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Exposing Healthcare Fraud

WHISTLEBLOWING 101

By Andray K. Napolez

The Federal False Claims Act, 31 U.S.C. § 3729 *et seq.*, and certain state false claims acts closely modeled after the federal Act (CA, DE, DC, FL, HI, IL, IN, LA, MA, MI, MO, NH, NM, NV, TN, TX, and VA) (collectively, the acts) are gaining momentum as a mighty weapon to wield against fraud in the healthcare arena. Under the acts, also referred to as whistleblower and *qui tam* acts, a private citizen may bring an action on behalf of the government to recoup funds illegally obtained by a defendant as a result of a false claim (or damages related to a defendant's failure to pay an obligation to the government—a reverse false claim). In fact, the term *qui tam* is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro seipse*, meaning *he who sues for the king as for himself*.

False claims perpetrated by healthcare providers include charging for services not performed; billing more than once for the same service; upcoding, in which the provider changes or falsifies billing codes on services performed to maximize Medicare/Medicaid reimbursement; performing medically unnecessary testing; and falsifying documents that certify a patient's need for treatment.

Pharmaceutical manufacturers and their sales reps also contribute to healthcare fraud by (1) marketing off-label uses for their drugs that fall outside the FDA approved uses (and thus have not been proven safe and effective); (2) inflating the price of drugs for Medicare/Medicaid claims while giving deep discounts or free samples to practitioners, encouraging them to prescribe that particular drug over another (this practice is also known as "marketing the spread"); and (3) suppressing reports of a drug's adverse effects.

> Suits brought under the acts have produced staggering settlements and jury awards.

Complaint Process

The acts have a precise protocol that a whistleblower (or relator) must follow in order to preserve her whistleblower claim to a future share of any recovery, and negotiating these steps can be complicated. Generally, the claim develops as follows:

1. The whistleblower discovers fraud in the course of her employment or business interactions and consults with a qualified whistleblower attorney.
2. Together, the relator and her attorney research the alleged fraud and, if the evidence is sufficient to support the claim, file a complaint under seal. Filing under seal is mandatory because it gives the government an opportunity to evaluate the claims without alerting the defendant to the potential suit.
3. The relevant attorney general's office is notified of the fraud and supplied all documentation (this may be federal, state, or both depending on where the fraud occurred and where the claim was filed).
4. The government has 60 days to investigate the claim and decide whether to intervene in the case. This is typically far too short a period for an adequate investigation; therefore, extensions are often granted.
5. Upon completion of its investigation, the government may intervene or the relator may pursue the case individually should the government decline intervention. The government, however, may intervene in a case *at any time*, even if it previously declined intervention.
6. After the decision for or against intervention is made, the case is unsealed. The defendant is served with a copy of the complaint and any disclosure materials the relator has to support her claims. The case follows the normal course of litigation from this point forward.

If a whistleblower's suit alleging fraud is proven and damages are awarded (or if the case is settled), the relator is entitled to 15 to 30 percent of the government's total recovery. This total is based on the total amount of materials and services fraudulently billed, trebled (multiplied by 3), plus $5,500 to a maximum $11,000 in penalties per false claim, depending on where the claim is filed.

In recent years, suits brought under the acts have produced staggering settlements and jury awards. In 2001 Tap Pharmaceuticals agreed to a $560 million settlement for allegedly marketing the spread and concealing its best price for its cancer drug, Lupron, from Medicare/Medicaid. (Government

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Draft Effective Commercial Arbitration Clauses

By Daniel S. Terrell

Although the benefits and burdens of arbitration are often the subject of intense debate, the primary reason for incorporating arbitration in a commercial agreement is generally based on the belief that arbitration is faster, less expensive, and more flexible than the court systems. The practical reality, however, is that a boilerplate arbitration clause can still lead to cost-intensive, protracted court proceedings. In addition, it's likely that merely inserting a form clause would not increase the chance that arbitration could resolve a future dispute in an efficient manner. This article discusses a few elements to consider when drafting an arbitration clause with the goal of increasing the effectiveness of commercial arbitration.

Combined ADR Approach

Arbitration can be combined with another form of alternative dispute resolution like mediation to increase the likelihood of settlement before significant costs are incurred. This other form of ADR is used as a precursor to the arbitration and can narrow the issues for any future litigation if settlement does not occur. Some parties are now agreeing to resolve commercial disputes by using a collaborative law process prior to any mediation or arbitration, in which (1) the parties agree

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Making a Professional Referral

By Rashada N. Jamison

As an attorney, you're likely to face a time when a friend or client asks you for a referral to another professional who can help him solve a problem. This person likely feels that you are a credible source for a quality recommendation and thus has a certain amount of trust in you and your judgment. Before providing a name and contact information, consider that your recommendation may be the only candidate your acquaintance considers—based primarily on your perspective. What should you consider before you recommend another professional?

A good way to determine whether you're making a good referral is to ask yourself if you would choose that person to handle a personal matter for you. Make the same assessments you would if the service were for you, and use these as a filter for your final recommendation.

