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The Senior Lawyer

A publication of the Senior Lawyers Section
of the New York State Bar Association

Inside

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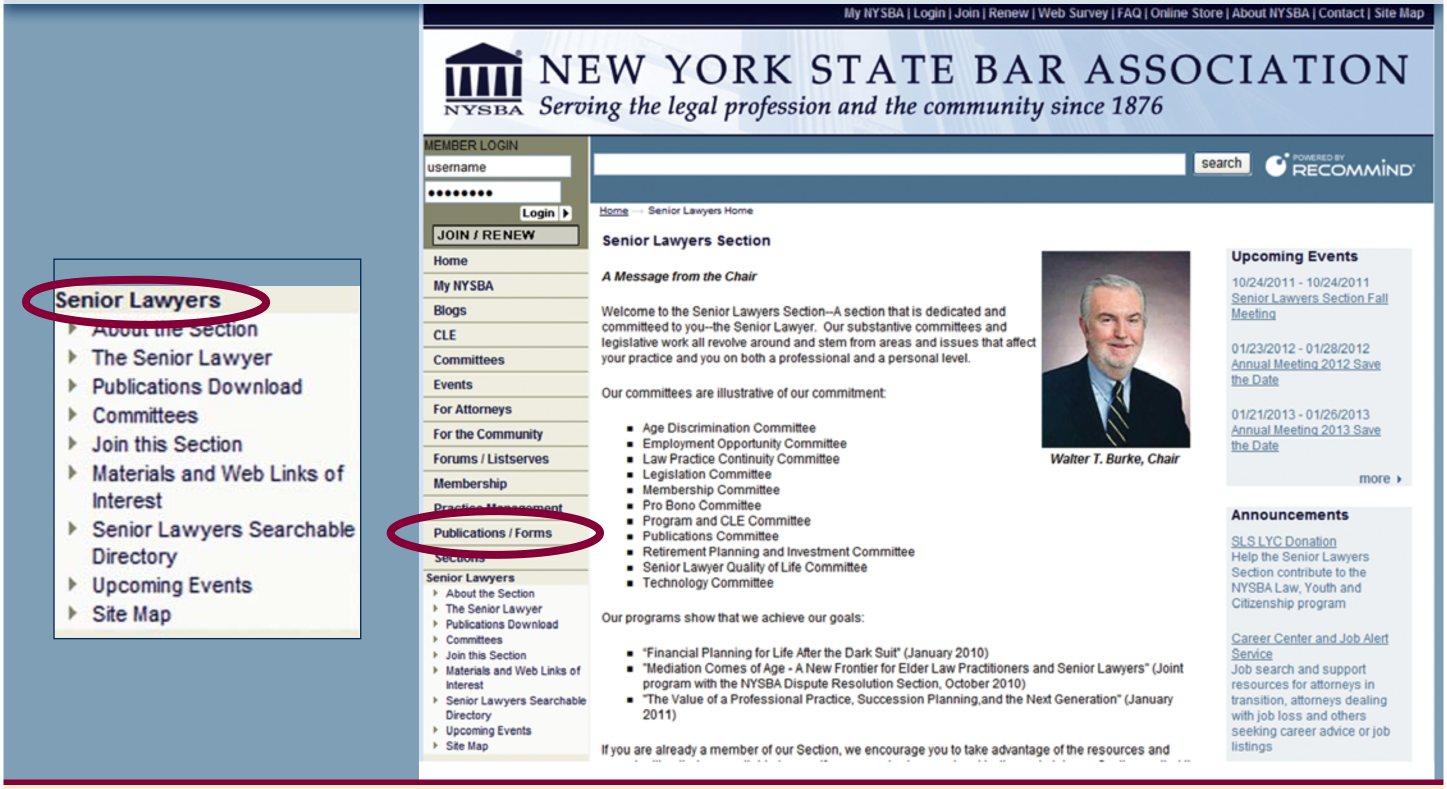

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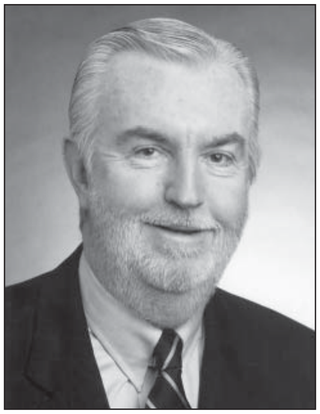


I am honored to be writing to you as the Chair of the NYSBA's Senior Lawyers Section, one of the newest, most dynamic and expanding sections of the Bar. I hope that many of you have read and hopefully taken to heart the *State Bar Journal*'s July/August special edition on planning for the elder years. It demonstrates in many interesting and illuminating ways the necessity of what many senior lawyers already know, the necessity for planning the later stages of life to insure that they are happy and successful.

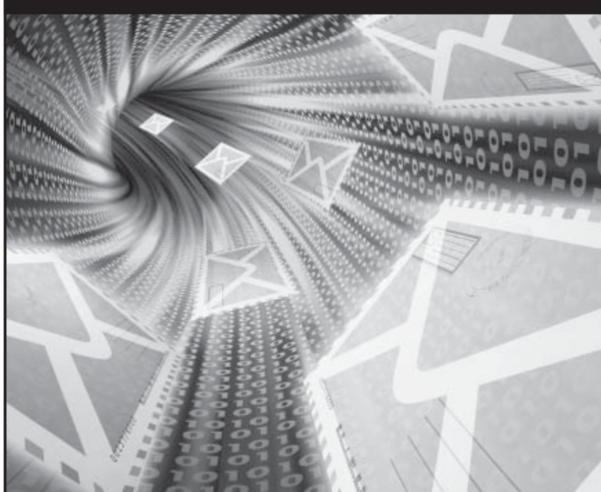
In mid-August I attended the inaugural meeting of what will hopefully be a nationwide initiative to stress the need for planning for the elder years. Entitled "Be a Planner, Not a Gambler," this extraordinary forum brought together attorneys, judges, physicians, health care providers and agencies that work with and serve the elderly. The purpose was to identify common problems and begin to seek interdisciplinary approaches and solutions to these problems. While initially New York-centered, it is hoped that the movement will soon become nationwide.

We know that there are multiple reasons why our members cannot attend some of our meetings, but that does not mean that we do not wish to share the knowledge and insights that are gained at these meetings. Therefore, in response to numerous requests, we are offering a recording of our very well received seminar on valuing a law practice. To order, or for more information, see the ad on p. 37 in this issue.

Even though the temperature is now hovering around 90 degrees, the plans for our January 2012 program at the Annual Meeting are well under way. We are delighted to be able to tell our members that the Honorable Judith Kaye will be the keynote speaker at our Annual Meeting. We will provide more detailed information about that program on our website.

Walter T. Burke

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact one of *The Senior Lawyer* co-editors:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

www.nysba.org/TheSeniorLawyer

A Message from the Editors

Willard H. DaSilva

My older brother had an expression:

"Time flies like an arrow;
Fruit flies like a banana."

Although it was a play on words, the expression continues to haunt me as days seem like hours, months like days and years like months. I recall that when I was in grade school, the summer recess was an extended period free from the travails of school. Now, summer flies like an arrow. So it seems as though it were only yesterday (although it has been only two years) that I last wrote a column for *The Senior Lawyer*. It seems that as we grow older, time moves much more rapidly than in prior years, and it becomes increasingly difficult to do all of the things that we feel that we would like to do in a given time.

This issue of *The Senior Lawyer* is a potpourri of articles on various subjects. Some of the articles have been written expressly for this issue, while others have been selected because of their particular importance to the members of our Section. They run a gamut of subjects from simple (or not so simple) professional and personal experiences to serious matters of law and legal procedures. Hopefully, there will be a number of articles of particular interest as well as usefulness for each of you. If not, I have two suggestions. First, please let me know the kinds of articles and information that you would like to see in this publication. Second, do not hesitate to volunteer your services as a writer or as a planner of articles so that our entire membership will have the benefit of your thinking and expertise.

There is in creation at the present time a Board of Editors to plan future issues, to solicit and select authors and to ascertain what you, as readers, would like to see in this magazine—and, especially, to implement all of the suggestions and efforts to produce a magazine that will be of particular usefulness to each of you, not only in your professional lives but in your personal ones as well.

If you have ideas or a flair for writing, please "step up to the plate" and let me hear from you. This is your magazine, and it should fulfill all of your needs and all of your expectations.

Marguerite Stenson Wynne

Among the articles, one is written by our Section Chair, Walter T. Burke and Timothy E. Casserly, entitled "Retirement: The End or the Beginning?," where for most of us there is a new and exciting future. Michael J. Garibaldi has written "Know Your Firm's Value, Know Its Future."

The article "The Metamucil Generation" was written by one of the leading matrimonial lawyers in the country and a founder of the largest law firm in the United States devoted entirely to family law, Schiller, DuCanto & Fleck, which is located in Chicago. It is an alert for what may lie ahead for us in the future. Anthony J. Enea, a noted attorney in White Plains, gives a brief overview of "Two Years of Estate and Gift Tax Nirvana!" The sobering need for long term care insurance is explained by Jeffrey A. Asher.

As we move further into the 21st Century, "Cloud Computing" is an expression that was practically unheard of by most of us as little as two years ago. Although it is a relatively new electronic resource, there are many concerns, one of which is opening a door to a malpractice claim. David S Caplan has provided us with an initial "wake-up call." Another original article by Anthony J. Enea gives us "Seven Factors to Consider Prior to Commencing a Guardianship Proceeding Under Article 81 of the Mental Hygiene Law."

There is a myriad of other articles, but to mention each of them would unduly extend this column. And so, I hope that each of you will find interesting, informative and useful articles.

Once again, I urge you to let me know if there are any articles, subject matter or features that you would like to see in this—your magazine.

Willard H. DaSilva on behalf of my Co-Editor,
Marguerite Stenson Wynne, and myself

Retirement: The End or the Beginning?

By Walter T. Burke and Timothy E. Casserly

"Few men of action have been able to make a graceful exit at the appropriate time."

—Malcolm Muggeridge

Few aspects of an attorney's life engender such yearning and such fear as the prospect of retirement. Does retirement mean doing whatever you want to do—having unlimited choices—or does it condemn you to being just another nameless, faceless person standing in the coffee line at Starbucks being universally ignored.

What would life be like without the dark suit that projects our image, identifies us in the social structure, and provides our income? Can I financially afford to take off the suit? The following article reviews some items that every attorney should review when contemplating retirement, be it a near or a distant event.

"Does retirement mean doing whatever you want to do—having unlimited choices—or does it condemn you to being just another nameless, faceless person standing in the coffee line at Starbucks being universally ignored."

Financial Aspects

As Tennessee Williams once noted, "You can be young without money but you can't be old without it." The almost universal question clients have when planning for their retirement is how much money do I need to have in order to retire? The better approach for planning is to determine what a realistic budget is for yourself and your family and then from that determine what the number is that you need. Due to lifestyle and geographic variations, having an absolute number needed for retirement is a futile effort. However, if it is determined that a particular client realistically needs X thousand dollars per month for the balance of his or her life, that becomes a number that can be worked on, projected, and a goal established. Some clients are very happy with a modest amount of money coming in every month which more than satisfies their needs. Others find that a net after tax income of $600,000 or more is inadequate. Where you fall in this spectrum is very subjective, but it does determine how much money you need to retire. Unfortunately, there is no short cut or magic number to life and picking numbers out of the air—such as $1 million or $5 million—does not in any way move the process forward in any relevant retirement planning. Yes, more is better, but more is not better if it causes you to spend extra years doing something you do not like. This is especially the case when you could have had many more years of happiness and satisfaction doing something for reasons other than generating needless income.

The Roman philosopher Seneca once remarked on the human condition, "Our plans miscarry because they have no aim. When a man does not know what harbor he is making for, no wind is the right wind." A successful retirement plan requires just that—a plan. Putting it off, delaying it, ignoring it, jumping into it, any one or all of the above can lead to a retirement disaster. Most lawyers do not wake up one morning and decide that they are going to go out and buy a house. If you have a child, you do not wait until age 18 to consider that you may need money to pay for the child's college education. Why would you not spend time and effort planning something that will affect you for the balance of your life? Yes, there are many variables, and yes it is difficult. But that's not a reason not to do it. Once you have a plan that suits your individual needs and you have ascertained an intelligent estimate of the financial assets that you will need to maintain that lifestyle, then you can address some of the issues of retirement planning such as: Do I take early retirement? Do I work an extra two years? When should I elect to take social security? Do I work part-time? Or should my spouse continue to work or not? You may not necessarily like what you see in the plan, but at least you'll have a plan.

For many attorneys, the retirement years offer additional options for tax planning, particularly in how and when you withdraw and/or liquidate certain assets for your cash flow needs. When you work, all of your income is taxable in one form or another. However, in retirement you often have multiple sources of income with varying tax consequences, including pension, social security, drawing down of after-tax savings, partial distributions from various tax-sheltered annuities, appreciated assets, IRAs, and deferred compensation.

Income taxation is not an area where experimentation and self-help is very profitable. If during your career you successfully managed taxes, understood them and enjoyed doing them, then fine. For the vast majority of attorneys who did not participate in that strange exercise, they should retain a very good CPA or Certified Financial Planner because your retirement planning is a dynamic process. You should meet with your advisor not only before you retire, but several months after you retire, and subsequently in the fall of every year as well. It is at these points that you can modify the plan, make whatever adjustments may be necessary, and understand where your tax exposure may be. Meeting only with your accountant in April is simply an exercise in memorializing your mistakes.

Wall Street and You

Just as there is no magic dollar amount for a successful financial retirement, there is no universal investment mix that works perfectly for every retiree. What is clear is that the extremes—extremely conservative or all risk—do not work well. The balance of investment products that you select will be based on multiple factors including your knowledge of investments, your comfort level, your tolerance of risk, and your need for growth to protect against inflation and provide longevity for your accounts. The last time CDs were a rock solid retirement investment was when Jimmy Carter was President and six-month CDs were paying 14% and money markets were paying 8%.

Despite the Great Depression, the tech stock boom and bust, the real estate crash, and the 2008 debacle, a diversified portfolio of stocks and bonds has proven to be the most reliable method of retirement investing. If you are not familiar with this type of investment, now would be a good time to talk to friends and colleagues and get some professional help. Because you are a good attorney does not make you a good investor.

Taxes

Many attorneys have acquired a variety of assets in different retirement plans over the years. IRAs, Keoghs, Simple Plans, 401ks and quite possibly a defined contribution plan from an employer. There are several things in common with all these plans: There are required minimum distributions beginning at age 70 ½ and all proceeds taken out are taxed as ordinary income regardless of their source. You should be aware that in the first several years of required minimum distributions, since this is based on life expectancy, the distributions relative to the principal are relatively modest. However, as one gets older, the minimum distribution requirement increases regardless of whether you are using the money or not. Therefore, you should look to balance the required minimum distributions and, quite possibly, take out additional moneys even though not immediately needed to avoid being forced to take out disproportionally larger amounts later in life and therefore paying additional taxes.

You should also balance the types of investments you have in your retirement plan with what you have in your after-tax savings. Capital gains tax at 15% from your equities is attractive in your taxable savings; however, capital gains in your retirement plan simply comes out as ordinary income. For the same reason, you should never have tax free income in a retirement plan.

Retirement Projections

One of the biggest causes of anxiety and frustration about retirement planning is the use of the retirement projection calculators that are offered on multiple websites. Depending upon the assumptions made for rate of return as well as the inflation factor, these projections can take the same amount of money and project you to be wealthy beyond your dreams or destined to live in abject poverty. While these projections can be very helpful, they can also lead to a badly skewed prediction of your future financial health.

One should look at the rate of return in terms of one's own portfolio, that is, how one's assets are allocated, and to some extent use a historical perspective on how those assets have performed over time. While history is no guarantee, it can be somewhat representative of what is most likely to happen over a period of 20-plus years.

With regard to inflation, while all of us are paying $4 a gallon for gas (as opposed to the $1.25 we all remember), many attorneys close to retirement have either satisfied their mortgage or have locked in favorably low permanent rates, have already paid for their children's education, and are not buried in credit card debt. Those three factors are what cause most individuals to have huge debt that inflation proceeds to exacerbate. If you are not burdened by them, then the danger of inflation is greatly diminished. With regard to the $4 per gallon for gas, think about investing in the oil companies.

"For many attorneys not retiring is a cloak and a shield from the world to say that they are not changing, not aging and have lost none of their skills."

The Psychology of Retirement

The idea of retirement is attractive to some but dreaded or feared by others. Sometimes it is postponed not for financial but for psychological reasons. For many attorneys not retiring is a cloak and a shield from the world to say that they are not changing, not aging and have lost none of their skills.

Aldous Huxley once observed that, "They intoxicate themselves with work so that they won't see how they really are." We have all seen the sad picture of lawyers who tried to hang on too long. They miss deadlines, are confused at meetings, forget basic elements of a case or argue irrelevant points. Nobody wants to be that person and yet we have all seen that person. If it is not finances, then what drives people to become the shell of their former professional self? For some it is ego, the attorney has defined himself not as a person but as an attorney and therefore to give up the trappings of the office is to give up himself. For others it is the fear of a challenge late in life. Dr. William Russell has told us that, "Leisure is the most challenging responsibility a man can be offered." While leisure can be attractive for a weekend or a week, the prospect of a lifetime of leisure forces us to new and different challenges and a new variety of choices. For those who have spent 30 or 40 or more years doing the same, often satisfying work, the prospect of something so new and open ended is frightening. Couple that fear with the definition of yourself as your profession, and one can easily see why attorneys hang on too long to their briefcase. That is also why during the working years it is so critical for attorneys to cultivate strong family ties and social connections as well as to seek out enjoyable hobbies and meaningful work that is not tied to revenue or necessarily the profession. This is not something that is done overnight or within two months of a planned retirement date. As Mark Twain observed, "Habit is habit, and not to be flung out the window by any man, but coaxed downstairs a step at a time."

"While leisure can be attractive for a weekend or a week, the prospect of a lifetime of leisure forces us to new and different challenges and a new variety of choices."

For some attorneys the road is simple: You keep on working because if you don't you will get sick and you will die. While we all know individuals for whom that path was taken, that does not make it a forced march for the rest of us. Often this simplistic view of life post retirement is used to mask the real fear, that of a long term illness and a protracted stay in a nursing home.

Yet despite these fears often attorneys will studiously ignore basic medical advice and/or the specific direction of their physicians. Rather than giving the appearance of a slight loss of independence, they will drive when it is no longer appropriate for them to drive, maintain the large expensive house when only one or two people live there, and struggle to maintain a house with multiple levels when one level housing is the most appropriate for them. These are the exact activities that tend to guarantee that loss of independence and cause the long term illness. But change is something that they refuse to accept.

In addition to the fear of the debilitating aspects of long term care, whether it be physical or mental, there is also the fear of the crippling cost of long term care. Depending on where you live in New York State, monthly costs of nursing home care can range from a low of $7,000 per month to a high exceeding $16,000 per month. These are costs not covered by Medicare or almost any typical health insurance policy. While long term care insurance is available, most attorneys do not have it. So whether you are concerned about the physical or mental aspect of long term illness or the financial aspect of long term illness, there are two things to remember: (1) there are steps that can be done to minimize the dangers and risks associated with long term care, and (2) a successful retirement plan will deal with but not dwell on this aspect of retirement.

The End of the Game

As much as we hate to admit it, death comes to all of us. As attorneys we do or should know the importance of estate planning documents. If your individual estate is worth less than $5 million, then you are free from (at least for now) concerns about federal estate tax. If your spouse has similar holdings, then with a modicum of planning $10 million can be passed to the next generation free of federal tax. Please note that New York State is still holding at a $1 million credit line after which state estate tax will be due.

New York State also has a new Power of Attorney which is dramatically different from the prior forms. While the old forms continue to be in effect, as the years go on it is anticipated that the old forms will meet more resistance from being accepted by third parties such as banks and other financial institutions.

Your Health Care Proxy (yes, you should have one) should be updated both in terms of your current medical condition as well as the appropriate agents that you have named. Finally, you should have a checklist of important contacts and a list of where vital documents are located. You do not want your legacy to be your loved ones plowing through all of your back records and documents looking for missing investment accounts or an insurance policy. You want your last official act as a lawyer to be smooth, efficient and professional.

Resources

Books of Interest

The Lawyer's Guide to Buying, Selling, Merging, and Closing a Law Practice, Sarina Butler and Richard Paszkiet (ABA Publication)

Portfolio Life: The New Path to Work, Purpose, and Passion After 50, David D. Corbett

Prime Time: How Baby Boomers Will Revolutionize Retirement and Transform America, Marc Freedman

Working Identity, Herminia Ibarra

The Next Fifty Years: A Guide for Women at Mid-Life and Beyond, Pamela D. Blair

Changing Course: Navigating Life after Fifty, William Sadler and James Krefft

Web Sites of Interest

www.go60.com

www.retirement-cafe.com

www.retiredbrains.com

www.retirementlifestylecenter.com

Volunteerism

volunteerattorneys@nycourts.gov

www.americorps.org

www.globalvolunteers.org

http://apps.americanbar.org/lpm/lpt/articles/fin09101.shtml

www.legalservicesnyc.org

Health

www.mayoclinic.com

www.ehealthsites.com

www.webmd.com/healthy-aging

Wealth

www.money.cnn.com/retirement/guide

www.personal.fidelity.com/planning/retirement

www.personal.vanguard.com/us/planningeducation/retirement

www.troweprice.com

Of Particular Interest to Women

www.thetransitionnetwork.org

Walter T. Burke is Chair of New York State Bar Association's Senior Lawyers Section, past Chair of NYSBA's Elder Law Section, and past Chair of the ABA Senior Lawyers. Timothy E. Casserly is past Chair of the NYSBA's Elder Law Section, a Certified Financial Planner™, and past President of the Capital Region Chapter of the Financial Planning Association. They are principals in Burke & Casserly, P.C., a regional law firm located in Albany, New York. Both are principals of Arista Wealth Advisors, a financial planning firm and a Registered Investment Advisor with the Securities Exchange Commission.

