Key New Developments in Real Estate Finance
By Brook Boyd

The following is a summary of the most important new developments in U.S. real estate finance, during the period from April-October of 2018. These developments are described in more detail in the 43rd update to Boyd, Real Estate Financing (Law Journal Press 2018).

Easing of Federal Regulatory Restrictions on Commercial Real Estate Finance

A federal regulatory penalty applies to commercial loans that primarily finance or refinance the acquisition, development, or construction of real property (for the purpose of converting such property into income-producing property), and that are dependent on future income or sales proceeds from, or refinancing of, such property, for the repayment of such loans ("HVCRE ADC loans"). Regulated lenders must generally hold 50% more capital for such HVCRE ADC loans than for regular commercial real estate loans. However, pursuant to the Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA"), HVCRE ADC loans do not include (A) an acquisition mortgage loan, or refinancing, of existing income-producing real property, if the cash flow from the property is sufficient to support the debt service and expenses of the property, (B) a mortgage loan for improvements to existing income-producing improved real property, if the cash flow is sufficient to support the debt service and expenses of the property; or (C) commercial real property projects in which (i) the loan-to-value ratio is less than or equal to the applicable maximum supervisory loan-to-value ratio; (ii) the borrower has contributed capital of at least 15% of the property's appraised, "as completed" value to the project in the form of (I) cash; (II) unencumbered readily marketable assets; (III) paid development expenses out-of-pocket; or (IV) contributed real property or improvements; and (iii) the borrower contributes the minimum amount of capital described under clause (ii) before the lender advances the loan, and such minimum amount of capital contributed by the borrower is contractually required to remain in the project until the loan has been reclassified by the lender as a non-HVCRE ADC loan. In addition, a loan is no longer deemed to be a HVCRE ADC loan upon: (1) the substantial completion of the development or construction of the real property being financed by the loan; and (2) cash flow from the property being sufficient to support the debt service and expenses of the property. Further, the following are not deemed to be HVCRE ADC loans: (1) any loan made prior to January 1, 2015, or 2) any loan for the acquisition, development, or construction of properties that are (i) 1-4 family residential properties; (ii) real property that would qualify as an investment in community development; or (iii) agricultural land.

EGRRCPA also provides that a “Community Bank Leverage Ratio” (the required minimum ratio [between 8-10%] of a bank's equity capital to its consolidated assets) will be issued by federal regulators for banks with assets of less than $10 billion; and all
New Laws for “Small” Lenders May Impair the Secondary Market for Their Loans

While new federal laws are intended to ease regulatory restrictions on certain lenders (such as certain regulated lenders with less than $10 billion of assets, as discussed above), however, some of such laws deny the same benefits to assignees that have been assigned loans originated by such lenders. This could adversely affect the secondary market for such loans, and may even trigger future claims against syndication sponsors, unless the impact of such new laws is expressly disclosed.

A Lost Note May Impair the Secondary Market for the Underlying Loan

In SMS Financial XXV, LLC v. Corsetti, the court held that a transferee of a lost note could not enforce it because Rhode Island had not adopted the 2002 amendment to Section 3-309 of the UCC, which explicitly permits the assignee of a lost note to enforce it. Similarly, in Sabido v. Bank of N.Y. Mellon, the court ruled that the assignee of a mortgage note was not entitled to enforce it, and rejected the assignee’s lost note affidavit since it “did not state that any of the putative transferees . . . were ever entitled to enforce the note, and did not state unequivocally that the note was not lost as the result of transfer or lawful seizure. . . . The [note assignee] was required . . . to prove that it ‘acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.’ [Fla. Stat.] § 673.3091(1)(a). . . . [T]he [note assignee] ‘offered no proof of anyone’s right to enforce the note when it was lost.’”

Documenting a Financing Based on SOFR (the Proposed Replacement for LIBOR)

The Alternative Reference Rates Committee of the New York Federal Reserve has issued guidelines for USD LIBOR “draft fall back contract language”, including “trigger events” (that start the transition from LIBOR to a new reference rate), a “successor rate waterfall” (listing various unadjusted rates that would replace LIBOR), and a “spread adjustment waterfall” (that would be applied to the successor rate on account of differences between LIBOR and SOFR). The “secured overnight financing rate” (“SOFR”), which is sponsored by the U.S. Federal Reserve, is generally expected to replace LIBOR. Also, Fannie Mae recently issued $6 billion of bonds with a floating interest rate pegged to SOFR. The documents for this offering are publicly available, and provide a market standard for future financings based on SOFR. Since SOFR is viewed as a risk-free rate, while LIBOR is not, therefore SOFR is expected to be lower generally than LIBOR at any given point in time. Accordingly, it is expected that an interest rate spread adjustment will be added to SOFR. Also, since SOFR may become a negative rate, therefore lenders should consider an interest rate floor for any SOFR-based financings.
Impact on Interstate Lending of U.S. Supreme Court ruling in South Dakota v. Wayfair, Inc.

Generally, in order for a U.S. state or local government to tax a U.S. or non-U.S. lender which is not physically present in such state or locality, there must be a “nexus,” between such lender and such state or locality, in accordance with U.S. federal law. However, in South Dakota v. Wayfair, Inc., the U.S. Supreme Court upheld the right of South Dakota to require large Internet retailers to collect sales taxes relating to sales to South Dakota residents, even though such retailers had no physical presence in South Dakota. In the light of this decision, lenders need to evaluate whether they are also subject to taxes in jurisdictions where such lenders have no physical presence, but have nonetheless transacted business.

How Lenders Can Be Protected Against Divisions of LLCs

New laws have been enacted in Delaware and other states that permit “division” of LLCs and their assets and obligations in a manner that may in certain cases leave a secured lender with a lien against a new entity that is no longer creditworthy. These laws require new protections for lenders against such risks. Accordingly, the loan documents should require (1) the lender’s prior written approval for divisions by LLCs and other entities, (2) new and acquired entities, resulting from any such division, to assume the original borrower’s obligations under the loan documents, and to consent to liens and security interests, in favor of the lender, against the assets acquired by such entities, and, (3) prior to any division, the filing of UCC financing statements (and, to the extent necessary, the recording of new mortgages and related instruments, and/or assumptions of existing mortgages and other existing instruments) in order to perfect the lender’s interest in the assets that are acquired by such entities. A lender should also consider requiring that the above restrictions be added to the borrower’s limited liability company agreement, and that such provision cannot be amended without the lender’s consent, although this may be subject to the rights of creditors pursuant to the bankruptcy laws.

Pledge to Mortgage Lender of Equity Interest in Borrower Has Been Held Enforceable and Not a “Clog” of the Borrower’s Right of Redemption

In one case, two lenders were secured by both (1) mortgages on two different properties, and (2) pledges of certain equity interests in the partnerships that owned such properties. When the lenders gave notice of their intention to sell such equity interests at a UCC sale, the owners of the properties sued for a preliminary injunction against such UCC sale, and claimed that such UCC sale would “clog” the equitable right of the property owners to pay the mortgages before a mortgage foreclosure. The court refused to grant such preliminary injunction, stating that (1) any losses of the owners of the properties would be compensable as damages, so they would suffer no irreparable harm, (2) the property owners had a right of redemption pursuant to UCC § 9-623 (which generally provides that redemption may occur any time before the secured party
disposes of the collateral at the UCC sale), and (3) the property owners could bid at the UCC sale.14

In Some States, Opinion Giver Must Acknowledge That It Represents the Lender

UC Funding I, LP v. Berkowitz, Trager & Trager15 held that, under Connecticut law, a lender group had no claim against a borrower's law firm, for giving a false legal opinion relating to a Ponzi scheme, because the law firm did not agree that it was issuing its opinion as counsel to the lenders. The court stated “a lawyer cannot have ‘undivided loyalty’ to her client and also have a legal obligation to the party adverse to her client in the transaction without express language indicating otherwise. . . . . . [Lenders] have not sufficiently alleged that it was reasonable for them to rely on the advice of [the borrower’s attorney], counsel of an adverse party in a financial transaction.”

This may trigger difficult ethical issues. For example, in some states, it is generally unethical for a lawyer to represent both the lender and the borrower in the same loan transaction, unless such parties consent, and the lawyer is engaged to act only in a ministerial role in order to carry out an agreement that has been previously agreed to by the parties without the assistance of the lawyer.16

“Franchise Services” Decision Clarifies When Bankruptcy Remote Provisions Are Enforceable

A new case upheld a Delaware corporate borrower’s “bankruptcy remote” organizational structure, since its certificate of incorporation provided that no bankruptcy petition could be filed by the corporation unless it was authorized by a majority of the holders of each class of stock. Therefore, the sole preferred shareholder had the right to an order dismissing the corporation’s bankruptcy petition (filed without the preferred shareholder’s approval), even though the parent company of the preferred shareholder was also an unsecured creditor of the Delaware corporation.17

Risks Relating to Loan Acceleration and De-acceleration

A potential land mine for a lender is created when the lender accelerates its loan, but then sends to the borrower a proposed loan modification agreement, pursuant to which the lender agrees to dismiss its existing foreclosure action, and to give the borrower additional time to pay the loan. In one case, a lender commenced a foreclosure action against a borrower on October 6, 2009, and accelerated the loan. This foreclosure action was dismissed in August 2013. The borrower then signed a loan modification agreement dated August 19, 2013, but the borrower alleged that he was later informed by the lender that there was no record of a loan modification agreement and that any payment for less than the unpaid balance would be rejected. The borrower continued to receive statements from the lender demanding payment of the entire unpaid balance. The borrower eventually sued to cancel the lender’s mortgage on the ground that it was time-barred on October 6, 2015 (i.e., 6 years after the lender’s acceleration of the loan). The court ruled that the plaintiff had acknowledged the mortgage loan by signing the
loan modification agreement, and there was no condition in such agreement that it be signed and returned to the borrower. Therefore, the court ruled that the loan was not time-barred, and granted the lender’s motion to dismiss the borrower’s action.18

If a lender is concerned that the statute of limitations to enforce a loan is about to expire, and the lender’s loan has been accelerated, then the lender can take unilateral action to de-accelerate its loan. In one case, a lender commenced a foreclosure action on January 13, 2009. On October 21, 2014, US Bank, as the lender, sent a letter to the borrower stating that the lender “hereby deaccelerates the maturity of the Loan, withdraws its prior demand for immediate payment of all sums secured by the Security Instrument and re-institutes the loan as an installment loan.” The court ruled that the January 13, 2009 foreclosure complaint accelerated the loan, and that the October 21, 2014 letter de-accelerated it. The court noted, in dictum, that “a ‘bare’ and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations.” However, the court refused to dismiss the borrower’s action to declare the lender’s mortgage unenforceable on statute of limitations grounds, on the basis that fact questions were unresolved regarding standing. The court stated, “the de-acceleration notice dated October 21, 2014, does not establish that US Bank had standing to de-accelerate the earlier demand that the . . . mortgage debt be paid in its entirety.”19

Obviously, it is preferable for a lender to obtain the express acknowledgment of the borrower and other loan obligors to any de-acceleration of the loan, rather than to rely on the lender’s unilateral de-acceleration.

Expansion of the jurisdiction of the Committee on Foreign Investment in the United States (“CFIUS”) to review U.S. and foreign transactions involving foreign persons

Certain purchases, leases or licenses of land by a foreign person, and acquisitions, mergers or takeovers involving foreign persons, are now subject to expanded review by the CFIUS.20 If CFIUS approval is required for any transaction, then all parties will need to ensure that such approval has been properly obtained. Since there are many issues relating to whether any particular investment must be precleared with CFIUS, therefore, some lawyers have recommended that, until these issues are resolved, law firms should include an exception, in their form opinion letters, for compliance with the CFIUS preclearance requirements.21

FNMA and FHLMC may refuse to buy residential mortgage loans unless they are based on approved credit scoring models

The Federal National Mortgage Association (“FNMA”) and the Federal Home Loan Mortgage Corporation (“FHLMC”) are authorized to condition the purchase of residential mortgage loans (including loans secured by condominium units, interests in cooperative apartments, and multifamily properties), on the validation and approval by FNMA or FHLMC, as applicable, of the credit scoring models used to approve the borrowers.
Each credit scoring model that has been validated and approved must be periodically reviewed to determine if the continued use of such model is still appropriate. Credit scoring models in use as of May 24, 2018 (that have not been so validated and approved) may continue to be used until the earlier of 1) the date a credit scoring model is approved as provided above, or 2) November 20, 2020.22

**New Method of Verifying Personal Data**

Lenders are now authorized, with the consent of an individual, to contact the U.S. Social Security Administration to confirm such individual’s name, social security number, and date of birth, in connection with a credit transaction and certain other cases described in 15 U.S.C. 1681b.23

**Lenders May Be Required To Delete Any Copy of Individual Borrower’s ID**

If an individual borrower makes an online application to an institutional lender for a loan, and the lender receives a copy or scan of the borrower’s driver’s license or personal ID, and uses such license or ID to verify the borrower’s identity, or as otherwise permitted by law, then the lender is required, in certain cases, to delete such copy or scan.24

**Loans May Be Unconscionable Even If They Are Not Usurious**

The California Supreme Court ruled that even if the interest rate on a consumer loan is not usurious, it may nonetheless be unconscionable if such interest rate is too high.25

The foregoing is merely summary general information, and is not specific legal advice for the benefit of any particular client or any other person.

---


2 E.g., 12 C.F.R. § 3.32(f-j).


6 See 15 U.S.C. § 1639c(b)(2)(F)(iii) (exemption from certain requirements relating to qualified mortgages for certain regulated lenders with less than $10 billion of assets); 12 U.S.C. § 3356(c) (limiting the right of a loan assignee to claim the benefit of a federal statutory exemption from certain appraisals of real estate located in rural areas); and 12 C.F.R. § 1026.35(b)(2)(v) (denying an exemption from the requirement for an escrow account for certain first-lien higher-priced mortgage loans that, at consummation, are subject to a commitment to be acquired by a person that does not satisfy the conditions in 12 C.F.R. § 1026.35(b)(2)(iii)).


585 U.S. 1 (2018). See REF, supra note 1, § 2.05[10][b].


2018 WL 2023485 (D. Conn. May 1, 2018). See REF, supra note 1, § 9.01[6].


In re Franchise Serv. Of N.A., Inc., 891 F.3d 198 (5th Cir. 2018). See REF, supra note 1, § 17.02[3][a-b].


Email from Richard Frasch to members of the Legal Opinions Committee, ABA Business Law Section (Nov. 1, 2018, 10:49 AM PDT) (on file with author).


De La Torre v. CashCall, Inc., 5 Cal. 5th 966, 422 P.3d 1004 (Sup. Ct. 2018). The actual language of the court is poetic, not specific. The court said that an interest rate on a consumer loan may be unconscionable if such interest rate is “so ‘unreasonably and unexpectedly harsh’ as to be ‘unduly oppressive’ or ‘shock the conscience.’”
FASTEN YOUR SEATBELTS:
THE TESTY TRACK OF ADVISING TRUSTEES IN LITIGATION

Crystal Patterson of Wyatt, Tarrant & Combs, LLP, Louisville, KY

David Lieberman of Levin Schreder & Carey, Chicago, IL

Kara Greuel of R&R Strategies, LLC, Tulsa, OK
A trustee enters your office, Petition in-hand, with a look of worry. Litigation has been commenced against the Trust, calling into question not only the conduct of certain trust beneficiaries, but also that of the trustee. “How can this be? We have always done what we thought was right. Do they really get to challenge our decisions? Do they really get to see my files? What about how much this going to cost me to defend? Can I recover my fees?” The questions are un-ending. Today, we’ll try to navigate some the issues that arise on the testy track of advising trustees involved in litigation.

