenses and their clients’ shrinking wallets. Expanding a general practice often requires expenditures for marketing, but by participating with group and prepaid legal

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services plans, you can have the clients calling you with no marketing costs. Sound too good to be true? Well, read on!

## What Are Group and Prepaid Legal Services?

### *Legal PPO*

There are several models, but some of the fastest growing plans are based on the traditional healthcare PPO model, where members choose a provider from the network and the plan pays the attorney directly for the covered matters. As with the health insurance model, different plans cover different matters.

### *No-Cost Referrals*

The marketing is handled for you so you can expand your practice without the advertising expense. Most plans are sold through employee benefit plans, so the plan markets to the employers, who then offer the benefit on a voluntary basis. The clients are referred directly to panel attorneys based on location and practice areas. The plans do not charge firms or lawyers a fee to join the panels.

### *General Civil Matters*

Legal plans typically cover everyday civil legal issues. Some plans will cover limited criminal matters, such as minor traffic offenses. Most plans are looking for lawyers and firms with general practices, able to cover the most common legal issues. Lawyers and firms are not prohibited from representing plan members in cases outside the covered matters, so yesterday's satisfied will client could be tomorrow's personal injury client.

## What's in It for Me?

### *Supplement Current Practice*

Most attorneys start with legal plans as a supplement to their regular business. Plans provide a ready-made client base without the need for advertising. The downside is that the compensation for the covered benefits is typically less than the usual hourly rate. The attorneys who stay with legal plans quickly realize that the more efficiently they operate, the more profitable servicing legal plans can become.

### *Regular Rate Referrals Outside the Plan Structure*

For many firms that use legal plans as an adjunct to their existing business, they have found that "word of mouth referrals" by plan members to be a good source

of new business. For example, a will for a plan member is reimbursed at less than the lawyer would customarily charge, but that satisfied client refers friends and neighbors who are not in the plan. Happy clients will return for legal work not covered by the plans.

### *No Account Receivables*

Covered services provided to plan members are paid directly to the attorney, according to a set fee schedule, no collection headaches. When a client retains the lawyer for noncovered services, the lawyer bills the client directly at normal rates, after executing a fee agreement with the client. With all noncovered cases, including contingent fee matters, the fees are not shared with the plans.

### *Training*

Most of the larger plans will provide a manual detailing the coverage and a plan representative to assist with questions about coverage, billing and other procedures. In addition, the plans may host CLE events and conferences, providing low cost educational opportunities.

### *Networking*

Panel attorneys form a nationwide network that can provide valuable resources to the solo and small firm practitioner. Far more than 15,000 attorneys nationwide are already providing services to group and prepaid plans. By joining a panel, you would have instant access to those lawyers, to serve a member across jurisdictional or practice boundaries or just to share ideas.

## How Do I Get Involved?

### *Plan Requirements*

- Be licensed to practice in the state where you accept clients.
- Be in good standing with the relevant regulatory authorities and no bar complaints or disciplinary problems.
- Maintain a physical office in the states(s) where licensed and practicing law.
- Maintain malpractice insurance coverage (some plans have partnership agreements with malpractice carriers).
- Some plans have a “minimum years of practice” requirement

### *On the Web*

There are several ways to get involved with group legal services plans. Through an exclusive arrangement with GPSolo, you can join the American Prepaid Legal Services Institute (API) and ABA-Affiliated organization at a special discounted rate. One of the member benefits of joining API is access to the Universal Application. Interested attorneys can fill out one web-based application and send it to seven different group legal services plans at once. The same portal allows current plan members to upload their annual updates and send that information to all the plans for which they provide services.

### Where Can I Get More Information?

- Go to http://www.aplsi.org
- Call Adrienne Tucker, API Member Services, at 312-988-5751
- Contact any member of the ABA Standing Committee on Group & Prepaid Legal Services (Dwight L. Smith, Chair

*William R. Go of Bakersfield, CA, is a former member ABA Standing Committee on Group & Prepaid Legal Services and the president-elect of the American Prepaid Legal Services Institute.*

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# How Social Media Helped Jump-Start My Practice

*By Cari Rincker*

Last June, I made a big decision to quit my job in Wyoming and relocate back to New York City to hang my shingle as an agriculture and environmental attorney. Armed only with my knowledge of reading a few books on starting a law practice, I started Rincker Law, PLLC. Social media has helped jump-start my law practice in several ways. My agriculture law blog, Facebook, Twitter, Linkedin, Plaxo, JD Supra, Avvo, and Justia have all played a role into getting my practice off the ground.

### I'm a Legal Blogger

Part of the reason why I decided to go solo was that I wanted to become the agriculture attorney that I went to law school to be. With this in mind, I wanted to start an agriculture law blog to help showcase this love for the industry. As a new solo, I felt that the blog would be a good way for me to focus my energies toward my long-term goals. But in the shortterm, it has played a role in building my practice in just a few months. The blog itself has been incredibly successful thus far. Not only does it demonstrate my knowledge and passion for agriculture

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law to potential clients, but my agriculture law blog is also becoming a great information source for people in the agriculture community. Additionally, I am finding my blog linked to other agriculture blogs, and this type of organic advertising is invaluable.

I have been pleasantly surprised how many agriculture producers are following my blog. Blogs have a unique way of forging relationships with people that you do not know. In the last month at two different conferences, several people have come up to me saying "I follow your blog!" From there, a conversation started helping make this person part of my network. From a technical standpoint, my web designers incorporated my blog directly into my website (www.rinckerlaw.com/blog). Even though many legal bloggers have their blogs on separate sites (e.g., Blogger, Wordpress, Typepad), having your blog incorporated in your firm's website helps the blog look more professional and drives more traffic to your law firm website. If a person is googling topics that I blog about, he/she can easily find my biography and contact information on my firm's website.

In my opinion, there are three big factors that help make a blog successful. The most important factor in a successful blog is knowing your audience. I'm not blogging to other lawyers; instead, I'm blogging to farmers, ranchers, and agribusiness owners. My blog is primarily informative and written to the nonlawyer. I want farmers and ranchers to check into my blog each week for information on current events and practical legal advice that they can implement in their life. One day I might blog about how Cass Sunstein was appointed, and the next I might continue my Ag Torts 101 series or discuss language that should be included in a farm lease. Blogs do not always have to be a sophisticated work of art, but they need to speak to your audience.

The second most important factor in a successful blog is to show who you are. Though I try to be professional in my blogs, I think lawyers should not be afraid to show their personality. To explain, some of my blogs have little to do with the law itself. For example, I might have a blogroll on various cattle blogs or ag tweeps to follow or discuss my involvement with the National Cattlemen's Beef Association's (NCBA), Young Producers' Council (YPC), or the New York State Bar Association (NYSBA) Animal Law Committee. Show who you are as a person and why you stand out from the crowd. At the end of the day, people want to hire somebody they like and trust. Have the real you shine through in your blog.