The Metamucil Generation

By Joseph N. DuCanto

It is undeniable that living a long time can be, at once, both a blessing as well as a curse. Having outlived a significant percentage of my contemporaries, I am now entering what has euphemistically been described as "the Golden Years," implying that the balance of life left has a rare and precious quality. Indeed, in most cultures throughout history old age has been revered, presuming to bring with it wisdom and the exercise of sound judgment based upon experience, which is invaluable to the young.

Old age also was rather rare in bygone eras in that the anticipated life-span of humans was, relatively speaking, *very* short. For example, it is estimated that in the Bronze Age (3,000 B.C.) the average life span of humans was 18 years and during the Roman Empire (275 B.C.) a mere 26 years. And who can forget the greatest love story of all time, Romeo (age 16) and Juliet (age 14) yearning for the nuptial couch, who might with luck live to see 40! And yet these lovers were quite typical of that time, onward into the cusp of the 20th Century. Teenagers married, promptly had numerous children, many of whom died during infancy, with the parents just as promptly dying in their 30s and 40s, one hopes leaving their progeny old enough to shift for themselves.

In what has been the wink of an eyelash, there has been an astonishing increase in the average life expectancy of our citizens. From the turn of the 20th Century (1900) to this date there has been a 55 percent increase in average life expectancy, from 49 years to 76 years. Much of this phenomenal increase is due to readily observable improvement in care before and immediately following birth, the development by science and pharmaceutical houses of "silver bullets" that cure or prevent many infectious or communicable diseases, and generally improved nutrition and hygiene. Indeed, just in the 30 years from 1960 to 1990, male life expectancy increased from 66.6 years to 71.8 years; female life expectancy from 73.8 years to 78.5 years.

Whatever the congeries of events that have led to this positive result, we are being told by medical researchers and biogerontologists that medical expansion of longevity has not, by any means, come to a halt. Based merely upon existing components already in place, the projected unisex life expectancy by 2010 will have increased to 77.9 years, 74.4 for men and 81.3 for women. These figures should be reviewed against actuarial data utilized and published by the Internal Revenue Service as a means for calculation of values of a life annuity and the correlative imposition of taxes. Current projections in use will undoubtedly become obsolete and hopelessly conservative as the future arrives, since incredible laboratory advances are being made that not only can retard the biological mechanisms of aging, but actually reverse the aging process. See, for example, the story by Science Writer Ronald Kotulak, reporting on a new and effective "memory drug," in the March 2, 1992, issue of the *Chicago Tribune*, page 17. Thus, there is plenty of existing and well-founded speculation that there will come into existence in the 21st Century a vast increase in the percentage of our elderly population that will exceed 100 years of age!

"Having outlived a significant percentage of my contemporaries, I am now entering what has euphemistically been described as 'the Golden Years,' implying that the balance of life left has a rare and precious quality."

The sociological, cultural and financial implications of the appearance of these events are slowly beginning to be explored. But you and I cannot await onset of these changes to be presented as an accomplished fact before we consider what we, as Family Lawyers, must anticipate as issues and problems to be confronted in our ongoing legal practice. So far as I am able, I intend hereafter to explore and discuss with you a number of questions raised by these exhilarating developments. Many of these questions have no current answer, and I don't purport to do any more than raise them as a prelude to further examination and discussion. The points I make flow inevitably from the material at hand and a search for solutions or answers begins with isolation of the issues.

What Will Happen to the Institution of Marriage?

Marriage has served mankind well since the dawn of time, but the institution has effectively remained static in Western cultures, unchanged in form or purpose over thousands of years. We all understand its major purpose as nothing less than provision of a protective, religiously, culturally and legally sanctioned format directed towards propagation of the race within a small identifiable unit. But a marriage undertaken "until death do us part" that could reasonably be expected in by-gone years to last for 20-25 years is a far different commitment from a marriage contracted today, which could well last 50, 60, and even *70* years! Indeed, in Cook County, Illinois, as I am fond of saying, one does not get a 50-year sentence for "murder one!"

Boredom, alone, appears to motivate many divorces, particularly among the so-called "empty nesters," where the couple find little in common with each other once the kids have left home.

There is also much empirical evidence within our divorce practices that the longer a marriage endures, the less the likelihood that the couple will ever divorce. Verification of this phenomenon was published several years ago by *U.S. News & World Report* that projects that less than two percent of those married 40 years will ever obtain a divorce. Yet these numbers are projections based upon average divorce and death rates in 1985, obviously drawn from much earlier actuarial data, but are nonetheless interesting as confirmation of the proposition that inertia is a powerful force in life. As one hits his/her mid-sixties many forces of age take over and control or direct action: Retirement, illness, the birth of grandchildren, as well as resignation to one's fate can be easily accepted and forgiven as a rationale for continuation of a moribund marriage. The sexual fires of youth—often a powerful driving force in the young—have been banked, if not totally extinguished, thus removing an ever-present trigger of discontent often encountered by divorce lawyers in the younger divorce client.

But suppose one can count on living a healthy, relatively youthful life 40 years beyond retirement, with all of the challenges and romance that this suggests, including "good sex." What impact will this have upon the numbers and absolute percentages of divorce? We are presently at a point where more marriages end by divorce than by death, there being a national divorce rate of slightly over 50 percent. Indeed, it is recognized now that more money and property change hands within divorce than through probate and estates! It is my belief that both the absolute number of percentages of divorce among the elderly (roughly defined as those over 60) will increase substantially in the foreseeable future, well into the 21st Century. Even if the *percentage* (or "divorce rate" if you prefer) does not significantly increase, the population against which that percentage is to be applied will at least double to nearly triple over the next 20 years, creating a vastly enlarged pool of older divorcing individuals, calling upon us for our specialized services.

What About the Economics of the Elderly?

If our people live effective, healthy, lives into their nineties and beyond, how can they plan their economic well-being along with the fact of divorce? How can they save for 40 years or more of life after retirement? The vast majority of them cannot and will not. But what about Social Security? Will this national program, designed and implemented originally with actuarial data gathered long before the immense upswing in life expectancy, be able to handle far greater numbers than could ever have been imagined? As presently constituted, the Social Security program could not possibly bear the financial drain without imposing confiscatory taxation upon the younger working members of our society. When Social Security was initiated in the mid-thirties, there were eight employed workers supporting one retiree; by the year 2,000, there will be three employed workers supporting one retiree! The scene is thus ripe for intergenerational conflict in the economic arena far beyond my limited ability to project.

Inevitably, what has to happen is a massive overhaul of the retirement and Social Security system, which will combine financing from sources other than direct taxation, a cut in the "safety net" of dollar pay-out to retirees, together with an extension of incentives to the elderly to continue employment long beyond what is now deemed "normal retirement age."

From the viewpoint of divorce lawyers, these changes, while nebulous at present, must be considered as we structure settlement agreements.

"Rehabilatory Alimony" becomes a quaint—if not cynical—phrase in the elderly divorce. Solid, life-long, security of some sort is essential in order to provide the non-working member with some cash flow above and beyond Social Security. In the overwhelming bulk of late-age divorces there simply is not enough property to "equitably divide" and expect that life can continue without the presence of stark poverty. It seems not to have yet clicked in the consciences of those who write our divorce laws that an equitable division of zero is still zero!

Other Considerations in Divorce Among the Elderly

In the interest of brevity, I am going to list merely a few additional items for future consideration and discussion and a few of my personal comments.

1. **Progeny:** While divorce among the elderly mercifully is not accompanied by custody/visitation problems, there will inevitably be increases in grandparent visitation problems as adult children predictably take sides and seek to punish one or both parents for destroying their childhood memories of a unified "family."

2. **Inheritances and Family Heirlooms:** What happens when inevitably a healthy 82-year-old granddad marries the 37-year-old divorcee down the street? The ever-present creation of yet a new generation is obviously there. What happens to the money dad had left following his divorce from his failing 78-year-old wife?

3. **Working Seniors:** If grandpa continues to work endlessly, should his former wife of 40 years be permitted to share in the fruits of his extended vigor? If not, why not? The "normal retirement" age of 65, set in the days of Bismarck when few ever reached that age, will come under increasing pressure for revision upward. Indeed, age 75

is the normal retirement age for Judges in Illinois and many circumvent this by a variety of artifices such that one Judge, a close personal friend, still effectively serves at 91!

4. **Health Care:** What avenues are available for extension of commercial medical and hospitalization policies for the elderly divorce client?

5. **Estate Planning:** Those who have occupied the upper echelons of the executive suite will retire, as currently, with substantial accumulations of retirement and other assets. These assets, under adroit professional management, may well grow rather than diminish during many decades of retirement. After all, the "miracle" of compound interest is very much linked to the passage of time. With our more affluent clients, estate planning and use of trusts in divorce matters will become more prominent assignments, effectively forcing a melding or our professional talents into a parallel "Family Law" field—Estate Planning, Trust and Probate.

6. **New Forms of "Marriage":** With women outliving men by a considerable amount, older men overwhelmingly marry women somewhat to much younger than they. The net effect for women is that the older women get, the less large is the pool of men available to them, there being cultural and psychological taboos against younger men marrying older women. (But by all means younger males should consult Ben Franklin's essay, "In Praise of Older Women.") Will this change, and what impact will it have if it does? Perhaps we should reexamine acceptance of polygamy? Clearly, with the proposition stated, polyandry would not be the answer! Or maybe we will invent other forms of marriage, such as marriage for a term of years, with options for renewal, or "reopeners" or "cancellation" provisions. How about "companionate marriages," which would permit women beyond childbearing years to live with a "husband" without the full panoply of reciprocal rights and responsibilities that accompanies marriage today. These and other seemingly "off the wall" ideas will eventually be considered. After all, who among us in the '40s, '50s, and '60s could ever have predicted the wholesale rise of "live-in" relationships, which are so common today.

7. **Children of an Older Parent:** How will this impact upon child bearing and provisions for support until maturity? An octogenarian fathering children can result in some perceivable anomalies in the usual view of a "family"; imagine, if you will, a young child with half-siblings who are grandparents!

8. **Child Birth Rate:** Will ZPG, zero population growth, be achieved? If so, with the death rate declining as fewer seniors depart, how many young children will there be? Will married couples, like the Chinese today, need a license to propagate? Perhaps with fewer children in our society we will more highly value and protect them than we seemingly do now. Conversely, will we find ourselves crammed wall-to-wall with people, like Japan, India, and China today?

9. **Revised Educational Formats:** We have seen a shift in the educational field from a typical four years of college to a major effort in "adult education." It is increasingly acceptable that formal education not end at high school or college. Rather, life-long involvement in intellectually challenging programs surround us and will become increasingly important for our engorged group of senior citizens.

10. **How Long Is Too Long?** Will we "cap" how long we are permitted to live? Some researchers talk with a straight face about a foreseeable life span of *150-200 years*! Suppose one partner decides to stop taking the anti-aging treatment, and the other wishes nonetheless continue to do so. I suppose we have a clear case of "irreconcilable differences," but we also have a clear human tragedy, not unlike the final scenes of *Lost Horizons*, where a beautiful seemingly young woman leaves Shangri-La only to visibly and dramatically wither in conformity with her actual age! Consider, if you will, the dramatic presence today of a Civil War veteran of the battle of Chickamauga Creek, which occurred September 19-20, 1863, or in 2063 a World War II veteran of Iwo Jima, which occurred in February and March, 1945! What an oral history lesson they could deliver! Also recall, if you will, the marvelous fantasy played out by Dustin Hoffman some years ago in the movie entitled *Little Big Man*, in which Dustin is interviewed at age 125 and describes in graphic detail the many phases of his past life, as a cowpoke, a frontier preacher, a gunfighter, a drunk, and Indian Chief, and so on. Why not?

11. **Gray Panthers, AARP and the Political Process:** We are rapidly moving from a glittering concentration upon young as the personification of all good things in life. Gray is now O.K., and becoming more so. The rise of the "Gray Panthers," and the growing influence and numbers of the American Association of Retired Persons, assures the elderly, who vote in uncommonly large percentages of those eligible, a loud and very effective voice in the political process at all levels of government. Is an octogenarian female as President a future possibility? Why not?

12. **Two and Three Career Lives?** How would you like to spend two lifetimes as a divorce lawyer? I'm thankful that I've made it this far unvanquished by the constant presence of the "burn-out" phenomenon. There is little question in my mind that "labor is worth of its hire" and that we who labor in the vineyard of Family Law pay a high price for our vanity. Unquestionably, as our effective, healthy, life span is extended, many of us will move on to other careers that necessarily draw upon our life experience as Family Lawyers. So it will be with other occupations, and second careers will become the norm, not a cause for wonderment.

13. **Changing Tax Laws:** The present law relating to qualified plans and IRAs has sought to restrict and annuitize these treasure troves by compelling full consumption and taxation of the accumulated principal within the actuarially determined life span of the participant-beneficiary. Draconian financial penalties are imposed for failure to comply. Obviously, there will need to be an entirely new track surface upon which these laws are imposed if life span continues to be extended.

> *"Medical science may, in fact, now be able to deliver the promise of greatly extended life. But, in doing so, we will inevitably be required to sort through our collective minds as to whether this is, in fact, a blessing to mankind or a further curse—much like the atomic bomb—which science has delivered to us."*

Conclusion: Have We Invented the Fountain of Youth?

The Spanish explorer Ponce de Leon spent much of his adult life exploring what is now the State of Florida, avidly searching for the fabled "Fountain of Youth." Medical science may, in fact, now be able to deliver the promise of greatly extended life. But, in doing so, we will inevitably be required to sort through our collective minds as to whether this is, in fact, a blessing to mankind or a further curse—much like the atomic bomb—which science has delivered to us. If what I hear and read is correct, we don't have much time to ponder the issues; the future always lies ahead, but what kind of a future can we anticipate, and what, effectively, will mankind constructively do with the additional years of life so fortuitously granted to it? Only time will tell, all too soon!

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Two Years of Estate and Gift Tax Nirvana!

By Anthony J. Enea

On December 17, 2010, President Obama signed into law "The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010" ("2010 Act") (try saying that 10 times fast), which contains sweeping revisions to federal estate and gift tax laws. Although it will take several months for all of the provisions of the 2010 Act to be thoroughly digested, one thing appears to be certain—the 2010 Act presents an unprecedented two-year window for the affluent to engage in significant estate and gift tax planning.[1]

In summary, the following are the relevant federal estate and gift tax rules contained in the 2010 Act:

(a) For decedents dying in 2010, the executor of the estate may choose between (1) no federal estate tax pursuant to the prior repeal of the estate tax with the "modified carryover basis rules," which limits the step-up in basis of the decedent's property for capital gains tax purposes to $1.3 million for heirs and $3 million for spouses, or (2) the new $5 million estate tax credit, with an unlimited step-up in the cost basis for capital gains tax purposes on the property passing from the decedent's estate. The maximum federal estate tax rate is 35% if the new $5 million credit is chosen. The time to file the federal estate tax return for decedent's dying in 2010 has been extended to nine (9) months after the date of enactment of the 2010 Act, being, September 19, 2011.[2]

(b) For the year 2010, the lifetime gift tax credit remains at $1 million with a maximum tax rate of 35%. Thus, no change was made.[3]

(c) For the estates of decedents dying in 2011 and 2012, the federal estate tax credit is increased to $5 million per person and $10 million for a married couple. The maximum tax rate is reduced to 35%. For the year 2012, the credit amount will be indexed for inflation. The estate tax credit under the new rules is now portable. Thus, the executor of the estate of a decedent can transfer the unused portion of the decedent's estate tax exemption to the surviving spouse.[4]

(d) Commencing on January 1, 2011 the gift tax credit is now re-unified with the estate tax credit with a $5 million gift tax and generation skipping tax credit per person being available, and not $1 million as it was under the law in effect for 2010. The 2001 Tax Act had "de-coupled" the estate and gift taxes. Thus, in 2011 and 2012 a single person can make a total of $5 million worth of taxable gifts without incurring a gift tax, and a married couple can gift a total of $10 million without incurring a gift tax. The maximum tax rate on gifts in excess of the credit amount remains at 35%.[5]

For example, a married couple that has previously utilized each of their $1 million gift tax credits ($2 million total) now has the ability to give away an additional $4 million total per person ($8 million total per couple) in 2011 and 2012. In reality, if this married couple is gifting assets that can be discounted for lack of marketability and a minority interest discount, the value of the assets gifted can be significantly greater than the $8 million. I think it is safe to assume that a lot of gifting will occur in the next two years.

Although there is uncertainty as to whether the provisions of the 2010 Act will be extended beyond 2012, the new rules effectively shield the vast majority of Americans from any federal estate taxes during the next two years. Those financially concerned with estate taxes, i.e. the affluent and small business owners, now have the opportunity to take significant steps to reduce their exposure to the potential for estate taxes in a material way. The use of complex trusts, such as Grantor Retained Annuity Trusts (GRATS), Intentionally Defective Grantor Trusts (IDGTS), Qualified Personal Residence Trusts (QPRTS), as well as Family Limited Partnership and Limited Liability Companies, will be of great importance in taking advantage of the unprecedented opportunity that has presented itself.

It should be remembered that the New York Estate Tax Credit remains at $1 million per person. As with all things in life, advance planning is of critical importance.

Endnotes

1. The Tax Relief, Unemployment Insurance, Reauthorization and Job Creation Act of 2010 (Pub L 111-312, H. R. 4853 ("2010 Act").
2. 2010 Act §6018.
3. 2010 Act §302(a)(1) and §302(a)(2).
4. 2010 Act §303 and IRC §2010(c).
5. 2010 Act §302(a)(1) and §302(a)(2).

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Know Your Firm's Value, Know Its Future

By Michael J. Garibaldi

Ask a buyer and a seller what a particular law practice is worth, and you'll probably get different answers. Many other professional services firms such as accounting or medical practices have a rule of thumb for valuation. But not enough law firms have been sold to establish a rule. Additionally, several unique factors affect each law firm's valuation.

You may not worry about your practice's current value, and until recently many accountants felt the same way. All that has changed since H&R Block, Century Business Services, American Express and other public companies began acquiring major accounting firms. This acquisition spree hasn't hit the legal profession yet, but it's a possibility. And even if a law firm consolidator never knocks at your door, you may still want to know your firm's value.

"Beware of advisors who use guesswork—instead of in-depth analysis—to determine your practice's value."

Factors to Consider

Many accepted valuation methods used for small businesses also apply to law practices. However, law firms must also consider some unique factors. You should know that the ABA's Code of Ethics generally prohibits buying and selling client lists. Check with your state to find out whether it restricts selling client files—which really belong to the client, not the firm—and associated goodwill the firm generates.

Additionally, the type of work a firm performs affects its value. For example, if firm Null & Void handles only contingency fee cases, how would you value the firm's future income stream? Firm Cease & DeSist works in the corporate arena, but because the firm has a steadier income flow, a valuation can more easily assess the firm's future revenue.

Goodwill and Sales

Firm size affects value. Because so much of a practice's value comes from goodwill, and the legal profession is mainly relationship driven, acquiring small practices is riskier than multipartner practices. Ask: Will the acquirer continue to get the same revenue stream if the sellers are no longer in the practice?

Client referral sources also influence valuations. A practice that specializes in matrimonial law usually serves one-time clients and, thus, depends heavily on referrals.

This firm must consider:

- What happens to referrals after acquisition?
- Do referrals originate from a few sources or many?

The buyer must perform due diligence before seriously considering a sale.

A practice's reputation as well as its partners' experience and expertise can increase or decrease its value. More valuable firms:

- Develop a brand name,
- Employ lawyers with well-known expertise, or
- Perform unique work.

Valuation Methods

Because little public information exists about law firm valuation or sales, you may hear that a practice sold for an amount several times greater than its revenues. This probably occurs because of hearsay as rumors become easily exaggerated. Or the sale might have been based on the partners' inflated value of the firm's original worth, not a legitimate valuation. Beware of advisors who use guesswork—instead of in-depth analysis—to determine your practice's value.

Generally, practices sell two major types of assets—tangible and intangible. Tangible assets are fairly easy to value because they appear on your balance sheet. Also referred to as a practice's goodwill, intangible assets represent a practice's values beyond the value of its tangible assets. Goodwill is your firm's most valuable asset and also the most difficult to measure. For instance, large or international firms may possess easily transferable institutional or practice goodwill. Meanwhile, small-firm lawyers vest their goodwill in each individual lawyer's client relationships. This personal goodwill may be transferred over time with carefully planned transitions of client relationships. Employment contracts and noncompete agreements have become important elements of a practice sale package.

Valuators typically use three main valuation methods: asset-based, market-based and income-based. The asset-based method calculates a firm's value as the function of its market value of underlying assets and liabilities. The market-based method does not apply to legal practices because meaningful databases of comparable market data do not exist. Income-based approaches—which are common—determine value based on discounted net cash flow or capitalization of earnings.

Obtain a True Picture

On the surface, most business valuations seem more subjective than objective—more art than science. Professional judgment as well as numerous rules and exceptions affect valuation. The more you understand how each factor affects your firm's valuation, the more you'll understand its value. Comparing your firm with the practice next door doesn't yield a true picture of your firm's value.

The object of a valuation is to predict accurately all future net cash flows to arrive at today's value of those future dollars. You may try to determine your firm's worth, but it's best to hire a valuation professional who can explain valuation intricacies.

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About the Senior Lawyers Section

As people are living and working longer, the definition of what it means to be a senior continues to evolve. The demographics affect us all, including lawyers. In July of 2006, the New York State Bar Association formed a special committee to recognize such lawyers and the unique issues that they face. As the result of the work of this committee, the House of Delegates approved creation of the first Senior Lawyers Section of the New York State Bar Association.