I. BASIC FIDUCIARY PRINCIPALS GOVERNING YOUR CLIENT

A. You Are An Agent of a Fiduciary

A “fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary).” Paul B. Miller, Justifying Fiduciary Duties, 58 McGill L.J. 969, 1011-12 (2013). The resultant power to “act purposively on behalf of another” requires that a trustee, in exercising his authority, abide by the twin fiduciaries duties of loyalty and care. Id. at 1019. “The duty of loyalty proscribes misappropriation and appropriation and regulates conflicts of interest by requiring a fiduciary to act in the ‘best’ or even ‘sole’ interest” of those he is required to protect….The duty of care prescribes the fiduciary’s standard of care by establishing ‘reasonableness’ or ‘prudence’ standard that is informed by industry norms and practices.” Robert H. Sitkoff, An Economic Theory of Fiduciary Law, PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 198 (Andrew S. Gold and Paul B. Miller eds. 2014), https://dash.harvard.edu/bitstream/handle/1/15274343/PhilosophicalFoundationsFiduciaryLaw.pdf?sequence=1 (last accessed April 8, 2018). In the context of litigation then, the attorney’s role critical role becomes how to advise a fiduciary in such a way that the fiduciary is permitted to protect his or its own interests while simultaneously abiding by the trustee’s fiduciary duties of loyalty and care. A testy track, indeed.

B. Balancing Zealous Advocacy With Fiduciary Considerations

1. Model Rules tell us:

   a. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. (cmt to MR 1.3)

2. But a fiduciary client often owes competing duties. It is key that the litigant-fiduciary and its counsel heed, and sometimes strike a balance, among other duties:

   a. The duty of loyalty.
b. The duty to furnish information  
c. The duty to inform  
d. The duty of confidentiality  
e. The duty to preserve trust property  
f. The duty to defend actions  
g. The duty to deal impartially with beneficiaries

II. DEFINING WHO IS THE CLIENT

A. Counsel to the Fiduciary vs. Counsel to the “Trust”

1. Duties Run to the Fiduciary Only

The majority view is that a lawyer representing a fiduciary owes a duty only to the fiduciary, and not the beneficiaries of the trust or estate. An ABA legal ethics opinion succinctly articulates this view:

A lawyer who presents the fiduciary in a trust or estate matter is subject to the same limitations imposed by the Model Rules of Professional Conduct as are all other lawyers. The fact that the fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer’s obligations to the fiduciary client under the Model Rules, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. Specifically, the lawyer’s obligation to preserve the client’s confidences under Rule 1.6 is not altered by the circumstance that the client is a fiduciary. See ABA Legal Ethics Opinion 380 (May 9, 1994); see also Kentucky Bar Ass’n Legal Ethics Opinion E-401 (September, 1997) (“We reject the view that a lawyer who represents a fiduciary owes obligations to the beneficiaries that in some circumstances will override obligations otherwise owed by the lawyer to the fiduciary, such as the obligation of confidentiality;"

The California Court of Appeals espoused a similar view:

It is of course the purpose and obligation of both the fiduciary and his attorney to serve the estate. In such capacity they are obligated to communicate with, and to arbitrate conflicting claims among, those interested in the estate. While the fiduciary in the performance of this service may be exposed to the potential of malpractice (and hence is subject to surcharge when his administration is completed), the attorney by definition represents only one party: the fiduciary. It would be very dangerous to conclude that the attorney, through performance of his service to the administrator and by way of communication to estate beneficiaries,
subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to evenhanded and fair administration by the fiduciary. They are not owed a duty directly by the fiduciary’s attorney.

*Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1269, 266 Cal. Rptr. 483 (1990); see also Bain v. McIntosh, 2015 U.S. App. LEXIS 3116 (11th Cir. March 2, 2015) (concluding that under Florida law, “only the person or entity acting as a [trustee] is considered a client of the lawyer,” and affirming summary judgment in favor of an attorney whose accountings he prepared at the behest of his trustee client were the basis of a claim by the trust beneficiaries against him individually); *Huie v. DeShazo*, 922 S.W.2d 920, 925 (Tex. 1996); *Spinner v. Nutt*, 631 N.E.2d 542, 546 (Mass. 1994).

2. **Limited Duties Run to the Beneficiaries.**

Conversely, other jurisdictions follow the approach espoused by the Restatement (Third) of Law Governing Lawyers in recognizing that a lawyer may owe a duty to non-clients (such as trust beneficiaries) if the lawyer knows the fiduciary is violating its own duty and the lawyer does not act to stop the fiduciary. Restatement (Third) of Law Governing Lawyers Section 51(4) (2000). Specifically, a lawyer may be liable to a nonclient when:

(a) the lawyer’s client is a trustee, guardian, or [performs] similar functions for the nonclient;
(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of representation to prevent or rectify the breach of fiduciary duty owed by the client to the nonclient where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
(c) the nonclient is not reasonable able to protect its rights; and
(d) such a duty would not significantly impair the performance of the lawyer’s obligations to the client.

*Id.*; see also Charleson v. Hardesty, 839 P.2d 1303, 1306 (Nev. 1992) “[W]hen an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a duty of care and fiduciary duties towards the beneficiaries as a matter of law.”; ACTEC Commentaries MRPC 1.2 (the “lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them”).

**B. Individual vs. Corporate Trustee**

Where the trustee is an individual, serving in his or her individual capacity, it is clear who is the client: the individual. The question gets murkier when the trustee is a corporate trustee, trust company, or bank with a trust division. By and large, the corporate fiduciary is deemed to be the client. Individuals retained or employed by a corporate trustee are generally thought to directly
owe fiduciary duties to trust beneficiaries, as well. *In re Estate of Daniel Swiewicki*, 106 Ill. 2d 111, 1167-17 (1985).

III. TACKLING CONFLICTS

A. Reconciling Conflicts of Interest When Fiduciary Is Also a Beneficiary

B. Duty of Impartiality vs. Personal Interest

C. Fiduciary’s Duty to Defend Will or Trust Contest

D. Should a Fiduciary Seek to Enforce a No-Contest Clause
   1. Generally
   2. Do fiduciary duties trump a no-contest clause
   3. What if the fiduciary is the alleged wrong-doer

E. Special Issues with Trustees Who Also Are Attorneys and/or the Drafting Attorney

Attorneys and other professional advisors, such as accountants and financial advisors who serve as trustees are governed not only by fiduciary and negligence standards, but often by the ethical standards of their professions.

ABA Formal Opinion 02-426, “Attorney Serving as Fiduciary for an Estate or Trust” which gives important insight into the ethical norms in this area. Under the current Model Rules, attorneys can seek appointment as a fiduciary, but must not allow self-interest to cloud their exercise of independent professional judgment in recommending trustees. When there's a significant risk that the attorney's independent professional advice will be "materially limited," the attorney must obtain the client's informed consent in writing. An attorney may prepare an instrument appointing himself as trustee only if the client is properly informed, the appointment does not violate the conflict of interest rules of Model Rule 1.7 and the appointment does not result from undue influence or improper solicitation by the attorney.101 Finally, attorneys should familiarize themselves with Model Rule 1.8 ("Conflict of Interest: Current Clients: Specific Rules"). Model Rules 1.7 and 1.8, which may be modified in a particular jurisdiction, are the primary ones dealing with the ethical issues that arise when attorneys serve as trustees.

Resources
F. How Much Protection Do Exculpatory Clauses Offer

An exculpatory clause is a provision designed to relieve a fiduciary of liability for certain types of breaches of trust. Such a clause typically appears in a will or trust instrument. In essence, an exculpatory provision is meant to relieve a trustee of liability. Mark L. Ascher Et. Al., SCOTT AND ASCHER ON TRUSTS §24.27, at 1798-99. Exculpatory clauses are designed to avoid the duties that would otherwise apply to a fiduciary’s dealings with the trust property. In general, exculpatory clauses are strictly construed by the courts. A trustee is relieved from liability for a breach of trust only when the provision clearly provides for relief with respect to the breach in question. “Thus the courts have often held that the breach of trust in question did not fall within the terms of an exculpatory provision.” See Mark L. Ascher Et. Al., SCOTT AND ASCHER ON TRUSTS §24.27.2, at 1804. Further, exculpatory clauses are not enforced if the provision itself is against public policy. Id. at §24.27.3, at 1805.

The law on exculpatory clauses has evolved over the years. Historically, such clauses were often held unenforceable as against public policy. Kevin J. Parker, Trustee Defenses: Statute of Limitations, Laches, Self-Executing Accounting Release Provisions, and Exculpatory Clauses, 23 Probate & Property 53, at 53. Today, exculpatory clauses are enforced, with certain limitations. Most states follow one of three systems: the Restatement; the Uniform Trust Code (UTC); or statutes nullifying exculpatory clauses based on public policy concerns. Id.

1. Restatement.

The Second and Third Restatement allow a trustee to defend claims of breach of trust by invoking an exculpatory clause in the trust instrument. According to the Third Restatement, such a clause is enforceable to the extent its inclusion was not due to the trustee’s abuse of his relationship to the settlor. Restatement (Third) of Trusts § 96(1); see Restatement (Second) of Trusts § 222 (1959). Further, an exculpatory clause is enforceable except to the extent that it purports to relieve the trustee “of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries, or . . . of accountability for profits derived from a breach of trust.” Restatement (Third) of Trusts §96(1); see Restatement (Second) of Trusts § 222 (1959).

2. Uniform Trust Code.

The UTC generally provides a trustee the same defenses to claims of breach of trust as those found in the Restatements. Section 1008, much like its equivalent in the Restatements, provides that an exculpatory clause is enforceable except to the extent that it purports to exculpate
a trustee for breaches committed in bad faith or with reckless indifference to trust terms or beneficiary interests, or to the extent it was included as a result of the trustee’s abuse of his relationship with the settlor. UNIF. TRUST CODE §1008(a) (amended 2005).

There are differences between the UTC and the Restatements. One significant difference is that the UTC allows a settlor to exculpate a trustee for a profit resulting from his breach, while the Restatement expressly prohibits exculpation of such profits, i.e., an exculpatory clause is enforceable except to the extent that it purports to relieve the trustee of accountability for profits derived from a breach of trust. Id.; Restatement (Third) of Trusts § 96: Restatement (Second) of Trusts § 218 (1959). Further, the UTC adds a presumption that an exculpatory clause drafted by the trustee is invalid as an abuse of his relationship with settlor. Id. at § 1008(b). A trustee cannot draft an exculpatory clause in order to avoid liability. The trustee, however, can rebut the presumption by proving that the term is fair and that its terms were made known to the settlor. Id.

Jurisdictions that have adopted the UTC have included various modifications to §1008. In Florida, the law adds the requirement that an exculpatory clause drafted by or at the direction of the trustee must be directly communicated to the settlor in order to be enforceable. See §F.S. 736.1011; 3-39 Florida Estates Practice Guide § 39.07. Similarly, in the version of UTC §1008 adopted in Utah, the exculpatory clause is invalid if it “was inserted by the trustee or fiduciary without disclosure of its existence and contents.” Utah Code Ann. § 75-7-1008.


Some states use statutes to limit the scope of exculpatory clauses. For example, under the California Probate Code, “[a] provision in the trust instrument is not effective to relieve the trustee of liability . . . for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary.” Charles W. Pieterse and Charles E. Coates III, “Exculpation and Proaction,” SR003 ALI-ABA 14.


Delaware has adopted an even less restrictive approach that allows the settlor of a trust to relieve the trustee of liability for following the terms of a trust as long as there is no willful misconduct. The relevant portion of 12 Del. C. § 3302 (e) states:

Any fiduciary acting under a governing instrument shall not be liable to anyone whose interests arise from that instrument for breach of fiduciary duty for the fiduciary's good faith reliance on the express provisions of such instrument. The standards set forth in this
section may be expanded, restricted, or eliminated by express provisions in a governing instrument.

12 Del. C. § 3302 (e).

G. Special Issues When Representing Trustees in Litigation with Charitable Beneficiaries

1. Notice of Litigation
2. Authority of and Enlisting Help from the Attorney General

IV. PRE-LITIGATION STRATEGY

A. Resignation vs. Removal

If there is a risk that an interested party may seek removal of a trustee, it is appropriate to consider whether the trustee should simply, prophylactically resign as trustee. Removal of a trustee is an extreme form of equitable relief that places a high burden of proof on the beneficiary. *McNeil v. Bennett*, 792 A.2d 190, 220 (Del. 2001). A removal petition generally requires the petitioning party to make a “clear showing of abuse or wrongdoing in the actual administration of the trust.” *Gresham v. Strictland*, 784 So. 2d 578, 581 (Fl. App. 4 Dist. 2001); see also *Capaldi v. Richards*, 870 A.2d 493, 496 (Del. 2005) (a court “may remove a trustee who fails to perform his duties through more than mere negligence”); *Williams v. Duncan*, 55 S.W.2d 896, 902 (Mo. App. S.D. 2001) (removal of a trustee is a remedy that the court should use sparingly). Section 706 of the Uniform Trust Code set forth several bases upon which a trustee might be removed:

(a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

1. the trustee has committed a serious breach of trust;
2. lack of cooperation among cotrustees substantially impairs the administration of the trust;
3. because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or
4. there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.
Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief under Section 1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries.

Section 706’s official comment is instructive in how the removal grounds should be construed:

Subsection (b) lists the grounds for removal of the trustee. . . . A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries. The term “interests of the beneficiaries” means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. Removal for conduct detrimental to the interests of the beneficiaries is a well-established standard for removal of a trustee.

Subsection (b)(1) . . . makes clear that not every breach of trust justifies removal of the trustee. The breach must be “serious.” A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee’s duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary’s request for information as required by Section 813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

U.T.C. Section 706, cmt. While mere disagreement, resentment, or antagonism is not sufficient cause for removal, a trustee’s conduct in causing animosity amongst beneficiaries may be grounds for removal. In re Ex’rs of Koretzky, 8 N.J. 506, 528 (1951).