Go With Who You Know

One of the best sources for a referral is someone you personally have worked with, because you have firsthand knowledge of the referree's work. Gauging the quality of her work based on a fact or facts you know rather than on speculation will help you be objective.

Providing a referral based on good work or services someone you know and trust has received is usually just as reliable. If you refer a professional you personally have not worked with, however, it's considerate to share that information with the inquirer. Manage his expectations by saying something like, *Although I haven't worked with Dr. Wolff, it's my understanding her work is fantastic.* The inquirer will appreciate hearing the truth. Be precise in the information you provide to both the inquirer and the professional whom you suggest. In the event you have no recommendation, just say so.

Heads Up

When referring to someone you know or have worked with in the past, let that person know you've recommended her, and to whom. If you're not sure she's open to new clients or wants her contact information shared, call and ask.

It's completely acceptable to tell the inquirer that you'd first like to touch base with the referee and then get back to him.

Reaching out not only is a nice courtesy but also tends to strengthen the relationship between you and the person you recommend.

If you sense the inquirer may not be an ideal match with your referee—say, he's looking for a property lawyer but asks a lot of extraneous questions—share that insight with the referee to help her make an informed decision.

Disclosure

You are not required to share the extent of your knowledge of, relationship with, or relation to the person you refer, unless you believe there may be a conflict of interest. For example, no harm is done by referring a legal matter to your attorney sister. If she has all the right qualifications, you can ethically share her professional background but not reveal she is your sister. If you're working on a business matter with someone who asks you to recommend an attorney, however, you may want to disclose that the person you recommend is your sister. Being up front about this allows the colleague to make an informed decision, and speaks to your credibility and integrity.

If you're unsure whether to disclose information about the relationship, consider your intentions. Is there a reason for keeping it confidential? Is it important that the inquirer know? You may have to make a judgment call.

When you're the one asking for a referral, stay open minded. Don't judge someone whose referral turns out not to work for you.

In the end, it's not just about who you know but also who knows you.

Rashada N. Jamison is a communications agency vice president and owner of Silver Stream Consulting Group in Chicago. She may be reached at rashadajamison@yahoo.com.

READY RESOURCES

- *The Lawyers Guide to Marketing Your Practice*, 2d ed. 2004. PC # 5110500. Law Practice Management Section.

Common-$ense $aving

By Jean Jacques Borno

The old-fashioned common sense of our grandparents still stands as a reliable guide to money. Whether you are digging out of holiday debt or managing substantial assets, the principles are similar and are worth repeating.

Don't keep up with the Joneses. Comparing and competing with others can lead to financial overextension. All your income disappears every month to support too much house, too many vehicles, and premium coffee. Many things that you see others enjoying are not paid for—those big spenders may be up to their ears in debt.

The advertising-driven consumerism of American society has lured millions of us into confusing our needs with our wants. Most new purchases trade potentially income-producing assets (money you can invest) for income-draining liabilities (new car, vacation home).

But possessions do not bring peace or financial independence. Enough really *is* enough. Pare down your lifestyle and clarify what you really value. If your spending expands as your income expands, you can miss many great opportunities to reduce debt and build wealth.

Get out and stay out of debt. Ben Franklin said, "He who has four but spends five has no need of a purse." If you spend more than you earn, you are living in debt rather than building wealth.

Analyze your spending—are the culprits new clothes, dinners out? Do whatever it takes to control them—stay out of stores, eat at home, tighten your belt. Shred the credit card offers, choose one card to use carefully, cut up the others, and pay them off, the one with smallest balance first, until you are debt-free. Then pay your credit card bill in full every month—no excuses.

> Shred the credit card offers, choose one card to use carefully, and cut up the others.

Never go into debt for holiday purchases. Use only cash, checks, or a debit card tied to your checking or brokerage account to buy gifts. Make a list and stick to it. Pat yourself on the back when you spend less than you budgeted.

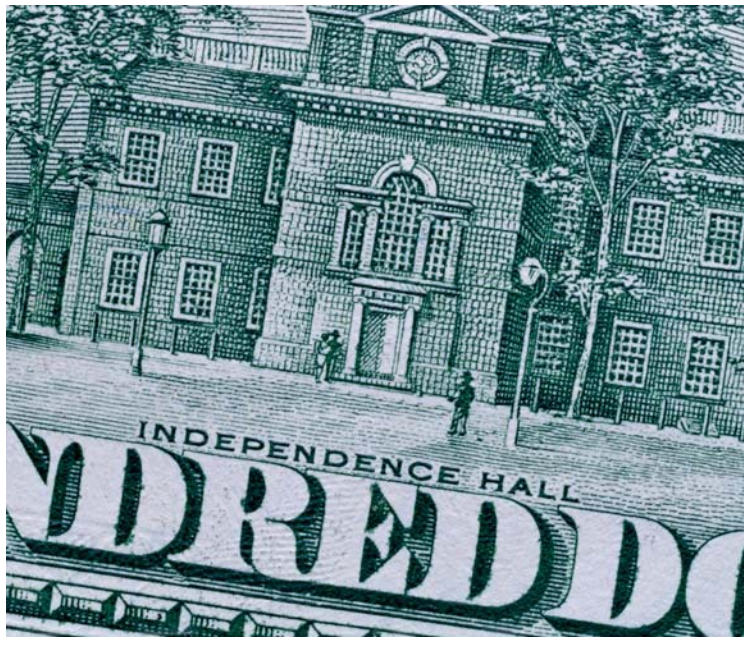
On a budget but still need to buy gifts? Try being creative. If the gift is for a golfer or burgeoning gourmet, consider a subscription to *Golf Digest* or *Gourmet* magazine. Not only does it cost less than $25, but the recipient also will appreciate it—and you—all year long.