Lawyers who are age 55 or older have valuable experience, talents, and interests. Many such senior lawyers are considering or have already decided whether to continue to pursue their full-time legal careers or whether to transition to a new position, a reduced time commitment at their current position and/or retirement from a full-time legal career. Accordingly, the Senior Lawyers Section is charged with the mission of:

- Providing opportunities to senior lawyers to continue and maintain their legal careers as well as to utilize their expertise in such activities as delivering pro bono and civic service, mentoring younger lawyers, serving on boards of directors for business and charitable organizations, and lecturing and writing;
- Providing programs and services in matters such as job opportunities; CLE programs; seminars and lectures; career transition counseling; pro bono training; networking and social activities; recreational, travel and other programs designed to improve the quality of life of senior lawyers; and professional, financial and retirement planning; and
- Acting as a voice of senior lawyers within the Association and the community.

To join this new NYSBA Section, see page 77 for a Membership Application, go to www.nysba.org/SLS or call (518) 463-3200.

Using Long-Term Care Insurance as Part of the Elder Care Plan

By Jeffrey A. Asher

People are living longer.[1] The number of persons aged 65 and over is expected to double by the year 2030 and the fastest-growing segment of the population consists of people who are 85 and older.[2] Many experts are concerned that "aging issues" will reach a critical point as early as this year when the "baby boom" generation first starts to reach the age of retirement.[3] In this current political world, issues of health insurance, retirement, and long-term care are dominating discussions surrounding the upcoming mid-term elections. For some, aging will bring continued health, enjoyable retirement, and financial freedom. For others, aging will bring mental disability, terminal illness, and poverty. For all, aging will bring an increased complexity to life.

As Elder Care attorneys we focus on issues of long-term care, financial management, assisted living, public benefits, and whether our clients can afford their long-term care choices. The good Elder Care attorney will work closely with social workers, retirement coaches, geriatric care managers, financial planners, and others, to create a comprehensive plan for our elder clients. The following shows how long-term care insurance ("LTC insurance"), as part of a comprehensive elder care plan, will address many of the needs discussed above.

The Need for Long-Term Care and Long-Term Care Solutions

A person needs long-term care when he or she suffers from a chronic illness or condition, or has suffered a trauma, that will limit his or her ability to do certain things for himself or herself. These activities, or what we know as "activities of daily living" or ADLs, include such things as bathing, dressing, toileting, and eating. These activities may also include such things as doing household chores, preparing meals, food shopping, and/or managing his or her finances, or activities we call "instrumental activities of daily living" or IADLs. Alzheimer's disease is a good example of a common chronic illness that, depending on how far the disease has progressed, will necessitate long-term care and long-term care solutions.

For most of our clients needing long-term care solutions, we typically evaluate their financial situations, prepare for them a Health Care Proxy and/or Power of Attorney evidencing their appointments of alternate decision-makers, help them prepare a realistic and appropriate budget to pay for their long-term care needs, or help them get benefits, when necessary and appropriate, to pay for such care. For those for whom it is appropriate, we will help them prepare more long-term planning solutions, such as qualifying for Medicaid benefits.

The Costs of Long-Term Care

According to the Genworth 2010 Cost of Care survey,[4] a person aged 75 years needing long-term care should anticipate paying, on average, around $48,000 per year in home health care costs,[5] around $40,000 per year for assisted living facility costs, and around $117,000 per year for nursing home costs. According to the same survey, a person currently 55 years old and anticipating care in 20 years' time will pay, at age 75, approximately $129,000/year for home care, $104,000/year for assisted living facility, and $310,000/year for a nursing home.[6] Needless to say, this can become very expensive very quickly.

A good Elder Law attorney will also help evaluate the financial situation, prepare a realistic and appropriate budget to pay for long-term care needs, and, when appropriate, prepare more long-term planning solutions, such as qualifying for Medicaid benefits.

Medicaid Eligibility and the Transfer of Assets Planning Dilemma

There are generally two types of Medicaid coverage: Medicaid home care[7] (also referred to as community-based Medicaid), which provides home health care, some hospital coverage, doctor appointments, medications, etc. And, Medicaid nursing home care (also referred to as institutional Medicaid), which is care in a skilled nursing facility or similar institution.

To qualify for Medicaid, Medicaid recipients (whether for home care or nursing home care) may only keep a small amount of assets and income. As of the time of writing this article, a Medicaid recipient living alone may keep no more than $13,800 in non-exempt assets and have no more than $767 per month in income (both of these amounts increase depending on the number of family members who live with the Medicaid recipient), plus an unearned income credit of $20 if the applicant is over 65, blind or disabled. An individual in a nursing home or similar institution is restricted to a personal needs allowance of $50 per month. Income includes Social Security payments, distributions from IRAs and other retirement accounts, interest and dividends, etc.

Giving assets away to qualify for Medicaid is not permitted. A Medicaid applicant who does so is "penalized"—denied Medicaid benefits—for a period of time following the transfer; provided, however, that there are certain transfers which are considered "exempt transfers."

In determining the penalty period, Medicaid will "look back" at the applicant's assets over a period of 5 years. The "look back" period examines account statements, deeds, tax returns, etc., intended to discover any transfer of assets which would disqualify an applicant from Medicaid.

The Deficit Reduction Act of 2005 ("DRA"),[8] enacted on February 8, 2006, changed, among other things, the date on which the applicant's penalty begins, following a transfer of assets. Under the "old rules" of Medicaid eligibility, relating to transfers prior to February 8, 2006, the penalty period, once it is calculated on the transfer, began on the first day of the month following the transfer of assets, regardless whether a Medicaid application was made or whether the applicant was otherwise eligible for Medicaid.

Under the "new rules," however, the transfer of assets penalty period begins, not on the first day of the month following the original transfer as under the "old rules," but on the date the applicant makes his or her Medicaid application, is in an institution receiving care, and would otherwise be eligible for Medicaid but for the transfer of assets. The DRA shifted the penalty period from something that may have occurred in the past but hopefully and typically expired before the Medicaid application is made, to one not yet happening until the applicant needs Medicaid.

So, this leaves us in a bit of a planning dilemma. The good Elder Care attorney cannot advise his or her client to transfer an asset to qualify for Medicaid unless and until the client (1) enters and is in need of institutional care, (2) makes a Medicaid application to pay for such care, and (3) has no other non-exempt assets such that the client is otherwise eligible for Medicaid.

If we wait until (1) and (2) are true, and then make the transfer of assets, then our client will be penalized from Medicaid benefits beginning on the date of the transfer because (3) would have been false. On the other hand, if the client makes the transfer of assets now when any of (1), (2), and/or (3) are false, and waits until (1) and (2) become true to make (3) true, then the client had better not need Medicaid within the five years following the transfer. The best solution is that the client waits the five years from the date of the transfer to apply to Medicaid. That way, Medicaid will not pick up the transfer within the look-back period.

But, what if, as happens many times, (1) and (2) become true, but it is within five years of the transfer of assets? In that case, (3) is false since the value of the transferred property will be brought back into the client's available resources and the client will be ineligible to receive Medicaid benefits for the duration of the calculated penalty.

The Role of Long-Term Care Insurance in the Qualified Elder Care Plan

This article proposes an Elder Care plan utilizing a transfer of assets, together with a Medicaid Trust, and assumes the likelihood that Medicaid nursing home benefits may be needed within five years. For purposes of this article, and the plan discussed herein, the reader needs to assume a few things:

1. We are not dealing with a situation where the client is imminently going into a nursing home and the family is looking for emergency Medicaid planning. For those situations, there are other planning options that are the subject of other articles.
2. There are no qualified donees with which to make exempt transfers for purposes of the transfer of asset rules.
3. The client is of a certain age where the purchase of long-term care insurance is at least reasonable, if not easily affordable.

> Example: Carla Client's irrevocable income only trust ("Medicaid Trust") was funded with $600,000 on May 1, 2006, after the effective date (February 8, 2006) of the new Medicaid rules.

Under the old rules, the transfer penalty would have been calculated as follows:

$600,000 ÷ $9,132/mo[9] = 65.70 months
≈ 66 months ÷ 12 months = 5.50 years.

Under the old rules, the funding of the trust on May 1, 2006 would have generated a 5 year and 6 month penalty beginning on May 1, 2006 and ending on November 1, 2011. Assuming that Carla Client would not have needed Medicaid to pay for her nursing home until at least November 2011, this would have been a great result for the client and a great plan by the attorney.

However, the new rules did away with such planning. Under the new rules, assuming the facts above and further assuming that the client goes into a nursing home and applies to Medicaid on June 1, 2010, the transfer penalty is calculated as follows:

$600,000 ÷ $10,285/mo[10] = 58.34 months
≈ 59 months ÷ 12 months = 4.91 years.

The funding of the Medicaid Trust back on May 1, 2006, will generate a penalty period of 4.91 years beginning on June 1, 2010. Starting June 1, 2010, and continuing for almost 5 years, the family will have to pay privately for the nursing home services. Taking $12,000 per month as an example for the cost of Carla Client's nursing home care, the Medicaid Trust will be exhausted (assuming no growth) in 50 months or just over 4 years. In other words, the Medicaid penalty will continue for another year even after the Medicaid Trust has been exhausted.

On the other hand, if in May of 2006, Carla Client had purchased a LTC insurance policy at the same time she created and funded her Medicaid Trust, then the planning would have been complete back in May of 2006. On June 1, 2010, when Carla Client goes into a nursing home three things will happen: (1) she will file a claim with her LTC insurance provider starting her entitlement to nursing home benefits under the policy;[11] (2) Carla Client's Medicare benefits will pay entirely for the first 20 days of the nursing home's services and will require a co-pay for the next 100 days; and (3) Carla Client will make an application for Medicaid thus beginning the 4.91 year penalty period.[12]

When 4 years and 11 months have elapsed, and Carla Client is no longer subject to Medicaid's penalty period, then she will be able to stop the benefits from her LTC insurance policy and qualify for services under Medicaid. Or can she? The answer is probably not, because Medicaid will not just let you stop your outside benefits if you are entitled to them. And, if Carla Client had purchased a "lifetime benefit" policy rather than a set term policy, then there might be a few more years left in the policy during which time Medicaid, which is called the "payer of last resort," will expect the LTC insurance company to continue to pay.

But, assuming that Carla Client purchased a LTC insurance policy that was structured through the coordinated planning of the Elder Care attorney and the LTC insurance broker to provide no more than 5 or 6 years[13] in benefits, then the transition from the LTC insurance company to Medicaid would coincide with the expiration of the look-back period following the creation and funding of the Medicaid Trust in May of 2006.

Understanding LTC Insurance

In New York, LTC insurance is available in four general forms: Home Care Insurance Only, Nursing Home Insurance Only, Nursing Home and Home Care Insurance, and Long-Term Care Insurance. It is the Long-Term Care Insurance that we are discussing in the examples herein.

As the name states, Home Care Insurance only pays for home care. It is used by individuals who have absolutely no intention whatsoever to go into a nursing home. Or, have already purchased a Nursing Home Insurance Only policy and need to cover for home care services.

Similar to Home Care Insurance Only policies, Nursing Home Insurance Only pays for nursing home care. It is used by individuals who have every intention of going into a nursing home, or anticipate that their condition will necessitate them going into a nursing home. And, individuals who purchase Nursing home Insurance Only policies typically have the financial wherewithal to provide for their home care needs, but want to guard against the costs for nursing home care. Or, these individuals have already purchased a Home Care Insurance Only policy and need to cover for nursing home services.

A Nursing Home and Home Care Insurance policy provides coverage for nursing homes and home care only. This policy should be less expensive than a Long Term Care Insurance policy, but does not cover as much.

Long-Term Care Insurance is the broadest policy, and thus the most expensive. Typical Long-Term Care Insurance policies also cover adult day care facilities, assisted living facilities, and other such places.

All LTC insurance policies in New York must offer, as an option, the "inflation protection" benefit which is designed to increase the daily benefit amount over time to keep pace with inflation. Otherwise, an individual could choose to increase the benefit amounts at a future time. Under this option, the individual can increase the benefit amounts every specified number of years. However, choosing to increase the daily benefit will also increase the premiums based on the individual's attained age at the time he or she increases the benefits.

Speaking with my long-term care insurance broker, I asked the question "for those people who don't like LTC insurance, why don't they?" His answer was: cost of the premiums and "because they don't really understand it." As Elder Care attorneys we really cannot help with the cost aspect, since that is the responsibility and a function of the LTC insurance company and industry. But, we can help with the lack of understanding.

The reason why people do not understand LTC is because it is not part of an overall comprehensive elder care plan. When LTC insurance is purchased outside of a qualified planning process, people typically do not know whether to choose a "lifetime benefit" or a term benefit; they do not know how much to choose as a daily benefit, nor whether or not to take the inflation protection rider. Incorporating LTC insurance with an elder care plan gives the client a real understanding of the way in which LTC insurance works as part of the greater long-term care solution.

Now, imagine that Carla Client's brother, Charles Client, purchased his LTC insurance policy and created his Medicaid Trust also in May 2006. But, for whatever reason, Charles Client did not fund his Medicaid Trust at that time. Ten years later, in May 2016, Charles has to go into a nursing home for skilled nursing care. At the same time that Charles files his claim with the LTC insurance company he also funds his Medicaid Trust. By making his Medicaid application in May 2016, and assuming none of the current rules have changed within the last ten years, including the look-back period, then Medicaid will see the transfer of assets in May 2016 and penalize him accordingly. Since we do not know how long the penalty period will be at that time (and it may be longer than the 6 year benefit Charles Client purchased under his LTC insurance policy), it would probably be wise for Charles Client to wait out the look-back period and apply to Medicaid only after the five years have elapsed since the funding of the Medicaid Trust. By waiting until June 2021 to apply for Medicaid benefits, Charles Client can ensure that his Medicaid application will be approved since (1), (2), and (3), as discussed above, would all be true—he would already be receiving qualified institutional care, he will make a Medicaid application to pay for such care, and he will have no other non-exempt assets that would otherwise render him ineligible for Medicaid.

For those people who like and understand LTC insurance, they purchase it because they want to preserve the assets they have worked hard to accumulate, or because LTC insurance gives them independence—freedom from having to rely on children or the government to provide long-term care.

For those people, however, who do not understand LTC insurance or fail to see that the annual cost for such LTC insurance is only a fraction of the lifetime costs for long-term care, the qualified comprehensive elder care plan may help them better understand the benefits of LTC insurance. The bottom line is that when used properly as part of a comprehensive elder care plan, LTC insurance enables our client to receive qualified care in their home, the community, in an alternate living facility, or in a nursing home or other skilled nursing facility.

I am not trying to sell LTC insurance.[14] I am merely pointing out that this type of planning should be fairly obvious to us. But, is it obvious to our local LTC insurance brokers and companies? I suggest that you speak with your local LTC insurance broker and make it obvious to him or her. We surely see the need for LTC insurance as part of our Medicaid planning to cover the gap, if any, between transfer of assets/trust funding and the need for Medicaid. But, do our local LTC insurance brokers see the need for Elder Care and Medicaid planning when they sell a LTC insurance policy to their clients? This is not a primer intended to show us, the good elder care practitioner, the value of LTC insurance, but to show the financial adviser the value of our services in combination with their own for the benefit of their clients.

Endnotes

1. The average American life expectancy is about 75 for men and 80 for women. Deaths: Final Data for 2006: National Vital Statistics Reports; Vol. 57, No. 14; Hyattsville, MD; National Center for Health Statistics; 2009; Table 8, Pg. 27. Available at http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_14.pdf.
2. World Population Ageing, 1950–2050, New York (NY): United Nations Publications; 2002; Pg. 23. Available at http://www.un.org/esa/population/publications/worldageing19502050/.
3. The United States Census Bureau considers a baby boomer to be someone born between 1946 and 1964. See, United States Census Bureau, "Oldest Boomers Turn 60" (2006). Available: http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006105.html.
4. Available at http://www.genworth.com/content/products/long_term_care/long_term_care/cost_of_care.html (Genworth Study).
5. Based on 8 hours of care per day, 5 days per week.
6. Genworth Study, supra note 4. The Genworth Study webpage has a function to calculate future costs.
7. Within Medicaid community-based care there are several programs, such as: Certified Home Health Agency Services, Personal Care Services, Long-Term Home Health Care Program (a/k/a Lombardi), Medical Adult Day Care, and Managed Long-Term Care Services.
8. Pub.L. 109-171, 120 Stat. 4 (Feb. 8, 2006).
9. The 2006 Medicaid monthly regional rate for NYC. GIS 06 MA/001. Available at http://www.health.state.ny.us/ health_care/medicaid/publications/docs/gis/06ma001.pdf.
10. The 2010 Medicaid monthly regional rate for NYC. GIS 10 MA/001. Available at http://www.health.state.ny.us/ health_care/medicaid/publications/docs/gis/10ma001.pdf.
11. The commencement of Carla Client's benefits will be subject to the policy's elimination period, which is typically 90 days. The "elimination" or "waiting period" is the number of days the insured must wait before long-term care benefits will be paid under the policy. During the elimination or waiting period, the insured will have to pay privately for the care he or she receives. Shortening the elimination period will increase the cost of coverage.
12. Carla Client can apply to Medicaid either when she goes into the nursing home and have her penalty period calculated at that time, or after the look-back period expires, thus avoiding the calculation of a penalty period. The end result would be the same.
13. Different LTC insurance companies offer different benefit terms and options.
14. The client (and the reader) should consult with qualified LTC insurance broker to learn more about available LTC insurance policies and options. LTC insurance policies have certain limitations on benefits or even exclude them altogether. The client must understand the individual limitations and benefit exclusions which are contained in his or her LTC insurance policy.

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Lawyers in the Cloud: Cooling Shade or Impending Thunderstorm? Is Cloud Computing for Lawyers?

By David S Caplan

One topic is nearly certain to be on the agenda at nearly every major bar association meeting lately: "cloud computing." Equally certain is that at least one, probably more, of the sponsoring vendors will be offering some form of cloud or remote computing product. But can these cloud computing vendors provide the certainty that lawyers (as users of technology) need before they jump onto the "cloud" bandwagon?

Cloud computing purports to offer some major benefits, especially to solo and small firm practitioners for whom controlling costs and flexibility are serious needs.[1]

However, there are several reasons for an ordinary computer user to hesitate to adopt cloud computing services, whether they are simply remote data backup services or web-based applications. A primary reason is the infancy of the industry.[2] The typical market cycle for technological innovations certainly applies to the cloud environment as much as to any other new technology. When it is new and "HOT," a multitude of players enter the market. The offerings have varied degrees of sophistication and quality, and the players themselves vary from large, well-established computing vendors to small one-app startups. As the market matures, many of the lesser entrants fall by the wayside, either because a larger participant provides something better (or devotes more marketing dollars to gain acceptance) or because the new entrants don't have the capital to sustain themselves until profitability. Because cloud computing is at the early stage before the usual market shakeout, prospective users must be very careful in choosing any provider since it's far too early to tell which ones will be around for the long haul.

For lawyers, however, there is another, more specific concern: the necessity of avoiding malpractice claims or disciplinary action. First of all, lawyers (especially those in litigation) are subject to strict deadlines where even a day's delay in retrieving critical information can result in damage to a client and a resulting malpractice claim. For example, it can be especially tempting for an attorney starting a solo practice to choose web-based word processing, spreadsheet, e-mail and database programs rather than spend hundreds of dollars on Microsoft Office, Adobe Acrobat, etc. However, reliance on a remote provider also exposes the lawyer to risks such as failed Internet access (*albeit* temporarily), server failures at the provider's site, and even the sudden financial failure of the provider itself. When a pleading must be filed today, few courts will listen to an excuse that "I couldn't get access to my software."

Deadlines are not unique to lawyers. However, unlike many other prospective users of cloud-computing services, lawyers are entrusted with confidential client information and cloaked with a heightened fiduciary duty to protect it, almost at all costs. Further, lawyers are not permitted to contractually limit their potential malpractice liability, so their risks can be much higher than the risks of others who possess confidential information of their customers.

This risk of a breach of the lawyer's duty to safeguard client confidential information (and the attorney's own work product for a client) is cited as the greatest reason for avoiding the cloud. If a lawyer considers using the cloud, her due diligence obligation is extremely high. The risks are exacerbated, also, by a dearth of official guidance on the standard of care required to avoid malpractice liability or the measures that qualify as meeting the standard. So far, the author has not located any court cases addressing this issue, and only a few legal organizations have issued ethics guidance on the new forms of cloud services. Unfortunately, while these opinions offer general guidelines, they still don't (and probably can't) address the judgmental questions of how much diligence is enough or what security techniques are adequate.

Several ethics opinions exist on the use of offline data storage. They are fairly universal in stating that the online storage security does not have to be 100% effective 100% of the time. However, lawyers are required to "take reasonable precautions" and "exercise sound professional judgment on the steps necessary to secure client confidences against foreseeable attempts at unauthorized access."[3] In the Arizona opinion, the inquiring lawyer's use of SSL encryption, unique and randomly generated folder and document names, and converting all documents to password-protected PDF documents were deemed to satisfy the "reasonable precautions" requirement.

However, the opinion also included two cautions. First, the Bar noted that professional competence is not limited to legal competence, and a lawyer who proposes to use online data storage will be expected to be sufficiently tech savvy to know what he or she is doing or hire an expert (probably an expert independent of the provider) to advise and assist. Second, the opinion recognized that technology develops (or perhaps decays) over time so that attorneys are charged with the duty to keep up to date on technological changes and avoid continuing to use security techniques when they become obsolete. This theme was echoed in guidelines proposed by the eLawyering Task Force of the ABA's Law Practice Management section to the ABA's Ethics 20/20 Commission.[4]

The New York State Bar Association also addressed online storage of client data. Its Committee on Professional Responsibility issued an opinion that online storage of confidential client information is ethical as long as the attorney exercises "reasonable care."[5] In this regard, the opinion listed four steps that a lawyer *may* take in exercising reasonable care:

1. Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;
2. Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;
3. Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and/or
4. Investigating the storage provider's ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.