Finally, get the word out about your blog and its entries. Other types of social media can help do this for you. For example, I bring my blog into Facebook through the Networked Blogs application. Each time my blog is updated, it

shows up in the minifeed of my 1,000+ closest "friends." My friends oftentimes comment on my blogs right there in Facebook instead of the blog itself. Also, I always put my blog links on Twitter so the 1,000+ people following me see my blog topic and link. Some folks "retweet" my blog title and link to their followers (and so on).

My blog also automatically updates in my LinkedIn and Plaxo profiles, so my professional contacts can view my new entries. Justia also has my agriculture law "blawg" listed on their website. You've worked hard on building your social circles. Use these contacts to leverage the visibility and readership of your blog.

**I'm a Facebooker**

Admittedly, I am in the Facebook generation, but Facebook is a great marketing tool for attorneys of all age groups. I was in law school when Facebook was just for people with an email from colleges or universities, so most of my contemporaries are also on Facebook; however, Facebook isn't just for college kids anymore. Over the last few years, Facebook has matured and morphed into a powerful networking tool for professionals, organizations, and businesses.

Facebook is more about "*who you know*" while Twitter is about "*who you want to know*." My Facebook profile is a mix of both professional and personal. As I am "friending" more professional contacts, I have struggled somewhat on the proper balance. I do use Facebook to post personal pictures of my life, and most of my status updates are personal in nature, but Facebook does have sophisticated privacy settings. I am able to put strictly professional contacts on my "Limited Profile" so I can restrict their access to certain photo albums and information.

Some decide to have two Facebook profiles, one personal and one professional. This option seems unmanageable to me but it is the only way to really ensure professional contacts don't see personal information. Stay in your comfort zone, whatever that may be. The important networking principle here is that Facebook is a way to get to know *people*. Old friends, new friends, friends of friends (and their friends!): it's a place where people can interact and share ideas and what is going on in their life. Part of generating clients is building relationships, and Facebook is a perfect place to do that. Don't be a passive Facebooker—join the party and share your ideas, an interesting news article or post pictures. Join discussion groups relevant to your area of practice and chime into the conversation. Show your passions and who you are as a person. When these people need a lawyer, they will think of you.

I also use Facebook to help market my law firm. I downloaded the JD Supra application so my Facebook friends can see the legal articles that I have uploaded onto the site. As noted above, I bring my agriculture law blog into Facebook through Networked Blogs. I also created a "fan page" for Rincker Law, PLLC, and in only a month I have almost 400 "fans." I keep my personal profile private while my fan page is open to the public so the articles I post on there can be found through Google. A fan page can be used to generate discussion, post news about your law practice, or list upcoming speaking events. In addition, my blog also automatically comes into my Facebook fan page. I also think that my fan pages illustrate that I have a lot of people who know and support me.

### I'm a Legal Bird

After months of resistence, I finally joined Twitter, and it has had a positive impact on my career. In fact, I have generated more contacts through Twitter than the other types of social media combined. At first, I didn't understand Twitter because I was already a Facebooker. Twitter just seemed like another place for me to post Facebook status updates, but Twitter is a completely different animal than Facebook entirely. If you are not on Twitter, I urge you to give it a chance.

In just a few short months, I quickly caught on to the madness, and I am now part of the cult called Twittersphere. After watching a tutorial on YouTube, I finally learned how to successfully use Twitter (it took me a week to understand what the "@" and "#" symbols meant). Before I knew it, I had farmers and ranchers all over the country following my tweets and replying back to me. I have had phone and email conversations with people that I have met through Twitter and have met several people In Real Life (IRL) through Tweet-ups and agriculture conferences. The real key here is to try to convert *virtual* relationships into *real* relationships, which takes time and persistence.

Most of the people I am friends with on Facebook I know personally; however, the charm of Twitter is that you follow and are followed by people you do not necessarily know personally. Twitter is about forging relationships with people you *want* to know. Though some people choose to tweet about every nuance of their life, Twitter is primarily about sharing ideas. This is the true value of Twitter. It is the fastest way to get and spread news today and a great way to have conversations about the issues you care about (and your clients care about). It's amazing what you can say in 140 characters.

Another way that Twitter can help spark networking opportunities is through

participation in discussion groups with your potential clients. For example, I participate in weekly discussions called #agchat (the hashtag makes the term searchable on Twitter). I join the conversation on Tuesday nights with farmers, ranchers, agriculture extension specialists, and other agriculture enthusiasts to talk about issues affecting the industry. Not only has it helped me gain prominence within the industry, but it has also helped build relationships. There are discussion chat groups in myriad of topics on Twitter, and I think lawyers need to be part of that online conversation.

In addition, I have used Twitter as a powerful marketing tool for my firm. As I previously stated, each time I update my blog, I post a link on Twitter and oftentimes my ag tweeps "retweet" this link to their followers. This helps increase the readership of my blog and visitors to my law firm website. Also, let your relationships with your tweeps help do the marketing for you.

For example, I met an ag journalist through Twitter that recently recommended me as an agriculture attorney in her article (which is the best kind of advertising that you can ever receive). On Fridays, the folks on Twitter recommend other people to follow. If I am mentioned in a #FollowFriday (or #FarmerFriday) by a farmer or rancher, their followers are more likely to follow my tweets as well allowing my network to expand while helping get my name out among the agriculture industry. Furthermore, my web designers also developed a Twitter background for me that matches my website. From a marketing standpoint, this background gives my Twitter page a more professional look and I am able to comply with New York ethics rules by ensuring the background says "Attorney Advertising."

Twitter is also perfect for technology enthusiasts, like myself, and helps create a public image that is technology savvy. I downloaded UberTwitter to my Blackberry so I can literally tweet from the palm of my hand when I am out of the office. I enjoy tweeting from conferences from my Blackberry and being apart of that "breaking news" source for farmers and ranchers. Additionally, I have also downloaded TweetDeck to my computer, which adds a completely different dimension to Twitter. I have two Twitter accounts: a personal account (@CariRincker) and a law firm account (@RinckerLaw). Tweetdeck makes managing multiple accounts a breeze.

You can also selectively choose to update your Facebook status from Tweetdeck and have columns for search terms such as #ag, #farm, or #cattle. It is very easy to "retweet" ("RT") through Tweetdeck or send people direct messages or @ replies. Additionally, JD Supra has an exciting Facebook application for Twitter

called Social Transcripts. Through this application, my Facebook account brings in all the tweets with #agchat each day so my Facebook friends can quickly see the news bites affecting agriculture. Not only do I want to portray the image that I am on the cutting edge of technology, but I also want people to see me as a great source of information on agriculture law and policy.

From a privacy standpoint, I have decided to have my @CariRincker account private and my @RinckerLaw account public. There are different views about this. I tweet mostly about law firm news and agriculture law from my @RinckerLaw account while my @CariRincker account is a mixture of both personal and professional tweets. I prefer this so every tweet from @CariRincker cannot be Googled; however, my tweets and hashtags from this account cannot be searched within Twitter, so I probably don't have as many followers as I could. Another advantage to having public accounts is the ability to participate in discussion groups like #agchat or #foodchat. Chat programs like TweetChat or Twubs cannot pick up your tweets if they are private. Because of this, most attorneys on Twitter tend to keep their account(s) completely public. This is a matter of personal preference, and I reconciled it by having both a private and public account. I use my public @RinckerLaw account to participate in discussion groups, and I am more selective on my tweets from this account.