Live below your means. Spend less than you make. Everyone has enough to save. If your income were cut by 10 percent, you would find a way to adjust. So deposit 10 to 20 percent of every check into an automatic-deduction investment account (your company's 401(k) or an account with a brokerage firm).

Don't put all your eggs in one basket. Diversification is the key to preserving your invested assets. Picking just one or two stocks or funds is risky, as is parking money in multiple accounts at multiple firms. If your investments are the players on a team and you are the owner, you still need a coach. Find a good financial advisor and book a consultation.

Take care of yourself. Your goal is to achieve eventual financial independence, which occurs when your investment income meets or exceeds your monthly expenses. Achieving this takes time but pays off in psychological freedom. Forget shortcuts and trying to get rich quickly—the goal is a slow, gradual process built on the cumulative effects of your long-term choices.

Be a good steward. With wealth comes great responsibility; it requires education, attention, time, and effort, because even a fortune can be lost with poor management. Also with wealth comes great opportunity:



the delightful experience of having sufficient surplus to give charitably, to provide for others. Ebenezer Scrooge still illustrates the misery of hoarding and the joy of giving.

Money is a powerful tool that can be frittered away, wasted on temporary satisfactions, or used wisely for a long-lasting legacy. Cultivate uncommon common sense in matters of finance to set your course on the ultimately more satisfying path.

Jean Jacques Borno is a financial advisor with Morgan Stanley in Washington, D.C. Contact him at jean.borno@ms.com or 202/862-9085 for further information.

READY RESOURCES

■ *The American Bar Association Guide to Credit & Bankruptcy*. 2006. PC # 2350044. Division for Public Education.

Health Care Fraud

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programs require manufacturers to report their lowest or "best" price to ensure the government gets the same deal others do.) In 2004, Pfizer agreed to pay $430 million to settle federal and state whistleblower suits alleging its subsidiary, Warner-Lambert, encouraged physicians to prescribe the company's anti-seizure drug, Neurontin, for various non-approved, off-label uses. In October 2006, a jury found the managed care organization Amerigroup liable for at least $144 million (penalties are still being calculated) for refusing to enroll women in their third trimester of pregnancy because the women's medical needs typically conflicted with Amerigroup's cost-saving directives. These examples illustrate the power of whistleblower acts from a public insurance perspective—i.e., the recoveries are primarily a result of overpayment by federal and state Medicare and Medicaid services.

And there's more. Plaintiffs in a recent Illinois case employed the Illinois Insurance Claims Fraud Prevention Act, 740 ILCS 92/1 *et seq*., to combat the medically unnecessary use of electrodiagnostic testing by untrained, unsupervised technicians. This act allows a relator to file claims on behalf of *private* insurance companies, just as a whistleblower would file on behalf of the government. Check to see if your state has an equivalent provision.

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READY RESOURCES

■ *Health Care Fraud and Abuse*, with 2006 Cumulative Supplement. PC # 1620214P9578. Health Law Section.

■ *Sarbanes-Oxley: Update on Recent Decisions*. 2006. PC # CEL06SOUC. ABA Center for CLE, Section of Litigation.