A key matter to note, again, is that the New York opinion offers a list of questions to ask a cloud provider, but it does not provide sufficient answers on what types of security are sufficient to protect an attorney from liability if a breach should occur.

In the broader cloud-computing context, only one formal statement has been issued by a regulatory body, and it places a dramatically high standard of diligence on members of its bar. On April 21, 2011, the North Carolina State Bar revised its earlier proposal of *2010 Formal Ethics Opinion No. 6* relating to the use of "Software as a Service."[6] Like the professional associations, North Carolina's disciplinary body permits use of cloud services by North Carolina attorneys as long as the attorney exercises "reasonable care." However, unlike the approach taken by New York or Arizona to off-site data storage, this opinion imposes *mandatory minimum requirements* that must be met. These include the following:

- "An agreement on how confidential client information will be handled in keeping with the lawyer's professional responsibilities must be included in the SaaS vendor's Terms of Service or Service Level Agreement, or in a separate agreement that states that the employees at the vendor's data center are agents of the law firm and have a fiduciary responsibility to protect confidential client information and client property.
- "The agreement with the vendor must specify that firm's data will be hosted only within a specified geographic area. If by agreement the data is hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and the state of North Carolina.
- "If the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity, the law firm must have a method for retrieving the data, the data must be available in a non-proprietary format that is compatible with other firm software or the firm must have access to the vendor's software or source code, and data hosted by the vendor or third party data hosting company must be destroyed or returned promptly.
- "The law firm must be able get data 'off' the vendor's or third party data hosting company's servers for lawyers' own use or in-house backup offline.
- "Employees of the firm who use SaaS receive training on and are required to abide by end-user security measures including, but not limited to, the creation of strong passwords and the regular replacement of passwords."

The opinion then emphasizes that the above are only minimum standards and meeting those standards may still not be enough to constitute reasonable care in a particular situation. The opinion then lists some "examples" of additional practices that can help assure the safety of client information, such as:

- Investigating the financial stability of the SaaS vendor.
- Requesting copies of the SaaS vendor's security audits.
- Evaluating the SaaS vendor's firewalls, encryption techniques, socket security features, and intrusion-detection systems, as well as having state-of-the-art systems within the firm.
- Having within the firm a back-up for shared document software in case of service interruption, such as an outside server going down.

This latter requirement, alone, has convinced the author that placing reliance on remote applications in not viable at this time. If an attorney without her own internal systems is subject to disciplinary action (and, by extension, a malpractice claim), then why bother with the cloud? Its use won't save any money and just exposes the attorney to risks.

Another restraint imposed by the opinion is the clear expectation that any lawyer not "tech savvy" enough to understand the details of how its cloud provider operates must hire an expert advisor. This, too, seems to drive the cost of safety to a point where the advertised savings are eaten up by the required protective measures.

The risk is the key factor militating against lawyers' reliance on cloud-based services. Outages happen to even the largest cloud providers, such as Amazon's outage in April when it took three days for its systems to be fully restored. Consider the malpractice exposure of relying on Amazon to store data if the client's brief was due on day two of the outage. Also, many of the cloud software providers are not major, well-financed entities with reliable histories. The risk that a particular software developer may fail is fairly high in the current economic climate.

Further, most law firms will not have the bargaining power to demand inclusion of the mandatory terms required by North Carolina in contracts with cloud vendors. Nearly all of them will offer fixed terms of service and are not interested in negotiating separate, more-demanding terms with their lawyer-customers. Now that North Carolina has proposed its minimum standards, even attorneys in other states will be at risk if they contract for cloud services without meeting, at least, North Carolina's minimum requirements. North Carolina is a respected commercial state. Since no contrary authority exists, the odds are rather great that courts or disciplinary bodies in other states will look to the North Carolina opinion to define the applicable standard of care when ruling on a malpractice claim or bar complaint.

Frankly, the existence of the North Carolina opinion and the financial and technological uncertainties outstanding in the cloud services industry create an environment where full reliance on those services is a risk that attorneys should not take. Hopefully, when the industry matures, vendors will incorporate the assurances that will meet standards of care established by regulators such as North Carolina. Also, the risks should lessen after the industry goes through its shakeout phase and attorneys can be confident that their providers will remain in existence or, for the stronger companies, remain interested enough in the market to stay in it for the long term. And, it will definitely be beneficial to see a few court decisions to give clarity to the due diligence standards required of attorneys. Until then, this author recommends staying watchful on the sidelines and waiting for further developments before entering the cloud.[7]

Endnotes

1. *See* "More Clouds or Just Smoke & Mirrors?" by Professor Gary A. Munneke, Chair of the NYSBA Law Practice Management Section, available at http://www.nysba.org/AM/Template.cfm?Section=Home&ContentID=46752&Template=/CM/HTMLDisplay.cfm.
2. As Professor Munneke points out, the Internet is not new; neither is downloading content from it. The cloud is in its infancy because of the newness of remote application offerings and the number of companies, small and large, rushing to provide the next new service or latest "app."
3. State Bar of Arizona, Ethic Opinion 09-04, citing N.J. Ethics Op. 701 (Apr. 10, 2006).
4. Statement by Richard S. Granat, Co-Chair of the eLawyering Task Force to the Ethics 20/20 Commission, February 11, 2011, in response to the Commission's Issues Paper Concerning Client Confidentiality and Lawyers' Use of Technology, September 20, 2010.
5. Formal Opinion No. 842, NYSBA Committee on Professional Responsibility, September 20, 2010.
6. Proposed 2011 Formal Ethics Opinion #6: **Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property**. The full text of the proposed opinion is available at: http://www.ncbar.com/ethics/propeth.asp. The North Carolina State Bar that issued the opinion is the regulatory agency of the state. It should not be confused with voluntary bar organizations like the New York State Bar Association or the North Carolina Bar Association. This is the second version of the proposed opinion and is awaiting a public comment period before its final adoption. This is a slightly more restrictive version of the first proposal issued in 2010.
7. To be clear, the danger discussed in this article is limited to two functions: storing client data where it might not be accessible when needed and exclusive reliance on software or other critical functions not housed under a lawyer's direct control. Cloud services may be well suited to functions like internal practice management (such as sharing calendars over the web) or client-communication (such as an extranet where client and attorney can share files—as long as other copies are kept instantly available). Cloud services can be valuable; they are just not ready for attorneys' most critical and sensitive duties.

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Seven Factors to Consider Prior to Commencing a Guardianship Proceeding Under Article 81 of the MHL

By Anthony J. Enea

There are numerous valid reasons for commencing a Guardianship Proceeding pursuant to Article 81 of the Mental Hygiene Law, some of which are significantly less apparent than others. Generally, the most obvious reasons result from the need to be able to make personal (health/medical) and financial decisions for someone who is unable to make the decisions, and has not executed a sufficiently broad Durable General Power of Attorney and a Health Care Proxy. The less apparent are those that result from intra family rivalries and squabbles, where one family member is sufficiently concerned with possible fraud, financial abuse and manipulations by another. These often fall into what can be referred to as the "protect my inheritance Guardianship Proceeding."

Irrespective of the underlying reasons for considering the commencement of an Article 81 Guardianship, there are, in my opinion, seven significant factors that must be considered prior to commencing and filing the Proceeding:

(1) Determine whether it is an absolute necessity to commence a Guardianship Proceeding because there are no other alternatives. The first inquiry in determining the necessity of the Proceeding is whether the Alleged Incapacitated Person (AIP) has executed a valid Durable General Power of Attorney (POA), Health Care Proxy (HCP), Living Will and HIPAA form. The existence of the aforestated advance directives may obviate the need for a Guardianship Proceeding if they are sufficiently broad enough to deal with the issues present in the particular case at hand. For example, in many instances a valid POA has been executed, but the POA is not sufficiently broad to address the AIP's financial needs. There may be an immediate need for broad gifting powers for Medicaid and/or estate planning purposes where the POA only permits gifting to the named agent and others in amounts limited to the personal exclusion amount ($13,000.00 per person, per year). If the POA does not specifically permit broader gifting, then commencing the Guardianship may be necessary. This commonly occurs when, for Medicaid eligibility purposes, it is necessary that all assets held in the name of one spouse be transferred to the other in order that Medicaid can be obtained for the ill spouse. The well spouse (community spouse) can then execute a spousal refusal for Medicaid eligibility purposes.

(2) Review how title to the AIP's assets is held. Does the Alleged Incapacitated Person have assets in joint title with others? If so, can these assets be accessed by the joint title holder if the Alleged Incapacitated Person is not able to make decisions as to his or her financial affairs? For example, although a husband and wife may have joint title to an investment account, the financial institution may not permit a transfer of said account from one spouse to the other without the existence of a POA that permits said transfer, because a joint investment on account may require the signature of both account holders . This problem generally does not occur with joint bank accounts, as both title holders have access to the funds in said joint accounts upon the signature of either of them.

(3) If the petitioner in a Guardianship Proceeding is seeking Guardianship over the assets held jointly by the Alleged Incapacitated Person with a third party or in trust for a third party (not the Alleged Incapacitated Person's spouse), it will be necessary that the Petitioner ascertain whether the joint account is a true joint account entitled to the presumptions of joint ownership and survivorship rights pursuant to §675 of the Banking Law, or whether the account is a "for convenience only" account wherein the joint title holder has no ownership interest or survivorship rights. (See §678 of the Banking Law). If the Petitioner determines that there exist true joint accounts or "in trust for" accounts, and that he or she will be seeking Guardianship powers over said accounts, it will be necessary that the Guardian give notice of the Guardianship proceeding to the joint account holder and specifically request that the joint account and "in trust for account" be retitled in a manner that allows the account to retain its joint and/or "in trust for" nature. (See §81.08 of the MHL).

(4) Has the Alleged Incapacitated Person executed a Last Will and Testament or an Inter Vivos Trust? If a Last Will or Inter Vivos Trust are in existence, it will be important to determine whether or not any proposed transfer or disposition of the AIP's assets sought in the Guardianship Proceeding is

consistent or inconsistent with the AIP's wishes expressed therein. If a beneficiary(ies) under an existing Last Will or Trust is affected by a proposed transfer, he or she will be entitled to notice of the Proceeding and a right to be heard. (See §81.07 and 81.21 of the Mental Hygiene Law).

(5) Prior to filing a Guardianship Proceeding it is important to determine whether the powers the Guardians will seek will be of an "unlimited" or "definite" duration. Obviously, a critical factor as to the duration of the Guardianship will be whether there is a likelihood that the AIP will be able to handle his or her financial affairs at a later date. Additionally, it will be necessary to determine whether there are any specific or special powers over the person or property that the Guardian requires that are not enumerated as part of the standard powers provided for §81.21 and 81.22 of the Mental Hygiene Law. For example, perhaps the Guardian needs the power to relocate the AIP to another state or wishes to make gifts or transfers of the AIP's property. Such powers are not enumerated in other Mental Hygiene Law.

Under certain circumstances, the Petitioner may want the Guardianship to be a "special," "limited" or a "single transaction" Guardianship. For example, the Alleged Incapacitated Person may have executed a Health Care Proxy, but he or she did not execute a POA. The Guardianship could be limited to a Guardianship of the property but not of person. Additionally, if in a particular case the plan is to transfer all of the AIP's assets to his or her spouse for Medicaid eligibility purposes, limiting the term of the Guardianship to a term that will end once all of the assets are transferred may be worthy of consideration. (See §81.16 and 81.23 of the MHL).

(6) Does there exist the possibility that the Guardianship will be contested?

The possibility that the Guardianship will be contested will have a significant and important impact on whether or not to commence the Proceeding. It is always a difficult decision to commence a Guardianship for one's father or mother, but the decision is made significantly more difficult when the Petitioner knows or believes that mom or dad will contest it. Voluntarily placing oneself into a litigious proceeding with a parent or a loved one may have significant consequences depending on the level of mental capacity of the AIP. It is not outside the realm of possibility that the AIP, either during the pendency or after the Guardian has been appointed, will execute a new Last Will and Testament which excludes the Petitioner(s) as a beneficiary. A finding of incapacity and the appointment of a Guardian does not in and of itself eliminate the possibility of the execution of a valid Last Will & Testament.

(7) Is the appointment of a Temporary Guardian advisable?

In cases where there exists a significant possibility for either personal or financial harm to the AIP because he or she is unable to handle his or her affairs, it may be advisable to request that the Petitioner(s) or a third party be appointed a Temporary Guardian pending the final determination of the Court. This is often utilized when there is a an immediate need to marshal the AIP's assets to prevent waste, dissipation or fraud, or where there is an immediate need for someone to handle the Alleged Incapacitated Person's personal and financial affairs. (See §81.23 of the MHL).

Additionally, where there is concern about the AIP being the victim of elder abuse, fraud or manipulation, it may be advisable to request that the Court issue a temporary restraining order preventing a third party from having contact with the AIP as well as restraining any access to the AIP's bank accounts and assets. (See §81.23 of the MHL).

In conclusion, although the aforestated factors are not the only factors that one should consider prior to commencing a Guardianship, in my experience they are often the most important.

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The Pursuit of Happiness: A Senior Lawyer Revisits an Old Flame

By Charles D. Goldman

Somewhere along the line in elementary school, long before we ever heard of *stare decisis*, precedent, judicial review or uttered our first "Objection, your Honor," we all encountered Thomas Jefferson's magnificent Declaration of Independence with its memorable beacon call for "life, liberty and the pursuit of happiness."[1] As we moved along our educational and career paths and evolved into practicing lawyers, the "pursuit of happiness" became enmeshed in, if not totally suppressed by, other goals, such as "winning"—for the client, for ourselves. While much has been written about the dissatisfaction of the members of the legal profession,[2] it is also important to look at the flip side and realize that "happiness" is vitally important for the attorney as well as the client.

"Happiness" or "happy" is not a concept articulated in the laws of the land. It is not found in the United States Constitution whose hortatory language recites it is "to form a more perfect Union…promote the general Welfare…Blessings of Liberty…our Prosperity."[3] The 13th Amendment abolishes slavery but does not mention the word happiness.[4] The 14th Amendment prohibits states from depriving any person of life, liberty, or property without due process of law.[5] It does not mention happiness. Major Federal laws aiming at rectifying problems of ordinary, vulnerable people, including seniors, do not mention "happiness" or "happy." For examples, the Age Discrimination in Employment Act of 1967,[6] and the Civil Rights Act of 1964, Title VII,[7] do not mention "happiness." Nor do laws such as the Equal Pay Act[8] and the Americans with Disabilities Act.[9]

Similarly, fundamental New York laws, including the State Constitution[10] and state civil rights law, the New York Executive Law,[11] are not expressed in the terms of making someone "happy."

By establishing the legal remedies, such as compensatory damages or an injunction to stop an untoward practice or on the positive side, a promotion, and legal fees for the prevailing party, laws establish the parameters of relief lawyers may obtain to make clients "happy" in the traditional sense.

As lawyers we can and should do more than consciously be aware of what the law may inarticulately but, in effect, define as "happiness" for the client. Lawyers need to work with the client throughout all phases of the relationship—from the initial consultation to closure, to help the client define what will make him or her "happy." Here I examine the lawyer-client relationship and offer practical suggestions to get both the client and lawyer to "happy."

Clients and Happy Relationships

As attorneys, to guide us in our relationships with clients, we follow the admonitions and guidance of the Code of Professional Responsibility[12] (and our own personal code of conduct/morals). We live with and apply them in each phase of our interactions with a client. Let me offer some practical suggestions on how, mindful of the ethics rules, we, as lawyers, can achieve functional, successful relationships with clients and prospective clients, in other words make both the client and lawyer "happy."

> *"As lawyers we can and should do more than consciously be aware of what the law may inarticulately but, in effect, define as 'happiness' for the client."*

A. Intake and Forming the Relationship, Communication, End Game Result

1. Fees

A prospective client calls and makes an appointment. Invariably, one of the client's questions will be about fees and costs to him or her. It may be their matter is one, such as personal injury, that is accepted on a contingent fee basis. Or it could be a business-related matter that is done on an hourly basis. The Code of Professional Responsibility is clear that where the attorney has not represented the individual/entity regularly, the fees, expenditure and scope of representation must be spelled out.[13]

In addition to the ethical responsibilities, from a pure business perspective, to get off on the right foot with the prospective client, it is important that the lawyer clearly communicate about fees. Before the prospective client ever sits down in your office let him or her know whether or not there will be a charge for that initial consultation. Tell the prospective client if there is some time, such as a half-hour, that is free, after which charges start being incurred. Don't let that be a surprise to the prospective client after he or she is already in your office. Have a document, a "fee sheet" spell it all out in lay language, not legalese. When you meet with the client, highlight the parts on it that are important to his or her matter. This shows the client you are thinking about THE CLIENT (as well as yourself). Importantly, keep a copy for your file.

Clients, like the general population, appreciate the few genuinely free things in life. To make the clients happy, tell them that the time you spend discussing fees and the retainer is gratis, not part of initial intake. Make sure the retainer is in plain English, not legalese, and that the client has every opportunity to understand it, has had all his or her questions addressed and made an informed decision.[14]

2. Communication Practice

Jay Foonberg wrote that the telephone is your lifeline.[15] If your client winds up saying, "My lawyer did not call me back" he or she is saying the lifeline is *in extremis*. The Rules of Professional Conduct are clear that a lawyer must keep the client reasonably informed about the status of a matter (as well as promptly comply with reasonable requests for information).[16]

As counsel your aim is to comply with the ethics rules and keep the client happy by keeping him or her informed in a way which is not going to be burdensome to the attorney.

Let me suggest that at the initial meeting with clients you tell them that you are aware of the need to communicate, will give them copies of all correspondence and pleadings, and spell out your operating practice objective when it comes to calling people back. In doing so you make it clear to the clients that if they have a true emergency, they need to say so when leaving a message.

3. Potential End Result: Explore What Will Make the Client "Happy"

A client will come in for a reason, whether it be a prophylactic reason, such as estate planning and a will, or a remedial reason, such as he or she has been sued over some event/circumstance. To be most effective, early on you need to let the client know 1) that you are aware of the legal remedies (common law and statutory) and 2) your aim is to achieve for clients, if reasonably possible, the success they want, i.e. to make them "happy."

My experience is that after you have had a healthy dialog with the client for some time (and it varies idiosyncratically depending upon what is involved), it is important to probe beyond the basics of what the law allows and try to ascertain what are the client's goals/needs/interests in seeking to hire an attorney. A victim of sexual harassment or employment discrimination may be entitled to dollars as damages and specific relief in the form of a copasetic, uncharged workplace. However, by probing more deeply, unobtrusively, you have the opportunity to learn a great deal more, including the client's ideal (or true) end game (which may or may not be obtainable under the law in practice). For example, in a workplace matter such as discrimination, in addition to money, the client may really want an apology from senior management or a particular different job.

I introduce the subject by reminding clients that when they came in I said I wanted to be successful for them, to make them "happy." I go on, "Let me ask you a question to which there is NO wrong answer: "What will really make you happy here? What is going to put a smile on your face now and in a few years?" If clients have never heard of a question to which there really is no wrong answer (an eventuality for which you have to be prepared), they may stare blankly at you. To break the silence you explain that this is their case, their life and you want them to be happy—not only now but in a few years when this matter that brought them to you is way in the rear view mirror. When I do this, I usually pick up the client's papers and say, "This is your case, your life." And then I pick up a second folder and say to the client, "See, this folder. When you leave, I pick up this other folder, this other person's life. You have to live with your life, your folder, and I want you to be happy in your life. I know we can revisit this, but today I want to know what I can do for you to make you happy."

Tell the client what you are doing is brainstorming ideas and that ALL ideas/wishes have merit. If you are familiar with it, refer to "Getting to Yes," in which Professors Fisher and Ury make clear the value of ALL ideas.[17] If the silence is still weighing heavily, I may try to lighten the mood by adding, "I want you to be happy not only for your sake but for mine, too. I want you to come back to me in the future or recommend me to your friends so I can make them happy too and make more money for me."

If you are fortunate, the client at some point will start spewing forth a dream result, money, job etc., his or her version of hitting the legal lottery.

But if the client is still a bit quizzical or not gushing forth, you can say, "Let's try and do this together," and using the statutory and common law remedies as your own jumping off points, suggest a recovery of money (a sure winner) and other things the law allows. Then tell the client it is okay if he or she wants other things, such as a transfer to an entirely different work unit away from the offender or a hiatus of time, such as a year in school at the employer's expense or company payment for health insurance beyond COBRA.

When clients react to something you suggest or, better yet, comes forth with their own item for the "wish list" probe their interest as to why that is important, their interest in it, and take note of their passion/ardor for the item. Let the client say anything and write it down for the both of you as a benchmark to be revisited. I recommend keeping a separate sheet on this subject on which I put the initial client definition of "happy" and then add all changes, with dates and, if possible, annotations for the client's reasoning—as best can be discerned. It is also crucial when exploring what will make clients happy that you convey your zeal, your commitment to them and their case. You want to make sure the client knows that when it is appropriate you can be a "junkyard dog"[18] in order to make him or her happy.

B. Existing Relationship

1. Honor the communication objective you promised the client.

   This is done by sending the client copies of materials, letters, pleadings and by returning their calls. Honor your personal code as well as the Code of Professional Responsibility, noted *supra*.

2. Revisit with the client his or her original end game objectives and see how far/near you are to making the client happy and if you are still on track.

Most obviously this is done whenever the client wants to discuss the end game or his or her objective. If the client does not raise the matter, in litigated matters my practice is to review the client's objective with him or her after a pleading is filed (other than a non-substantive motion such as for an extension), at the end of discovery, and before a court appearance or conference with the opposition. If the matter is not in litigation, revisiting the objective/end game can and should occur when major correspondence is received/goes out or before conference on the potential case with the other side. Simply say, "Let's see where we are and where we wanted to go. How far along are we? Or is there a reason to change things? Are we on the right track in terms to recovering the dollar objective? Is the job situation in flux? Is there any new factor or new objective that has arisen?"