While the trustee client may not be all that interested in getting involved in protracted litigation, and resigning to “get out of the middle” may sound like a good idea, it is unlikely to yield any appreciable benefit. First, if the trustee’s conduct is being challenged in any way, resignation will not prevent the trustee from being required to participate in discovery or the imposition of potential remedies, such as disgorgement, on the trustee. Second, the trustee’s ongoing service as a trustee may aid in the trustee’s ultimate recovery of its fees and costs incurred in participating in the litigation. Finally, there is a subconscious implication of wrongdoing if a trustee steps down at the first sniff of trouble. Accordingly, unless there are extenuating circumstances, resignation is likely not an effective early strategy.
B. Retention of Counsel and Payment of Fees

Consideration must be given to whether the trustee will use trust funds to compensate the attorney or whether the trustee will use his or its own / personal funds to compensate the attorney. Most trust instruments give trustees the power to retain and compensate counsel with trust funds. Even when a trust does not explicitly reference such power, trustees are generally deemed to have the power to retain counsel under statute or common law of most jurisdictions. *Webbe v. First National Bank and Trust Company of Barthington*, 487 N.E.2d 711, 715 (Ill. App. Ct. 1985) (trial court did not abuse its discretion in awarding the trustee its’ fees and costs and assessing them against a single beneficiary’s share of the trust remainder). Moreover, a trustee who successfully defends himself against a challenge to his conduct may be entitled to reimbursement of his fees from trust assets under the theory that the trustee’s defense of his actions conferred a common benefit, not only a personal benefit:

Coming then to the merits of the dispute, the plaintiff's first complaint is the allowance to the defendant out of the trust assets of his expenses in defending himself in the action. The argument is that these expenses were incurred in the defendant's individual interest, and may not be charged against the trust. That completely misses the true situation: a trustee was appointed to administer the assets; the settlor selected him to do so, and whatever interferes with his discharge of his duty *pro tanto* defeats the settlor's purpose. When the trustee's administration of the assets is unjustifiably assailed it is a part of his duty to defend himself, for in so doing he is realizing the settlor's purpose. To compel him to bear the expense of an unsuccessful attack would be to diminish the compensation to which he is entitled and which was a part of the inducement to his acceptance of the burden of his duties. This has been uniformly the ruling, so far as we have found.

*Weidlich v. Comley*, 267 F.2d 133, 134 (2d Cir. 1959) (citations omitted); *see also Regions Bank v. Lowrey*, 154 So.3d 101, 112 (Ala. 2014) (finding that trial court improperly reduced reimbursement of attorneys’ fees and costs incurred by trustee in successfully defending surcharge claims and stating that to hold otherwise would diminish the compensation that was an inducement to the trustee accepting the burden of serving).

However, if a trustee uses trust funds to compensate counsel, and the trustee is ultimately found to have done something wrong or exceeded its authority, then there is a risk that counsel will be required to disgorge the fees and potentially, pay the fees of the other litigants. *In re: Niles*, 176 N.J. 282 (2003) (where an executor or trustee enjoys substantial economic benefits from committing undue influence, that person may be required to pay the counsel fees of the parties establishing that undue influence). If a trustee uses personal funds to compensate counsel, there is a risk to the trustee that a court may not approve reimbursement to the trustee for the trustee’s funds expended in the litigation.
V. LITIGATION OPTIONS

A. Wait and See – Let Others Commence Suit

B. Proactive Options
   1. Petition for Instructions
   2. Declaratory Judgment Action
   3. Interpleader
   4. Construction Actions
   5. Admission of Errors in Administration

C. Forum Selection and the Probate Exception to Federal Jurisdiction
   1. Forum selection considerations
   2. Scope of probate exception to federal jurisdiction

VI. PRIVILEGE ISSUES, THE DEAD MAN’S STATUTE, AND DISCOVERY

A. Privilege Generally

Undoubtedly one of the most frequently sought items in fiduciary litigation, is the
teacher’s file. The discoverability of that file hinges on whether the communications between the
trustee and counsel are protected by the privilege. In the seminal case of *Riggs National Bank of
Washington D.C. v. Zimmer*, 355 A.2d 709, 712 (Del. Ch. 1976), the Delaware Court of Chancery
found that a trustee could not use the attorney-client privilege to prevent disclosure of
communications between the attorney and trustee. The court reasoned:

As a representative for the beneficiaries of the trust which he is administering, the
trustee is not the real client in the sense that He is personally being served. And,
the beneficiaries are not simply incidental beneficiaries who chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. The trustees here cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege. The policy of preserving the full disclosure necessary in the trustee-beneficiary relationship is here ultimately more important than the protection of the trustees’ confidence in the attorney for the trust….The fiduciary obligations owed by the attorney at the time he prepared the memorandum were to the beneficiaries as well as to the trustees. In effect, the beneficiaries were the client of Mr. Workman as much as the trustees were, and perhaps more so.

*Id.* at 713-14. The Court concluded that if a trustee instructs attorneys to perform work that ultimately benefits the beneficiary, then the beneficiary is the “real client” and holder of the attorney-client privilege. Consequently, while the communication is privileged, the beneficiary (i.e., the “real client”) may discover the communication because there was no privilege as to him. Alternatively, if the work benefits solely the trustee, then the trustee is the holder of the privilege and the communication may not be discovered by the beneficiary. *Id.; see also United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011) (although not a trust case per se, the Supreme Court acknowledged that the fiduciary exception exists in American law); *Hammerman v. Northern Trust Company*, No. 1 CA-CV 13-0260 (Ariz. Ct. App. 2014) (holding that “[w]e therefore adopt the fiduciary exception and hold that a component of a trustee’s duty under A.R.S. § 14–10813(A) is a duty to disclose legal consultations and advice obtained in the trustee’s fiduciary capacity concerning decisions or actions to be taken in the course of administering the trust”); *Zook v. Pesce*, 91 A.3d 1114, 1120 (Md. Ct. App. 2014) (holding that “in a dispute between putative heirs or devisees under a will or trust, the attorney-client privilege does not bar admission of testimony and evidence regarding communication between the decedent and any attorneys involved in the creation of the instrument, provided that evidence or testimony tends to help clarify the donative intent of the decedent” *But see* Kentucky Bar Association Legal Ethics Opinion E-401 (September 1997) (“We reject the view that a lawyer who represents a fiduciary owes obligations to the beneficiaries that in some circumstances will override obligations otherwise owed by the lawyer to the fiduciary, such as the obligation of confidentiality”).

Of course, not all jurisdictions are in accord as such a result can chill the otherwise free exchange of information between trustees and counsel. In some jurisdictions, such as Florida, legislation has been adopted to clarify the mechanics of how the privilege operates in the context of representing fiduciaries:

A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure …to the same extent as if the client were not acting as a fiduciary….only the person or entity acting as fiduciary is considered a client
of the lawyer. This section does not affect the crime or fraud exception to the lawyer-client privilege…

Fla. Stat. Section 90.5021 (2011). Application of the statute was plagued for years by the Florida Supreme Court’s adoption of countervailing court rules, such as Rule 5.240(b)(2) (fiduciaries must give notice to beneficiaries of the fiduciary lawyer-client privilege), and vaguely conflicting interpretations of the “need” for and constitutionality of the statute by the Florida Supreme Court and the South District of Florida. See Bivins v. Rogers, 207 F. Supp.3d 1321 (S.D. Fla. 2016) (applying the statute and noting that the Florida Supreme Court did not “vitiuate or overturn the statute” when questioning its need). In January, however, any doubt was resolved when the Florida Supreme Court in In re: Amendments to the Florida Evidence Code – 2017 Out-of-Cycle Report, adopted the statute retroactive to its passage date of 2011.

New Hampshire has similarly codified its rejection of a fiduciary exception to the attorney-client privilege:

(a) A communication between an attorney and a client acting as a trustee, trust advisor, or trust protector is privileged and protected from disclosure to the same extent as if the client was acting in his, her, or its individual capacity and was not acting as a trustee, trust advisor, or trust protector.

(b) The privilege is not waived by (1) a fiduciary relationship between the trustee, trust advisor, or trust protector and a beneficiary of the trust or (2) the use of trust property to compensate the attorney for legal services rendered to the trustee, trust advisor, or trust protector.

(c) If an attorney's client is a trustee, trust advisor, or trust protector, then the attorney's client is only the person acting as trustee, trust advisor, or trust protector.

New Hampshire RSA 564-B:2-205; See also Heisenger v. Cleary, 150 A.3d 1136, 323 Conn. 765, 769 n.2 (2016) (affirming trial court decision, but declining to address appellants’ argument that trial court erred in refusing to adopt the fiduciary exception to the attorney-client privilege).

Practice Pointer: It is prudent for counsel to execute a new engagement letter identifying the trustee as the client and open a new physically segregated file when it becomes clear that litigation involving the trustee may ensue. In the event the court may consider whether a particular activity or communication by counsel was intended to benefit the trustee or the beneficiaries, such a bright line action may help answer that question.

B. Dead Man’s Statutes

1. What Are They?
• Statutes law prohibiting the admission of a decedent’s statement as evidence in certain circumstances, as when an opposing party or witness seeks to use the statement to support a claim against the decedent’s estate.

• designed to close the mouth of an interested survivor in suits involving transactions with a decedent

• Rooted in common law distrust of interested party, one with a stake in the outcome of the proceedings, deemed incompetent to testify

2. **Broad Disapproval**

• Scholars, judges and lawyers widely criticize

• Criticisms
  
  o assume some people are more dishonest than honest
  
  o present an injustice to honest witnesses with valid claims against decedent or intestate
  
  o riddled with exceptions that can be exploited, e.g., allowing third parties to testify
  
  o confusion arising from conflicting and inconsistent judicial decisions and application
  
  o statutes are vague
  
  o confusing to lawyers, judges and scholars
  
  o complicated, technical and confusing

3. **Abolished or Ignored in Many Jurisdictions**

• Approximately 30 states have repealed or refuse to recognize
  
  o Permit the historically excluded testimony to be heard
  
  o Charge fact-finder with determining weight and credibility

• Remaining states recognize it fully or with some degree of limitation.
  
  o AZ, CO, ID, IL, IN, LA, MD, MI, NJ, NY, NC, PA, SC, TN, TX, VT, VA, WI, WY
4. Variability Among Jurisdictions Still Applying Statutes

- Statutes vary widely from state to state
- Each is different, affecting a different person or limited to a specific type of action
  - most focus on the same criteria
  - most are strictly construed to limit application to a limited set of events
- Variations and issues
  - When does it apply?
    - At trial, not in discovery
  - Recurring Areas of Confusion
    - Scope of cases in which it applies
      - Will contests?
      - Trust contests?
    - Who can invoke
    - Types of testimony subject to Act
    - What are the exceptions
      - When the representative opens the door
      - Testimony is admitted
      - Waiver
- Illinois: broad, traditional prohibition
  - “no adverse party or person directly interested in the action shall be allowed to testify on his or her own behalf to any conversation with the deceased [person] . . . or to any event which took place in the presence of the deceased [person].”
• Maryland and other jurisdictions narrow the scope by applying statutes only to a limited category of cases, such as those that affect the size or obligations of the estate.

• Ternnessee: statute interpreted narrowly because of policy considerations and strictly construed in favor of admission of testimony
  o Generally applies only to cases where the subject transaction did not increase or diminish the decedent’s estate

• Virginia and other states permit otherwise disqualified testimony if corroborated independently from a disinterested party who is not financially interested in the outcome of the case
  o designed to prevent litigant from having benefit of his own testimony when, because of death or incapacity, the personal representative of another litigant has been deprived of the testimony of the decedent or incapacitated person.

5. Effect of Fed. R. Evid. 601 and State Counterparts

• FRE 601 generally eliminated common law witness incompetency rules, but not dead man’s statutes
  
• Adopted in most states

6. Suggested Resources

• Fred Franke and Anna Katherine Moody, The Terms of the Trust: Extrinsic Evidence of Settlor Intent, 40 ACTEC LAW JOURNAL (2014)


Practice Pointer: Ascertain at the outset whether a Dead Man’s Act might apply in the subject jurisdiction, what it provides, who may assert it, and the implications and possibilities for deliberate or inadvertant waiver.

C. Discovery / Third Party Litigation Discovery
1. Discovery Generally

2. Third Party Litigation Discovery
   a. Responding to Subpoenas
   b. No good deed goes unpunished

VII. MANAGING TRUST ASSETS WHILE LITIGATION IS PENDING

A. Duty of Prudence

B. Duty to preserve and protect trust property

C. Duty to make property productive

D. Prudent Investor Rule

E. Other Considerations

VIII. LITIGATION SETTLEMENTS THAT SEEK TO MODIFY TESTAMENTARY INSTRUMENTS OR TERMINATE A TRUST.

1. Beneficiaries and Legatees engaged in will or trust contests, construction actions, petitions for instructions or other trust and estate litigation often seek to settle disputes by terminating a trust or otherwise modifying dispositive provisions of a will or trust.

   The fiduciary may face a dilemma if the proposed modification is at arguably at odds with the material purposes of the trust, or the settlor’s intent.

   In resolving trust contests, construction actions and other trust litigations, or non-judicial settlement agreements, beneficiaries may seek to terminate or modify a trust in a manner at odds with settlor intent.

   What is the trustee’s duty to preserve or protect settlor intent?

   How does the trustee reconcile its duties of loyalty?

2. Judicial Modifications and Terminations Permitted Under the Family Settlement Doctrine
Many courts allow modification of a will or trust, or trust termination, if the family settlement doctrine applies. The doctrine reflects policy recognizing the desirability of ending family disputes about the disposition of an estate through settlement agreements, rather than litigation.

While state rules vary, generally a court will allow parties to modify terms of a will or trust by agreement as long as the agreement was valid and there was a reasonable or substantial basis for the disputed claims advanced by the parties that are resolved by the agreement, thus showing there was a bona fide dispute.

Requires a *bona fide* dispute. Parties must often show a reasonable basis to conclude that costly and protracted litigation will result over the proceeds or distribution of an estate, materially depleting the estate, and family relationship will be torn asunder.


   Traditionally courts have allowed modification of irrevocable trusts only upon: (1) consent of all beneficiaries as long as a modification not contrary to the material purposes of the trust, and (2) changed circumstances that would defeat or substantially impair accomplishing the purposes of the trust.

4. Modern Statutorily Permitted Modification of Irrevocable Trusts

   UTC Sections 410-414 identify permissible modifications and terminations of trusts other than by its express terms. The objective of the is to enhance flexibility while adhering to the principle that preserving the settlor’s intent is paramount.

   Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer achieves a material purpose or if the settlor concurs (Section 411), by the court in response to unanticipated circumstances or due to ineffective administrative terms (Section 412), or by the court or trustee if continued administration under the trust's existing terms would be uneconomical (Section 414).

   Virtual representation statutes permit many modifications as long as the proper parties are served and have an opportunity to participate in the proceedings.

5. A Fiduciary Must Balance and Consider Its Relevant Duties.

   a. A trustee stands in a special relationship of fiduciary responsibility to the grantor of the trust and to the beneficiaries. In carrying out his or her fiduciary duties, the trustee must be mindful of that unique relationship.

   b. Trustee’s Duties to Settlor

      Some scholars maintain that the trust can be viewed primarily as a contract between the settlor and the trustee who accepts trusteeship. *See, e.g.*, Langbein,

Thus the trustee must administer the trust in strict accordance with the trust's terms and the settlor's intent as expressed in the trust instrument.

c. Trustee’s Duties to Beneficiaries.

**Duty to Administer Trust by Its Terms:** The starting point is the trust instrument and its terms prescribing what the trustee must do to accomplish its purposes. The trustee is obligated to administer the trust strictly by its terms.

**Duty of Loyalty:** The trustee’s fundamental legal and ethical obligation owed to beneficiaries is the duty of loyalty. The trustee must put a beneficiary’s interests first, before the trustee’s own interests. It imposes three general requirements. The trustee must act with good faith, must not self-deal, and should avoid conflicts of interest. Put otherwise, the trustee is obligated to administer the trust solely in the interests of the trust beneficiaries. The trustee may not engage in any act that puts his or her personal interests in conflict with those of any of the trust beneficiaries.

**Duty of Impartiality:** A trustee has a duty to deal fairly and impartially with all beneficiaries and to act with appropriate regard for their respective interests. It is not an obligation to treat beneficiaries equally, and some scholars suggest it is better described as a duty of “due regard.”