**I Keep My Profiles Updated and Stay Abreast of Social Media Trends**

I have professional profiles listed on LinkedIn, Plaxo, Avvo, Justia, JD Supra, Martindale Hubble, and Findlaw. I realize that this list is somewhat exhausting, but I think that it's important to have updated profiles on at least a few of these websites. Each of these websites have potential advantages and ways to help generate business.

LinkedIn allows you to post your online resume and connect with other professionals. I bring my blog into LinkedIn and join relevant groups for networking purposes. I have also been very impressed with Justia so far. It's a great way to bring in all your information about your law practice onto one place with links to your "blawg," Twitter, JD Supra, Scribd, Facebook, etc. JD Supra has also be a nice place to upload legal documents and articles. I recently prepared a law outline for an animal welfare conference and uploaded the outline onto JD Supra. I also posted the link to my livestock animal cruelty outline to my agriculture law blog. Social media is at its best when the different tools are blended.

Admittedly, I have not fully tapped into my potential with Avvo. Though my

profile is updated, many lawyers generate business by answering questions from potential clients through the program. Social media can be somewhat time-consuming, but I should probably implement time to answer questions on Avvo into my daily routine. I am also considering starting a YouTube account for Rincker Law, PLLC where I will have videos of interesting agriculture law lectures done by myself and other attorneys in the industry. Some attorneys are video blogging right now and that is something else that I am considering. Stay abreast of social media trends, but also make them your own and tailor your use to speak to potential clients.

### How Has Social Media Translated Into Business?

My activity in social media has generated business for my new law practice in several ways. First, some of my clients and potential clients are using social media. Powerful networking requires planting seeds and cultivating those relationships. I have cultivated past relationships through Facebook and formed new ones through Twitter. Not only have I met clients and potential clients through social media, but I have also met other attorneys who have referred work to me. Second, social media has given me a way to demonstrate my knowledge and passion for agriculture law to my friends and the general public. We live in an Internet age, and clients are attracted to lawyers who are talking, writing, blogging, and tweeting about the issues that are important to them. Finally, social media has given me an Internet presence that showcases my credentials and highlights my personality. Social media allows attorneys to be *creatively professional* while cultivating relationships with both clients and respected colleagues. Social media can be time-consuming, so choose your weapons accordingly. The ultimate goal is to strengthen your Internet presence, expand your social network, and build your credibility as an attorney in your area of practice.

*Cari B. Rincker is the principal attorney at Rincker Law, PLLC, in New York, New York. Before starting Rincker Law, PLLC, Cari was an associate at Budd-Falen Law Offices, LLC, in Cheyenne, Wyoming where her broad practice areas ranged from agriculture, environmental, and natural resource issues to federal lands, wind energy development, crop insurance, property law, commercial law, and probate with clients located all over the west. She can be reached at cari@rinckerlaw.com.*

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## YOUNG LAWYERS

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## Advice for Your First Client Interview

*By Adam J. Post*

So you have braved this current economic recession and started your own solo practice or small firm. You have secured professional liability insurance, found office space, and started building your Internet presence. Your phone has just started to ring, your email volume is picking up, and you are networking with other attorneys. You are no doubt focused on the business aspect of your law practice. All those steps are important to the success of your new business. Hopefully soon you will have your first client interview. If it goes well, you will sign your first client and start to actually practice law in addition to building the business side of your practice. Here are several critical elements to keep in mind before and while you meet with your potential client.

**Actually Listen to What They Have to Say**!

You surely have encountered many fellow lawyers who fight to explain the law in depth, arguing over each and every obscure point without really listening to the other side. This is not one of those situations. If you find that your potential client wants to spend the time arguing and bickering, then you have a good

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indication of what your working relationship will be. Remember that a client interview is also an attorney interview and is always a two-way street. The client needs to be confident in your ability to represent him or her, and you need to feel that you can work with the client. It will help you to adopt a listening frame of mind that you mentally take with you into the client interview. Because we are attorneys, clients come to us with legal problems, and in order to ultimately assist in solving the problem, we need to listen to find out what the details are. In addition to hearing and taking note of all the important facts, you give the client an important opportunity to get everything out in the open, creating an honest, sharing environment. Although it may sound cheesy, we always want the opportunity to tell our version of events, our story. No doubt they may have told friends or family members about their legal issue, but like a psychologist or doctor, you are listening to their story in a different, more objective light. This is probably the first time that they have explained all of the facts to you, and confided in you with issues they may have omitted from conversations with the other parties. You may have heard the legal issues and facts involved in other cases, but it is critical to understand that this matter is of high importance to your client. Imagine if you were in their shoes and you needed the help of a skilled attorney to represent you on an important legal issue.

### Remember That You Must Manage Expectations From the Start

Your potential client may want the moon but may also have no idea what to expect as a realistic outcome for their specific case. I have heard people joke about how lawyers always respond to a question with “it depends” or “maybe,” without giving a firm answer. This is because you need to cover the different scenarios that may unfold in your handling of your potential client’s case. Don’t build up expectations to make them higher than what you are sure you can deliver because your client will remember what you said and rightly hold you accountable. If you do not know the answer to a question that you field in the interview, explain to them that you will research the issue and get back to them with the information. It is much better to deliver additional value to your client in your representation of them versus failing to deliver on objectives established early on. That is the difference between having satisfied clients who refer you to others and unsatisfied clients. This applies to the biggest and even the smallest of issues involved in your service to the client. For example, you need to make sure that you have established when and how you will communicate case updates. Follow though and timely return phone calls and emails the day they are received. Keep the client connected to the progress of the case with a prompt update of any important developments. There is nothing worse than promising

to keep the client informed and not doing so. An email or phone call only takes a minute or two, while demonstrating professionalism and reflecting the attention that you are devoting to them.

Many law schools conduct classes on empathic listening and "the practice of law." I'm sure that many of you have taken such classes, but most schools and teachers don't treat them with the importance they deserve. You are much more likely to profit from developing this skill in your legal career, than from focusing on the legal abstractionisms that most law school professors devote time to. As a law student at UC Davis, I remember taking one of these classes that spelled out the principles of the client interview, but did not actually teach the practical art in any meaningful way. It's like riding a bike because it comes easier to some than others, but can only be mastered with practice.

*Adam J. Post is a Los Angeles criminal and family law attorney. His solo practice, the Law Office of Adam J. Post, focuses on criminal defense and family law. Mr. Post is a former deputy district attorney and a graduate of UC Davis Law School. He can be reached at adampostlaw@gmail.com, and he maintains his website at http://www.adamjpost.com and his Los Angeles DUI Defense and Family Lawyer blogs are published at LADuiDefense.blogspot.com and MyLosAngelesFamilyLawyer.blogspot.com/.*

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## Endowment Spending: What's a University to Do?