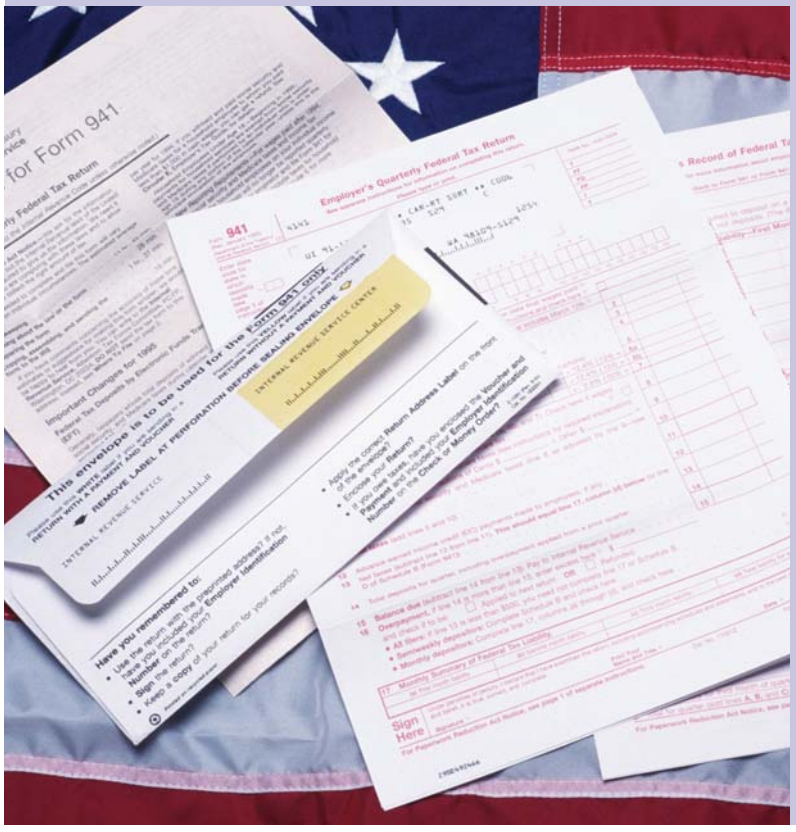
Tax-Filing Tips to Avoid Penalties

By Harry Teichman

Everyone likes to hear about ways to make tax filings easier and less painful. The following tips apply to everyone, every year, and could end up saving you (or your clients) thousands.

1. Always, always, always mail anything to the IRS using United States Postal Service Certified Mail, and retain the proof of delivery receipt for at least six years. The rule for items mailed to the IRS is that timely mailed is timely filed. If a return is lost in the mail and the certified mail receipt demonstrates that the return was timely mailed, this is proof as a matter of law that the return was timely mailed. If an item is mailed a day late, however, the item will not be deemed *received* until it actually is received.
2. Applying for the automatic extension to *file* a return does not mean the taxpayer has an extension to *pay* the taxes. Many of my clients are shocked when they get hefty penalty bills from the IRS for failure to timely pay their taxes—despite their meticulous record keeping regarding the automatic extensions that they requested. Make a good estimate of your tax obligation, and pay it by the due date of the return. The penalty for failure to pay on time is one-half of one percent (.5%) of the outstanding balance per month; interest accrues on the outstanding balance plus penalty (about 8% currently). If a taxpayer doesn't have the money to pay the tax, try applying for an installment agreement, which will reduce the penalty on the underpayment (but not the interest) to one-quarter percent (.25%) per month. Many times the IRS will agree to a short-term installment agreement (12 months or less) over the phone without substantial documentation from the taxpayer. Waiting for the IRS to contact the delinquent taxpayer will certainly make this process more difficult (and more expensive).
3. As a corollary to Rule 2, *always* file a tax return on time (on time means including any properly granted extensions), especially if the taxpayer does not have the money to pay all of the taxes indicated on the return. It is not a crime to fail to pay taxes; it is a crime to willfully fail to file a return. If that fact alone is not incentive enough, the penalty for failure to timely file is 5 percent (5%) of the outstanding balance per month. This penalty includes the penalty for failure to pay and is capped at 25% of the outstanding balance (but interest continues to accrue on the penalty and the principal).

> Applying for the automatic extension to file a return does not mean the taxpayer has an extension to pay the taxes.



Many of my clients don't file returns because they don't have the money to pay. For example, Client 1 files a return on time but no payment; when, six months later, she has the money together to pay the tax, she will be responsible for the original amount plus a 3% penalty—in addition to six months of interest. Client 2 foolishly doesn't file even a return, and thus is liable for a 25% penalty on the amount owed, as well as interest on the penalty and the principal. (The tax is due by April 15 whether or not a return is filed.)

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Don't Do It Yourself

HIRING TEMPORARY LAWYERS

By Youshea A. Berry

You are a solo practitioner in a large city. You have worked for two years to create a niche in your market, and you have *finally* started to make a name for yourself. Clients you have served well are referring other potential clients. Networking through your local bar associations, regular trips to the gym, and weekly visits to the dry cleaner have increased your stream of new clients. These clients have an understanding of your practice areas, and their issues are diverse. Alas, you are but one person. But you *can* effectively serve your growing client base with the help of some temporary outside help.

Contract lawyers (also known as temporary lawyers or independent contractors) can be of great assistance when you are overwhelmed with work. The mention of contract lawyers often brings to mind million-dollar legal temporary agencies that make substantial amounts hiring out lawyers at market rates, but discussed below is a group of lawyers who serve solo and small law firms as *independent contractors*.

Don't hire an employee when you want an independent contractor. It is extremely important to understand the difference between an independent contractor and an employee *before* you decide to hire for your practice. Failure to understand the nuances involved with this kind of hiring can lead to substantial fines from the IRS; in addition you may have to pay any back taxes that you (as the employer) failed to withhold from the independent contractor's fees.

When using independent contractors, you may ask only for a specific outcome of an assignment; you may not direct the procedures that will lead to the outcome. For example, if you need a complex shareholder agreement for your firm, you generally may not direct *how* the independent contractor does the work. (The IRS makes exceptions for basic instructions to independent contractors, for example, scope of instructions, extent to which the business retains the right to control the worker's compliance with the instructions, and the effect on the worker in the event of noncompliance.)