I remind the client that when we first met, we said we could revisit this and that we probably will revisit it again before all is said and done. Whatever is said, add it to your sheet of what will make the client happy.

This is good business and compliant with the Code of Professional Responsibility, especially Rules 1.2 and 1.4.

C. Closing a Matter and Ending the Relationship

A matter/representation may be completed when a defined task for which the client and counsel have entered into a retainer is complete, such as the drafting of documents or it may be completed when there is a result (hopefully, good) in litigation. Be aware of the ethical considerations and rules related to ending the relationship.[19]

However, since most litigation winds up being settled, it is crucial to keep in mind that ethically ALL offers of settlement MUST be communicated to the client.[20] It is also important to keep in mind that ultimately it is the client's, not the attorney's, decision whether or not to accept the settlement offer.[21] If the client is satisfied with the offer, i.e., if the client is happy with it, that is what counts. The happy client's decision to accept the offer prevails over any objection counsel may have that acceptance is ill advised. To paraphrase an old baseball saying, in case of a tie, the tie goes to the client. In such a situation, to avoid adverse repercussions later, it is wise for counsel to write the client that while counsel will carry out their wishes and prepare/sign documents etc., the client is acting contrary to the advice of counsel. Lawyers need to remember it is the client, not the attorney, who is to be "happy" with the result.

In considering any settlement offer, at any stage, it is helpful to go back over the responses you developed with the client from the outset as to what will make him or her "happy" and updated as events transpired. With a full history of the client's goals/interests, you can work with the client to see the immediacy of the pending offer in the broader perspective of the full continuity of the legal representation.

> *"A happy client brings more clients."*

In today's legal system, there is a great impetus to amicably resolve disputes through alternative dispute resolution, most commonly mediation. Mediation is a wonderful opportunity to make a client "happy" as the client has a) total control to say yes/no to any offer and b) notwithstanding a statutory scheme of remedies, can obtain, with the consent of the other party, any legal consideration to resolve a dispute. In mediation a resolution fashioned around the client's interests and needs is a recipe for a happy client. Prepare clients carefully, using their prior expressions of what will make them happy as part of your roadmap to resolution. This makes the ultimate resolution a result that evolved with their input, not a result imposed on the client by a third party, such as a Judge.

It is important to keep in mind the sage advice of Jay Foonberg who reminds us, "A satisfied client will produce more clients and generate more business for you than any other single source."[22] Clients are not usually strangers who find us. Rather, most business is either from repeat business or referrals from clients. In terms of the premise here: happy customers come back and send their friends.

A few other words about "happy" and "happiness." While every lawyer has had clients who have made them very unhappy, mere dissatisfaction or mere unhappiness is not a reason to ethically terminate a client.[23] However, where there is fundamental disagreement or the client has failed to cooperate or otherwise rendered the representation unreasonably difficult, that can be a basis for terminating the client.[24] As a practical matter when you are so upset/unhappy with a client you want to be rid of him/her, check the ethics rules and bar counsel opinions carefully for guidance—BEFORE terminating the client. An ounce of prevention here can avoid the boatload of unhappiness that comes with a complaint to the Bar.

Conclusion

The "pursuit of happiness" needs to be part of the lawyer's consciousness in the course of representing the client. By helping the client define throughout the course of your representation what will make him or her happy and working toward that objective, the attorney is doing true service to the client. A happy client brings more clients. A happy client usually means a happy lawyer. Sounds like a win/win.

Endnotes

1. The Declaration of Independence, para. 2 (U.S. 1776).
2. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, Unethical Profession, 52 Vand. L. Rev. 871 (1999).
3. U.S. Const. prmbl.
4. Id. amend. XIII para.1.
5. Id. amend. XIV para.1.
6. P.L. 90-602, 29 U.S.C. Sec. 602 (1967).
7. P.L. 88-352, 42 U.S.C. 2000e (1964).
8. P.L. 88-38, 29 U.S.C. Sec. 206(b) (1963).
9. P.L. 101-336, 42 U.S.C. Sec .10101 (1990).
10. N.Y. Const. art. 1, cl. 11, prohibiting discrimination in civil rights.
11. N.Y. Exec. art. 15 para. 290 "…equal opportunity to enjoy a full and productive life…an equal opportunity to participate fully in the economic, cultural and intellectual life of the state…"
12. Practitioners need to check the applicable ethics rules in the jurisdiction in which they practice. In New York, the Code of Professional Responsibility, Part 1200 of the Joint Rules of the Appellate Division, is at 22 NYCRR Part 1200. In the District of Columbia it is in D.C. Bar Rules App. A. References herein are generally to the New York Code of Professional Responsibility.
13. RPC Rule 1.5.
14. RPC Rule 1.4(b). Also see RPC Rule 1.2(d).
15. Foonberg, How to Start and Build a Law Practice (American Bar Association, 5th ed. 2004) p. 204.
16. RPC Rule 1.4(a)(3)(4).
17. Fisher and Ury, Getting to Yes (Penguin 2 ed. 1991) pp. 60-63.
18. Croce, "Bad, Bad Leroy Brown" (1973); also see Rules of Professional Conduct Rule 1.3(a).
19. RPC Rule 1.16.
20. RPC Rule 1.4(c).
21. RPC Rule 1.4(a)(iii). Also see RPC Rule 1.2(a).
22. Foonberg, How to Start and Build a Law Practice (American Bar Association, 5th ed. 2004) p. 217.
23. RPC Rule 1.16.
24. Id., see especially Rule 1.16(b)(4)(7); cf. D.C. RPC Rule 1.16(b)(3)(4) vexatious or obdurate conduct by the client.

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The Roth IRA Conversion: A Unique Opportunity

By William Pfeiffer and Donna M. Stefans

Donna M. Stefans

A. What Is a Roth IRA?

The Roth IRA presents one of the most compelling estate tax planning opportunities for clients in recent years. The opportunity to grow assets on an income tax free basis and then pass those assets to future generations who will continue to have the opportunity to grow the same assets on an income tax free basis can produce substantial advantages when compared to growing the same assets in a traditional IRA account.[1] In order to determine whether the opportunity exists for a particular client and then quantify that advantage, several questions must be asked and several assumptions must be confirmed. The financial, legal and tax advisors for the particular client must prepare and review projections for alternative scenarios thereby allowing the client to make an informed decision. This also presents an opportunity for each of these advisors to work as a team on behalf of the client.

B. How Do You Execute a Roth Conversion?

For many clients, the opportunity to fund a Roth IRA is created by the conversion of a traditional IRA account or 401k or 403b account.[2] Previously, conversion to Roth IRA accounts was limited to taxpayers whose adjusted gross income was below specified amounts. These limitations have been permanently eliminated for 2010 and future years.[3] For conversions in 2010, taxpayers have an option of reporting the amount of the conversion either entirely in 2010 or 50% in 2011 and 50% in 2012. It should also be noted that clients also have the option of completing partial Roth conversions over multiple tax years. This would be important for clients whose income or deductions will vary from one year to the next. Obviously clients will have a desire to convert accounts in years when they have higher deductions or lower income amounts than they would ordinarily recognize in "normal" years.

To effectuate a Roth conversion, you need to initiate paperwork with the current custodian of the traditional IRA. All of the brokerage houses mutual fund companies and banks have the procedures and protocols in place to handle the transactions. However, if the tax deferred money is in a 401k or 403b, the client must check with his or her retirement plan sponsor/administrator for the steps necessary to effectuate the conversion. Each plan has different rules and regulations to follow, but again, all administrators are versed in how to handle the procedure.

William Pfeiffer

C. What Are the Income Tax Considerations?

We also need to determine the client's expectations for future income tax rates. At the moment, many clients are expressing an expectation that income tax rates will increase in future years. This will enhance the advantage of a Roth conversion. Even if tax rates increase, the client also needs to determine if his or her income will otherwise decrease placing them into a lower tax bracket in future years. Part of this determination will be to determine if the client will continue to pay mortgage interest, property tax and fund charitable contributions in future years. As you can see, the questions to ask and assumptions to verify are numerous.

One of the basic concepts of income tax planning is to defer the payment of tax. Since this usually involves deferring the recognition of income whenever possible, a conversion to a Roth IRA is counterintuitive. It also requires the client to have current liquidity to pay the taxes due. If the client is required to consume part of the taxable distribution from the traditional IRA account in order to pay the income tax liability due to the conversion, the advantage of the conversion is reduced. However, if the client is able to pay the tax using other "after-tax" assets, the advantage is realized because the amount of the tax paid is effectively an additional contribution to a tax deferred account.

D. How Does the Roth IRA Conversion Affect Cash Flow Needs?

Probably the most significant variable to determine is the projected cash flow needs of the client. It will need to be determined if the client will rely on distributions from the converted account for both short-term and long-term spending requirements. To the extent that distributions will be required from the account, a conversion will become less attractive. For clients expecting their distributions to be greater in amount and occur in the near term, a conversion will not be the right choice. However, for those clients who will not require use of these assets for several years, or possibly never at all, a conversion might create the compelling advantage described above.

E. Are There Required Minimum Distributions (RMDs) Similar to Regular IRAs?

For those clients who continue to consider a conversion after a thorough review of the above factors and assumptions, we need to calculate the benefit of required minimum distributions not being applicable to Roth IRA accounts when compared to traditional IRA accounts. Since owners of a Roth are not required to take *any* distributions during their lifetime, the opportunity for the account to grow is enhanced.[4]

F. Estate Savings Tax Benefit?

What about the estate tax liability of the client as the original owner of the account? If you view the payment of income taxes upon conversion *from a traditional IRA* to a *Roth* as a reduction of the taxable estate of the client, a conversion also presents an estate tax savings. However, if a traditional IRA account generates an estate tax liability for the client, the beneficiaries of that account are allowed to take a portion of the federal estate tax paid as an itemized deduction on their income tax return.[5] This may not produce a dollar-for-dollar benefit to the child or grandchild and also requires the consumption of liquid assets to pay the tax immediately following the death of the client. In most situations, the case for the Roth conversion works better here too.

G. After the Roth IRA Owner Passes Away, What Happens Next? Tax Free?

Upon the death of the account owner, the designated beneficiary will need to commence required distributions over his or her life expectancy.[6] For a child or grandchild, this may provide the opportunity for another fifty years of tax-deferred growth. This is often referred to as a "stretch" IRA. Of course, it is really tax free growth as the distributions to the beneficiary are not taxable as income to the beneficiary.[7] Although the Roth is counted as part of the taxable estate for estate tax purposes, if the chosen beneficiaries never fall into the category of having the taxable estate, the beneficiaries ultimately revel in tax free growth and distributions over many lifetimes as it passes through the generations! Kudos!

H. Additional Factors to Consider: Market Conditions

We need to factor in expectations regarding investment performance. The higher the expected rates of future returns, the greater the advantage to capture the projected growth on a tax free basis. One way to hopefully increase the opportunity for growth is to time the conversion during a period of depressed asset values. We will sidestep the question as to whether we are currently in such a period and leave that to the individual client and their advisors. It should also be noted that the Internal Revenue Service has provided an opportunity for clients to undo a conversion through a process known as recharacterization.[8] This will apply to those clients who converted to a Roth IRA and then observed their Roth account decrease in value.

I. Application for Medicaid

According to one leading authority, "Since Roth IRA owners are not subject to required minimum distributions, it is likely that the local Medicaid agency will treat the Roth IRA as a fully available resource for Medicaid purposes."[9] The author then wisely continues to suggest that the advisors check with their local Medicaid agency regarding its interpretation before providing guidance to their client.

Conclusion

In conclusion, the decision to convert a traditional IRA to a Roth IRA involves many complex variables and decisions. Nevertheless, it is a strategy that can produce great results for a particular client under the correct circumstances. It also presents an opportunity for the individual advisors to that client to work together and provide perspective into their disciplines on behalf of each other. It is not a process that should be pursued either by the client alone or in the absence of any of his or her advisors.

Endnotes

1. Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 302 (1997).
2. I.R.C. § 408A(e) (2006).
3. Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. 109-222, § 512 (2006).
4. I.R.C. § 408A(c)(5).
5. *Id.* § 67(b)(7).
6. *Id.* § 408A(d) (distribution rules).
7. *Id.* § 408A(d)(2)(A).
8. *Id.* § 408(d)(6).
9. Vincent J. Russo & Marvin Rachlin, *New York Elder Law and Special Needs Practice*, N.Y. Elder L. Prac. § 14:14 (May 2010).

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Spousal Rollover of Retirement Accounts

By Seymour Goldberg

Many clients have accumulated a considerable amount of assets in retirement accounts such as qualified plans, 403(b) tax-sheltered annuities and governmental 457 plans. In addition many retirement accounts have been rolled over to individual retirement accounts (IRAs). Other clients have established Roth IRAs.

For a married couple with children there is a tendency to select the spouse as the primary beneficiary and the children as the contingent beneficiaries of retirement accounts and/or IRAs. In addition, if a retirement plan is subject to ERISA, then the surviving spouse must generally be the primary beneficiary of the retirement account subject to limited exceptions.

If the surviving spouse is the primary beneficiary of a retirement account and/or traditional or Roth IRA, then the surviving spouse can generally disclaim his/her interest in the retirement account and/or traditional IRA or Roth IRA. However, the author has recently reviewed the rules of a major corporation's retirement plan and found that disclaimers would not be permitted to be given any legal effect under the retirement plan rules.

Several important technical issues involving spousal rollovers follow:

Issue (1): If an IRA owner dies on or after his/her required beginning date (i.e. April 1 after attaining age 70½), must a required minimum distribution be made for the year of the IRA owner's death?

Answer: Yes.

Issue (2): Who must receive and report any unpaid required minimum distribution for the year of death of the IRA owner?

Answer: The deceased IRA owner's beneficiary.

Example

John has a traditional IRA and his wife Mary is the primary beneficiary of his IRA. John's children are the contingent beneficiaries of his IRA. Assume that John died on February 15, 2011. His birth date is December 1, 1936. At the date of his death he was age 74 but had he lived he would have attained age 75 by December 31, 2011.

Assume that John's required minimum distribution for the calendar year 2011 would have been $50,000 based on age 75 (not 74). However, John only received $10,000 from his IRA prior to the date of this death on February 15, 2011.

Under the IRS rules the unpaid required minimum distribution from John's IRA for the year of his death must be paid. The authority for this rule can be found in the IRS's final regulations at § 1.401(a)(9)-5, A-4 which provides in part as follows:

> [I]f an [IRA owner] dies on or after the required beginning date, the distribution period applicable for calculating the amount that must be distributed during the distribution calendar year that includes the [IRA owner's] had lived throughout the year. Thus, a minimum required distribution, determined as if the [IRA owner] had lived throughout that year, is required for the year of the [IRA owner's] death and that amount must be distributed to a beneficiary to the extent it has not already been distributed to the [IRA owner].

Thus, in the absence of a timely qualified disclaimer by Mary, then Mary as the beneficiary of John's IRA must receive the unpaid required minimum of $40,000 ($50,000-$10,000) from John's IRA with respect to John's year of death in 2011.

It should be noted that Mary may not roll over the unpaid required minimum to her spousal IRA rollover account.

Mary should act quickly after John's date of death and roll over John's deceased IRA account after withdrawing the unpaid $40,000 required minimum distribution attributable to the year of John's death to her spousal IRA rollover account. This can be done as a direct transfer to her spousal IRA rollover account to save time.

Obviously, Mary should immediately select designated beneficiaries of her spousal IRA rollover account that are consistent with her estate plan.

Prompt action by Mary is necessary since Mary may pass away shortly after John's death or she may become incapacitated before creating her spousal IRA rollover account. If Mary consummates a spousal IRA rollover and selects, for example, her children as the primary beneficiary of her spousal IRA rollover account, then on her subsequent death her children may generally take advantage of the IRS life expectancy payout rules that apply to them if they satisfy certain IRS rules. These IRS rules will be discussed in a subsequent article.

From a technical point of view, the IRS determined that the beneficiary of John's IRA (under non-probate law concepts) must receive the unpaid required minimum distribution for the year of John's death, not John's estate unless John's estate is the beneficiary of John's IRA.

Seymour Goldberg, CPA, MBA, JD, a senior partner in the Woodbury law firm Goldberg & Goldberg, P.C., is Professor Emeritus of Law and Taxation at Long Island University. He has been quoted in major publications, including *The New York Times, Forbes, Fortune, Money Magazine, U.S. News & World Report, Business Week,* and *The Wall Street Journal,* and has been interviewed on CNN, CNBC, and WCBS. Formerly associated with the IRS, he has been a member of the Northeast Pension Liaison Group for over 20 years, and has been involved in conducting continuing education outreach programs with the IRS on the retirement distribution rules. He has authored guides for the American Bar Association, the America Institute of CPAs, JK Lasser, and other organizations. His recent books include *IRA Trusts & Retirement Distribution Trusts as Beneficiary of Retirement Assets: What the Practitioner Needs to Know* and *Inherited IRAs: Practice Aids and IRS Distribution Issues,* among others.

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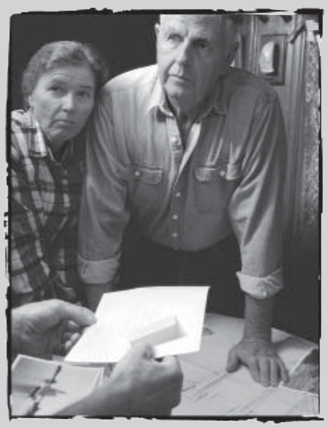

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How the 2010 Tax Act Affects New York Estates

By Laurence Keiser

Last year, I reported in the Summer issue of the *Newsletter* on how the federal estate tax repeal affected the distribution of New York estates as well as the filing of estate tax returns in the state of New York for 2010 and future years.[1] This article updates that guidance in light of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the "2010 Act"),[2] which was enacted on December 17, 2010 (after 11½ months of Congressional inaction).

I. Will Construction Legislation

The repeal of the federal estate tax as of January 1, 2010 had an unfortunate impact on wills and other testamentary documents executed by New York testators who died in 2010 if those documents used a formula bequest tied to the federal estate tax law. Consider a common formula: "I leave to my children the amount that can pass free of federal estate tax, and I leave the excess over that amount to my spouse." As a result of the federal estate tax repeal, the amount that could pass free of estate tax became the entire estate, and as a result, the surviving spouse was inadvertently disinherited under wills using such a formula. (The same situation could happen if the excess over the exclusion amount was left to a charity: the charity would be disinherited.)

To prevent this unintended result, New York (and some 20 other states) passed clarifying legislation during 2010. New York enacted Estates, Powers & Trusts Law 2-1.13 (EPTL). Under this new provision, the EPTL was modified to construe certain formula bequests or other dispositions of property (such as in trusts or beneficiary designations) as if they were made pursuant to the Internal Revenue Code as in effect on December 31, 2009.[3] The intention was to protect the surviving spouses of decedents who had thought there would always be an estate tax exclusion and never considered that the estate tax could, indeed, be repealed. The new statute was made effective for decedents dying after December 31, 2009 but also provided that it would not apply if the federal estate tax became applicable before January 1, 2011.

As a result of the 2010 Act, the federal estate tax became applicable again, retroactive to the beginning of 2010. However, the 2010 Act permitted an executor to make an election not to have the federal estate tax apply for a decedent who died during 2010. (Such an election would also cause Internal Revenue Code § 1022, the modified carryover basis rule, to apply to the assets included in such estates.)

For estates that do not elect out of the federal estate tax, it is clear that the federal estate tax applies for purposes of EPTL 2-1.13. But if an election out is made, is the federal estate tax considered "applicable" for 2010? Could it be argued that in this situation, a formula bequest of the maximum amount that can pass free of federal estate tax would be $3.5 million (the exclusion amount in effect on December 31, 2009) because the federal estate tax is not considered "applicable" to this particular estate, or would the formula result in a $5 million credit shelter bequest? Obviously, the election out option was not contemplated by the New York legislature at the time EPTL 2-1.13 was enacted.

Example: A 2010 decedent owns $6 million worth of highly appreciated securities. The decedent's will left "the amount that can pass free of federal estate tax" to his children from a prior marriage and the excess to his second spouse outright.

Under the 2010 Act, absent an opt out election, the estate will pay no federal estate tax because of the $5 million exclusion and the $1 million marital deduction, and the estate beneficiaries will get a full step-up in basis for all the securities. Of the $6 million, $5 million will pass to the children from the prior marriage and $1 million will pass to the second spouse.

However, if the executor opts out of federal estate tax, will EPTL 2-1.13 construe the exclusion amount as $3.5 million? If so, $3.5 million will pass to the children and $2.5 million will pass to the spouse. There still will be no estate tax, but there also will be no step-up in basis, except to the extent allowed by the modified carryover basis provisions. If this is the result, then the surviving spouse will get $1.5 million more than if the executor had not made the election, and the decedent's children will get $1.5 million less. Furthermore, there may be additional capital gains tax when the assets are sold.[4]

Most practitioners do not believe that this is the correct result. Instead, the consensus is that formula clauses in the wills of all decedents dying in 2010 should be interpreted to provide for an exclusion amount of $5 million.

A modification to EPTL 2-1.13 is necessary to clarify this ambiguity. Indeed, a modification has been proposed so that formula clauses for 2010 decedents will result in a $5 million exclusion without regard to an election out by the executor.[5] This modification has the support of the Trusts and Estates Law Section of the New York State Bar Association and the Association of the Bar of the City of New York.

II. Will Drafting in Light of the New York Estate Tax

Portability of Estate Tax Exclusion

For the remainder of 2011 and all of 2012, the federal estate tax exclusion amount is $5 million and the exclusion is "portable" between spouses. Portability allows the unused portion of the first spouse's exclusion amount to be used by the surviving spouse if the first spouse's executor makes an election to do so.