**Duty of Protect and Preserve Trust Assets.** Trustee’s duty of prudence entails a duty to preserve and protect the property.

**Duty to Defend Validity or Integrity of the Trust Instrument.**

6. **Is Trustee Merely a “Stakeholder.”**

   Some courts have so diminished the trustee’s role.

7. **Consider Seeking Judicial Instructions.**

   Courts of equity permit a trustee to obtain protection by applying to the court for instructions where there is doubt as to its powers or duties. The right has been codified by statute in many states. Matters subject to petition for instructions include proper construction of the trust instrument and the extent of the trustee's powers and duties.
Automatic Stay Applies even though Landlord Terminated Lease before Bankruptcy

By: Lawrence D. Coppel

Under the Bankruptcy Code, the filing of a bankruptcy case by a tenant will automatically stay all actions, including lease evictions, subject to certain exceptions. One exception provides that the automatic stay is not applicable to an action by a landlord to obtain possession of the premises under a commercial lease if the lease “has terminated by the expiration of the term of the lease” either prior to bankruptcy or during the bankruptcy case. Bankruptcy Code § 362(b)(10).

In the case of *In re Indiana Hotel Equities, LLC*, 586 B.R. 870 (Bankr. E.D. Mich. 2018), the United States Bankruptcy Court for the Eastern District of Michigan considered whether the § 362(b)(10) exception to the automatic stay applies to prevent a landlord from evicting a tenant whose lease was terminated by the landlord before bankruptcy as a result of the tenant’s default.

Under the facts, a long-term lease of a hotel located near the Indianapolis airport was terminated by the landlord before bankruptcy as a result of the tenant’s default. The tenant challenged the termination in state court and lost. It appealed the decision to the state’s appellate court and filed a Chapter 11 case before the eviction process was completed. The landlord then moved in the bankruptcy court for an order declaring that the stay was not applicable.

The landlord argued that its termination of the lease fell within the § 362(b)(10) exception because the “term of the lease” means not only the time period through the date by which the lease expires, but also the “term of the lease” may end on an earlier date on which the lease is terminated under its terms. The bankruptcy court disagreed and held that “under the only reasonable reading of the statutory language” the landlord’s termination of the lease was other than at the expiration of the lease term. In so ruling, the court noted that the definition of “term” under the tenant’s lease referred only to the calendar term determinable when the lease was signed, as opposed to a term that would end earlier due to termination as a result of a default.2

The bankruptcy court’s interpretation of the § 362(b)(10) exception is supported by a majority of the courts that have decided the same issue. However, because the court’s decision considered whether the lease definition of “term” was limited to the calendar term, it is an open issue as to whether the § 362(b)(10) exception to the automatic stay is applicable where a lease defines “term” to include only the period of time when the lease is in effect, which would account for an early termination arising from a default. There are no cases on that issue.

---

1 Lawrence D. Coppel is the Chair of the Bankruptcy and Restructuring Practice at Gordon Feinblatt LLC in Baltimore, Maryland where he represents landlords and other parties in bankruptcy cases and out-of-court workouts. Mr. Coppel’s bio and contact information may be found at www.gfrlaw.com/lawrence_coppel.

2 Although the landlord failed to convince the court as to the applicability of the § 362(b)(10) exception, it later succeeded in obtaining relief from the stay on the basis that the pre-petition lease termination was “cause” for the stay to be lifted. *In re Indiana Hotel Equities, LLC*, 589 B.R. 315 (Bankr. E.D. Mich. 2018).
Virginia Supreme Court Clarifies Remedies In Power Of Attorney Lawsuits

By William W. Sleeth III, Esq.

The Virginia Supreme Court recently issued a ruling that clarifies that under the Virginia Uniform Power of Attorney Act, trial courts may award monetary damages against an agent under a power of attorney, but may not issue an injunction directing that the agent must return money.

The issue arose due to language contained in the Virginia Uniform Power of Attorney Act, Section 64.2-1615(1), which provides that agents under powers of attorneys are “liable to the principal or the principal’s successors in interest for the amount required to [r]estore the value of the principal’s property to what it would have been had the violation not occurred.” At issue in the case (Mangrum v. Chavis, 18 Va. S. Ct. UNP 160782 (2018)) was whether this language provides that the agent under a power of attorney who is being sued for alleged financial improprieties may be forced by court order to restore money to the estate of the deceased principal under the power of attorney, or whether it provides merely that a money judgment may be entered against the agent.

The plaintiff argued that the language of the statute (focusing on the word “restore”) permitted the trial court to order that the defendant be enjoined to return funds to the estate. The defendant argued that the statute (with its reference to “is liable”) merely establishes a basis for a monetary judgment to be entered against him (as opposed to the equitable remedy of an injunction). On appeal, the Virginia Supreme Court held that the language “permits the circuit court to award a judgment for money damages against the attorney-in-fact to his or her principal, or to the principal’s successors-in-interest, not to enjoin or to decree specific performance that a res be returned.”

This ruling is significant for several reasons. First, it clarifies the remedies that a litigant must plead in a lawsuit when asserting claims against an agent under a power of attorney.

Second, it makes the job of a litigant a bit more challenging in recovering on a judgment compared to if the Virginia Supreme Court had accepted the plaintiff’s position. In light of the ruling, a successful plaintiff who has obtained a judgment against an agent under a power of attorney must undertake efforts to try to collect on the judgment if the judgment is not paid (those efforts could include conducting debtor’s interrogatories, garnishing wages, garnishing bank accounts, etc.). If the agent does not have adequate assets from which to satisfy the judgment, the plaintiff will effectively be out of luck until a day comes when the agent acquires some assets.
If the Court had accepted the plaintiff’s position, an agent under a power of attorney would be subject to a trial court’s contempt power if he didn’t restore the money he was ordered to, and therefore the agent could be subject to fines or imprisonment by the court for failing to comply. This would have provided a more powerful remedy for a successful plaintiff (compared to a mere monetary judgment).

---

1 William W. Sleeth III, Esq. (william.sleeth@leclairryan.com) is a partner at the law firm of LeClairRyan, where he leads the firm’s national Estate and Trust Litigation Practice Team.
Hairy Deals

By Joshua Stein*

In any commercial property sale, especially in high-value congested urban areas, there’s usually some “hair” of some kind attached to the property somewhere – something about the property that makes it less than perfect. Maybe there’s a title issue, a lease with weird renewal rights, a tenant in trouble, a minor problem with an exterior wall, or an issue about the legality of one of the rental spaces.

In a frenzied seller’s market, buyers often overlook that hair. In a more buyer-friendly market, such as today’s, it’s different. Any variance from perfection creates a hook for negotiations, price adjustments, and contingencies. Something a buyer might have overlooked in 2013 leads in 2018 to agonized conference calls, long meetings, and complex contractual clauses and procedures.

That dynamic plays out, at its worst, if the buyer doesn’t identify the hair in its early investigations, the parties sign a contract with a due diligence period and a free out, and the buyer discovers the problem through its due diligence. By then, the other potential buyers have gone on to other things. The seller has only one buyer left, the one that had a due diligence out and found a problem that it claims will be very expensive to solve and wasn’t taken into account in its financial model.

Unless the seller wants to start over, the seller just has to deal with the hair, often with a price adjustment, a delayed closing, a contingency, an obligation to obtain something from a third party, complex post-closing obligations, a larger holdback, or some other unappealing measure.

To avoid these problems, a seller that plans to take its property to market should know more about its property than any buyer will ever figure out. The seller needs to get ahead of the process. If it knows about a possible issue it should try to do something about it before it becomes a problem. Ideally, before the seller lists the property the seller will identify all issues with the property and solve them, so buyers can’t find them – which the seller should assume they will – and then express concern about them.

* Joshua Stein handles a wide range of commercial real estate transactions and regularly serves as an expert witness. He is a member of the American College of Real Estate Lawyers and author of five books and over 300 articles on commercial real estate. Many appear on his website, www.joshuastein.com. He received his law degree from Columbia, where he was a Harlan Fiske Stone Scholar and a managing editor of the law review. The author reserves the right to assert positions inconsistent with this article, which is offered for discussion only. An earlier version of this article appeared in Real Estate Weekly. Copyright (C) 2018 Joshua Stein.
That isn’t always possible, of course. Sometimes the seller doesn’t necessarily want to “solve” a “problem” with the property unless there’s a closing. For example, if the “problem” consists of a long lease that will impede development, that lease might not be a problem at all if the seller doesn’t sell. It might be a good thing. So the seller might negotiate an option to terminate the lease if the seller actually does sell the property.

If the seller knows of problems, might it make sense to do nothing and hope the buyer doesn’t notice? That might have worked in 1956. It doesn’t work in 2018. Today’s buyers, with lenders and equity investors looking over their shoulders, all supported by smart lawyers vying with one another to find problems, are typically smart, careful, and more than duly diligent. They dig. They find things. When they do, it’s usually worse than if the seller had been forthcoming from the beginning. Among other things, it often leads to a loss of trust, which ripples into the entire transaction and contract negotiations.

So it’s up to the seller to investigate its own property at least as carefully as any buyer ever will. That means understanding any issues in the leases and any physical problems. It means ordering a title report and looking for surprises and problems. A pragmatic seller that wants to avoid surprises may also order an environmental assessment, reports from government agencies, and an updated physical report. In short, the seller should seriously consider doing all the due diligence a buyer will do, and more.

Aside from preventing problems later, that approach can also speed the process along and reduce uncertainty and burdensome terms in the contract.

First, if the seller gives the buyer all the information the buyer will discover through its own due diligence, that can shorten or perhaps even short circuit the buyer's due diligence. Instead of demanding 60 days for due diligence, the buyer may be able to justify only 30. Of course, the most important investigation any buyer performs in its due diligence period consists of determining whether it can raise the money it needs to close. The seller can’t help much with that.

Second, the seller’s investigations can define a baseline for the property. If lucky, the seller might persuade the buyer to agree that it can terminate for due diligence only if it discovers anything the seller didn’t disclose as part of the baseline. Buyers may find that arrangement a bit claustrophobic, though, given the importance of the due diligence period to enable the buyer to find financing for the purchase.

Third, the seller may be able to handle the problem or even solve it before the parties go to contract. The problem won’t be a surprise and, ideally, won’t be an issue.

Fourth, if the seller makes things easier and cheaper for the buyer – because all property information is neatly and completely assembled and the buyer doesn’t have to order its own third-party reports in the first instance – this might attract and keep the interest of more potential buyers and eventually produce higher bids.
Caveat emptor may sound great, but in practice it’s the seller that should start out by being aware and preventing problems, or at least being ready to deal with them, before they arise. In Latin, the phrase is caveat venditor.
The Uber Version of Estate Planning for Seniors

By: Martin M. Shenkman, Esq. and Jonathan G. Blattmachr, Esq.¹

Estate planners have focused considerable attention on planning for the Section 199A deduction, non-grantor trusts and the like after the 2017 Tax Act. However, scant if any attention has been focused on the evolution of aging clients and how estate planners can use technology to be a more substantial and important part of the planning team, render services that remain relevant to a the large swath of aging clients who are indifferent to estate tax planning and just won’t get excited about the latest mantra from the estate planning world “basis maximization.” While most if not all readers have (or will!) use Uber, Lyft or other such services, how can these and other technologies provide a model for service delivery for estate planners to aging or infirm clients?

Why is this all so necessary? Estate taxes are irrelevant for most clients and that driver for business has largely dissipated. Document generation software is growing more sophisticated and more and more less experienced practitioners can create plans and draft documents that can replicate the results of what the most sophisticated practitioners can do. Artificial intelligence has barely nipped at the heels of planners, but in short order it will likely obviate many of the services and guidance clients have traditionally sought from practitioners. Estate planners can bellow about the merits maximizing the basis of assets transferred to family members (not to say that it is not important) but many clients don’t care, and many if not most who do care still view income tax planning as in the purview of their CPA not their estate planner. That will not lessen the need to incorporate basis maximization planning in estate plans, but it does not seem that such income tax planning will ever be a driver to push clients to their estate planner’s office. Aging clients do fear the impact of dementias, elder physical abuse, elder financial abuse, identity theft and more. Aging clients universally want to retain their independence. Estate planning, in a somewhat broader and more holistic manner, can help address these concerns.

Following is a blog post about seniors using Uber that can provide a construct that estate planners should all embrace:²

“Driving to the doctor, the supermarket, to visit friends or just to see the change in seasons through Mother Nature’s eyes is something many of us take for granted. When our senior loved ones no longer drive, whether they are no longer safe behind the wheel, choose to give up their keys, or can’t afford to own a car, they still need to get from one place to another. How can they get to essential services like the grocery store or just to places that will help them enjoy life, like visiting friends or the ice cream shop, especially if they live in suburban or rural cities without a transportation infrastructure? Not being able to get where they need to go or having to rely on family or friends to get there, can rob seniors of their independence and maybe even the ability to age in place…Unfortunately, a large majority of community dwelling seniors have no access to public transportation or walkable city services and need to find a solution to meeting their needs without a car to rely on each day. It is estimated that by the age of 75, 31%
of seniors need to find alternative forms of transportation because they no longer drive....There is a way for our senior loved ones to get on the road again! Yes, we are talking about Uber.”

**Uber** is far from the only illustration of the growing sharing economy:³

- **Instacart** is the personal grocery shopping service that will deliver your grocery order to your door for a nominal fee. Consider seniors for whom travel is difficult, or because of arthritis or other challenges find mobility painful or too time consuming.
- **Poshmark** helps women monetize their closet and declutter at the same time. You can list gently used clothing items for sale in less than 60 seconds with their app. Consider the common and growing problem of seniors downsizing. This can provide a cost efficient and straightforward way to do so. Also, consider the financial challenges facing many clients with longevity.
- **Getaround** can make a client’s car generate income when they are not driving it. Consider the oft discussed challenge for many aging clients of financial resources as longevity continues to expand. Perhaps that car the senior client cannot yet part with, but which is used less and less, can provide cash flow to offset its carrying cost.

Technology provides a range of benefits that can help both aging clients and their caregivers:⁴

- Technology can provide social connections. Video chat and social media can keep seniors in touch with long-distance loved ones. But how many estate planners schedule periodic reviews with clients? Those reviews could be about much more than just updating an estate plan, but rather to have an objective and independent attorney in effect checking in on a client, providing important social connection, and perhaps minimizing the risk of elder abuse. “Have you had your financial adviser or CPA automate your bill paying yet?” How does the client appear? Is there anything worrisome in the client’s demeanor? The signs are no different than what any advisor on the planning team might consider in recommending an initial review by a care manager.
- Emergency equipment can be vital to the security of aging clients. Surveys consistently show that 80 to 90% of seniors want to stay in their own home as they age. Technological solutions can make doing so safer for them. Every senior that lives alone should have a Personal Emergency Response System (PERS).⁵ **ADT**, for example, provides such devices. A PERS device allows the wearer to call for help with the simple push of a button. How many estate planners recommend this to clients that have health challenges and/or who are aging? If the estate planner is not having this type of frank discussion with the aging client who is? Too often, no one.
- According to a 2009 survey by Medco Health Solutions, more than half of the older adults took at least five different prescription drugs regularly, and 25% took
between 10 and 19 pills a day. Technological solutions that also provide reminders and "time to refill" alerts can aid adherence to the prescribed medication schedule. Seniors and their caregivers can take advantage of the **RxmindMe** or **Personal Caregiver** medication reminder smartphone apps to reduce missed medications and prevent medication errors.