The IRS and the courts have used the following criteria to determine whether a worker is an independent contractor or an employee: (1) whether the hiring party holds or exercises behavioral control over the independent contractor; (2) whether the hiring party holds or exercises financial control over the independent contractor; (3) the overall relationship between the independent contractor and the hiring party. A more complete description of the independent contractor guidelines and forms is available at www.irs.gov.

Another strong indication of an independent contractor relationship would be the fact that, as the hiring party, you do not take any withholding from payments to the contractor. You are not responsible for state or federal taxes, Medicare or social security withholding, or unemployment tax for independent contractors. Each year, however, you must report payments to independent contractors in excess of $600, using IRS Form 1099-MISC.

A simple way to determine whether you are acting as an employer is to submit a completed Form SS-8, Determination of Worker Status, to the IRS, which will make a case-specific determination for the worker in question.

Determine an hourly amount for independent contractors. Pay scales vary widely by jurisdiction and skill area. The cost of hiring a lawyer as an independent contractor to do a

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Surviving a Firm Merger

By James Weaver

Mergers between and among law firms, historically rare occurrences, are becoming commonplace. Firms of all sizes must be competitive, and that's often accomplished by combining resources to expand in size, service areas, and geographic locations.

Mergers are often good business decisions for law firms, but in the short term they can make young attorneys feel vulnerable.

Because each situation is different, there is no set approach for successfully navigating a merger. You can, however, take steps to improve your chances of surviving the merger and also to discover personal opportunities at the new firm. Following are a few tips based on my experience and that of several colleagues.

Give the merger a chance. Don't rush to judgment; give the merger time to play out before deciding whether it will have a positive effect on your career. If merging made business sense, there must be opportunities for cross-selling, growth, and client development at the new firm. Worrying about what might happen before the dust settles may cause you to miss an open door of opportunity.

Ask questions and get the facts. When the merger is announced within your firm, you will have a lot of questions regarding its potential impact on you, the firm, and clients. If possible, direct your questions to key attorneys within the firm who were involved in the merger. Nothing fuels feelings of uncertainty and vulnerability more than not knowing what's going to happen. Don't listen to the rumors, get the facts.

Show initiative and meet lawyers from the other firm. Don't wait for a social event or office relocation to start meeting attorneys and professionals from the other firm. The firm's web site likely describes its areas of practice and its attorneys; identify those who practice in your area of law or to whom you may cross-sell your services. Arrange for one-on-one meetings whenever possible to get acquainted. Being proactive can help you to get work assignments and/or internal referrals for your services.

Speak and write. Writing about and giving presentations on your area of practice will allow you to quickly introduce your skills to your new colleagues and strengthen your visibility within the firm. Volunteer to give a presentation during your monthly practice section meeting or local bar association meeting, to write articles for trade or legal publications, or to author an article or advisory for your firm's client newsletter. This is also a way to make the new firm known to your existing clients and remind them that additional services are available to them post-merger.

Be creative—think like an entrepreneur. Growing law firms value associates who demonstrate creativity and entrepreneurialism. Watch for opportunities to either cross-sell your services to existing clients or market your niche to potential new clients. The potential to cross-sell grows exponentially when firms first merge because a new pool of clients and practice areas is available to draw upon.

James P. Weaver is an associate in the Pittsburgh, Pennsylvania, office of Buchanan Ingersoll & Rooney, PC. James can be reached at james.weaver@bipc.com.

***READY* RESOURCES**

- *How to Start and Build a Law Practice*, 5th ed. 2004. PC # 5110508. Law Practice Management Section, Law Student Division.

ARE YOU INTERESTED IN LEADERSHIP?

Would you like to become more involved with the Young Lawyers Division, or hold a position giving you more responsibility as well as a voice in the Division's growth and activities for the future?

Appointments for leadership positions within the Division will be made this spring for the 2007-2008 bar year. To learn more, visit **www.abanet.org/yld/appointments**.

The deadline for submitting your application is **February 28, 2007**.

Is Your Career On Track?

By Eldora L. Ellison and Theodore Wood

If you have been wondering whether you are on track in your career, you've already taken an important first step for your future. But if you haven't ever thought about this, there is a good chance you're well on your way to being derailed. Even though your firm or organization probably provides you with an annual performance evaluation, you, as a professional, carry the primary burden to critically assess your own development. Too often, lawyers confuse *continued employment* with *professional success*. Don't be fooled; the two terms are not synonymous.

To clarify your self-assessment, try becoming your own worst critic while simultaneously being your new best friend. Although there is no need to be *hyper*critical of yourself, it is important that you periodically take a step back and objectively ask yourself whether your career is heading in the right direction. Although those around you may sometimes sugarcoat your situation—or, conversely, may be overly critical of you—you will learn to become your best friend if you strive to view your situation and your career objectively. But don't stop there: When you identify areas that need improvement, devise a strategy to either improve in those areas or cope with your shortcomings. The following suggestions may help you get on track in the new year.