*By Susan N. Gary*

Should Brandeis University sell off its art collection to meet expenses? Why can't it use its endowment instead? What if the endowments used to fund professorships or scholarships drop in value? Should a university spend more from its endowment to tide it over during these difficult economic times? Should a university spend less and try to preserve what's left in its endowment? These are all pressing questions, but none of them have easy answers. Legal rules provide guidance—not answers—but understanding the guidance is instructive. Misunderstandings about what the laws say—and do not say—have confused the discussions about endowment spending. A clearer understandingmay help.

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A number of incorrect statements have circulated recently:

- A university or other charity cannot spend from an endowment fund that is “underwater” (i.e., with a value below the value of the original gift).
- UMIFA was created to protect money in endowment funds; UPMIFA allows charities to spend whatever they want.
- UPMIFA changes donor intent.

A bit of history will help explain why these statements are not accurate. Two versions of a state law apply to many endowment funds. UMIFA (the Uniform Management of Institutional Funds Act (1972)) is the older version, adopted in 47 states and the District of Columbia, and UPMIFA (the Uniform Prudent Management of Institutional Funds Act (2006)), is the newer version, adopted in 28 states plus D.C. and under consideration in many more states. Both statutes apply to charities organized as nonprofit corporations, and in most states the statutes apply to colleges and universities or, in the case of public universities, to the endowment funds held for them by university foundations. UMIFA and UPMIFA both provide interpretations of donor intent concerning spending from endowment funds. The statutes apply only when a university and donor have not reached some other agreement about the “rules” that will govern endowment spending. Many endowment funds need not use the statutory guidance.

Imagine that a university says to a donor, “Here’s how we operate the endowment: we apply a spending rate of four percent to the total value of the fund and that’s what we distribute each year. We review the spending rate every year and we may adjust it up or down, but we won’t make huge adjustments.” The donor responds, “Great. That sounds like a good way to operate. Here’s $100,000 for the endowment.” (Would that it were always that easy.) In this case, assuming that the information is written down by the university and given to the donor, UMIFA (or UPMIFA) will not apply—the university and donor have written their own rules.

But what if a donor makes a gift to a university and says, “Hold this as an endowment” or maybe instead says, “Spend only the income from this gift.” If income had one, clear definition, we would know what that donor meant, but income may mean trust accounting income (the rules that determine income and principal for a trust), taxable income, corporate income, or something else. In the 1960s, most people assumed that “income” for a university meant trust accounting income. The trust accounting rules defined income as interest,

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Imagine that a university says to a donor, "Here's how we operate the endowment: we apply a spending rate of four percent to the total value of the fund and that's what we distribute each year. We review the spending rate every year and we may adjust it up or down, but we won't make huge adjustments." The donor responds, "Great. That sounds like a good way to operate. Here's $100,000 for the endowment." (Would that it were always that easy.) In this case, assuming that the information is written down by the university and given to the donor, UMIFA (or UPMIFA) will not apply—the university and donor have written their own rules.

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dividends, rents, and royalties and assigned all capital gains to principal. An endowment that could only distribute "income" might be tempted to invest primarily in bonds to generate interest. A decision not to invest in stocks meant more income in the short term, but also meant that the value of the fund eroded over time.

In 1972 the Uniform Law Commission (aka the National Conference of Commissioners on Uniform State Laws) produced UMIFA to respond to the problem. UMIFA did not define income or principal and left a lot of open questions, but it did make investing for total return possible and enabled charities to create balanced portfolios for their endowments. UMIFA facilitated the successful growth of many endowments. It also indirectly encouraged the development of the spending rates that many universities and other charities now use.

UMIFA created a concept called historic dollar value (hdv) to represent the dollars contributed to an endowment. Hdv did not represent "principal," and UMIFA did not suggest that a fund should spend everything above hdv. The concept simply provided a way to say that a charity could spend appreciation—the amount above hdv—and thus authorized the spending of capital gains. An endowment fund is said to be "underwater" when the value of the fund falls below its hdv. A fund cannot spend capital gains while it is underwater. UMIFA said nothing about when a charity could spend interest and dividend income, and the right to spend that income appears to continue under other law, even when a fund is underwater.

UMIFA worked reasonably well, but using hdv as a way to explain spending created some odd results. For an old fund, hdv becomes meaningless. An endowment created in 1930 with $100,000 might be worth $1 million in 2009. An hdv of $100,000 does not provide any useful guidance on what the endowment should spend. For a recently established fund, hdv may prevent the university from spending capital gains, if a drop in stock market follows soon after the gift. An endowment created in 2007 with $100,000 may be worth $70,000 or even less in 2009. The hdv remains at $100,000, and the university will be unable to spend appreciation until the value of the fund exceeds that amount. UPMIFA changes the guidance for charities trying to do right by their donors. UPMIFA does not (and could not, constitutionally) change donor intent.

Rather UPMIFA changes the way a university interprets donor intent. As discussed, when a donor says "pay only the income," the donor has not clearly indicated what that means. Before UMIFA, universities interpreted it to mean

"pay only interest and dividend income." UMIFA then changed the interpretation and interpreted it to mean "spend the amount of appreciation above hdv that the university determines to be prudent." UPMIFA changes the interpretation again and interprets the donor to mean "spend some amount each year but hold enough back to preserve the long-term viability of the fund." Both UMIFA and UPMIFA require the university to act prudently in deciding how much to spend, but UPMIFA provides more and better guidance for making that determination.

Here again are those incorrect statements, this time followed by explanations of why the statements are incorrect.

**Under UMIFA, a university cannot spend from an endowment fund that is "underwater."**

UMIFA does not prevent a university from spending interest or dividend income earned by an underwater endowment. Guidance on the website of the New York Attorney General's Charities Bureau takes this position, and this position is consistent with the language of UMIFA.

A university may also be able to spend from an underwater endowment if the university authorized the spending before the fund went underwater. UMIFA and UPMIFA both use the language "appropriate for expenditure" rather than "spend." The distinction is intentional. The board of a university will typically make a decision to spend from an endowment at some time, perhaps some months, before the actual spending takes place. The board must be able to act based on information available at the time the board makes the decision. If a decision to spend is prudent at the time the board votes to appropriate, then the university can spend that amount even if the endowment goes underwater after the appropriation.

**UMIFA was created to protect money in endowment funds; UPMIFA allows charities to spend whatever they want.**

John Hechinger and Jennifer Levitz discussed endowments in the Wall Street Journal (Feb. 11, 2009) and described UMIFA as "laws passed decades ago to keep charitable gifts from disappearing too rapidly . . . ." As explained above, UMIFA actually increased the ability of a university to spend from an endowment fund by authorizing the spending of capital gains. Hdv was not created to protect the funds of an endowment; hdv was created to provide a mechanism for determining what constituted appreciation.