So, what do technology, Uber and other sharing economy solutions provide seniors, and how can estate planners adapt similar concepts to their practices to make matters easier?

- Minimize the need to drive to appointments.
- Address the reality that few clients return for annual reviews, which become more critical as clients age.
- Facilitate interaction and communication.
- Provide additional safety to aging or infirm clients.
- Assure coordination of a holistic estate planning team.
- Minimize or ease check writing and recordkeeping which become more difficult with aging.
- Make documents accessible to the client and others who need them in a manner that is convenient to an aging client who might have difficulty locating documents or transmitting them.

What are some of the specific ways estate planners can cost-effectively adapt some of these concepts to help aging and infirm clients? How can estate planners broaden the scope of services provided, better assist and protect aging clients, and more?

- Post short video clips explaining concepts and planning to clients and their loved ones on your website. These can be created inexpensively in the practitioner’s office without the cost of expensive marketing and PR firms. These videos can explain the issues each practitioner sees his or her clients needing information on. Using video clips will be much easier for many clients to digest then the traditional newsletters and written materials. For an illustration see [www.laweasy.com](http://www.laweasy.com).
- Document management becomes increasingly difficult for seniors and can be simply resolved. For example, **ShareFile** provides a cost-efficient and simple means for an estate planner to create a secure password protected cloud vault for each client. PDFs of all key client documents can be uploaded to that vault. The client can choose which persons to share that password with. Practitioners can encourage clients to share the password with their wealth advisers and CPAs to foster collaboration, assure that clients can easily facilitate other advisers having documents, and avoid the need to copy, scan, email or otherwise do so themselves. For practitioners, this approach can virtually eliminate calls and emails by third parties requesting copies of documents. Those inquiries can raise issues of obtaining approvals to provide the documents and create time drains that are difficult to bill for.
• **ShareFile** has an app for smart phones which practitioners can make available to clients. If a client or client’s spouse/partner is rushed to an emergency room, his or her health proxy and other key documents can readily be downloaded from their smart phone to provide to a hospital. Not only with this capability give clients peace of mind but it will also eliminate the urgent document requests inquiries that can be difficult for practitioners to respond to.

• Web based meetings are a simple and cost-effective way to meet with clients to maintain communications and eliminate the need for clients to drive to the attorney’s office or for the practitioner to drive to the client’s home thereby increasing the cost of services. When a web-based meeting is combined with cameras, the visual makes the interaction more personal and provides much more insight to the practitioner (than a mere telephone call). These services are readily available from many providers and quite inexpensive. For example, **GoToMeeting** is a web-hosted service created and marketed by LogMeIn. It is an online meeting, desktop sharing, and video conferencing software package that enables the user to meet with other computer users, customers, clients or colleagues via the Internet in real time. 5 million seniors are subject to financial scams every year. While most perpetrators are family, friends or home health aides, scammers include fake lotteries, home improvement scams and more. The Feds passed “The Senior Safe Act.” The theory is that financial advisers can spot signs of elder financial abuse. Advisers need protection from liability and violations of privacy if they alert authorities about potential fraud. FINRA Rules 2165 and 4512 became effective in 2018. Why shouldn’t estate planners be part of this protective effort as well? By communicating through web conferences, visually seeing and hearing clients in their home environments, estate planners may identify issues that financial professionals who may only see clients in their offices, when they are groomed and perhaps rehearsed for the occasion, may miss.

• **GoToMeeting** can easily record a client meeting. Many practitioners have shied away from video recording of client meetings to confirm a client’s dispositive intent or capacity. Videos can sometimes be picked apart by a forensic psychiatrist, are costly, and many clients are uncomfortable with formality. That discomfort can readily be translated into questionable capacity on the recording. But has anyone considered the impact of periodic recordings of a client on a web conference from the comfort of their home, at no cost? How might that translate into a different perspective on corroborating capacity or testamentary intent? (One option to ensure the client’s wishes in his or her testamentary documents are carried out is to consider pre-mortem probate and declaration of validity of a revocable trust. But few have bothered to use it. More certainly should.)

• The voice recordings from a video conference can be quickly (10 minutes) transcribed and saved as a Word document using many inexpensive (10 cents per minute of transcription) web-based services, e.g. **Temi.com**. Consider how easy a written record of a client conference call or web meeting can be created to corroborate the discussions. If the practitioner wants to send a follow up letter to the client, it is quick and easy to copy and paste key points from the transcription into a confirming memorandum or letter. That same transcription, even in rough
form, can be circulated to the advisor team to inform other advisers not on the call of the discussions.

- To foster collaboration of the planning team, vital to the protection of many aging clients or clients with health challenges such as cognitive issues or chronic disease, a web meeting of the advisers can be quick and cost-effective. It eliminates the costs of travel time being billed and the social niceties that precede any meeting but add to billable time to the client.
- Firms that do not take credit cards for payment should as it provides an easier means for an aging client to handle payments then writing checks.

**Conclusion**

There are many other ways practitioners can harness technology and other changes to better serve aging client, expand the services offered, make the delivery of even traditional services more elderly-friendly, and more. Each of these enhances the value offered to the aging client and will help keep the practitioner relevant and a value add that commoditized services cannot yet compete with. It is up to the practitioner to put himself or herself in a position to advise senior clients of these important options and to have the staff or referral sources to implement them.

---

1 Martin M. Shenkman, Esq. is Co-Vice Chair of the Special Needs Planning Committee of the ABA Section of Real Property, Trust and Estate Law.
5 “Best Medical Alert Systems - November 2018,” [https://www.best10medicalalerts.com/?utm_source=google&kw=personal%20emergency%20response%20system&c=265742111227&t=search&p=&m=e&adpos=11&dev=c&devmod=&mobval=0&network=g&campid=362025071&adgroupid=56267178527&targetid=kwid-87883632&interest=&physical=9003430&feedid=&a=9911&ts=&gclid=EAlaIQobChMlp-uA_vTJ3gIVm4WzCh3eQgKBEAYASAEgLqQvD_BwE]
Qualified Opportunity Zone Funds: An Investment Option Worth Considering

Philip R. Hirschfeld
Cole Schotz P.C., New York

The 2017 Tax Act adopted special benefits for taxpayers looking to prevent taxation of capital gains, which will also assist the real estate market in 1,000s of economically distressed communities across the country. The IRS recently released proposed regulations and guidance, which are helpful and should stimulate use of this new tax motivated investment option. If an investor recognizes a long term capital gain ("LTCG") from the sale of stock or other assets and within 180 days of the sale, the investor makes a cash investment equal to the LTCG in a Qualified Opportunity Zone ("QOZ") Fund then the investor can get the following tax benefits.

First, the taxpayer can elect to defer recognition of the LTCG until the earlier of (1) the date the taxpayer sells their interest in the QOZ Fund or (2) 2026. Also, unlike a §1031 tax-free like-kind exchange, there is no requirement to invest the entire sale price in the QOZ Fund to get tax deferral; the taxpayer only has to invest the gain to get tax deferral.

Second, there is a permanent reduction in part of the deferred LTCG from the original investment if the investment in the QOZ Fund is held for at least five years before sale. If the QOZ Fund investment is held for 5 or more years, then the deferred gain will be reduced by 10%. If the QOZ Fund is held for 7 or more years, the deferred gain is reduced by 15%. Also, whenever the deferred gain is recognized, the tax basis of the QOZ Fund is increased by the gain that is then recognized.

Third, if the investor has patience and can delay the sale of their interest in the QOZ Fund until they have held the investment for 10 years or more then the tax basis of the investment is increased to the fair market value of the investment on the date of sale. This "step-up" in tax basis effectively eliminates any federal income tax on the sale. These tax benefits will stimulate long-term investments in QOZ Funds.

What is a QOZ? A state can designate any economically distressed area as a QOZ, which can include select parts of cities and townships. The U.S. Treasury Department must then consider whether to certify that designation as being a QOZ. A map showing certified QOZs is available on the internet, https://www.cims.cdfifund.gov/preparation/?config=config_nmtc.xml. Around 8,000 areas have been designated as QOZs.
What is a QOZ Fund? A QOZ Fund is a corporation or partnership if 90% or more of its assets consist of QOZ Property, as described below. Unlike prior tax programs that were targeted to housing (e.g., low income tax credits), the QOZ Fund can invest in QOZ commercial real estate or any trade or business such as an operating business located in the QOZ. Thus, they are more flexible. A QOZ Fund self certifies its compliance with applicable requirements on Form 8996. As a result, an investor in a QOZ Fund needs to be confident that the fund qualifies as a QOZ Fund.

QOZ Property is QOZ Business Property, QOZ Partnership Interests or QOZ Stock. QOZ Business Property is tangible property located in the QOZ that was acquired by purchase from unrelated parties; other conditions also need to be met. QOZ Partnership Interests and QOZ Stock are investments in partnerships and corporations that meet certain conditions aimed at making sure they benefit the QOZ.

How is a Partnership’s Capital Gain treated under these rules? In its recently released guidance, one important item addressed is how to deal with a capital gain recognized by a partnership so as to obtain tax deferral under the QOZ Fund rules. The partnership has 180 days from the date of the sale generating the capital gain to invest the capital gain in a QOZ Fund. If the partnership makes that investment within 180 days of the sale, then tax deferral and related tax benefits apply for all partners. However, that 180 day period may have already passed for sales made in early 2018. Also, other partnerships may choose to not reinvest.

If the partnership does not invest in a QOZ Fund, then each partner can choose to reinvest their share of the capital gain into a QOZ Fund and get tax deferral and the tax benefits described above. That partner must make that investment within 180 days of the end of the partnership’s taxable year, and not the actual date of the partnership’s sale. This approach gives partners in a partnership a second bite at the apple to invest the capital gain in a QOZ Fund and gives them added time to make that decision well after the tax year is over. Also, a partner could make this investment earlier if the partnership has recognized a capital gain and the partnership indicates it will not reinvest the sales proceeds in a QOZ Fund. In that case, the partner can elect to start the 180 day period on the date the partnership sold the asset that generated the capital gain. A partnership may decide that giving each partner the option to invest in a QOZ Fund may be preferable since it gives each partner more flexibility in choosing what fund to invest in, if any, and when to sell it.

Conclusion: The bottom line is investing in a QOZ Fund has major tax advantages that deserve its consideration. Also, unlike other tax programs targeted to low income areas (such as the low income housing tax credit), this tax incentive is not restricted to only providing assistance to low income people. Rather, the QOZ Fund can invest in real estate or certain operating businesses that may have significant profit potential. As a
result, the QOZ Fund can offer both tax benefits and economic benefits. Investors need, however, to make sure the QOZ Fund is properly managed and compliant with all tax rules to better assure these benefits may materialize.

Philip is the Vice Chair of the Committee on Federal Taxation of Real Estate within the Real Property Trust and Estate Section of the American Bar Association and a frequent author and lecturer on tax topics of interest to the real estate community. To learn more about Philip or contact him with questions, see http://www.coleschotz.com/PhilipHirschfeld.
Ethical Considerations of Elder Law Practice - Trendiness and Traps

By: Zisl Edelson, J.D., M.B.A. - ABA Spring Symposium, Orlando, Florida, May 2018

Edelson Law, LLC
8401 Crawford Ave.
Suite 104
Skokie, IL 60076
www.edelsonlawllc.com
Ph. 847-410-9131

I. Background - What is Elder Law

Elder law is a relatively new and very interesting field that seems to be attracting lawyers from other practice areas. That was my path to elder law. For the first part of my career, I practiced mostly in large corporate settings, working primarily on commercial real estate and corporate transactions. Overtime, I decided that I wanted to leave the big firm experience and start my own practice. I had always been interested in tax and estate planning. Since I had a life-long affinity for grandparents and grandparent-like figures, elder law was appealing. But, when I started out in elder law, no one warned me that the field was extremely complex and difficult to master, and that I would be faced with ethical challenges in almost every engagement.

There are three areas where I see most of the ethical issues I come across:

A. Mistakes - Work done by other attorneys who make mistakes because they are trying to practice elder law, on the fly, without having committed to spending the necessary hours of time learning the law, reading cases, articles, statutes and attending continuing education classes.

B. Money - Caregivers, family members, and relative strangers who want to get their hands on the elder person’s money. This most often presents as individuals trying to gain control with powers of attorney for property. Powers of attorney for property are essential for Medicaid and asset protection planning, but can expose clients to great potential for abuse.

C. Capacity - Issues of capacity often span across generations. I sometimes meet with adult children who do not realize their elderly parents are competent and insist their parents are losing it, when they are perfectly capable of signing estate planning documents. These same kids are often suffering from their own psychological issues or disabilities. Sometimes, people with significant issues present as being totally normal, and it takes careful attention to figure out family dynamics and who the bad actors may be.

II. Elder Law is Trendy - Don’t Practice on the Fly.

It’s all over the media that the baby boomer generation is now aging and is a huge consumer group for products and services, including elder law. The statistics back up the media hype. Perhaps this trendiness is one reason that on a regular basis I often come across mistakes made by other attorneys, without sufficient background in elder law. Ethically, attorneys should only
represent clients when they have the knowledge to handle the matter. The ABA Model Rule of Professional Conduct provides:

**Rule 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Because elder law is a trendy area, I believe there is an increased risk of younger lawyers (and more experienced lawyers looking to expand or change practice areas) to jump in without realizing the great complexity involved, including the federal and state statutory framework, federal and state regulations, and the ever-changing case law. Attached as Exhibit A, are resources I recommend as helpful to learn the elder law area. In addition, below is a list of matters that the typical elder law client may need help with, and what an elder law attorney should generally know about, although it’s not critical to master every area (for example, I refer out all guardianship and litigation work).

**A. Estate planning, with a focus on potential future disability (special needs), long-term care, and Medicaid/asset protection planning, including:**

Drafting powers of attorney to allow for gifting and Medicaid planning, while preventing theft and preserving the estate plan.

1. Drafting advance health care directives, taking into account the client’s desires and continual advances in medicine, which makes it difficult to predict what medical treatments will be available in the future and will also be in conformity with the client’s current wishes.
2. Special needs trusts, including spousal testamentary, third party and self-settled pay-back (OBRA) trusts.
3. Understanding income tax issues that relate to gifting before death (for Medicaid planning), and tax issues upon death.
4. IRAs and required minimum distributions.
5. Estate planning to avoid family fights, and especially fights over how best to take care of aging parents.
6. Funeral, memorial and cremation planning.
7. Guardianship and avoiding guardianship.
8. Probate and contested estates.

**B. Medicaid, Medicare and Long-term care planning, including:**

1. Medicaid eligibility - laws vary by state but must comply with federal law.
2. Medicaid civil rights law - this is a growing and important area.
3. Administrative law for appeals of Medicaid applications.
4. VA Benefits.
5. Family and third-party caregiver agreements.
6. Rental agreements for when the older person lives with an adult child.
7. Medicare coverage, advocacy and appeals.
8. Facility agreements with nursing homes, assisted living and continuous care communities.
9. Litigation and contested matters involving nursing homes, health care providers.
10. Long-term care insurance.

C. Guardianship and avoiding guardianship, including:

1. Understanding the various options for limited guardianships.
2. Understanding issues of incapacity.
3. Familiarity with elder care professionals such as care managers and professional fiduciaries who can serve as private guardians or as agents for “orphan” elderly.
4. Working with geriatric health and psychiatric experts.