- Be introspective and devote time to assessing your professional development. Don't forget the soft skills that are critical to your success (e.g., leadership, networking, and management).
- Gain some perspective by looking at your situation from the standpoint of your supervisors. If your supervisors have not already told you what professional qualities are important to them, ask.
- Be proactive and seek the professional opportunities you desire and the constructive evaluations you need. Then heed the advice you get!
- Don't make it hard for your supporters to support you. For example, if you have a billable-hour requirement, meet it, or you'll make it hard for your would-be supporters to legitimately praise you.
- Find a trusted advisor who knows your firm or organization well—and who will call a spade a spade. Once this advisor gains your confidence, and vice versa, she may even share valuable inside information that will help you navigate within your organization.
- Don't be a recluse; develop a social and professional network inside and outside your business. Remember, you are not alone. Similarly, learn about the structure of your organization and its process of decision making.
- Don't underestimate the meaning of the word *support* in your support staff. Your staff can save your hide! Remember that good advice and information can come from a variety of sources, not just from the leaders in your organization.
- Recognize your strengths and play to them while working on your shortcomings. For example, if you're not naturally very organized, seek help from your support staff to problem solve and maintain organization.
- If you truly are a square peg that stands no chance of becoming well rounded, don't try to fit into the round hole. You're more likely to find your niche and blossom professionally in a different organization—one that values square pegs.

Eldora L. Ellison and Theodore Wood are, respectively, director in the biotechnology/chemical practice group and an associate in the electrical practice group at Sterne, Kessler, Goldstein & Fox PLLC, Washington, D.C. The authors can be reached at eellison@skgf.com.and twood@skgf.com.

***READY* RESOURCES**

- *Making Partner: A Guide for Law Firm Associates*. 2006. PC # 5110576. Law Practice Management Section.
- *The Curmudgeon's Guide to Practicing Law*. 2006. PC # 5310356. Section of Litigation.

Tax 101
ASSET AND STOCK SALES

By Matthew P. McLaughlin

If you have a client who is considering the sale of a corporation or business, specific tax and nontax issues should be discussed and considered before you advise the client about how to structure the deal. The major advantages and disadvantages of stock sales as opposed to asset sales are discussed below.

Stock Sale: Advantages

1. The seller realizes and recognizes income taxed at a capital gain rate on the sale of the stock in a corporation. One exception to this general rule occurs when a portion of the purchase price is allocated to a covenant not to compete; here, the seller generally recognizes the monies as ordinary income and is taxed accordingly.
2. One nontax advantage is that the seller does not have to liquidate or otherwise dispose of the corporate entity—the purchaser acquires the asset and will either maintain its existence or liquidate it.

Stock Sale: Disadvantages

1. From a tax perspective, the sale of stock can cause the seller to lose net operating losses it may have prior to the stock sale. If the seller wants to utilize these losses, a stock sale is not the recommended way to structure the transaction.
2. Practical nontax problems can be created by selling stock. These occur primarily when the seller is financing the transaction for the purchaser or when the seller has a desire to continue a particular line of the business. If the seller is financing the sale, issues can arise in the collateralization of the transaction. If the seller wants to continue a particular line of the business, the seller may have to spin off that particular line prior to the closing of the stock sale, and an asset sell would be a better way to structure the transaction.

Asset Sale: Advantages

1. If the seller wants to sell only certain assets to the purchaser, an asset sale provides for doing so. This is an advantage to the seller who wants to maintain and continue a line or division of its business.
2. If the seller is a corporation that does not have a significant built-in gain with respect to its assets, an asset sale can allow both parties more flexibility. The purchaser typically will prefer an asset acquisition because it gets cost basis (which is generally fair market value) in the assets it is purchasing.

Asset Sale: Disadvantages

1. There is a potential double tax problem if the seller is a corporation. The seller's sale of the assets is a taxable transaction. If the seller distributes the proceeds from the sale as a dividend and/or liquidates, the shareholders can be taxed upon the receipt of the dividend distribution, whether or not liquidation takes place.
2. A paramount disadvantage is that the purchaser typically does not assume any of the seller's liabilities. In general, the purchaser of assets of a corporation is not responsible for the liabilities and debts of the seller.

It is important to recognize that the advantages and disadvantages listed here from the seller's perspective also apply if you represent the purchaser. Although the pluses and minuses discussed above are germane to any type of business transaction, every sale or purchase of a business from another entity presents its own issues and conflicts.

If your client wants to sell or purchase another business, it is critical to staff the transaction early in the game and include appropriate nonlegal and legal professionals and advisors. These may be certified public accountants, financial advisors, business brokers, and insurance agents. The legal teams should include, as appropriate, individuals with expertise in the following areas of law: real estate, labor and employment, tax, securities, antitrust/Hart-Scott-Rodino, environmental, intellectual property, regulatory, ERISA and employee benefits, and, finally, litigation. Employing both types of specialists can smooth the transaction from due diligence through closing phases and may mitigate or eliminate problems throughout the negotiating, document-drafting, and closing process.

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Arbitration Clauses

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to engage in a series of intense settlement negotiations, and (2) the parties' legal counsel agree to withdraw from representation if the process is terminated without settlement.