UPMIFA provides better guidance on spending from an endowment and establishes more clearly the rules of prudence that govern that spending. For old funds, hdv is meaningless, and although UMIFA requires the university to be prudent, UPMIFA provides a list of factors for the university to consider in making a prudent decision. The duration of the fund is key among those factors and reminds the university not to spend too much or too quickly. UPMIFA permits spending when a fund's value falls below hdv, but only if spending under those circumstances is prudent, keeping in mind the long-term nature of an endowment fund.

**UPMIFA changes donor intent.**

Neither UMIFA nor UPMIFA change donor intent, although both change the interpretation of what an endowment means. When UMIFA first appeared, the New Hampshire Legislature asked the New Hampshire Supreme Court whether UMIFA would violate the contracts clause of the constitution if it applied to gifts that predated the statute. The court concluded it would not, because the statute merely interprets intent and does not change it. Like UMIFA, UPMIFA changes the interpretation of what it means to be an endowment.

Anecdotal evidence suggests that many donors want an endowment to continue spending during economic downturns. Continuation of a university's programs is more important to these donors then maintenance of any particular amount in the fund. But donors presumably also hope that the university will weather current conditions and will have enough left in its endowment to continue to grow and build.

UPMIFA allows a university to spend appreciation when a fund goes underwater, and for that reason interest in UPMIFA has grown. Under UPMIFA a university will not need to change its investment strategy to generate interest and dividend income in order to continue spending, and a university can use its endowments sensibly during these difficult economic times. But UPMIFA will not solve a university's economic woes and still leaves the university with hard decisions. One university may find spending from an endowment necessary to continue funding important programs. As long as the university complies with any purpose restrictions on the endowment, spending may be prudent, even if the value of the fund drops further. Another university may have enough other funds to manage in the short term, and may decide to reduce or limit spending from the endowment, to preserve the amount that remains until the market recovers. Either decision may be correct legally, and the board must decide which is better for the university. UPMIFA improves the law, both by providing

flexibility to universities to allow them to make good decisions and by providing better guidance about what it means to be "prudent."

*Susan N. Gary is the Orlando J. and Marian H. Hollis Professor of Law at the University of Oregon. Prof. Gary served as reporter to the Drafting Committee to Revise UMIFA.*

**Note**

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# Trusts, Estate Planning and the Family Jet

*By Michelle M. Wade and Dillon L. Strohm*

When a high-net worth family or individual is purchasing a jet that will be flown primarily for personal and family use, it can be useful to consider at the outset how the structure of the ownership and operation of the aircraft fits within the estate plan of the owner and any future ownership or usage by his or her heirs.

Early planning may help avoid the need for future transfers of ownership of the aircraft. Most States impose taxes on transfers of aircraft, and there may also be other state and federal tax issues involved. These often arise when trying to restructure the ownership of the aircraft and transfer it to a trust in order to satisfy estate planning needs.

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Despite the many limitations on aircraft ownership and operations contained in the Federal Aviation Regulations, the U.S. Federal Aviation Administration (FAA) does allow registration of an aircraft in the name of a trustee of a trust. The FAA has requirements for trustee's of trusts which own aircraft. Under FAR 47.7(c), each trustee of the trust must be either a U.S. citizen or a resident alien. They must also submit an affidavit of citizenship from each trustee and a copy of the trust agreement to the FAA. The Federal Aviation Regulations (FARs) also require that they submit a "copy of each document legally affecting a relationship under the trust."

There are special requirements which must be met if any beneficiary is not either a U.S. citizen or a resident alien. An affidavit is required from each trustee stating that "the trustee is not aware of any reason, situation, or relationship (involving beneficiaries or other persons who are not U.S. citizens or resident aliens) as a result of which those persons together would have more than 25 percent of the aggregate power to influence or limit the exercise of the trustee's authority."

If persons who are neither U.S. citizens nor resident aliens have the power to direct or remove a trustee, either directly or indirectly through the control of another person, the trust agreement must provide that those persons together may not have more than 25 percent of the aggregate power to direct or remove a trustee. However, the regulation does not prevent those persons from having more than 25 percent of the beneficial interest in the trust.

Trusts, frequently called "owner trusts," are commonly utilized to own and register an aircraft in the United States. If an existing trust or a trust organized for a different purpose is later utilized to own the aircraft, the trust agreement may need to be amended in order to satisfy the FAA requirements mentioned above. The FAA must approve all trust agreements used to register an aircraft. As such, confidentiality of the terms regarding other assets held in a trust which has multiple purposes can be a concern if an aircraft is added to an existing trust.

Addressing aviation issues in the trust created to meet other estate planning and family needs can quickly become complex. Deciding how to best handle each issue varies from person to person. Consulting an attorney experienced in corporate jet registration and operations can assist by providing guidance on how to ensure FAA compliance while satisfying estate planning goals.

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### Note

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# Estate Planning for a Family with a Special Needs Child

*By Sebastian V. Grassi, Jr.*

This article is a general overview of issues that a lawyer may need to address when preparing an estate plan for a family with a special needs child.

For purposes of this article, "special needs child" refers to a child who, at birth or because of a subsequent illness or injury, is mentally, physically, or emotionally disabled, and because of the severity of the disability is, or may be, eligible for means-tested government benefits. "Means-tested" government benefits are public programs with limitations on the amount of income and assets/resources a recipient can own. Such programs include Supplemental Security Income and Medicaid.

• Past Issues

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Typical special needs children include those born with cerebral palsy, autism, Fragile X syndrome, Down syndrome, mental impairment, and so on. See Thomas D. Begley Jr. & Angela E. Canellos, *Special Needs Trust Handbook* (2009); chapter 17 of Lawrence A. Frolik & Melissa C. Brown, *Advising the Elderly or Disabled Client* (2d ed. supp. 2008); and Sterling L. Ross Jr., *The Special Needs Trust: A New Wrinkle No More* , 36th Heckerling Inst. on Est. Plan. ch. 16 (Jan. 2002), at 15-i, for detailed information on special needs planning.

### *Overview of Critical Government Benefit Programs*

The most important means-tested government benefit programs concerning a special needs child are:

- Supplemental Security Income (SSI), 42 U.S.C. § 1381 et seq., 20 C.F.R. Part 416, which provides a minimum level of monthly income to aged, blind, and disabled individuals who meet certain eligibility requirements and are indigent. In most states, the receipt of SSI benefits automatically entitles or includes the receipt of Medicaid benefits. The two benefits are linked together. If the special needs child loses his or her SSI benefits, the child may also lose his or her Medicaid benefits.
- Medicaid, 42 U.S.C. § 1396 et seq., 40 C.F.R. Parts 430, 431, and 435, which is a medical payment program (and not a health insurance program) for the aged, blind, and disabled who meet certain eligibility requirements and are indigent. In addition to paying for medical services, Medicaid pays for a host of ancillary services that are essential for a special needs child, such as personal care attendants, housing, and so on. Consequently, preserving the special needs child’s Medicaid eligibility is typically of paramount concern.