III. Common Mistakes Made by Lawyers (and persons trying to be their own lawyer).

Lawyers that do not primarily practice elder law often have elderly clients, and with the best intentions, try to help them with complicated elder law issues. These are some common misconceptions about elder law:

1. Revocable living trusts protect assets from Medicaid - wrong
2. Irrevocable Trusts with HEMS and other “support” provisions are not countable assets for Medicaid - wrong
3. A “quitclaim deed” somehow has magical powers that gets the asset out of the elderly person’s name and protects the property from Medicaid recovery - wrong
4. A person’s home is protected from Medicaid forever - as long as they have the “intent to return home” - wrong in most states
5. A person cannot qualify for Medicaid if they have any assets - wrong
6. It’s too late to protect assets if an elderly person is already in a nursing home - wrong
7. It’s okay to have more than one power of attorney for property (i.e. more than one adult child on different powers of attorney) - wrong
8. A power of attorney allows the agent to do anything they want - wrong
9. If grandma cannot remember what she ate for breakfast, she is not competent, and a guardianship is needed - wrong most times
10. A guardianship fixes everything - wrong most times
Elder law is such a complex field, that it is easy for even experienced attorneys to make serious mistakes. These are some examples of other lawyers’ work I have corrected during the past year. These lawyers were intelligent and well-intentioned. They had their client’s best interests in mind, but did not have sufficient background to properly perform the work. All personal details and some facts have been changed to protect the identities of the people involved:

A. Caregiver Child - Not a Caregiver Child

A very competent and caring local real estate attorney tried to help his client, was hired for a closing but, somewhat unknowingly, was pulled into Medicaid planning. His client had elderly parents, who had recently entered a nursing home. The client had read about the “caregiver child” exception to the Medicaid rules on the Internet and asked the attorney to set up an irrevocable trust to own a new condo that his parents were planning to buy for him, with the proceeds from the sale of their home. The caregiver child exception to Medicaid was briefly mentioned by the client, but apparently glossed over. The client did not fully explain to the attorney that he was trying to use the caregiver child exception to help preserve the value of his parent’s home, and the attorney did not know the right questions to ask.

The caregiver child exception allows the transfer, without penalty, of an elderly person’s primary residence to a child who took care of parents for the prior two years, if the care enabled the parent to stay out of a nursing home. See, 42 USC 1396p(c)(2)(A)(iv). The care does not have to be provided full-time for 24 hours a day, but it must be very significant. There may also be state specific rules and case law for the caregiver child exception. For example, recent NJ cases, have set forth strict conditions for using the caregiver child exception. See, M.K. v. Division of Medical Assistance and Health Services, N.J. Super. Ct., App. Div., No. A-0790-14T3, May 13, 2016, and V.P. v. Dept. of Human Services (N.J. Sup. Ct., App. Div., No. A-2362-09T1, Sept. 2, 2011).

In addition to specific requirements for the amount of time the child spent providing care, the federal statute is very specific and does not allow for the purchase of a new property, or for the transfer of the property to a trust. The statute only applies to the transfer of existing home, where the parent and caregiver child lived together. The transfer of a new condo to an irrevocable trust was not a transfer to the caregiver child. Instead, it was a transfer not for value (i.e. a gift), which caused a Medicaid penalty, because the transfer occurred during the 5-year look back period.

After the real estate transaction had taken place, the “caregiver child” came to see me for help with Medicaid planning for his parents, assuming that the condo would be an exempt asset. Upon further discussion, I learned that the “caregiver child” had, in fact, been working full-time during the two-year period and had not been taking care of his parents for more than a few hours a week. There is no case law that supports someone working full-time to qualify as a “caregiver child.” Also, while his mail was sent to the parent’s home, which would have been good evidence of his residence there, he didn’t actually live at the parents’ house full-time. He stayed at his girlfriend’s home most nights of the week. Even if the real estate transactions could have been undone, I did not feel that I could in good faith represent that client.

Ethically, there may be concerns that a client could be using an elder law attorney to submit a fraudulent Medicaid application. It is something to keep in mind when interviewing potential Medicaid planning clients. In this case there were many red flags, not the least of which was this client’s determination to use his real estate lawyer to set up an irrevocable trust and waiting to engage an elder law attorney, only just before he wanted to help his parents to apply for Medicaid.
When I pointed out that he didn’t meet the legal qualifications for the caregiver child exception, he went elsewhere. That was fine with me. Watch out for dishonest clients trying to take advantage of the Medicaid system. I have rarely come across this type of situation, but it’s important to keep your eyes open and avoid taking on clients who want to cheat the system.

B. Faulty Special Needs Trust and Faulty Powers of Attorney.

Client’s husband had dementia for many years by the time she came to see me. They had substantial assets (over $1 million), but not enough to pay for private nursing home care for the rest of the husband’s life. Client’s estate plan was prepared by an out of state attorney who did not understand the federal Medicaid laws, regarding countable assets and testamentary special needs trusts for spouses. One of my favorite planning techniques is using a testamentary special needs trust to protect assets for the surviving ill spouse. This is most logical to use when one spouse has an acute and serious fatal illness, and the other spouse has a disability that is not immediately life-threatening, but will eventually require costly nursing home care, such as Alzheimer’s. It also makes sense to use a testamentary special needs trust, even if one spouse is well, when the other spouse is in a nursing home and on Medicaid, to avoid the sick spouse losing Medicaid eligibility, if the healthy spouse dies first. It’s not uncommon for the well spouse to pre-decede the sick spouse. Caregiver spouses, sadly, sometimes wear themselves out. If you use this technique, be careful to pay attention to your state’s requirements regarding inheritance of the “spousal share.”

The federal Medicaid statute, which allows testamentary special needs trusts for spouses to be considered as non-countable assets is somewhat cryptic, but provides:

“For purposes of this subsection, an individual shall be considered to have established a trust if assets of the individual were used to form all or part of the corpus of the trust and if any of the following individuals established such trust other than by will:” 42 U.S.C. Section 1396p(d)(2)(A).

The emphasized language means that unless the special needs trust is testamentary (within a will) the trust will be a countable asset for Medicaid. Instead of using a testamentary special needs trust, the lawyer put the special needs trust into the wife’s revocable living trust. That structure could have blown $1 million for the client, if the wife died first, because Medicaid would have considered the assets available. I revised the estate plan to put the special needs trust into the wife’s will. The lawyer also failed to include the power to make gifts in the property power of attorney. The gifting power is usually necessary for emergency Medicaid planning, which takes place within the five-year look back period. Because the sick spouse had children from a former marriage, this gifting power had to be restricted to follow the sick spouse’s intent to provide for the children from his prior marriage.

IV. Watch Out for Greedy Caregivers, Greedy Children and Greedy Strangers.

Over the years, I have been shocked to see how greedy people can be, even adult children of the elderly. Knowing who you represent is an extremely important part of elder law practice, and greedy people may try to manipulate elder law attorneys. Often, the first phone call I receive is from an adult child of the elderly person. Most elder law attorneys take the position that they represent the elderly person, no matter who calls to make the initial appointment, or who brings the elderly person to the office.
Ethics/practice tip: It’s very important to meet with elderly clients alone, and hopefully far from the influence of the adult children, who sometimes have their own agendas. You should always make it clear who you are representing and meet with the elderly person alone. When necessary, I also make it clear to the adult children that it is my job is to protect their parent’s money for their parent’s future care and that they have no right to their parent’s money.

Here are some case studies that illustrate common ethical challenges in elder law practice:

A. Greedy Adult Children

I set up an estate plan for an elderly couple who had an adult daughter they didn’t trust with money. The daughter had never grown up and was both floundering in various business ventures and living an extravagant lifestyle, still asking her elderly parents for money. So, the husband chose a corporate fiduciary to be the agent under his property power of attorney and the trustee of his revocable living trust. He had a serious terminal illness and wanted to make sure his wife (who had early onset dementia) would be able to remain in Chicago, and stay in their apartment with full-time caregivers, for as long as possible. The wife, although suffering with dementia still maintained her strong personality and was adamant that she did not want to move to east coast (where her daughter lived), after her husband died. She was happy in Chicago and had a nice group of friends.

Since my work with the family began, the father’s illness had worsened, and the daughter pressured/convinced her parents to move to the east coast. I heard nothing until about one year later when the daughter called me from the east coast frantic to change her parents’ estate plan, in order to remove the corporate trustee/agent so that she could be the trustee/agent and “take care of them.” She was emotional and practically hysterical and demanded that the estate plan had to be changed. She started screaming at me and told me that her mother didn’t need “all that money.” She was so adamant that I change the estate plan to give her control over her parents’ money, that she offered to fly me to the east coast to work with them. Of course, I refused and explained that I represented the parents and had set up their estate plan in accordance with their wishes, and that it would be unethical for me to change the estate plan under pressure without clear direction from the clients.

Eventually, I learned that the daughter hired an east coast attorney, who charged $10,000 to prepare a new estate plan for her parents, naming her as trustee and agent. His work completely undid my plan which included a testamentary special needs trust for the wife and exposed all of the assets to Medicaid countability. The father was actually in and out of consciousness in the hospital, while these changes were made to his estate plan and he signed all of the papers literally on his death bed. The poor wife was left with minimal assets, no special needs trust, in a tiny apartment, with minimal caregivers, and isolated from her Chicago friends. She had no support system, except for her greedy daughter.

I was deeply concerned about the actions of both the daughter and the new lawyer. I had spent much time of the phone with the new lawyer, trying to explain the testamentary special needs trust, and why it was a good thing. The new lawyer was adamant that a revocable living trust would work out just fine. He didn’t understand the law and seemed to think that it was easier to do what the daughter wanted and make $10,000 - that is until the daughter’s husband came to his office and threatened to kill him and terrified the entire office staff with physical threats. Apparently, he was not working fast enough for the daughter who was trying to get the estate plan
changed before her father died.

Interestingly, the reason the client hired me in the first place was that he wasn’t happy with his first estate planning lawyer. His first lawyer spent three years on and off working on the client’s estate plan, and literally had the unsigned will in his desk drawer when I was hired. That attorney had set up a third party special needs trust for the husband with wife as beneficiary, because he thought it would protect the trust assets from Medicaid. The lawyer was not familiar with the federal law regarding testamentary spousal special needs trusts (42 U.S.C. Section 1396p(d)(2)(A)). Fortunately, the client was a smart man, and in reading a draft of the trust he wondered why the word “child” appeared repeatedly, and the word “spouse” was not consistently used in the document. I read the trust and immediately realized that the prior attorney had taken a form for a third party special needs trust for a child, incorrectly thinking he could adapt it for use between spouses. Big mistake. He charged the clients to prepare a special needs trust that would be a countable asset for Medicaid purposes.

Ethics/practice tip: When dealing with elderly clients, time is of the essence. If you cannot prepare powers of attorney and estate planning documents in a timely manner, don’t take the engagement. It’s not fair to let an elderly client wait months for their estate planning documents. Also, if the elderly clients are taking an unusually long time to make decisions on trustees, agents, etc. that can be a sign of dementia. I sometimes give my elderly (and also younger) clients time limits for making choices to help keep the estate planning process moving along. They appreciate the structure and my efforts to keep things on track.

B. Elder Orphan Cheated by Greedy Banker/ “Friend”

As a solo practitioner who answers my own phone, I get a lot of interesting calls. But, sometimes I think I should post a banner on my website that says:

“PLEASE DO NOT CALL IF YOU ARE TRYING TO STEAL MONEY FROM YOUR PARENTS OR THE PERSON YOU ARE TAKING CARE OF”

Someday one of these callers may end up in jail. Recently, a man called asking if I do powers of attorney. He said his elderly “friend” was in a nursing home and needed a power of attorney and a will. I asked if he was the caregiver and he said no - he was just a friend. Sounded straightforward enough. So, I went to the nursing home where the friend greeted me with a huge smile and threw into the conversation that he needed me to prepare a deed so that his friend could transfer her house to him. I explained I that had to see the elderly person alone.

In my brief conversation with the elder client, I learned that she had no children and had been widowed about a year ago. She met the “friend” because he had been her personal banker at a large national financial institution. She thought he was a wonderful person and gifted almost $1,000,000 to him over the course of a year. During that time, the “friend” had quit his job and had, in fact, taken on significant caregiver responsibilities for her, including helping the woman shop, cook and take care of her home. This created a situation where she felt dependent on him, since she had no family in town and no children. Unfortunately, his care-giving wasn’t so great, because she ended up falling and being left alone, with no assistance, for close to 24 hours. That’s how she ended up injured and recovering in a nursing home. The sad fact is that she had plenty of money to hire qualified live-in help and a geriatric care manager. But she had no one looking out for her to help her hire professional help and keep the fraudster/banker out of her life.
After realizing that the woman most likely lacked competency (it was not easy to call, she could recite her life story in detail and could account for all of her varied assets and real estate holdings) and that this “friend” was taking advantage of her, I called the Cook County Public Guardian’s office. The Public Guardian did a great job of taking fast action and had her bank accounts frozen within days. They also made sure she was getting the proper health care. It turns out that the friend had a police record and had swindled several other elders by ingratiating himself as their trusted personal banker.

**Ethics/practice tip:** Learn about local resources (both government and non-profit) who can help “orphan” elders, who are especially vulnerable to elder abuse - both financial and physical. Public guardians in some jurisdictions, such as Cook County, Illinois, have excellent reputations and do great work. Unfortunately, that is not true in all communities. Also, cities and towns often have their own departments of aging, which may be smaller and more responsive than larger state agencies. States and large counties also have departments on aging. These government agencies can step in to evaluate competency and help with providing social services.

For example, see:

1. Illinois Department on Aging at: https://www2.illinois.gov/aging/Pages/default.aspx
3. Village of Skokie, IL Senior Services at: http://www.skokie.org/hssenior.cfm
4. City of Highland Park, IL Senior Center at: https://www.cityhpil.com/resident/senior_center/index.php

The City of Highland Park, IL (where I grew up:) recently did a wonderful job assisting me with helping for an elderly resident, who had no family. The police department was happy to do a wellness check, and the City of Highland Park Senior Center (staffed by social workers) helped me cut through some state red-tape and get the elder evaluated for services. The police in Highland Park told me that they are overwhelmed by the needs of the elderly population. It’s a sad situation. There are so many elderly people on their own and there is a huge need for volunteers to help. The reason I got involved in this situation is also a good elder abuse warning story. I was called by a local real estate agent, who asked me a lot of questions about Medicaid and how to move an elderly woman out of her house and into a nursing home. Through several conversations, I learned that the realtor seemed to be pressuring the woman to sell her valuable property for a cut-rate price to a local land developer. That’s what can happen when the elderly have no friends or family in their lives.

**C. Powers of Attorney for Property - Not Just a Form**

I believe that drafting powers of attorney for property are the most important document in an estate plan, because they come into play when the client is most vulnerable - still living but incapacitated. Many attorneys do not realize the importance of properly drafted powers of attorney. For example, I recently had a discussion with a real estate lawyer who was trying to help an elderly woman, who had no children but did have a live-in caregiver. He had the woman sign a property power of attorney, so that he could close her real estate transaction. He had never met
with her in person, but instead faxed the power of attorney form to her caregiver for her to sign. This lawyer had no idea that what he had done was not only unethical - because he failed to meet with the woman in person to determine her capacity - but that by signing the new power of attorney she revoked her prior power of attorney which named a long-time trusted friend to be her agent. In my opinion, it was a disaster of a situation. The woman was a recluse and it would be very difficult to have her sign yet another power of attorney correcting the situation.