Minimize Prearbitration Court Proceedings

Parties can specifically reserve for the arbitrator the power to decide "substantive arbitrability" issues that are normally decided by a court, i.e., the arbitrator can be empowered to decide whether a valid agreement to arbitrate exists and whether the specific dispute falls within the scope of that agreement. The intent behind empowering the arbitrator in this regard is obviously to avoid the necessity and cost of litigating substantive arbitrability claims in court.

An effective arbitration clause contemplates that a party will institute court proceedings in an attempt to frustrate a future arbitration. Disincentives can be used to minimize the occurrence of such an attempt. A clause can provide, for example, that if a party chooses to litigate the dispute in court, that choice (1) is a separate breach of the contract for which stipulated (or liquidated) damages and attorneys' fees are recoverable and (2) is a waiver of the party's right to pursue in court and arbitration all claims, remedies, and defenses in connection with the dispute. Similar penalties can be used to address the case if a party refuses to arbitrate and must be compelled by a court to submit to the process.

Managing the Arbitration Proceeding

Arbitration clauses often call for the application of procedural rules generated by a private agency such as the American Arbitration Association and the International Chamber of Commerce. Although an agency's rules can act as a baseline for the effective management of an arbitration, the following additional controls may not be adequately addressed in such rules and should be considered on a case-by-case basis.

- Insert a venue provision for where the arbitration hearing will be held.
- Allow for the consolidation of multiple arbitrations and the joinder of parties when multiparty contracts or multicontract arrangements exist.
- Restrict the arbitrator's authority to fashion any remedies the parties deem undesirable, e.g., punitive damages, sanctions, fees, costs, and expenses.
- Enlarge the arbitrator's authority to decide dispositive, prehearing motions.
- Tailor limitations on the availability and scope of discovery based on potential claims and the complexity of the underlying business relationships, which limitations may concern (a) the maximum number of depositions (if any), hours for each deposition, and written discovery requests; and (b) the production of electronically stored information.
- Employ reasonable time restrictions for motion practice, discovery, the hearing, the rending of an award, and the publication of any written, reasoned explanation of the award.

Minimize Post-arbitration Court Proceedings

Courts—not arbitrators—have the power to reduce arbitration awards to enforceable judgments. Hence, court proceedings at this stage are nearly inevitable, absent settlement. Although the law limits the judicial review of arbitral awards, the parties may wish to restrict judicial review further to foreclose the possibility of prolonged court proceedings concerning the award's enforcement. In this regard, the arbitration clause may include an exclusion agreement through which the parties waive the right to bring any questions of law before the courts in connection with the award's enforcement. In addition, the parties can specify the venue for the confirmation, modification, or vacatur of the award.

Last, take great care to ensure that the drafted clause complies with applicable law, whether the Federal Arbitration Act, the New York Convention, and/or your state's arbitration laws.

Daniel S. Terrell is an associate in the New Orleans office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, and is Chair of the YLD Dispute Resolution Committee. Daniel can be reached at dterrell@bakerdonelson.com.

READY RESOURCES

- *How Arbitration Works*, 6th ed. 2003. PC # 5250204B1335. ABA Section of Labor and Employment Law.
- *Commercial Arbitration at Its Best, Successful Strategies for Business Users*. 2000. PC # 5070368. Section of Business Law, Section of Dispute Resolution.

Balancing Law and Motherhood

ONE WOMAN'S EXPERIENCE

By Christine Spinella Davis

Having a baby is a life-altering event that brings great joy and great challenges, and the challenges can be even greater for a mom who also maintains a legal career. As a full-time litigator who is also the mother of an 18-month-old girl, I found that although it is not easy, it is possible to have both. This past year and a half has taught me what works to help me maintain the fine balance between life at home and at work, at least during these early years of motherhood.

Find a reliable caretaker. Whether daycare, a nanny, or days at grandma's house, childcare you can count on is far and away the most important component to this delicate balance. Given attorneys' demanding schedules, you must be able to trust that your child will be well cared for in any circumstance. Of course, people get sick and face unexpected personal issues, but such events should not regularly occur. It is hard enough trying to finish up a motion by its due date without being informed that you will have no daycare in the morning.

Arrange for backup childcare. This is essential for unavoidable times when your caretaker isn't able to work regular hours or to cover for you if a deposition runs late. Some law firms contract with local daycare providers for emergencies; if your firm does, find out the protocol for taking advantage of this benefit, whether or not you think you'll use it (you may have to register your child with the daycare center beforehand). If your office doesn't provide daycare, be sure you have a plan in place—another daycare center or individual who can step in. Just knowing you have alternative arrangements will help keep your sanity when emergencies arise.

Devote specific times each week to your child. Even if you have to physically mark the "playdate" on your calendar, identify periods to set aside for you and your child. Maybe one hour every morning, or Saturday mornings and/or Sunday afternoons—whatever works best for you. I found that knowing I had time set aside for my daughter often made it easier for me to focus on my work.