### *Special Needs Challenges and Responses*

In addition to the usual hurdles that parents face when preparing an estate plan (for example, who should be the guardian, trustee, executor, and so on), the parents of a special needs child are faced with five unique estate planning challenges:

1. how to provide for *all* of their loved ones without jeopardizing the special needs child’s current (or potential) eligibility for means-tested government benefits such as SSI and Medicaid;
2. how to design an estate plan that supplements the special needs child’s means-tested government benefits and enhances the quality of the special needs child’s life;
3. how to treat the other children equitably while providing for the special needs child;

4. how to make sure sufficient funds are available at a parent's death to care for the special needs child; and
5. how to provide for the proper supervision, management, and distribution of an inheritance for the special needs child through a third-party created and funded special needs trust (SNT).

Of these five unique estate planning challenges, items (4) and (5) typically prove to be the most difficult to implement. This is especially true if most of the parents' estate is composed of retirement benefits, if there is no trustee in the parents'/special needs child's vicinity who is experienced in administering SNTs, or if there is an experienced trustee available (typically a corporate trustee) but its minimum fee is too high relative to the proposed size of the SNT.

*Practice Point*: In the client estate planning questionnaire/intake form, ask if any family members are disabled, incapacitated, or have special needs.

At a minimum, the parents of a special needs child should typically have the following five estate planning documents prepared:

1. A last will and testament.
2. A general durable power of attorney for financial affairs (GDPA). The parent's GDPA should permit the agent to make discretionary nonsupport distributions to or for the benefit of the special needs child and to establish a third-party created and funded SNT for the benefit of the special needs child.
3. A durable medical power of attorney.
4. A revocable living trust. During a parent's period of incapacity, the parent's revocable living trust should contain language that permits the trustee to make discretionary nonsupport distributions to or for the benefit of the special needs child. On the parent's death, the special needs child's inheritance should be distributed to a third-party created and funded SNT previously established by the parent.
5. A third-party created and funded SNT, which is discussed below.

Five estate planning options are available to parents concerning their special needs child:

1. Distributing assets outright to the special needs child (not recommended because the assets may disqualify the child from receiving means-tested government benefits);
2. Disinheriting the special needs child (generally not recommended because the child will have no "safety net" if government benefits are subsequently

reduced or eliminated);

3. Leaving property to another family member with the "understanding" that the property will be used for the benefit of the special needs child (generally not recommended because the arrangement is not legally enforceable and the sibling's creditors (including a potential ex-spouse) may be able to seize the assets);
4. Establishing a third-party discretionary support trust for the special needs child (generally not recommended because the trust will, in many states, disqualify the child from receiving means-tested government benefits); and
5. Establishing a third-party created and funded SNT for the special needs child (highly recommended because the trust will not disqualify the child from receiving means-tested government benefits).

*The Third-Party Created and Funded Special Needs Trust*

Of these five options, practitioners generally prefer that parents establish an inter-vivos stand-alone, third-party created and funded SNT. An alternative to a stand-alone, third-party created and funded SNT is to have the parents' last will and testament or their revocable living trust contain third-party created and funded SNT provisions.

An SNT established by and wholly funded with the assets of someone other than the special needs child (or the special needs child's spouse) is considered to be a "third-party" trust. Under existing applicable law, assets contained in a properly drafted and administered third-party created and funded SNT are not considered to be "available" to the special needs child for determining the child's (financial) eligibility for means-tested government benefits, such as SSI and Medicaid, *and there is no requirement that Medicaid be repaid from the third-party created and funded SNT when the special needs child dies or if the trust terminates during the special needs child's lifetime.*

A typical third-party created and funded SNT is one established by the parents or grandparents of the special needs child that is funded with the parents' or grandparents' assets (and not with the assets of the special needs child) *and* such trust is not created under 42 U.S.C. § 1396p(c)(2)(B)(iii) to make the trustmaker (for example, the parent or grandparent) eligible for Medicaid paid nursing home care. A trust established with the special needs child's assets (such as an inheritance, gift, bequest, alimony, or lawsuit settlement received by or payable to the special needs child) is considered to be a "first-party" or "self-settled" trust. First-party special needs trusts are discussed below.

*Caution*: *Never, ever* include a Medicaid payback provision in a third-party

created and funded SNT. This point cannot be overemphasized.

*Practice Point*: If an irrevocable inter-vivos third-party created and funded SNT is established by the parents or grandparents, the parents' (or grandparents') wills should specify the source for the payment of any death taxes attributable to the trust if any part of the third-party created and funded SNT is includable in the parents' (or grandparents') gross estate. Should the death taxes be apportioned against the third-party created and funded SNT, or against the residue of the parents' (or grandparents') estate?

### *Trustee Selection*

Because the trustee of a third-party created and funded SNT is given complete discretion in making distributions to or for the benefit of the special needs child, who should serve as the trustee of a third-party created and funded SNT is important. The selection of the trustee involves many considerations, including the trustee's ability to understand and respond to the needs of the special needs child; the trustee's knowledge of government benefit programs and the effect that trust distributions will have on the special needs child's government benefits; the trustee's health, integrity, reliability, and financial acumen; the trustee's potential for a conflict of interest if the trustee is a current or remainder beneficiary of the trust; and the potential for adverse income and transfer tax consequences if a family member serves as a trustee and is also a current or remainder beneficiary of the trust.

*Caution*: Because of SSI and Medicaid rules and for various tax reasons, neither the special needs child nor his or her spouse should serve as trustee of either a third-party or first-party SNT.

### *A Maximum Flexibility*

Because a third-party created and funded SNT is a discretionary nonsupport trust with spendthrift provisions (a very important element under common law and the Uniform Trust Code (UTC)—see UTC §§ 501 and 502), the trustee has maximum flexibility to meet the beneficiary's needs and maintain the beneficiary's eligibility for government benefits, all of which underscores the need to select the right person to serve as trustee.

As previously mentioned, such a trust, if properly drafted and administered, does not disqualify a special needs child from receiving means-tested government benefits. A third-party created and funded SNT is well suited to deal with possible changes in the amount of government benefits that may be

available in the future because of changes in SSI or Medicaid funding, budget cuts, eligibility requirements, and so on.

Even if the special needs child does not receive means-tested government benefits such as SSI or Medicaid and instead receives entitlement-based government benefits such as Social Security Disability Income and Medicare, a third-party created and funded SNT will always protect the special needs child from his or her inabilities, disabilities, predators, and creditors. A third-party created and funded SNT can, at the same time, be both flexible and protective.

### *Contingent Provisions*

Anyone can become a special needs child (or severely disabled) in just a matter of seconds. An auto accident or sporting injury can change a person's life forever. To plan for the possibility that a child (or beneficiary under a trust or will) becomes severely disabled at a later date, the testator/trustmaker should include a provision in the governing instrument that permits the fiduciary to establish a third-party created and funded SNT and fund the trust with the property that would otherwise be paid outright to the (now) severely disabled beneficiary. See sample drafting language on the following page.