Portability can be a blessing primarily because it will provide relief for married couples who own their assets inefficiently from an estate planning perspective. For example, if wife owns $10 million of assets and husband owns zero, and husband dies first, his estate cannot take advantage of the ability to pass $5 million free of federal estate tax. Portability will come to the rescue (at least for 2011 and 2012) and save the couple significant estate taxes (and may save their estate planning attorney from a malpractice case) by allowing the surviving wife to use the husband's exclusion at her later death.

Does the availability of portability mean that married couples with total estates of $10 million or less should simply leave their entire estates to each other? Not necessarily, at least in New York. There is no portability for purposes of New York estate tax. Thus, if a couple's wills leave all assets to the survivor with the intent of relying on portability, the amount that can pass free of New York estate tax will be wasted. Everyone, at all wealth levels, should at least take advantage of the $1 million New York exclusion.

Beyond that, should married couples leave the excess over their New York exclusion outright to their surviving spouse? Most estate tax practioners agree that couples with moderate wealth should not do so and should instead continue to use "credit shelter trust" planning to fully utilize the federal estate tax exemption of the first spouse to die. As reported in the Spring 2011 issue of the *Newsletter*,[6] there are a number of reasons why:

- There is no guarantee that federal portability will be extended past 2012.
- Consider the effect a remarriage by the surviving spouse may have on portability. Portability only allows the surviving spouse to use the unused exclusion of his or her *last* deceased spouse. Thus, the remarriage of a spouse (and subsequent death of the new spouse) can cause him or her to lose the unused exemption of the first spouse.
- If the executor of the first spouse elects portability, the statute of limitations for auditing the estate of the first spouse is extended, at least for purposes of computing the unused exemption amount of the first spouse.
- Trusts may provide asset protection which would not exist if the assets were in the direct name of the spouse. If the surviving spouse has a judgment against him or her, the assets in the trust will generally be protected from creditors.
- If all the assets are transferred outright to the surviving spouse, they will be included in his or her taxable estate at their fair market value at the time of the surviving spouse's death. All of the appreciation since the first spouse's death will be subject to estate tax, subject only to the portable exemption which will not "appreciate" with inflation. (Of course, there will also be a corresponding step-up in basis to the fair market value at the surviving spouse's death.) On the other hand, assets held in a credit shelter trust will not be included in the taxable estate of the surviving spouse and all of the appreciation in the value of such assets likewise will be excluded.

Another factor relevant to this analysis is the New York estate tax paid on the first spouse's death versus the total New York tax that will be due from both spouses' estates. Funding a credit shelter trust in the full amount of the federal estate tax exemption in the estate of the first spouse to die—and paying New York estate tax on that bequest—can lower the total amount of New York taxes paid from both estates.

Example: Husband and wife each expect to have taxable estates of $5 million at their deaths. They have wills that leave all assets to the survivor. At the first death, there is a full marital deduction and portability is elected. There is no federal or state tax at the first death. The New York State estate tax at the second death will be $1,067,600.

Had there been a $1 million credit shelter trust in the first estate, there still would have been no federal or state tax at the first death and the New York tax in the second estate would have been $916,400. Had $5 million gone into a credit shelter trust at the first death, there would be a New York tax in each estate of $391,600, for total state estate taxes of $783,200. Of course, in the latter case, the surviving spouse would have lost the $391,600 of investable capital between the two dates of death.

Flexibility continues to be important in drafting documents where there is a surviving spouse. The use of disclaimers (as well as more complex structures, such as Clayton QTIP trusts) should be considered in most situations.

New York QTIP Election

Most states, including New York, have no provision for a separate state QTIP election that is independent from the federal QTIP election. When the federal estate tax was repealed for 2010, it was no longer necessary to file federal returns for decedents dying in that year. On the other hand, the New York estate tax exclusion remained at only $1 million, and a QTIP election would be required for marital trusts in estates larger than $1 million to escape New York estate tax. A question arose as to whether a QTIP election in New York in 2010, made purely for New York estate tax purposes, would be accepted.

In March of 2010, the New York State Department of Taxation and Finance released TSB-M-10(1)M, advising that a separate QTIP election can be made in New York any time *a federal return is not required to be filed*. As written, the relief did not seem to be limited to 2010.

TSB-M-10(1)M discusses the separate New York QTIP election in the absence of a federal filing requirement under two scenarios: (1) when there is no federal estate tax in effect or (2) when there is a federal estate tax in effect, but an estate is under the federal filing threshold. Unfortunately, the 2010 Act adds a third possibility: when the federal estate tax is in effect, but the executor of a 2010 estate makes an election to opt out of the federal estate tax altogether.

The Department of Taxation and Finance recently provided additional guidance.[7] It reaffirmed that TSB-M-10(1)M applies to all situations when no federal estate tax return is required and said this includes when an estate elects not to come under the federal estate tax for 2010 (even though a return might have to be filed to opt out of the tax).

Example: A 2010 decedent has an estate worth $10 million, all in bank accounts. The decedent's will left $1 million to a credit shelter trust and the excess to a trust for the surviving spouse which qualifies for the QTIP election. The executor, the surviving spouse and the family's financial advisors agree to opt out of federal estate tax, which makes a federal QTIP election unnecessary. Nevertheless, the executor can still make a New York QTIP election even if a federal return is "required to be filed" in order to make the opt-out election.

At this time, it is not clear how a portability election will have to be made for federal purposes. What will happen if an estate has to file a federal estate tax return to make a portability election? A filing requirement for an estate below the filing threshold solely for the purpose of making a portability election was not anticipated by the Tax Department. If a federal return is required to be filed solely to elect portability, there would still be no reason to make a federal QTIP election if the estate is below the federal filing threshold. (Indeed, such an election would generally be avoided.) However, there is no provision in New York law for making a New York QTIP election that is inconsistent with a position taken on a federal return.

Many practitioners are hopeful that instead of requiring an executor to file Form 706, the IRS will create a simpler form to file in order to make the portability election if the sole purpose of filing is to elect portability. If such a form is issued by the IRS, it may clarify state-level QTIP guidance that is contingent on the absence of a federal estate tax filing requirement. However, no simpler form has yet been issued, and this remains an open question.

New York Alternate Valuation Election

In January of 2009, the Department of Taxation and Finance issued NYT-G-09(1)M dealing with the use of an alternate valuation election (an election to postpone valuation of assets until six months after the decedent's death) for New York State purposes. The Department interpreted New York law as allowing an alternate valuation for purposes of calculating the New York gross estate in situations where no federal return is required to be filed.

Again, this ambiguous language creates uncertainty in the situation where a federal return is required to be filed, but there would be no federal estate tax liability.[8]

Example: A 2010 decedent owns real property worth $4 million on date of death and $2 million in bank accounts. Six months after date of death, the real property is worth $3 million. Decedent's will leaves $3 million to charity and $3 million to decedent's friend. The gross estate is over the filing threshold, but no tax will be paid because of the $3 million charitable deduction. Will New York allow an alternate valuation election? The logical answer is yes, but this circumstance is not addressed by NYT-G-09(1)M.

III. Conclusion

The 2010 Act has raised appreciable issues for New York domiciliaries and their professional advisors. Most of the issues arise because New York conforms to the Internal Revenue Code as it existed on July 22, 1998. A New York decedent with a $5 million taxable estate does not pay federal estate tax through the end of 2012. However, as noted above, that estate will pay $391,400 of New York estate tax—and obviously, the tax becomes more onerous as the marginal NYS estate tax rate increases to 16%.

Is it time for a change in New York?

As a practitioner, this author can report that many long-time New Yorkers are choosing to move out of New York State to avoid the estate tax. They are fleeing to states that will not collect a separate levy upon death. (The fact that the weather in that state may be better than New York experienced this winter is merely icing on the cake.)

Albany's response is that the state budget always has a significant deficit and that New York cannot afford to lose the revenue that is collected through the estate tax. What Albany fails to see is the revenue lost by taxpayers moving out of New York State. Taxpayers moving out of New York State no longer shop here, no longer do their banking here and no longer employ New York accountants and lawyers.[9]

Many of us remember that prior to July of 1998, New York recognized this logic and reduced its estate tax to become a "pick up" state. It is again time for New York to get in line with the states that conform to the federal estate tax regime.

Endnotes

1. Laurence Keiser, "New York State Aspects of Federal Estate Tax Repeal," *NYSBA Trusts and Estates Law Section Newsletter*, Vol. 43, No. 2 (Summer 2010).
2. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. 111-312, 124 Stat. 3296, H.R. 4853 (Dec. 17, 2010).
3. This assumes the decedent had not intended the dispositions that would result under application of the 2010 Act. The statute also included a provision allowing for a judicial proceeding to determine the decedent's intent.
4. Consider the dilemma for the executor who has to choose between a step-up in basis and getting an additional $1.5 million to the surviving spouse.
5. Report on Legislation by the Joint Subcommittee of the Trusts, Estates and Surrogate's Courts Committee and the Estate and Gift Taxation Committee of the New York City Bar Association (March 2011).
6. Michael S. Kutzin, "The Estate Tax Is Back, but with Some Twists—And Opportunities," *NYSBA Trusts and Estates Law Section Newsletter*, Vol. 44, No. 1 (Spring 2011).
7. Facsimile from Jacqueline Trembley, Tax Regulation Specialist 1, Miscellaneous Tax Instructions and Interpretations, NYS Dep't of Taxation and Fin. (March 1, 2011) (on file with author).
8. To make an alternate valuation election under IRC § 2032, the election must reduce both the gross estate and the estate tax liability. IRC § 2032(c).
9. Curiously, they will abandon their lawyers in a heartbeat, but they will not give up their doctors.

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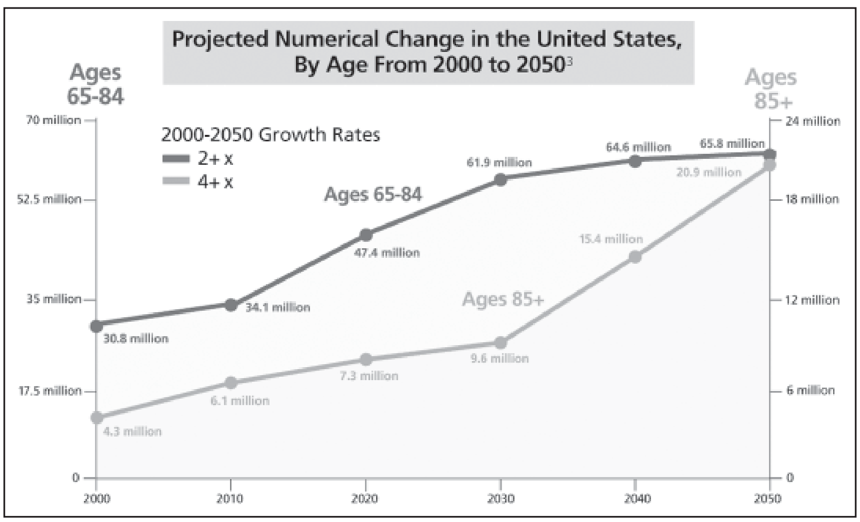
The Need for Longevity Planning

By Steve Shorrock

The 80 and over age group is growing five times faster than the overall population.[1] For a couple aged 65 today, there is a 50% chance for one to live to age 92 and a 25% chance one will live to age 97.[2] The graph below shows the population increases to mid-century for ages 65-84 and 85+.

Advances in the field of medicine and improvements in health conditions overall have led to people living longer. For example, cardiovascular mortality has shown a remarkable decline primarily due to bypass surgery, better diagnostics, risk mitigating drugs and lifestyle changes (most notably the decline in smoking). The possibility of spending 15, 20, 25 or more years in retirement should be realistically considered and planned for.



With a longer expected lifespan, what choices will your clients have to make and how can you assist them? I often suggest building a plan projecting life expectancy to age 100 that secures a quality retirement and:

- Provides for financial peace of mind.
- Retains independence so as not to be a burden on the family.
- Protects retirement assets from devastating medical costs.
- Provides multiple sources of income so as to not outlive retirement assets.
- Quality of life for the surviving spouse.
- Inheritance for your children.

Studies show the majority of the 30 million pre-retirees are woefully unprepared for retirement, so much that it may change the essence of retirement.[4] In this new retirement environment, one must have a clear understanding of the retirement risks, including:

- Entitlement programs such as Social Security and Medicare. The foundations of a secure retirement, are facing strains from an aging population and a tough economy. For the first time since the 1980s, Social Security will pay out more money in benefits than it collects in payroll taxes. Additionally, for the first time in history, people age 65 and over are about to outnumber children under age five.[5] Unless action is taken, Social Security will be unable to pay retirees full benefits by 2037.[6]
- Corporate reductions in retiree benefits, as many pension plans are quickly disappearing. More money must be saved in 401(k) plans, as corporations have shifted the return risk to their employees. Of concern is that more individuals than ever are using their 401(k) assets through loans and withdrawals to support current quality of life.[7]
- Low interest rates and an unstable stock market are causing many individuals to invest in money market funds providing minimal returns and often negative returns when inflation is factored in.
- Higher future taxes are projected as a growing deficit that must be paid for. As income taxes increase and personal exemptions are phased out, the ability to defer income taxes becomes more valuable.
- Longevity, as living longer requires the retirement plan to cover more years than previous generations.

With living longer, comes the associated costs that must be covered in the retirement plan, including:

- **Long-Term Care Costs—**An overlooked threat to asset and income protection is the potential for long-term care costs. The chances of needing some form of long-term care are very high. Medicare pays for up to 100 days of nursing home care. The annual cost in 2010 of a semi-private room in a New York nursing home is $116,800 and increasing annually.[8] The national average for 10 hours of daily home care is $75,000. Regardless of the form of care, the costs of long-term care will quickly reduce most retirement assets, as seen below:

The Impact of Long-Term Care on Retirement Savings[9]

Year	Assets at Start of Year	Income Needs	LTC Expense[10]	Investment Yield	Assets at End of Year
1	$500,000	$60,000	$75,000	$20,000	$385,000
2	$385,000	$61,800	$78,800	$15,400	$259,800
3	$259,800	$63,700	$82,700	$10,400	$123,800
4	$123,800	$65,600	$86,900	$5,000	($23,700)
5	($23,700)	$67,500	$91,200	($0)	($182,400)

Income Needs are the portion of household income needs that the assets had been relied upon to provide and assumes annual inflation of 3%. **LTC Expense** is based on a typical annual cost and is subject to 3% annual inflation. **Investment Yield** is assumed at 4% annually after taxes.

- **Health Care Expenses—**The Employee Benefit Research Institute estimates that to have a 50% chance of affording health care in retirement, assuming a retirement at age 65 in 2019:
  - A man would need between $144,000 and $290,000 in savings.[11]
  - A woman, as a result of a longer life expectancy, would need between $210,000 and $406,000 in savings.[12]
  - These estimates are for the projected savings needed to pay premiums for Medigap, Medicare Part B and Part D and out-of-pocket prescription drug expenses.
- **Income Stream—**With a possibility of reduced retirement assets to pay for long-term care costs, health care expenses, living expenses and the cost of living increases, predictable income streams from diversified sources are recommended.

An insurance solution for protecting your retirement assets and income is needed. We suggest a larger asset allocation to insurance products protecting against longevity risks, including:

- **Income for Life—**Life insurance and annuities providing guaranteed income you cannot outlive
  - A new, innovative rider, found in some indexed Universal Life products is a guaranteed income stream the insured cannot outlive. Income begins 15 or more years from issue, providing tax-free income for life.
- **Health Care Strategy—**Some new, innovative life insurance and single premium products with living benefits (for chronic, critical and terminal illness) and long-term care insurance
  - For no additional premium cost or underwriting, allows for the acceleration of the death benefit to support long-term care or chronic illness expenses. It is an annual "cash" benefit that can be used for any purpose as long as the insured's doctor certifies he/she cannot perform two out of six Activities of Daily Living. The policy either pays a benefit at the death of the insured or allows the death benefit to be paid as a living benefit to support the potential costs of long-term care.
- **Market Growth—**Indexed life insurance and annuities with upside market potential and interest rate floors
  - These indexed products allow the insured to participate in the growth of the market, up to the interest rate caps, and through interest rate floors never give back previous gains or have negative returns. These products provide great upside and tax-free income.

"We've seen how a stock market crash can devastate retirement plans," wrote *Chicago Sun-Times* financial columnist Terry Savage. "But the greatest risk is not the longevity of this bear market, or even another bear market. It's the associated costs of living longer and its healthcare and lifestyle implications."[13]

Endnotes

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Court of Appeals Rules There Is Privity Between the Estate Planner and the Client's Personal Estate Representative: But No Privity to Beneficiaries of the Estate

By Gary E. Bashian

The traditional protection from legal malpractice claims afforded Estate practitioners by the doctrine of Privity has been relaxed by a recent New York Court of Appeals decision.

In the *Estate of Saul Schneider v. Finmann*,[1] a unanimous Court of Appeals has ruled that a personal Estate representative "stands in the shoes of the decedent," and therefore has "the capacity to maintain a malpractice claim on the Estate's behalf."[2]

As many know, New York was one of the few remaining States that continued the precept that there was no Privity between a client's Estate and an attorney. Without this relationship of Privity, a personal Estate representative did not have the necessary standing to bring a malpractice suit against a negligent Estate planner. Now, such an action no longer requires strict attorney-client Privity as the Court has ruled that "Privity, or a relationship sufficiently approaching Privity, exists between the personal representative of an Estate and the Estate planning attorney,"[3] thus imposing a duty upon the Estate planner towards the personal representative of an Estate as would exist between an attorney and live client.

This newly imposed duty between the attorney and the Estate's personal representative establishes the threshold element necessary to bring a negligence action which was formerly denied to the personal Estate representative. Where it is found that this duty has been breached by an attorney, causation of damages is proved, and based on the actual damages that result to the Estate, the client's Estate now has a claim for malpractice in its quiver of arrows that should send quivers of concern to all Estate planning attorneys who have acted casually because of their belief that they would be protected by the old law. Although most attorneys will explain in detail orally the Estate, gift and income tax options and issues, there will now be lawsuits against attorneys who know the laws and tax consequences, explained all of the laws and tax consequences, but did not put it in writing. Even better, a writing acknowledged by the signature of the client.

The *Schneider case*[4] presented a situation that, until now, left a negligent Estate planning attorney immune from recourse by the former client's Estate. Mr. Schneider was represented by Mr. Finmann and his firm from early 2000 to his passing in late 2006. Plaintiff, the duly appointed personal representative of his Estate, alleged that based on the advice of his counsel, the decedent purchased a $1 million life insurance policy and over the next several years he transferred the policy in, and out, of a number of limited liability partnerships of which he was the principal owner, and then subsequently transferred the policy back to himself in his own individual name. Upon Mr. Schneider's death, this series of transactions resulted in the proceeds of the life insurance policy to be included as part of his gross taxable Estate. At the trial level, the Nassau County Supreme Court predictably granted Defendant's summary judgment motion for plaintiff's failure to state a cause of action pursuant to CPLR § 3211(a)(7), which was later affirmed by the Appellate Division Second Department on the same grounds.

The Appellate Division Second Department invoked the "well established rule in New York" expressed in *Spivey v. Pulley*[5] "with respect to attorney malpractice that absent fraud, collusion, malicious acts, or other special circumstances, an attorney is not liable to third parties, not in Privity, for harm caused by professional negligence,"[6] and did not allow the Estate to bring an action under Estates Powers and Trusts Law (EPTL) 11-3.2(b). As noted by the Appellate Division Second Department, New York Courts have strictly applied Privity in the past, and disallowed negligence claims against an Estate planner in its absence.

Upon being heard by the New York Court of Appeals, though, *Schneider* was not summarily dismissed for failure to state a cause of action. Indeed, New York's highest Court, relying heavily on the reasoning articulated in the Texas Supreme Court case *Belt v. Oppenheimer*,[7] determined that the personal representative of the Estate could pursue the malpractice cause of action against the allegedly negligent Estate planner. However, Estate beneficiaries and other third parties are still bared from bringing malpractice actions against Estate planners for negligent planning.

Belt v. Oppenheimer[8] involved a similar suit in Texas by the personal representatives an Estate who brought an action against the attorney planners for negligently incurring "over $1.5 million in tax liability that could have been avoided by competent Estate planning."[9] The *Belt* court reasoned that although damages did not occur to the Estate until after the death of the client, the negligent act occurred while the decedent was alive. If the decedent had discovered this prior to death, he could have brought suit against the Estate planner to recover fees, and for costs to restructure the Estate in order to ameliorate the negligence. Therefore, if the injury occurs during the client's lifetime, a claim of malpractice survives the client's death and is justiciable by the personal Estate representative. Logically, the Estate is standing in the same shoes as the dead client, and is essentially the alter ego of the dead client.

Schneider seems to have adopted the Texas Supreme Court's reasoning, indicating that "the personal representative of an Estate should not be prevented from raising a negligent Estate planning against the attorney who caused harm to the Estate. The attorney planner surely knows that minimizing the tax burden of the Estate is one of the central tasks entrusted to the professional."[10]

Though the *Schneider* decision is far from revolutionary, and the rather narrow ruling endeavors to balance the interests of both Estate representatives and their legal counsel within the framework of the EPTL 11-3.2(b) which allows the personal representative of an Estate to maintain an action for "injury to person or property" after the testator's death, the real question is what will be the scope of liability and the dollar amount of damages that a negligent planner may be exposed to for their malpractice.

While the New York Court of Appeals has specifically stated that this new application of the Privity requirement ensures that Estate planning attorneys will not be subject to "undesirable results, uncertainty, and limitless liability,"[11] it remains probable that if the reasoning of the *Belt* Court, cited above, were pushed to its logical extreme, it would result exactly in the "undesirable results, uncertainty, and limitless liability" that both New York's and Texas' highest Courts were specifically trying to avoid.