Prepare in advance for the week ahead. Do as much in advance as you can for the upcoming week—even planning menus or cooking ahead when possible. I also find it helpful to set out a weekly schedule for my household; a simple dry-erase board on the refrigerator tracks meetings and appointments. This ensures that everyone is on the same page and we don't inadvertently miss that doctor's appointment it took two months to get.

Don't be afraid to accept help. I'll be the first to admit that being a working mom can be draining. In order to get everything done, I have willingly accepted help at home, whether it's babysitting by the grandparents or help maintaining household tasks. I know that as much as I might like to be Wonder Woman (a role many women lawyers are drawn to), I am not. Don't be too proud to accept help.

Make time for yourself. Making time for things you simply *enjoy* is essential. Go to your weekly yoga class, meet your friend for coffee, garden. Doing something you enjoy that is not child- or work-related will prevent you from burning out. Think of it as a rejuvenating activity that will allow you to be a better attorney and a better mom.

Christine Spinella Davis is a senior associate in the Washington, D.C., office of Howrey LLP and is Chair of the YLD Tort, Trial & Insurance Practice Committee. She can be reached at daviscs@howrey.com.

DIVERSITY FELLOWS PROGRAM
GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION

The General Practice, Solo and Small Firm Division's Diversity Fellows Program is designed to promote ethnic diversity within the Division, recruit members of color, and provide leadership development opportunities within the Division for members of color.

The Division's Diversity Committee and Membership Board identifies and nominates two young lawyers of color who will be appointed by the Division chair-elect to funded fellowship positions within the Division, effective during the following bar year. Fellows will be funded, per the Division's reimbursement policy, to attend the Division's Fall and Spring Meetings.

Upon completion of successful active participation in the first scholarship year, the participants should then be appointed to regularly funded positions within the Division the following bar year, within consideration of the Division's existing needs and the participants' preferences based upon the recent participation.

The deadline for applications is April 28, 2007.
For more information, visit www.abanet.org/genpractice/diversity/index.html.

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Do It Yourself

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relatively simple job in a small market would differ substantially from that for an experienced communications lawyer doing sophisticated FCC work in a large market.

There are a number of ways to determine how much you should pay potential contractors, ranging from simply asking colleagues what they paid for such services to learning a local temp agency's going rate for contract lawyers. Legal services agencies generally have a strong grasp of what the individual market will bear for a specific class of lawyer.

The Internet also offers a number of sites that can give you an idea of how much lawyers might expect to be paid for certain work. Visit www.payscale.com for an example of how to determine a competitive salary for an independent contractor lawyer in your area.

Consider the ethics. When hiring a contract lawyer, adhere to your state's rules of professional responsibility. The ABA Model Rules are a great guideline; however, individual state rules covering legal ethics and the unauthorized practice of law determine whether you are within the rules.

With respect to the ABA Model Rules, the issues identified as most important in the area of contract (or "temporary") lawyers (set out in ABA Formal Opinion 88-356 (1988)—*Temporary Lawyers*) are these: conflicts of interest, confidentiality of information, disclosure to client, and arrangements with placement agencies (irrelevant for our purposes here). Although many states' professionalism guidelines are closely aligned with the ABA Model Rules, check your state's rules before hiring a contract lawyer.

Secure an agreement. The best way to create an independent contractor relationship is to secure an independent contractor agreement with the lawyer before she begins work for your firm. This is the clearest indication of the parties' intent. As we all learned in law school, where clear manifestation of parties' intent can be shown, a court is reluctant to infuse its own logic.

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***READY* RESOURCES**

■ *The Complete Guide to Contract Lawyering*. 2004. PC # V04CGCB. ABA Career Resources Center. To order online, visit www.ababooks.org.

Spring in Montreal

By Jay E. Ray

From May 3 through 5, 2007, at the YLD Spring Conference, attendees will have a unique opportunity to broaden their legal perspectives and skills, to network, and to create lifelong memories at a joint meeting in Montreal between the YLD and the Association de Jeune Barreau de Montreal (AJBM, also known as the Young Bar Association of Montreal).

Many Americans, tourists and professionals alike, have not been to this beautiful, unique, and exciting city or experienced its enchantments: historic old town, thousands of shops and excellent restaurants, French culture, and exotic nightlife. But Montreal was chosen because of the strength of the AJBM and the inherent opportunities for large numbers of U.S. and Canadian young lawyers to share perspectives and socialize.

As Chair of the Division, I have had the great fortune to represent American young lawyers at several international meetings. Through this joint conference with the AJBM, I hope to give their volunteers and members similar opportunities to broaden and diversify our legal experience. The substantive programming will cover cross-border and international issues in addition to our usual practice areas and will include "speed networking" between U.S. and Canadian lawyers.

This conference will feature something for everyone and will be an event to remember. Make plans to join us—and be sure your passport is in order if you intend to fly; you must have one for border crossings to and from Canada. For additional information visit the ABA YLD's web site at www.abanet.org/yld/spring07.

Jay E. Ray is Chair of the Young Lawyer Division and practices with Moseley Law PC in Dallas, Texas.

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