Without properly drafted powers of attorney, there is often no chance to protect assets when planning is needed for long-term skilled care. Money runs out very quickly, when a client needs to be in a nursing home. In most states a nursing home resident on Medicaid is allowed a very small monthly stipend for personal needs. In Illinois that amount is just $30 per month. Even the best nursing homes don’t provide everything a client may need, and which the family may not think of, to benefit the patient’s comfort and quality of life. This could include non-covered health care expenses such as massage, skin care, vitamins, supplements, acupuncture, manicures, pedicures, hair-cuts, etc.

In addition, the small Medicaid personal needs allowance will not come close to covering the costs of a patient advocate and/or geriatric care manager. If you are not familiar with these professionals, you should make sure to get acquainted with the local care managers in your area. A good resource to locate care managers is the Aging Life Care Association at: www.aginglifecare.org. I have found that clients receive better care in nursing homes when there is a professional patient advocate or geriatric care manager involved, who attends care planning meetings and stops by to check on the patient at least once a month. With some asset protection planning, there can be money available to pay for extras which will enrich the patient’s quality of life. Just because someone is living in a nursing home does not mean they cannot benefit from extra care and personal items such as books, electronics, and even paid companionship.

Most importantly, never print out powers of attorney from a form book and use them without reading the applicable statute, case law and thoroughly understanding what you are doing. State laws may prohibit certain powers altogether, but some powers and other attributes can be added to the forms. For example, gifting is an important part of asset protection planning for Medicaid. The power to make gifts should be included in the property power of attorney for clients who are concerned about protecting assets from long-term care costs and qualifying for Medicaid to pay for nursing home costs.

However, gifting powers can easily be abused, and may also be restricted by statute and case law. Some states may bar an agent from making gifts to himself or herself, and from changing beneficiary designations. For example, a recent Illinois case explains that self-dealing by an agent under a property power of attorney (which could include making gifts to oneself) is presumed to be fraudulent and held that the agent could not change a beneficiary designation on an IRA to herself, without explicit authority to do so under the property power of attorney. Collins v. Noltensmeier, IL App (4th) No. 170443, April 5, 2018. Also see, In re Estate of Shelton, 2017 IL 121199.

Here is an example of suggested gifting language, which may be used in a property power of attorney for Medicaid and asset protection planning, but be sure to scrutinize and personalize the language for your client’s situation and your state’s specific laws:
“My agent, in consultation with an elder law attorney and as part of a long-term care and Medicaid plan, and for the purpose of protecting my best interests and my legacy for future generations, has the authority to make gifts of any of my assets to my children, in equal shares, *per stirpes*, or to an irrevocable trust for the benefit of my children in equal shares, *per stirpes*. I specifically acknowledge that my agent is one of my children and authorize my agent to make a gift to himself or herself, but only in accordance with the requirements of the preceding sentence.”

**Ethics/practice tip:** Gifting is a complicated and risky Medicaid/asset protection strategy, with tax and other issues involved. There is a significant risk of abuse with all powers of attorney, but especially those that allow for gifting. Each power of attorney should be crafted for the client’s specific goals and situation. Gifting powers may not be appropriate in every situation.
Exhibit A

Practical Resources for Aspiring Elder Law Attorneys
(knowledge will help you avoid ethical issues)

   - Justice in Aging - a great source for information on Medicaid, with articles and trainings specifically for lawyers: http://www.justiceinaging.org/
   - Center for Medicare Advocacy - a great source for information on Medicare, the “self-help” materials on Medicare benefits and appeals are particularly useful for lawyers: http://www.medicareadvocacy.org/
   - Long Term Care Community Coalition, a great source for information on nursing homes and patient rights - http://nursinghome411.org/
   - National Center on Law and Elder Rights - https://ncler.acl.gov/ - offers free case assessments - but I have yet to get a response on a request. They offer online training and materials in various areas relating to elder law.
   - Consumer Financial Protection Bureau - https://www.consumerfinance.gov/practitioner-resources/resources-for-older-adults/ - this is the link for “older adults” there is helpful information on elder financial abuse and other financial topics.
   - Legal Aid - check out your local legal aid website. Illinois Legal Aid has some fantastic resources relating to the elderly, Medicaid and Medicare - www.illinoislegalaid.org
   - Centers for Medicare and Medicaid Services - https://www.cms.gov/ - many resources and links for Medicare and Medicaid program information
   - SHIPS - State Health Insurance Assistance Programs - https://www.medicare.gov/contacts/#resources/ships - your local SHIP office is the first stop for help with a client’s Medicare questions

2. Treatises, Manuals, List-serves, and Organizations. A sampling of what I have found helpful and some things on my wish list:
   - ABA Elderbar List Serve and ABA Programs. In particular, the Elderbar list serve has many social services attorneys involved and they provide a very important perspective. They also are extremely helpful and friendly.
   - ABA Elder Abuse Reporting Webpage - provides resources for every state: https://www.americanbar.org/groups/senior_lawyers/resources/reporting_elder_abuse.html
• Ethics in the Practice of Elder Law, Roberta K. Flowers and Rebecca C. Morgan, ABA Book Publishing 2013

• Tax, Estate & Financial Planning for the Elderly, by David M. English, John J. Regan and Rebecca C. Morgan, Matthew Bender 2017 (updated annually)


• Advising Elderly Clients and Their Families, Illinois Institute of Continuing Legal Education 2015

• Special-Needs Trusts, Illinois Institute of Continuing Legal Education 2016


• The Medicaid Planning Guidebook, Michael Anthony, 3rd edition. Mr. Anthony also provides training for lawyers and Medicaid planners - visit www.medicaidplanning.org

• National Academy of Elder Law Attorneys (NAELA.org) - list serves online, national and local educational programs

• Association of Special Needs Planners (ASNP.org) - list serves online, national educational programs
Unpacking The New Qualified Business Income Deduction For Real Estate Rentals

by Steve Gorin

The 2017 tax reform introduced a deduction generally equal to 20% of qualified business income (QBI) or the taxpayer’s taxable income, subject to certain limitations. This deduction applies to QBI from a relevant pass-through entity (RPE), such as a sole proprietorship or partnership (including an LLC taxed as either) or an S corporation. Proposed regulations issued on August 16, 2018 clarify the government’s current view of these rules.

Generally, to be QBI, income must be earned by a U.S. trade or business. Whether real estate rental is a trade or business depends on the facts and circumstances. For example, an apartment complex or a commercial building with many tenants, where the landlord provides significant services, generally would be a trade or business. On the other hand, if the landlord leases just one parcel of real estate to only one tenant under a triple net lease where the tenant does all the work and bears all the expenses while the landlord collects a monthly rent check, the rental would probably not constitute a trade or business.

How to qualify for the deduction

The proposed regulations provide a break if the same person or group of persons, directly or indirectly, owns 50% percent or more of the landlord and the tenant, as long as the tenant conducts a trade or business other than a specific service trade or business (SSTB). If the break applies, rental activity that is not a trade or business can qualify as if it were a trade or business, avoiding any concern over whether the rental income is QBI. On the other hand, if rental is tied too closely to an SSTB, the proposed regulations may disqualify part or all of the rental income, even if the rental on its own qualifies as a trade or business. However, the SSTB prohibition applies only if the individual or trust seeking the deduction has taxable income above certain thresholds (for 2018, $315,000 for married filing jointly and $157,500 for other taxpayers).

If rental activity does not qualify for this break, consider the way one’s real estate activity is structured. Each RPE filing its own tax return must separately determine whether its activity rises to the level of a trade or business. Suppose an individual or trust is a landlord holding a portfolio of triple net leases. If each property is held in a separate partnership, each partnership needs to decide whether the triple net lease activity for its own property, viewed in isolation, qualifies as a trade or business. On the other hand, if a partnership is the sole owner of a number of LLCs, each of which is treated as a disregarded entity for income tax purposes, then the partnership can look at all of the activity under its umbrella. Although the proposed regulations allow taxpayers to aggregate their trade or business

---

1 Steve Gorin is a partner in Thompson Coburn LLP and a past chair of the Business Planning Group of the American Bar Association’s Real property, Trust & Estate Law Section. For more about Steve, see http://thompsoncoburn.com/people/steve-gorin.
activity, they can aggregate only what constitutes a trade or business at the RPE level, so the aggregation option does not affect this analysis.

Possible limits to the deduction

If real estate rental constitutes QBI, the deduction of 20% of QBI is limited if the individual or trust’s taxable income exceeds the thresholds described above. In that case, the deduction is limited to the greater of 50% of qualifying wages or the sum of 25% of qualifying wages and 2.5% of the original purchase price (ignoring depreciation or other write-offs) of depreciable property used in the business (the original purchase price is referred to as unadjusted basis immediately after acquisition or “UBIA”). Under the proposed regulations, the ability to use the original UBIA may go away if one places the property in a new business entity (depending on the circumstances). The option to aggregate business activities that are closely tied together allows QBI, qualifying wages, and UBIA to be added together so that a business with more wages and UBIA than it needs can support a QBI deduction for other businesses with insufficient wages or UBIA. The election to aggregate is irrevocable and requires careful analysis.

This article is intended for informational purposes only. It is not intended to provide legal or tax advice to be relied upon without further consultation. If you desire legal or tax advice for your particular circumstances, please consult an attorney or tax professional. Tax professionals are welcome to email me for a free copy of my business structuring materials (and look at part II.E.1.e. Whether Real Estate Qualifies As a Trade or Business) or to attend a free webinar on October 30, 2018: Planning Using the Proposed Regulations under IRC §§ 199A and 643(f), which is being recorded for those who cannot attend. To hear the first webinar (September 13, 2018) in which the Treasury and IRS appeared after the proposed regulations were issued, go to IRS Guidance on Section 199A Deduction.
ARTIFICIAL INTELLIGENCE:

Shiny Object? Speeding Train?

(Part 1 of 2)

Overview:
This two-part series unpacks AI with these questions:

Part 1
A. How will lawyers use AI?
B. Who is using AI right now?

Part 2
(more on law schools and innovation)
C. What is AI?
D. Ethical Considerations

AI is a shiny object. The bright light is not the train that ends our lives as lawyers.

As a shiny object, AI is rivaled only by blockchain. But in contrast to blockchain, transaction lawyers have the opportunity to put AI to work immediately. Today.

Lawyers are in the legal information business. We create legal documents – legal information. It is our output. For those lawyers willing to invest in it, AI will be a valuable expansion, and even recreation, of their value proposition. Yes, it will significantly improve legal work flow; but more importantly, it will mature into a priceless treasure. It will be a treasure trove of legal information – “big legal data.” Because legal information as data has value. Tremendous value. Overlooked and ignored, yet in plain view, until today.

As recent as 2014, only a handful of companies pointed artificial intelligence (“AI”) at legal documents. For uses outside of eDiscovery, it was a narrow focus: contract reviews and legal due diligence – used by the largest of law firms on the grandest of deals.

Fast forward to these recent events:
• February, 2018: The National Law Journal identified 50+ companies offering AI tools pointed at the legal industry
• May & June of 2018: investors placed $200,000,000 in legal AI companies
• September, 2018: an investor placed $50,000,000 in a legal AI company
• A 2018 piece in the Yale Journal of Law and Technology reviews a significant 2015 decision by the U.S. Second Circuit (Lola v. Skadden), and gives an outstanding overview
of the use and impact of automation within the legal profession. The piece explores the “unprecedented advancements in algorithms and artificial intelligence technologies,” and offers advice on how lawyers should prepare for “an inevitable automated future.”

In 5 years, will this prediction be true?

“The law firms that are adopting AI systems now will be the firms in five years that have larger revenues, higher profits and more contented staff.”vi

A. How Will Lawyers Use AI?

Like any new tool, it is difficult to envision or understand “how” AI will impact our work as transaction lawyers.

AI is like your new car, or even your new washer/dryer: hidden from sight, behind the dashboard and under the hood or front panel, micro-processing has replaced levers and switches. AI simply is the next (most current) functionality of the chip.

The same business model applies to AI in legal work flow. You probably already use AI in your legal practice - without even knowing it.

USES OF AI BY LAWYERS

This important question constantly lurks around discussion on AI:

“what part of my legal practice will AI replace?”

My answer is simple: AI will augment or entirely replace the part of my work that is boring (or that part of your billings that is based on boring work).

Boring work = AI work.

On the other hand, AI will be extremely useful in these areas or tasks:

• marketing (identifying unique deals, expertise, etc.)
• quality control (review loan documents for correct & consistent terms)
• identifying conflicts
• implementing best practices (ID, collect, organize documents and provisions)
• practice management and analytics

In its *2018 Legal Tech Buyers Guide*, LawGeek identifies these current uses of AI:

<table>
<thead>
<tr>
<th>Contract Drafting</th>
<th>Contract Review</th>
<th>Digital Signature</th>
<th>Contract Management</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal &amp; Matter Management</td>
<td>Contract Due Diligence</td>
<td>Expertise Automation</td>
<td>Legal Analytics</td>
</tr>
<tr>
<td>Task Management</td>
<td>Title Review</td>
<td>Lease abstracts</td>
<td>??????</td>
</tr>
</tbody>
</table>

Each of us can experience AI by using these product offerings from these well-known service providers:

**Thomson Reuters**

Uses AI in legal research. Thomson Reuters’ “Westlaw Edge” – “Powered by state-of-the-art artificial intelligence that’s built upon more than 100 years of attorney-edited annotations, only Westlaw Edge brings together a full suite of AI-powered legal research tools – including the next generation of legal search, integrated litigation analytics, the most powerful citator, and more”

Some of the features of Westlaw Edge:

- An enhanced, AI-powered version of the KeyCite citator that provides warnings that cases may no longer be good law in circumstances that traditional citators could not identify.
- WestSearch Plus, an AI-driven legal research tool that guides lawyers quickly to answers to specific legal questions.
- Integrated litigation analytics, providing detailed docket analytics covering judges, courts, attorneys and law firms, for both federal and state courts.
- Statutes Compare, a tool that allows researchers to compare changes to statutes.

**LexisNexis**

After acquiring 3 AI companies (Intelligize; Lex Machina; Ravel Law), it formed Lexis Analytics, a suite of tools that organizes all of its major analytics acquisitions and products (as well as a couple new ones) into three categories –

- litigation analytics (plan and strategize around litigation, offering insights into motion and case outcomes, judges, timing, opponents and related subjects);
- regulatory (track regulatory developments, predict which bills will pass, and understand disclosure obligations); and
- transactional (better manage transactions through contract and document analytics).
Lexis Answers:xii

Lexis® Answers is a new service that provides answers to legal research questions on Lexis Advance. Instead of just providing documents with potentially relevant sections highlighted, Lexis Answers extracts and delivers a direct answer to your legal question, along with a finely-tuned document-based results list.

Lexis Answers also allows you to enter your query in the form of a Natural Language question. You do not have to translate your question into keywords or use Boolean syntax.