For example, if the personal Estate representative truly does "stand in the shoes of the decedent,"[12] then arguably he or she would be able to bring any variety of negligence claims on behalf of the Estate that are not prohibited by statute or common law. *Schneider* indicates that the basis of a malpractice action would flow from the failure to fulfill "one of the central tasks entrusted to the professional." What constitutes the essential duty of the Estate planner that, if breached, would be ruled negligence, and what method the Court will use to calculate damages, remain open issues to be determined by the Courts based on the unique and particular facts of each case.

There will, therefore, undoubtedly be many new actions throughout the Courts as personal Estate representatives bring suit where they suspect they have a cause of action due to negligent planning. Clearly, only time, and the inevitable litigation that the *Schneider* case will produce, can answer these questions.

Estate planners in New York must take great care when addressing their clients' needs as this application of Privity will have significant repercussions throughout their practices. It would behoove all attorneys to make sure their file contains enough memos and correspondence, confirmed by the client in writing, explaining the details and implications of the Estate plan as it is structured. This will be especially important where the client makes a decision to do something that will clearly, or may, result in additional taxes or other damages that that client's Estate could pursue post-death.

Endnotes

1. 210 NY Slip Op. 05281.
2. *Id*. (citing *Belt v. Oppenheimer* 192 SW 3d 780, 787 (Tex 2006)).
3. *Id*.
4. *Id*.
5. 138 A.D.2d 563, 564 (2d Dep't 1988).
6. *Schneider v. Finmann*, 60 A.D.3d 892, 893 (2d Dep't 2009).
7. 192 S.W.3d 780 (Texas 2006).
8. *Id.*
9. *Id*. at 782.
10. 210 NY Slip Op. 05281.
11. *Id*.
12. *Id*. (citing *Belt v. Oppenheimer*, 192 S.W.3d 780, 787 (Texas 2006)).

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What Is an Estate Planner to Do Without the Protections of Strict Privity?

By Anthony J. Enea

Since the New York Court of Appeals decision in *Schneider v. Finmann,*[1] estate planners have been wringing their hands with concern as to what steps they can take to protect themselves from potential malpractice claims by the personal representative of an estate.

The Court of Appeals held in *Schneider* that "privity" (a contractual relationship) or a relationship sufficiently close to privity exists between the personal representative of an estate and the estate planning attorney. The court held that the personal representative of an estate should not be prevented from raising a malpractice claim against an attorney who caused harm to the estate. With very little fanfare the court made a significant dent in the decades-old requirement that there be "strict privity" between the third party alleging malpractice and the attorney, absent fraud, collusion, malicious acts or a special relationship with the attorney. As if this were not sufficiently worrisome for the practitioner, the court went on to make the troubling statement that "the attorney estate planner surely knows that minimizing the tax burden of the estate is one of the central tasks entrusted to the professional."[2] While the court may have been correct in making this observation with respect to the facts presented in the case before it, the ramifications of such a general and conclusory statement may go beyond what the court envisioned. It may have been incorrect for the court to assume that minimization of estate taxes is the "central task" in every estate plan. How many of us have had a client say something to the effect of, "Let the kids worry about the taxes, I am leaving them enough"?

The decision in *Schneider* affects all attorneys who prepare wills and trusts, not just those who prepare sophisticated estate plans for the wealthy. In states that have not had a "strict privity" requirement, the number of malpractice claims against estate planners and will drafters has been high. Any attorney who drafts wills and trusts will need to ensure not only that there is not only no malpractice in the preparation and execution of the documents but also that all potential estate tax issues have been thoroughly reviewed with the client. While the majority of estate planners take the necessary precautions, it does not hurt to periodically review one's practices, procedures and communications with the client to ensure that the best possible practices and procedures are followed.

The following are some of the steps attorneys should consider taking in order to avoid a potential malpractice claim by the personal representative of an estate:

1) Obtain specific and detailed information about the client, his or her family and assets. The attorney should consider sending the client a questionnaire to obtain information about the value of the client's assets, and to the title in which all of the client's assets are held; whether assets have named beneficiaries or will pass by operation of law upon the death of the client; and the owner, annuitant, insured and beneficiary of any IRAs, 401Ks, annuities and life insurance policies. A review of all of the client's account statements and beneficiary designations should be considered. It is not unusual for clients to be mistaken as to title and beneficiaries of their accounts.

2) Obtain copies of wills, trusts and other advance directives executed by the client. It is important to ascertain whether the proposed plan is a significant departure from the client's prior estate plan and whether the client has decided to exclude from his or her plan individuals who may potentially contest a new will or trust.

3) In those cases where federal and/or New York estate taxes may be imposed, memorialize in writing the advice to the client as to the potential for estate taxes and the anticipated impact of such taxes upon the clients' estate and the beneficiaries.

4) Memorialize the various estate tax minimizations techniques reviewed and recommended to the client. For example, if you reviewed with the client a plan of gifting (charitable and/or non-charitable), life insurance trusts, GRATS, family limited partnerships, QPRTs or other estate planning techniques, delineate these options in writing to the client and indicate whether or not the client has decided to use any of these techniques, and if not, why not. Consider having the client sign a memorandum or letter to confirm that the client has been advised of these options and that the resulting estate plan accurately reflects his or her wishes. Such a statement could act as a potential deterrent to a claim by the estate's personal representative as it could be interpreted as a "waiver" by the client.

5) Memorialize the fact that the estate plan will result in certain assets being included in the client's gross taxable estate for estate tax purposes. For example,

when an attorney prepares a deed with the reservation of a life estate or a revocable living trust, the client may incorrectly assume that because the asset is no longer titled in his or her name, it is not taxable in his or her estate for estate tax purposes. Again, consider having the client sign a letter or memorandum acknowledging that he or she was so apprised.

6) Memorialize that you have relied upon the information provided by the client to evaluate the potential for estate taxes. The client should be instructed to advise the attorney of any significant changes in the value of his or her assets.

7) Memorialize that you have personally reviewed all of the documents with the client and that the documents were the only documents the client asked you to prepare.

8) Create a checklist of the steps to be followed by associates and staff for the execution and assembly of will and trust documents. This should help reduce any potential errors at the time of execution and assembly of the documents. It is also advisable to create and follow consistent procedures for the review and modification of any draft will and trust documents.

9) Memorialize that your representation has terminated once your legal services to the client have concluded. This is usually confirmed in the correspondence sending either the executed original or copies to the client (if the representation was limited to the preparation of documents). The relevance of officially terminating the relationship is to commence the tolling of any statute of limitation for any claims of malpractice.

Commencing the tolling of the statute of limitations is of particular importance for attorneys who regularly communicate with clients after the conclusion of their representation to keep clients apprised of changes in the laws or of any other issues of interest. For such attorneys it may be advisable to include language similar to the following in their termination letter:

> I wish to confirm that we have terminated our representation. In the future you may periodically receive correspondence from us about developments in the law and other topics that may be of interest to you. This correspondence will be sent for informational purposes only and will not be the continuation of our representation.

Using all or some of these practice recommendations will not guarantee that you will never be subjected to a claim of legal malpractice. However, taking these steps should help minimize the potential for a claim. Clearly, the Court of Appeals has made a determination as to what our "central tasks" are as estate planning attorneys and has charged attorneys with the obligation to minimize negligence in addressing those tasks. The decision in *Schneider* will naturally result in attorneys taking numerous steps and precautions to avoid malpractice, which may result in higher legal fees to the client. I hope I am mistaken; however, this seems eerily familiar to what has happened in the case of the medical profession. We can only speculate as to what the courts will next determine to be a "central task" entrusted to the estate planning attorney.

Endnotes

1. *Schneider v. Finmann*, 15 N.Y.3d 306, 2010 Slip Op. 5281, N. Y. 2010.
2. *Id.* at 4.

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A Lawyer's Guide to the Top 13 Social Media Issues

By Sharon P. Stiller

Introduction

For most people, including employees, a day does not go by without accessing a social media site.

Employees may frequent social media sites, even while at work. Social media sites include Facebook, Twitter, MySpace, You Tube, LinkedIn, Foursquare and Plaxo. Other social media sites include Orkutin Brazil and India, QQin China, Skyrockin France, VKontaktein Russia, Cywoldin South Korea, and Muxlim, which focuses upon Muslim society. The methods of communicating vary from blogs, to wikis, to instant messaging (IM), text messaging, and use of sites such as ResearchGATE for scientists and researchers.

Businesses are also using social media extensively. They may use it to promote and market a business and to build their brand.

Kodak's former Chief Marketing Officer explained it well in Kodak's *Guide to Social Networking*:

> Why do I take the time to use social media like Twitter and Facebook? Because in today's media landscape, it's vitally important to be where our customers are. Kodak has always embraced this marketing philosophy, and today that means being active in social media.
>
> The exciting thing about social media is it offers the opportunity to engage in two-way conversations with your customers. What better way to know how to best serve your customers than to hear directly from them? Social media has enabled new ways to initiate conversations, respond to feedback and maintain an active dialogue with customers.

http://www.kodak.com/US/images/en/corp/about Kodak/onlineToday/Social_Media_9_8.pdf.

Businesses also may use social media defensively by defending against potential negative communications about the business in the workplace.

In this context, the ease of utilizing social media and the speed at which items are posted greatly enhance the potential for damage. For example, in 2009, a Michigan mayor accidentally posted a link to sensitive employee information on this Twitter account. He posted a link to a report that had personal information on 65 city employees, including the Social Security numbers of six of those employees. The report also included information regarding wages and other garnishments.

Twitter is a service that allows users to send messages of up to 140 characters known as "tweets" to its web site and directly to interested users or "followers" who subscribe to get updates from a particular user. The City responded to the security breach by providing employees with a free subscription to an identity theft protection service.

What happens when technology collides with employer regulation of conduct at work or conduct that affects work or customers? This article explores some of the common issues.

> *"[T]he ease of utilizing social media and the speed at which items are posted greatly enhance the potential for damage."*

Issue 1: Must an Employer Monitor E-mail?

While it is unlikely that a court will require that an employer monitor e-mail, it is unwise not to monitor e-mail. The reasons for doing so are many.

An employer cannot ignore harassment in the workplace or close its eyes to what is rampant. In 1997, for example, Chevron Oil Company paid $2.2 million to settle a sexual harassment lawsuit brought by female employees who alleged that the company had permitted employees to use its e-mail system to disseminate sexually offensive materials, including a message discussing the "25 Reasons Beer is Better than Women." In the author's own practice, it is common to find e-mails attached as "evidence" in many hostile environment lawsuits.

It is therefore important to be aware of what is happening at the workplace, and monitoring helps employers to accomplish this.

Moreover, if an employer is charged with knowledge of what is happening at the workplace, it will also be charged with obviating the inappropriate behavior, so effective monitoring is needed to create effective remediation. The New Jersey Superior Court has held that "an employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activity, lest it result in harm to innocent third-parties." *Doe v. XYC Corp.*, 382 N.J. Super. 122, 887 A.2d 1156 (App. Div. 2005).

This, of course, means that if an employer takes on the duty of monitoring, it must actually do so, and then take prompt and effective remedial actions if inappropriate conduct is revealed.

Issue 2: Can Employers Monitor an Employee's Use of Personal E-mail at Work?

Employers can monitor work-related e-mail. While the Electronic Privacy Communications Act protects electronic communications from interception, it generally does not prevent an employer from intercepting e-mails or other electronic communications because the exceptions permit monitoring with consent, or by the provider of services, and permits intracompany communications. In *Fraser v. Nationwide Mutual Ins. Co.*, 352 F.3d 107 (3d Circ. 2003), the court rejected a defense that the employer had improperly intercepted e-mails.

It is a good idea for an employer to have a policy that e-mail is for work use only (although this is an oft-debated question) and permitting monitoring of all e-mails. Some employers go so far as to have a logon which provides that: "I hereby consent that all information and communications may be monitored."

The question becomes more difficult when an employee accesses personal e-mail at work. The pivotal issue is whether the employee has a reasonable expectation of privacy in the personal account, if used at work. Establishing a reasonable expectation of privacy has proved difficult for employees, particularly if an employer has a policy prohibiting the use of personal e-mail at work. See, e.g., *United States v. Hassoun*, 2007 W.L. 141151 (S.D. Fla. 2007) (in light of employer's written policies, employee had no reasonable expectation of privacy in his office computer); *Garrity v. John Hancock Mutual Life Ins. Co.*, 2002 WL 974676 (D. Mass. 2002) (employee had no reasonable expectation of privacy, even though folders were marked personal). See also *U.S. v. Butler*, 151 F. Supp. 2d 82 (D. Me. 2001) (there was no reasonable expectation of privacy in a computer that was part of a university network system).

Nonetheless, some e-mails may be off limits no matter what, such as those e-mails between an employee and counsel. In *Stengart v. Loving Care Agency Inc.*, 201 N.J. 300, 990 A.2d 650 (N.J. 2010), the appeals court ruled that a company that was sued by a former employee alleging sexual harassment and constructive discharge was not entitled to read and copy pre-suit e-mails that the employee exchanged with her attorneys through her personal e-mail account while using a company computer. The e-mails were drafted on the Company's computer, and the Agency's e-mail policy confirmed that there was no privacy in e-mails on the company computer.

Issue 3: Can an Employer Monitor an Employee's Social Media Use?

Similar to monitoring e-mails, an employer can monitor an employee's social media use, so long as it does not violate any statute or ethics rule. Courts have upheld terminations resulting from an employer's monitoring of an employee's social media discussions.

But employers must be careful about surreptitious conduct. Employers and attorneys alike have suffered adverse consequences from surreptitiously monitoring social media use, when they have had to engage in subterfuge or duress in order to access the media.

Some state laws as well as the federal Stored Communications Act (SCA), 18 U.S.C. § 2701, prohibit intentionally accessing or exceeding authorization to access a facility in which an electronic communication is provided and thereby obtaining access to an electronic communication stored in the system.

In 2009, a Newark, New Jersey jury found that restaurant managers who surreptitiously monitored employees' postings in a MySpace gripe group violated state and federal laws protecting the privacy of Web communications. *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (D.N.J. 2009).

Two servers were fired for criticizing their employers in the postings. The jury found that the restaurant violated the SCA as well as the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J. S.A. 2A:156A-27.

The postings called managers "stupid corporate f***s" and "d*** suckers," among other things. However, a password was needed to enter the forum. Although the employer claimed that another employee consensually provided the password, the fired employees' attorney argued that the employee only gave up her password under duress.

The court found that sufficient evidence supported a finding that the managers violated the SCA by knowingly accessing a chat-group on a social media website without authorization. Evidence indicated that although the witness had provided her log-in information to her manager, she had not authorized access by the managers to the chat-group, she felt she had to give her password to the manager, she would not have given the information to other co-workers, and she felt she would get in trouble if she did not provide her password. Evidence demonstrated that the managers accessed the chat-group on several occasions, even though the chat-group was intended to be private and accessible only to invited members.

A decision from the U.S. Court of Appeals for the Fourth Circuit allowed punitive damages under the SCA, even absent a showing of actual damages where an employer had accessed an employee's personal e-mail account after she left the company, without the employee's authorization. *VanAlstyne v. Elec. Scriptorium Ltd.*, 560 F.3d 199, 28 IER Cases 1441 (4th Cir. 2009).

A similar conclusion was reached by the Philadelphia Bar Association's Professional Guidance Committee, which issued an advisory opinion on the question of whether a lawyer could, within the bounds of the Rules of Professional Conduct, ask another person to contact a witness on Facebook or MySpace in order to "friend" them and gain access to the information on their personal profiles. The Committee found that the proposed conduct would violate ethical prohibitions against misconduct and requirements for truthfulness in statements to others. See *Philadelphia Bar Ass'n Professional Guidance Comm'ee Opn.* 2009-02 (March 2009).

Interestingly, more surreptitious conduct may be occurring than we realize. Apparently, surreptitiously operating government agencies can access social media as an investigatory tool. Recently, the Electronic Frontier Foundation, a San Francisco-based civil liberties group, obtained a 33-page document demonstrating that the FBI was engaged in covert investigations on social media services.

In addition to not gaining access surreptitiously, an employer cannot use information gathered from social media in order to screen out applicants based on a protected category. Also, an employer cannot violate statutory privileges in obtaining e-mails, such as the attorney client privilege. *Stengart v. Loving Care Agency Inc.*, supra, 201 N.J. 300, 990 A.2d 650 (N.J. 2010).

Issue 4: Can an Employer Terminate an Employee Because of Social Media Content?

On May 3, 2010, syndicated newspapers published a column which read as follows:

> Dear Abby:
>
> My wife was hired for an administrative position. On her first day of work, they called her into the human resources director's office and told her she was being "let go" because of her website.
>
> The site has photos of her when she worked as a model for a large department store. They are in no way provocative or overly revealing. Photos of our children are also on the site.
>
> The HR director told her that one of the other (internal) applicants had Googled her and had seen the site. An image so upset the other applicant that she made a formal complaint, which caused my wife's dismissal!
>
> We consulted a lawyer and contacted the local Equal Employment Opportunity Commission only to be told that North Carolina is an "at will" employment state and that the employer did nothing wrong. We feel their actions were wrong. Is there anything that can be done?
>
> —Yankee in Confederate County
>
> Dear Yankee:
>
> I'm sorry, but the answer is no. In most states there is a presumption of "at will" employment unless you have a written contract to the contrary. However, the employer cannot terminate an employee for an illegal reason—such as age, religion, gender, sexual orientation or a disability. It does not appear from your letter that your wife was terminated for an illegal reason, but what happened stinks anyway.

Termination for this type of conduct is not uncommon. In fact, a survey by the American Management Association in 2006 reported that 26% of employers had terminated an employee for violating the employer's e-mail policies; this was a 9% increase of the 17% termination rate reported in 2001. As many as 34% of employers fired workers for excessive personal use of the Internet.

Here are some of the most recent cases permitting termination for internet, e-mail or social media content:

Marshall v. Mayor and Alderman of City of Savannah, 366 Fed Appx. 91 (11th Cir. 2010): The 11th Circuit upheld a district court decision that a probationary firefighter failed to plead a retaliation claim based on gender, when the fire bureau chiefs met with her to discuss reprimanding her for posting official photographs of bureau employees on her personal internet pages along with scantily clad photographs of herself.

These photos included a picture of firefighters from the Department, which she obtained without permission from the city's web site. Marshall labeled this picture "Diversity." Another photograph, captioned "Fresh out of the shower," depicted her posing bare-shouldered. The other revealed Marshall's backside. According to the record, it apparently was difficult to tell what clothing, if any, she was wearing. She titled that picture, "I model too—this is from like my second shoot!"

The Department learned about Marshall's MySpace photographs from an anonymous caller in February 2007. The caller suggested that the social network account contained images that "may conflict" with the way the Department wanted to be portrayed. She was issued a written reprimand for violating Department policy, and then ultimately terminated for her "denial" of violation of the Fire Department's policy. She claimed that her termination violated her First Amendment right "to freely communicate on a completely personal basis where no real or imagined damage" to her employer had been demonstrated. The court determined that her "speech" in disseminating photographs on her MySpace page was not entitled to First Amendment protection. The 11th Circuit also pointed out that she did not demonstrate that male firefighters were treated differently, and she was fired for more than merely social network postings.

Pacenza v. IBM Corp., 363 Fed Appx. 128 (2d Circ. 2010): Summary judgment in favor of the employer was upheld, where the 54-year old employee who suffered from post-traumatic stress disorder was fired purportedly because he violated company policies by accessing sexual materials on the internet while at work. The Court held that the employer's reason for termination was legitimate and non-discriminatory and was not shown to be pretextual. The conduct was a clear violation of IBM's policies, and there was no showing that he was singled out or treated more harshly than similarly situated non-disabled employees.

Calandriello v. Tennessee Processing Center, LLC, 2009 WL 5170193 (M.D. Tenn. 2009): The Court dismissed a discrimination claim, finding a sufficient non-discriminatory reason for his termination based upon loss of confidence resulting from an allegedly bipolar employee's (1) admitted viewing of military and violent web sites (including ones providing news about serial killers) on his work computer; and (2) altering an inspirational poster to say that the image of a well known serial killer was inspirational. The employee had claimed that his use of the Internet did not violate company policy because he was "told by my supervisor to surf the internet when I had no project to work on" and other employees were constantly searching the Internet.

Cervantez v. KMGP Services Co. Inc, 349 Fed. Appx. 4 (5th Circ. 2009): The Court found that violation of the employer's computer use policy, which prohibited access to pornographic sites, was a legitimate reason for discharge and that the employee failed to show that this was pre-textual. In language that may prove helpful in these types of cases, the Court noted that the fact that the logs produced by the employer were inconsistent did not prevent summary judgment, since actual innocence is irrelevant if the employer reasonably believed the proffered reason and acted in good faith.

County of Sacramento, 118 Lab. Arb. Rep. (BNA) 699, 702 (2003) (Riker, Arb.): In a union setting, the Court will consider the equities despite the employer's policy. In one case an employer promised an employee confidentiality when interviewing her as part of a sexual-harassment investigation. The employee disclosed that she had used an internal computer system to send sexually explicit messages to a co-worker. The interviewer stated that the information she provided would not "be reported to her supervisor or co-workers, unless there was a need to know." The arbitrator reasoned that the one-day-suspension of the employee should be reduced to a written reprimand, in part because it was based on her confidential disclosures.

Schools are not immune from these issues; in some respects, conduct is scrutinized even more when children are involved.

In *Snyder v. Millersville University et al*., Case No. 07-1660 (E.D. Pa. 2007), a student was denied an educational degree based on information that the school learned from the student's MySpace account. She posted an e-mail about the students she was student teaching and a supervising teacher, accompanied by a photo of herself in a pirate's cap holding a cup, and captioned with "drunken pirate." When she was rated unsatisfactory in her student teaching and denied a degree, she sued, claiming violation of her free speech rights among other claims. In another incident, it was reported that a Sociology professor was escorted off the campus of East Stroudsburg University. The Newspaper reported that in February, 2010 the associate professor had posted on her Facebook page, "Had a good day today, didn't want to kill even one student." Earlier, she had written, "Does anyone know where I can find a very discrete hitman, it's been that kind of day." Chronicle of Higher Education, 2/28/2010 .