### *Coordination with Other Relatives' Estate Plans*

The principal purpose of a third-party created and funded SNT is to provide an inheritance for the special needs child without risking the loss of important means-tested government benefits such as SSI, Medicaid, and so on. Consequently, it is important that grandparents and other relatives (including the siblings of the special needs child) do not leave an inheritance outright to a special needs loved one.

Fortunately a parent's stand-alone inter-vivos third-party created and funded SNT can be structured to receive gifts, bequests, and inheritances from grandparents' (and other relatives'/friends') for the benefit of the special needs child. This avoids the grandparents (or other relatives/friends) having to prepare a separate third-party created and funded SNT.

### *Review of All the Parents' Assets*

A corollary to the need to coordinate a special needs child's inheritance with other relatives is the need to review all possible ways a special needs child could receive property, an inheritance, or a gift. For example, the following common assets and applicable beneficiary designations should be reviewed to make sure they will not be paid (or given) directly to the special needs child:

- IRA, 401(k), and other retirement benefits, see section 6.3.11 of Natalie B. Choate, *Life and Death Planning for Retirement Benefits* (6th ed. 2006), www.ataxplan.com;
- life insurance (including employer-provided life insurance) benefits;
- accidental death and travel insurance benefits provided through credit cards when a person purchases a plane ticket, and so on, using that credit card;
- annuities;
- savings bonds;
- any property not subject to the parents' will or trust;
- UGMA or UTMA accounts;
- "transfer on death" (TOD), "pay on death" (POD), "in trust for" (ITF) designations on accounts, savings bonds, or securities;
- inheritances, gifts, or bequests through another person's will or trust (if not paid to a third-party created and funded SNT);
- deeds;
- joint accounts;
- jointly owned property, including jointly owned real estate;
- final paycheck (including unused vacation and sick pay);
- collectibles, antiques, and family heirlooms;
- personal injury and wrongful death proceeds payable to a deceased parent's estate; and
- homestead laws that give the surviving spouse a life estate and the minor children a vested remainder interest (as does Florida law in certain instances).

*Caution*: This list is not exhaustive.

*Managing Assets Already Owned by a Special Needs Child*

If a special needs child who is disabled (as defined by Social Security under 42 U.S.C. § 1382c(a)(3)) has received (or has a vested noncontingent right to receive) an inheritance, gift, bequest, lawsuit award or settlement, child support, alimony, or divorce property settlement, the special needs child's receipt of these assets can result in the disqualification of means-tested government benefits such as SSI and Medicaid. See Thomas D. Begley Jr. & Andrew H. Hook, *Using Self-Settled Special Needs Trusts to Facilitate Matrimonial Settlements* , 34 Est. Plan. 42 (Apr. 2007).

To preserve these government benefits, the special needs child's disqualifying assets should be converted into exempt (or noncountable) assets or be transferred to a first-party self-settled SNT that is government approved.

### The (d)(4)(A) SNT

The first type of safe harbor first-party self-settled SNT is an inter-vivos irrevocable trust established under 42 U.S.C. § 1396p(d)(4)(A), commonly referred to as a "(d)(4)(A) SNT" or a "(d)(4)(A) Medicaid payback trust." A (d)(4)(A) SNT is best suited for a significant amount of resources that can sustain a professional trustee's minimum fee schedule. Generally, a corporate fiduciary requires the trust to contain at least $100,000 in marketable assets. By statute, a (d)(4)(A) SNT must contain a Medicaid payback provision on the death of the special needs child (or in some instances, if the trust terminates during the lifetime of the special needs child)—hence the name, "Medicaid payback trust."

*Practice Point*: As previously mentioned, a third-party created and funded SNT is *not* required to contain a Medicaid payback provision and should *never* contain a Medicaid payback provision.

### The (d)(4)(C) SNT

The second type of safe harbor first-party self-settled SNT is an inter-vivos "pooled account trust" established under 42 U.S.C. § 1396p(d)(4)(C), commonly referred to as a "(d)(4)(C) SNT" or a "(d)(4)(C) pooled account trust." A (d)(4)(C) SNT is administered by a nonprofit charitable association, which also acts as the trustee. The special needs child's disqualifying assets are transferred into the master trust, and a separate trust account (also known as a "sub-trust account") is established by the nonprofit charitable association for the sole benefit of the special needs child. For purposes of investment and management of funds, however, the master trust pools all the separate trust accounts—hence the name, "pooled account trust." A (d)(4)(C) pooled account trust is best suited for the situation in which the amount of non-exempt assets owned by the special needs child is not large enough to justify the cost of establishing and administering a (d)(4)(A) SNT or when the parents or child want to ultimately benefit the mission of the nonprofit association on the death of the special needs child.

*Practice Point*: Not all states have (d)(4)(C) pooled account trusts.

### OBRA 1993 Special Needs Trusts

Collectively, (d)(4)(A) SNTs and (d)(4)(C) SNTs are referred to as "OBRA 1993

special needs trusts" ("OBRA '93 SNTs") in reference to the law (the Omnibus Budget Reconciliation Act of 1993) that established the use of these trusts to preserve Medicaid eligibility, which was subsequently clarified in the Foster Care Independence Act of 1999, 42 U.S.C. § 1382b, to preserve SSI eligibility. See 42 U.S.C. § 1382b(e)(5), which authorizes the use of (d)(4)(A) and (d)(4)(C) SNTs to preserve SSI benefits for a special needs child.

The transfer of a special needs child's assets to a properly drafted and administered OBRA '93 SNT does not penalize the special needs child for purposes of qualifying for means-tested government benefits, and the child's assets held in a properly drafted and administered OBRA '93 SNT are not considered to be "available" to the special needs child for determining the child's financial eligibility for means-tested government benefits.

*Practice Point*: To avoid the special needs child making a completed gift to the OBRA '93 trust remainder beneficiaries on funding the trust, the special needs child should be granted a testamentary limited power of appointment over the trust assets. Treas. Reg. § 25.2511-2(c).

### *Medical Treatment and the Adult Special Needs Child*

Under the privacy rules of the federal Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. § 1320d, 45 C.F.R. Parts 160 – 164, which went into effect in April 2003, medical personnel (such as doctors and hospitals) are not allowed to talk freely about a patient's medical condition, and they can be fined or jailed for dissemination of any private health information without the patient's consent. This applies to all patients over the age of 18, including patients with special needs. Although the HIPAA privacy rules are well-intentioned, they can have horrendous implications for the medical care of an *adult* special needs child if he or she is unable to give informed consent and knowingly participate in his or her own medical treatment.

If an adult special needs child lacks the ability to make informed medical or mental health decisions or to give consent to the release of confidential medical information, parents should consider these options:

- if the special needs child is mentally competent under applicable state law, have an estate planning attorney prepare a durable medical power of attorney that includes HIPAA release information and names each parent as a "personal representative" under the HIPAA rules so that the parent can legally request and receive confidential medical information; or
- if the special needs child is mentally incompetent, obtain a guardianship over

the special needs child for medical treatment purposes.