The next-generation intelligence of Lexis Answers directly understands your Natural Language question, extracts the answering passage from our content, and presents the answer at the top of the results list by leveraging the latest in machine-learning technology and the power of the Lexis Advance platform.

iManage

After acquiring the AI company RAVN, iManage (the document management, security and sharing company), one commentator notes that AI will be a “no-brainer” for lawyers. Some of the benefits include:

- Auto-classify documents so they may be used or protected based on their content.
- Extract key information from content, including dates, obligations, amounts, and more.
- Identify documents that are subject to compliance requirements.
- Find terms and clauses within content for more effective information reuse and enhanced knowledge management.xiii

AI now drives research and drafting tools for litigators. In a recent ABA publication, Tom Mighell furnished this list of litigation focus. Each relies upon AI.

(Click with your state bar to determine which of these is provided free to you. xiv)

<table>
<thead>
<tr>
<th>Eva by ROSS-</th>
<th>Upload your brief and get a listing of cases; highlight text, and get cases with similar language xv</th>
</tr>
</thead>
<tbody>
<tr>
<td>Casetext by CARA -</td>
<td>Research suite: locates most on-point case; search specific issues; review other brief to see how others frame issues xvi</td>
</tr>
</tbody>
</table>
Attorney IO | Reviews a brief for patterns and connections; then lists cases likely to be relevant\textsuperscript{xvii}  
---|---  
Judicata | Reviews brief for strengths and weaknesses, and suggests improvement(s) (vulnerability analysis)\textsuperscript{xviii}  

And these are not the only companies offering AI-powered legal research.\textsuperscript{xix}

**BUT, ARE LAWYERS REALLY USING AI?**

I do not know of a definitive listing of law firms actively using AI. Like others, my answer to this question is based upon trends and numerous “indicators,” which point me to this conclusion: the failure to implement AI will have financial consequences for some law firms – and the disruption of the core business at law firms will be sudden and significant.

Innovation on the part of lawyers is the exception, and not the rule. Indeed, several surveys report that law firms are not innovating:

- Survey of clients: law firms generally are NOT innovating\textsuperscript{xx}
- Survey of large law firms: only a few law firms are innovating\textsuperscript{xxi}

Several law schools and numerous thought leaders have taken the lead in tracking innovation by law firms, including the use of AI. For example, Michigan State Law school has taken the first step in with its innovation indexes, which it uses to report on law firm innovation.\textsuperscript{xxii}

The index tracks law firms who claim that they have implemented innovations.

The index shows 20 law firms are using (have used?) AI either as part of a service, a product or as a consulting tool to help lawyers improve legal-service delivery.

(There are several other collections or lists of law firm innovation\textsuperscript{xxiii})

These are my favorite resources for keeping track of legal AI developments (using Feedly on my iPhone and saving materials into Evernote):

- Mark Greene’s “Today in Legal Artificial Intelligence blog”\textsuperscript{xxiv}
- Ricard Tromans’ “Artificial Lawyer” blog\textsuperscript{xxv}
- Bob Ambrogi’s “LawSites” blog\textsuperscript{xxvi}
- Two (2) Linkedin groups:  
  - Artificial Intelligence (@ 44,000 members); and  
  - Legal Innovation and Technology (@11,000 members)
As I’ve followed these sources during the past several years, more and more law firms are taking (small) steps in innovation.

Some of those steps include the following:

- A focus on project management
- Hiring data scientists – the “middle person” between AI IT and lawyers (yes, large law firms are hiring data scientists)
- Designating one or more lawyers as innovation and knowledge development counsel. While this simply might (could) be a marketing ploy, the list of law firms that are genuinely taking or testing this approach is growing; and take a look at the people & positions listed in the FastCase 50 for 2018xxvii
- The UK law firms, of course, are the leaders in this. For example, Allen & Overy and at Addleshaw Goddardxxviii have announced new career paths that combine legal expertise with technology.
- In the US, Mayer Brown and Reed Smith are examples of law firms experimenting with “non-billable credit” and tech-focused summer clerksxxix
  - Qn: so, how much innovation takes place in 100 hours (associates) or 50 hours (partners); or through the work of summer clerks? (My experience is that at least one and probably two “zeros” should be added to the hours.)

The hard part, of course, is getting it done. The most difficult step is moving from looking at the shiny object to taking thoughtful action.

**TIPS FOR USING AI**

Nicole Black has a thoughtful piece on the use of AI by traditional law firms.xxx She focuses on one thing: what is the problem that needs to be solved?

She flags identifying the problem that needs to be solved as the key to successful implementation of AI software. She also identifies “cultural obstacles” as a fundamental and key challenge. I agree.

This is my list of tools and tips that have helped me:

- Time, time and more time
- Identify a real problem with requirement of significant “upside” improvement (+50%)
- Plan (start small; commitment; changes to plan; tied to/aligned with law firm goals, strengths, etc.)
- Money (access to capital)
- Patience (thick skin)
- Commitment by the law firm leadership and all partners
- Compensation (with incentive component)
• Do NOT build it if you can license it
• Test-drive AI companies using a “real” work scenario (or “shadow” a project)
• Skills in project and process management (map/time work flow)
• 7 Tips on assessing whether a law firm has AI in its DNA:
  o Investors ($ used)
  o Academic background of technical leadership
  o Experience of data scientists/AI team
  o Talent density: proportion of AI talent to tech team
  o Hiring practices: hiring people with machine learning credentials
  o Company/law firm history: how long tech team has been at the firm
  o Full-time AI leadership: not part time focus on AI
• Articulate the economic benefits for innovating – and using AI
• Other tips

Of course, I save the best tip for last: if your firm is an iManage client, then explore iManage’s RAVN tool — I’m very familiar with RAVN.

B. Who is using AI?

These examples are just a few examples that show the accelerating use of AI and technology in and around the legal industry.

| 2018 In-House Counsel’s Legal Tech Buyers Guide | • The number of AI players servicing the legal industry has increased from 40 to 66 in the past 12 months
• The guide describes more than 120 technology solutions, in 16 categories of legal technology
• The report highlights the use of legal technology by more than 80 of the world’s top law departments (including McDonald’s, Facebook, NetApp, Google, and AIG) |
| Tracking Legal tech startups | As of late August, 2018:
• 678 companies - tracked by Bob Ambrogi
• 1,049 companies – tracked by Stanford Law’s CodeX (“a curated list of companies changing the ways legal is done”)

<p>| Follow the $$$$$$$ | • While not specifically directed at AI, the $500 Million secondary investment (July 2018) in the web-based legal |</p>
<table>
<thead>
<tr>
<th>**services company LegalZoom points to investor’s appetite to leverage software within the legal industry.**xxvii</th>
</tr>
</thead>
<tbody>
<tr>
<td>• As noted above: in May, June and September of 2018, investors placed <strong>$250,000,000</strong> in legal AI companies.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>JPMorganChase</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• The self-talk by leadership at JPMorgan Chase is this: “we are a technology company” xxxviii</td>
</tr>
<tr>
<td>• In 2016, the tech budget was @$9.5B ($3B of which spent on innovation such as machine learning)xxxix</td>
</tr>
<tr>
<td>• Their AI group created “COIN” to review 12,000 EU loan agreements (saving 360,000 hours of manual review)xli</td>
</tr>
<tr>
<td>• Their AI focusxli is primarily pointed at the Consumer Bank and the trading desk: in May, 2017, their Global Quantitative &amp; Derivatives Strategy Group published a 280-page report on big data and AI strategies, which includes a listing/description of “500 alternative data and technology providers.”xlii</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Barclay’s – Eagle Labs</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Barclays has created a collaborative “lab” (called “Eagle Labs”),xiii which intends to “create and curate a series of products, services and co-operative partnerships that improve the lives of people in the communities which we serve, whilst providing the commercial return to our shareholders.” xlii</td>
</tr>
<tr>
<td>• Joining Barclays to host legal tech startups that focus on legal technology: 13 law firms, PwC and the Law Societyxlv</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>British Government (Colonies v. the Crown)</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• 1776: Yorktown (Yanks win)</td>
</tr>
<tr>
<td>• 1812: A draw?</td>
</tr>
<tr>
<td>• 2018: British government creates an investment fund ($27Mill) to help AI grow in the legal, accounting and insurance sectorsxlvii</td>
</tr>
<tr>
<td>• 2018: British government organizes a trade mission to Vienna and Zurich for UK-based, legal tech vendors to “meet new customers and potentially win new contracts” xlvii</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>UnitedLex</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• European private equity firm CVC Capital Partners said Thursday it had acquired a majority stake in Overland, Kansas-based UnitedLex Corp., giving the legal services company access to $500 million in debt and equity “to invest in the company’s technology, target businesses for acquisition and to invest alongside the clients it serves.” xlviii</td>
</tr>
<tr>
<td>Two Legal Publications</td>
</tr>
<tr>
<td>------------------------</td>
</tr>
</tbody>
</table>
| National Law Journal: Profiles 50 companies described by it as “leading the legal industry in artificial intelligence”\[xlix | \[xlix
| Artificial Lawyer’s AL 100 Directory: directory of firms offering automation and AI for the legal industry, and systems designed to integrate and support those tools\[l |
| “We Want (The Technical) You” | Money Center Banks & Big Banks |
| Money Center Banks & Big Banks | |
| Every money center bank, and most big banks, have teams of people hired solely to discover, examine and deploy new technology solutions that impact their business |

The Big 4 accounting firms are investing in AI as a key ingredient in their services.\[li

<table>
<thead>
<tr>
<th>Deloitte</th>
<th>Partners with IBM Watson, Ayasdi, Narrative Science and Kira – with one use being lease reviews</th>
</tr>
</thead>
<tbody>
<tr>
<td>EY</td>
<td>Using AI in financial audits and inventory auditing (using airborne drones)</td>
</tr>
<tr>
<td>pwc</td>
<td>Developed “GI.ai” in collaboration with H2O.ai for use in financial audits and document reviews (leases, contracts, board minutes, etc.)</td>
</tr>
<tr>
<td>KPMG</td>
<td>Built a portfolio of AI tools using IBM Watson, which it calls “KPMB Ignite.” Uses include call center analytics, event predicting and document review.</td>
</tr>
</tbody>
</table>

Legal process outsourcing companies are incorporating AI into their services.

<table>
<thead>
<tr>
<th>AXIOM</th>
<th>One example: Axiom’s “Contract Intelligence Platform” partners with KIRA, the AI company.[li</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thomson Reuters</td>
<td>Partners with AI firm eBrevia in its LPO (legal process outsourcing) division [li</td>
</tr>
<tr>
<td>Wolter’s Kluwer</td>
<td>Building out its own platform (UpToDate; LegalView BillAnalyzer; CCHiQ; M&amp;A Clause Analytics) of AI solutions[liv</td>
</tr>
</tbody>
</table>

**CORPORATE LAW DEPARTMENTS**

Corporate legal departments now focus on technology. The increase use of technology by in-house teams is reflected in the following:\[lv

- 75%: in-house counsel now handles 75% of their legal work
• 71%: legal departments citing the need to increase productivity without increasing legal headcount
• 25%: the law departments’ spending on systems and technology has grown at a 25% faster rate than the larger corporate market in 2017

This focus extends to the creation of a new position in many legal departments: “Corporate Legal Operations” is a new role in the Legal Department. For example, Citibank had this job description in its legal department: Director, Legal Innovation and Delivery. (I can no longer give you a link to this listing – the job has been filled.)

This new position even has a new industry organization: The Corporate Legal Operations Consortium (“CLOC”).

The closing remarks by Mary O’Carroll, head of legal operations at Google, at the 2018 CLOC consortium meeting gives a remarkable summation of the importance of technology to corporate legal departments:

“First, let’s pause and appreciate the significance of this event. Wow. There were around 500 attendees including legal ops leaders from over 130 companies. WHAT?! If you told me five years ago that there would be a three-day conference focused on legal operations, I would have laughed. This is the largest legal operations event in history and it’s just the beginning. I’m sure you all are feeling the momentum of change in the industry right now. We’re on the verge of something very exciting.”

Finally, this footnote has links to 7 examples of AI being incorporated in corporate legal departments:

In part 2, we’ll take a quick look at the growing focus on technology by law schools, and take a look at AI itself: What does it do? How does it do it? Finally, and importantly, we’ll address some of the ethical duties and challenges associated with AI.

---

i [https://en.wikipedia.org/wiki/Big_data](https://en.wikipedia.org/wiki/Big_data)
viii [https://tmsnrt.rs/2MicsqT](https://tmsnrt.rs/2MicsqT)
ix [https://tmsnrt.rs/2NC7InI](https://tmsnrt.rs/2NC7InI) - “access to better predictive research suggestions that take you to the precise text you need to quickly find the answer to your legal question; exclusive AI-enhanced search technology continually runs behind the scenes to root out the most likely typeahead suggestions and instantly surface relevant information – saving you valuable time; see suggested queries with better predictive typeahead; using Litigation Analytics, you can leverage the largest collection of insights on judges, courts, attorneys, law firms, and case types to build the most effective case strategies”

x [https://tmsnrt.rs/2MicsqT](https://tmsnrt.rs/2MicsqT); Bob Ambrogi reviews it here [http://bit.ly/2Qh8UZr](http://bit.ly/2Qh8UZr)
xiv Tom Mighell column in ABA Law Practice magazine, July/August 2018 (pp. 30 & 31) (http://bit.ly/2ZbPmx); other use cases covered at http://bit.ly/2ITAIKQ
xv http://bit.ly/2CLlb7f
xvi https://casertext.com/cara
xvii https://www.attorneyio.com/
xviii https://judicata.com/
xxi http://bit.ly/2jg1G3r; see pages 15-18; results on for this Qn – “is your firm actively engaged in creating special projects/experiments to test innovative ideas or methods?”
xxii https://www.legaltechinnovation.com/

xvi www.lawsitesblog.com/
xvii http://bit.ly/FCaseS0 This list includes lawyers with legal tech roles at law firms

xxix Reed Smith law firm: “newly adopted initiative gives attorneys up to 50 hours of billable hour credits for putting time in new innovations” http://bit.ly/2IEPtZB - and Reed Smith’s summer associate program includes five legal tech summer associates who will devote their time to assisting the firm in evaluating and implementing new technology - http://bit.ly/2xZ2g9Y; Mayer Brown law firm: “Mayer Brown has quietly done something similar with an internal announcement coming this week alerting associates that they can now get billable credit for up to 100 hours spent on “legal process improvement” projects or other “thought leadership” hours, including researching and writing articles, client alerts, or giving speeches. (The firm also lowered its billable bonus threshold from 2,100 hours to 2,000 hours.) (http://bit.ly/2y0Ou9B)
xxi http://bit.ly/2OqAVtn
xxxv https://imanage.com/product/ravn/
xxxvi http://bit.ly/2xtUn7s
xxxvi https://read.bi/2HilCGx
xxxvii https://bloom.bg/2qQiUwL
xxi http://bit.ly/2ggk7wV
xlii http://bit.ly/2qT5CzG
xliii https://labs.uk.barclays/
xiv https://labs.uk.barclays/mission

artificial-intelligence.docx
Comment: For the past 10 years, I have spoken on legal technology. I clearly misjudged or mistimed the arrival of disruptive technology in the US legal industry. Now is the time to say it again (but quietly in this footnote): in 1776, the redcoats came and we (Yanks) clearly won. 1812 . . . let’s call it a draw (or, we just didn’t care about Canada) . . . today, the Brits could easily win, given their head start in legal tech. (Yes, “head” start as in much smarter than us Yanks.).