*Assisting the Adult Special Needs Child in Financial, Educational, and Daily Living Matters*

### *General Durable Power of Attorney*

If an adult special needs child is mentally competent under applicable state law, he or she should have a GDPA prepared by an estate planning attorney. The GDPA for the special needs child should authorize the child's agent to transfer the child's assets into a first-party SNT.

*Practice Point*: Under federal law, a GDPA cannot be used by the special needs child's agent to establish a (d)(4)(A) SNT for the benefit of the special needs child; however, an agent under a GDPA can transfer the special needs child's assets into an existing (d)(4)(A) SNT. An agent under a GDPA, however, can execute a joinder agreement for a (d)(4)(C) pooled account trust and transfer the child's assets into the (d)(4)(C) pooled account trust. See Andrew H. Hook, 859 T.M., *Durable Powers of Attorney* , for a discussion of GDPAs and sample forms.

Once the child becomes an adult, a parent's right to know, monitor, advocate, and intercede in the special needs child's affairs may be limited or prohibited absent the child's consent, a court order (such as a guardianship), or a GDPA. A GDPA will permit the person named as the power of attorney to assist the special needs child in his or her financial affairs. The GDPA is highly recommended because it is the least costly and least intrusive method for assisting the adult child in his or her nonmedical affairs. When the special needs child dies, the authority given the person named as power of attorney under the GDPA automatically expires.

### *Parent as Representative Payee*

In addition, a parent may become the "representative payee" of the special needs child's SSI, SSDI, and Social Security benefits, thus avoiding a court-appointed "guardian of the estate" or conservatorship. 20 C.F.R. Parts 404.2001–404.2065. A representative payee is the SSA's version of a conservator/guardian of the estate (as concerns the benefits in question), and the appointment of a representative payee preempts the authority of a court-appointed guardian or conservator concerning the benefits in question. As with a conservatorship or guardian of the estate, however, an annual report must be filed with the SSA documenting how the funds were used for the benefit of the special needs child.

### *Durable Power of Attorney for Education Matters*

If an adult special needs child is mentally competent under applicable state law, he or she also should have a durable power of attorney for education matters prepared. Such a document can name the parents as the child's agent and advocate concerning educational matters. Assisting the child in education-related matters once the child turns 18 is especially important if the child is intimidated by authority figures, such as teachers and school administrators, and needs a third party to advocate on the child's behalf. In most instances, the parents are the natural and preferred choice to serve as the child's advocate. See Judith C. Saltzman & Barbara S. Hughes, *Planning with Special Needs Youth upon Reaching Majority: Education and Other Powers of Attorney* , 1 NAELA J. 41 (2005).

### *Conclusion*

Estate planning for the special needs family is the first of many steps that needs to be taken by parents in their journey of caring for all their loved ones. Financial planning, retirement planning, housing issues, caretakers, personal assistants, advocates, and so on, also need to be considered, especially as pertains to a special needs child. Estate planning is a starting point, not the end all. Competent legal counsel along with other professionals can guide the parents along the way. "It takes a team to plan for a special needs child." See Abraham J. Perlstein, *Comprehensive Future Care Planning for Disabled Beneficiaries* , 27 Est. Plan. 358 (Oct. 2000).

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### Note

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# Estate Planning for Entertainers and Professional Athletes

*By Bradley S. Shear*

Estate planning is usually a difficult topic to discuss with clients because most people do not want to discuss their mortality. This tends to be particularly true with entertainers and professional athletes. Due to the estate issues surrounding Michael Jackson and Steve McNair's deaths this past summer, the importance of a well-drafted estate plan has recently gained the attention of the public.

### Career May Be Short and Less Predictable

Generally, most people have a professional life that spans 30 plus years. However, a Major League Baseball player has an average career of

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approximately 5.6 seasons along with the luxury of a guaranteed contract. In contrast, a National Football League player has an average career of about 3.5 years and a nonguaranteed contract. Recording artists may be one-hit wonders, and actors may have several years of steady earnings followed by years of little or no entertainment-related income. Authors and songwriters may have royalty-based income that may change over time depending upon achieved benchmarks in their contracts.

### Client Interview and Estate Planning Questionnaire

An attorney must ask the right questions to learn the sources of all of his client's assets and income. Professional athletes and entertainers may have income streams that resemble a very tight bell curve. These clients may also have contracts that include escalators if certain milestones are achieved. In addition to their employment contracts, these clients may also have earnings that are generated by marketing and/or licensing agreements that may change over time.

Intellectual property such as copyrights and trademarks may also be part of the estate. A client may have created a work for hire, or he may own or co-own a copyright. Understanding the ownership rights that your clients may have or may reacquire in the future will affect an estate's value.

Internet and social media assets may be involved. A client should own his domain name, and register his Facebook personal url, Twitter account user name, Myspace user name, and blog. The primary and secondary domain name market is relatively fluid, so valuing these assets is not as challenging as it once was. However, social media user names may be difficult to value because a website has the ability to change its terms of service at any time, and a change may deem a social media user name nontransferable or transferable under strict guidelines. Independent valuation experts should be engaged to value any unique asset whose value is not easily discernable.

### Tools to Utilize to Accomplish an Estate Plan

Generally, most clients create an estate plan to minimize tax obligations and to distribute their assets after their death. However, clients who own historically important memorabilia, artwork, or intellectual property may be interested in sharing these assets with others or using these assets to benefit a particular charity or cause. A nonprofit foundation or a charitable trust may be able to accomplish this goal.

High-profile clients may also become ensnared in frivolous lawsuits, so it is

advisable to examine utilizing entities such as an LLC, or a trust to protect an estate. To minimize tax obligations gifting, trusts, and relocation to a state with a lower tax burden should be explored. Each situation is unique and may require more than one planning tool.

An advance health care directive along with a living will provides a plan to follow in case of incapacitation. A durable power of attorney may enable an agent to make financial decisions on one's behalf if the need arises. Even though some jurisdictions may not recognize the title of literary executor, authors may want to consider appointing one if this position is needed to preserve a writer's literary legacy. Clients who are heavy users of social media may want to consider appointing an Internet-savvy social media executor who focuses on a client's virtual legacy.

Since tax and estate law may change annually, an estate plan should be reviewed at least once a year. The plan should also be examined whenever a life-changing event occurs, such as marriage, separation, divorce, the birth or adoption of a child, or a drastic change in planned future income. A client's insurance needs may also be reviewed at this time.

Some entertainers and professional athletes may have nontraditional family situations. To minimize will and trust challenges it is recommended to list immediate, former, and possible family members who are left out of an estate plan or who are not provided for in the manner that may be expected. Even though some states do not recognize "in-terrorem" or "no-contest clauses," this clause may be considered to minimize possible litigation.

Estate plans are not just for high-profile clients such as entertainers and professional athletes. Everyone should have an estate plan because if one dies without one, the estate will be distributed based upon your state's intestate succession laws, and these laws may not divide one's assets in a manner that is consistent with one's wishes. Therefore, it is highly recommended that everyone have an estate plan.

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