In *A.B. v. State*, 863 N.E.2d 12212 (Ind. Ct. App), a minor posted expletive-filled comments on a MySpace page purportedly in the name of the middle school principal; when he was held as a juvenile, the court found that the comment was political speech aimed at the principal's policies and protected under the Indiana constitution. But see *J. S. v. Blue Mountain School Dist*, 2007 WL 954245 (M.D. Pa. 2007), where the students posted MySpace comments on pages purportedly in the names of the principals, the punishment was upheld.

The rules may be different for public employees, who enjoy a free speech right. See, e.g., *Richerson v. Beckon*, 337 Fed. Appx. 637 (9th Circ. 2009) (teacher disciplined for blogging about what it was like inside a school district; her transfer did not violate her First Amendment rights since the speech had a significantly deleterious effect).

Issue 5: Is It Legally Permissible to Use the Internet or Social Media to Conduct Background Checks?

Employers commonly perform "Google" searches of applicants as part of the reference check process. A 2009 CareerBuilder survey found that 45% of employers report that they use social media sites to research job candidates. It has been estimated that at least 50 million individuals in the U.S. maintain "blog" diaries of their daily activities and at least 100 million post profiles on social media sites. These sites are commonly used to check up on an applicant.

Why is it important to verify credentials? The answer is that it is remarkable how many employees lie about their credentials. In 2002 Bausch & Lomb's chief executive, Ronald Zarella, was found to have lied about having a master's degree in business administration from NYU. Kenneth Lonchar, finance chief of Veritas Software, resigned in 2002 after the company learned he misstated his educational credentials, including falsely claiming to hold an MBA from Stanford. Sandra Baldwin, president of the U.S. Olympic Committee, left office in 2002 after admitting she lied about having a Ph.D. in English (she never actually completed her dissertation). See *White Lies on Resumes Raise Red Flags for Employers - Investing - Economy - SmartMoney.com*, http://www.smartmoney.com/investing/economy/white-lies-on-resumes-raise-red-flags-for-employers-21201/?hpadref=1#ixzz0nTJWEr6O.

According to the 2009 Screening Index released by ADP, a human-resources and payroll provider, 46% of employment, education or credential reference checks conducted in 2008 revealed discrepancies. That's up from 41% in 2006.

Because information posted on the Internet is voluntary, employers generally are not restricted from accessing information. However, employers may not engage in misrepresentation or surreptitious means to gain entry to a site deemed to be private, as explained in more detail in the beginning of this article.

Some of the most common reasons for rejecting applicants based on Internet background checks are:

- Candidate posted provocative or inappropriate photographs or information: 53%
- Candidate posted content about drinking or using drugs: 44%
- Candidate made derogatory statements about their previous employer, co-workers or clients: 35%
- Candidate demonstrated poor communication skills: 29%
- Candidate made discriminatory statements: 26%
- Candidate lied about qualifications: 24%
- Candidate shared information from a previous employer: 20%

On the other hand, some employees have been hired *because of* their online profiles. Some of the reasons include:

- Candidate's profile demonstrated personality and a good fit: 50%
- Candidate's profile supported the applicant's professional qualifications: 39%
- Candidate was creative: 38%
- Candidate showed solid communication skills: 35%

There are restrictions set forth under the Fair Credit Reporting Act , 15 U.S.C. § 1681 et seq. to obtaining background information without an employee's permission. The FCRA only applies when outside third parties are used to collect the information, and the provisions may readily be complied with by obtaining the employee's consent for a background check. In 2003, Congress passed the Fair and Accurate Credit Transactions Act ("FACT") which specifically excludes from the definition of consumer report an investigation of: (1) suspected misconduct relating to employment; and (2) compliance with federal, state or local laws and regulations or any preexisting written policies of the employer.

Along with complying with the Fair Credit Reporting Act, employers must always remember that just as they cannot negatively use information about a protected category related by the applicant, so, too, employers are prohibited from taking adverse action based upon a protected category learned through viewing social media.

Issue 6: Do Laws Controlling an Employee's Off-Duty Conduct Impact Upon an Employer's Ability to Use Social Media, or to Terminate for the Content of an Employee's Social Media? What About Off-Duty Conduct Laws or Searches Involving Public Employees? Does It Matter if the Employer's Equipment Is Used?

Several states protect off-duty conduct. New York, for example, has a "lawful activities" law, which protects employees engaging in recreational or certain political activities off duty, while not using work equipment, or work property. See N.Y. Labor Law § 201-d. Other states with similar laws include California (Cal. Lab. Code §§ 96(k), 98.6; Illinois (820 Ill. Comp. Stat. § 55/1-120 (limited to use of lawful products); Minn. Stat. § 181.938 (limited to lawful consumable products); Wisc. Stat. § 111.321.

To date, it is unclear whether anyone has attempted to use these statutes to protect his or her off-duty communications. To provide protection, it will have to be found that use of social media constitutes a recreational or political activity, which is not much of a stretch. However, to the extent that the communication is made at work or involves work-related activities, it may not find protection under these laws.

There are also Fourth Amendment and free speech protections available to public employees. The parameters of some of the protections have preliminarily been set by the United States Supreme Court when it decided the case of *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010). There, the

United States Supreme Court determined that a city acted reasonably in reviewing sexually explicit personal text messages transmitted on pagers provided by the police department in connection with work. The employees claimed that acquiring transcripts of the messages constituted an unreasonable search in violation of the Fourth Amendment. While holding that the conduct of the police department was reasonable, the Supreme Court declined to set general standards relating to social media use. The Court noted that:

> The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.… Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.… At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve.

City of Ontario v. Quon, supra, 130 S.Ct. 2619, 2629–30 (2010).

Issue 7: Can an Employer Regulate Whether Employees Spend Work Time Visiting Social Media Sites?

A 2009 survey conducted by Deloitte LLP concludes that 55% of all employees visit social media sites at least once a week. However, only 20% of the employees admit visiting these sites during working hours.

Unless a state statute prohibits monitoring work time, there is no other impediment to an employer monitoring how much time employees spend on productive activities or on non-productive activities, such as visiting social media sites.

In addition, in some contexts, the employee's job duties may require visiting social media sites. For this reason, if the employer is using social media as part of its own marketing strategy, it will need to consider the need for employees to be involved in that strategy in developing an appropriate policy on usage.

Issue 8: Can an Employer Be Held Liable for an Employee's Conduct on a Network?

The FTC has issued regulations that set forth strict regulations on employees' use of social media to discuss a product or service offered by an employer. 16 CFR § 255.1(d) (2009) The Guidelines provide that:

> Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failure to disclose material connections between themselves and their endorsers. Endorsers also may be liable for statements made in the course of their endorsements.

Under these guidelines, an employee must disclose his or her relationship, each time s/he endorses an employer's product or service. A positive comment on Twitter or Facebook could be deemed to be an endorsement if it "reflects [the employee's] opinions, beliefs, or experiences" about the employer's product or service.

The guidelines apply to endorsements made using "new media" such as blogs and social media sites, and FTC enforcement actions could be brought against a company whose employees comment on company products for services without disclosing the employment relationship.

The practical import, then, is that the employer should prohibit all communications about products or services or at least prohibit communications without the employer's approval and prior consent. In addition, the policy should require that if an employee makes any comment, the employee must disclose the employee's relationship with the employer. Last, the policy should provide that all employees must report any communications coming to their attention that violate the policy.

Similarly, the SEC in a guidance issued in 2008 (Release No. 34-58288 (August 1 2008)) made it clear that a company employee "speaking" from a company interactive forum may never be deemed to be acting in an individual capacity, so that the company may be liable for all employee statements made in that capacity.

Issue 9: Can an Employer Restrain an Employee or Ex-Employee from Defaming the Employer on a Network?

An employer may validly terminate an employee for making derogatory comments about the employer on the internet (See *Varian Med. Sys., Inc. v. Delfino,* 113 Cal. App. 4th 272 (2003), rev'd on other grounds (holding that an employer may terminate an employee who posted derogatory comments about the company and company executives).

In *Ramos v. Madison Square Garden Corp*, 257 A.D.2d 492 (1st Dept. 1999), the court refused to grant an injunction against an employee's defamatory statements, on the ground that there is an adequate remedy at law (post-publication damages) and relief in the nature of prior restraint is disfavored. But see *Aguilar v. Avis Rent-A-Car*

System, Inc., 21 Cal. 4th 121 (Cal. 1999) (granting a limited workplace injunction prohibiting racial epithets in the workplace).

Issue 10: Can an Employer Obtain Damages from a Network Site for Disparaging Comments Made by an Employee?

In general, the Communications Decency Act of 1996 ("CDA"), 47 U.S.C. § 230 et seq., provides immunity to operators of websites in most situations involving communications by third parties. In *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843 (W. D. Tex. 2007), the court held that these immunity provisions insulated the network from liability for a negligence claim alleged by the victim of sexual abuse by an online predator.

Issue 11: Are There Any Special Issues Involved When Employees Illegally Post Trade Secrets or Confidential Information?

Even in cases where an employee allegedly misappropriated trade secrets and was in danger of posting copyrighted material, the court found that enjoining the posting would violate the First Amendment as a prior restraint. *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745 (E.D. Mich. 1999). But there can be tremendous repercussions if employees or former employees post trade secrets or confidential information.

If employees post copyrighted material on an employer-operated blog and permission hasn't been given by the copyright owner nor is it a "fair use" under the Copyright Act, thereby exposing the employer to potential liability, the owner can request the removal of infringing content.

While there may be some common law protection, employers should have confidentiality agreements with employees, which should prohibit disseminating confidential information of the employer as well as the employer's clients or customers. Moreover, the agreement and/or policies should explicitly prohibit posting any confidential information on any Internet site, or removing or copying it.

Issue 12: Are There Any Special Protections Available or Other Considerations for Union Employees?

The NLRB has held that an employer does not violate the NLRA by having a policy prohibiting employees from using e-mail for non job-related solicitations. *The Guard Publishing Co. d/b/a The Register-Guard*, 351 NLRB No. 70 (12.16/2007). See, e.g., *City of Okmulgee*, 124 Lab. Arb. Rep. (BNA) 423, 430 (2007) (Walker, Arb.); Kuhlman Elec. Corp., 123 Lab. Arb. Rep. (BNA) 257, 262 (2006) (Nicholas, Arb.) (new policy on use of computers and internet is not contrary to CBA and does not materially, substantially, and significantly affect the terms and conditions of employment); but see California Newspaper Partnerships, 350 N.L.R.B. No. 89 (Sept. 10, 2007) (employer must bargain with union over policy forbidding use of e-mail accounts to send messages about union affairs).

In Sears Holdings, 18-CA-19081 (December 2009), the NLRB issued an Advice Memorandum finding that a social media policy did not violate Section 8(a)(1) because it could not be reasonably interpreted as chilling Section 7 activity. That social media policy provided as follows:

> [I]n order to ensure that the Company and its associates adhere to their ethical and legal obligations, associates are required to comply with the Company's Social Media Policy. The intent of this Policy is not to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates.
>
> **Prohibited Subjects**
>
> In order to maintain the Company's reputation and legal standing, the following subjects may not be discussed by associates in any form of social media:
>
> - Company confidential or proprietary information
> - Confidential or proprietary information of clients, partners, vendors, and supplier
> - Embargoed information such as launch dates, release dates, and pending reorganizations
> - Company intellectual property such as drawings, designs, software, ideas and innovation
> - Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects
> - Explicit sexual references
> - Reference to illegal drugs
> - Obscenity or profanity
> - Disparagement of any race, religion, gender, sexual orientation, disability or national origin…

However, the NLRB has filed a complaint against American Medical Response of Connecticut, Inc., contending that the non-unionized company illegally fired an employee for criticizing her supervisor on her personal Facebook page.

In *Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Circ. 2002) a pilot claimed he was wrongly disciplined and was critical of labor concessions on his blog. The Ninth Circuit Court of Appeals found that the content of the blog represented protected union activity and lacked the actual malice needed to make it defamatory.

Employees have been disciplined for conduct involving the internet, even though the employee is a union member. See, e.g., *Dep't of Veterans Affairs* (Hoffman, Arb.) (supervisor observed grievant repeatedly using computer for non-work related matters and calling other employees over to view his computer or announcing news to them and so requested a review of his internet usage); *Dept. of Veterans Affairs* (Petersen, Arb.) (e-mails evidencing a slowdown were discovered when someone alleged harassment and defamation; the arbitrator reduced the discharge to a written reprimand because that was the penalty for a slowdown under the employer's progressive discipline policy); *Tesoro Ref. & Mktg. Co.*, 120 Lab. Arb. Rep. (BNA) 1299, 1303 (2005) (investigation where employee posted hate group poster with listed URL); *A.E. Staley Mft. Co.*, A.E., 119 Lab. Arb. Rep. (BNA) 1371 (2004) (Nathan, Arb.); *MT Detroit*, 118 Lab. Arb. Rep. (BNA) 1777 (2003) (Allen, Arb.) ("chat room" operator informed company that an employee had posted a message containing offensive racial language); *State of Minn.*, 117 Lab. Arb. Rep. (BNA) 1569 (2002) (Neigh, Arb.) (extensive investigation of chain of pornographic e-mails and related computer use based on complaint from one employee that she viewed a naked woman on co-worker's computer screen).

The same issues arise in relation to union members' conduct when that conduct takes place through using electronic methods of communication. There may be secondary picketing issues if mass e-mails are sent to employees by others soliciting membership or support or if employees use e-mail to put economic pressure on a secondary employer to stop doing business with a primary employer.

Issue 13: Should Employers Have a Policy? If so, What Should It Contain?

Of course, the best practice is to have a policy which addresses not only computer use, licensing and access to the internet, but also the new issues evolving concerning social media. However, it is not sufficient to simply have a policy. It is incumbent upon employers to have policies that actually reflect what they do and to enforce their policies, as well as to train employees regularly about what is expected and what is prohibited. Policies related to these issues include a workplace anti-harassment policy (including using the computer, internet or social media), a computer and e-mail policy (including cell phones, if company issued, and prohibiting personal use of the computer at work), a social media policy prohibiting use of company logos, trademarks or names or making statements about the company except as authorized by the company, a confidentiality and trade secrets policy, a no solicitation, no distribution policy, and a noncompetition policy if enforceable in your jurisdiction. There is no one-size-fits-all policy for every employer, since, for example, an employer who is using social media as part of its own strategy will need to take that into account in developing appropriate policies.

Fundamental aspects of a policy depend on the organization, but should include:

1. Employees should be warned against any postings which contain:
    a. Confidential information: Employees should be warned that they must keep the employer and customers' proprietary information confidential;
    b. Discriminatory statements or sexual innuendos regarding anyone associated with the employer (including customers);
    c. Defamatory or derogatory statements about anyone associated with the employer (including colleagues and customers);
    d. Any illegal conduct using the computer or software; and
    e. Endorsements of company products or services.
2. Policies should also warn:
    a. Against using company logos, or other identifying marks without company permission;
    b. Making any reference to company services or products;
    c. Adding any unlicensed software to the company's computer systems;
    d. Adding any software to the company's computer system without company approval;
    e. Accessing any personal or inappropriate sites from work, including but not limited to pornographic or dating sites;
    f. That all use of the computer during work may be monitored and there is no privacy right in any account or information accessed during work or from the work-related computer;
    g. Requiring review of any material before it is posted on the employer's website;
    h. Prohibiting copying other material to publish on the employer's website;
    i. Requiring professionalism in all postings and publications; and

j. That all computer use may be monitored.

3. Employees should also be required to:

   a. Provide all passwords for accounts used during work time to management;

   b. Report all violations of company policy;

   c. Obtain management approval before sharing any data; and

   d. Obey all standards for linking.

4. Managers should be warned against any postings which contain:

   a. An informal review of an employee such as recommending someone on LinkedIn or “friending” a subordinate on Facebook; and

   b. Making any statements about colleagues on a social media site.

Conclusion

Social media is a powerful tool and it can be powerful weapon. We are just beginning to develop the rules of engagement governing conduct relating to social media. This article contains some of these rules but certainly more will develop, as we attempt to harness this powerful tool in a way that is fair to both employers and employees.

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Sex, Lies, and Videotape: Cyber Liability Issues in a Digital World

By Mercedes Colwin and Elizabeth F. Lorell

MySpace. Facebook. Friendster. Blogs. AboveTheLaw.com. You won't find these terms in the latest edition of Black's Law Dictionary. But they are appearing with greater frequency in legal memoranda and briefs, law journal articles and court opinions.

The explosive growth of social networking sites and computer-based platforms people use to express their opinions and to communicate with each other is reshaping the legal landscape in dramatic ways. Lawyers and clients venturing onto this terrain are confronting legal issues of first impression in the federal and state courts.

Indeed, the absence of settled precedent in "cyberlaw" presents significant challenges to a wide variety of clients, whether they are school districts or Fortune 500 companies. Underscoring cyberlaw's unpredictability is the inherent difficulty in applying decades-old legal precedent to emerging technologies. Two cases from two federal district courts in the Third Circuit starkly illustrate this clash, both of which are discussed in the article. In addition, this article discusses a case involving efforts to invoke the justice system to punish an online prank that went too far and a case in which a local prosecutor sought to indict a group of teenagers for the act popularly known as "sexting." The article then goes on to address other cyberspace-based platforms similar to MySpace.com, and discuss how they can bring unwanted attention to your law firm, your clients, or your company. Finally, the article proposes a set of "best practices" to help you navigate the pitfalls that so often dot the terrain in cyberspace.

I. Cases Involving Cyber Law

A. MySpace Mayhem—Protected Speech or Punishable Offense?

It all started with a computer, an Internet connection, and an idea. Justin Layshock, a high school senior from Western Pennsylvania, was not particularly fond of his principal, Mr. Trosch. So he decided to play a prank on Mr. Trosch. On or about December 10, 2005, he logged on to his grandmother's computer, and signed onto MySpace.com ("MySpace").[1] The Court described MySpace.com as "a very popular Internet site where users can share photos, journals, personal interests and the like with other users of the Internet."[2] On MySpace, Layshock created a "parody profile" of Mr. Trosch.[3] "No school resources were used to create the profile but for a photograph of [Mr. Trosch] that [Layshock] copied from the school's website[.]"[4] The "parody profile" depicted Mr. Trosch answering a number of "non-sensical answers to silly questions[.]"[5]

For example,

> In response to the question "in the past month have you smoked?," the profile says "big blunt." In response to a question regarding alcohol use, the profile says "big keg behind my desk." In response to the question, "ever been beaten up?," the profile says "big fag." The answer to the question "in the past month have you gone on a date?" is "big hard-on." The profile also refers to [Mr.] Trosch as a "big steroid freak" and "big whore." The profile also reflected that [Mr.] Trosch was "too drunk to remember" the date of his birthday.[6]

"[T]he absence of settled precedent in 'cyberlaw' presents significant challenges to a wide variety of clients.… Underscoring cyberlaw's unpredictability is the inherent difficulty in applying decades-old legal precedent to emerging technologies."

Word of Layshock's prank spread quickly through the school. In fact, Mr. Trosch learned of the unflattering MySpace profile from his daughter, also a student at Layshock's school.[7]

Discipline was swift. On December 21, 2005, Layshock and his mother were summoned to a meeting with the school district's superintendent and Mr. Trosch's co-principal, where Layshock admitted his involvement in the prank.[8] He was immediately suspended from school, and was ultimately prohibited from attending his high school graduation ceremony.[9]

On January 27, 2006, Layshock filed a lawsuit against the school, in which he alleged that the punishment meted out by the school violated his First Amendment right to engage in free speech.[10] He also alleged that the school's disciplinary policies and rules were unconstitutionally vague and/or overbroad.[11]

At the district court, both parties moved for summary judgment.[12] The Court framed its task as "balanc[ing] the freedom of expression of a student with the right and responsibility of a public school to maintain an environment conducive to learning."

This was not the first federal court to confront the thorny issue of student free speech. In fact, the United States Supreme Court faced a similar question more than 30 years ago in *Tinker v. Des Moines Independent Community School District*.[13] In *Tinker*, the Supreme Court held that school officials have a right to prescribe and control conduct in schools consistent with fundamental constitutional safeguards.[14] Yet the Court also rather famously observed that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[15]

More recently, the Supreme Court revisited the *Tinker* issue in 2007 in *Morse v. Federick*.[16] In *Morse*, the Supreme Court rejected a First Amendment challenge brought by a student who was disciplined by his school for unfurling a banner which proclaimed "Bong HiTS 4 Jesus."[17]

Layshock, however, marked the first time a court was asked to consider a First Amendment challenge to a disciplinary measure as a result of a phony MySpace profile. Here, the Court reviewed both *Tinker*, *Morse*, and its progeny, and concluded that as an initial matter, the school had to "establish that it had the authority to punish the student."[18]

The Court then determined that the school *had not* established that authority. Critical to the Court's decision granting partial summary judgment in favor of Layshock was the fact that the school had "not established a sufficient nexus between [his] speech and a substantial disruption of the school environment."[19] Unlike *Morse*, where the conduct occurred just shortly after the students were dismissed from class to view the running of the Olympic torch, the conduct in *Layshock* occurred off-campus, *i.e.*, at the student's grandmother's house, where he logged onto her computer and created the phony MySpace profile.[20] This off-campus conduct created "gaps in the causation link between [Layshock's] speech and a substantial disruption of the school environment."[21] Thus, the Court held that the discipline imposed on Layshock violated his First Amendment free speech rights, and he was therefore entitled to a trial on damages.[22]

Particularly interesting in the Court's analysis is the notion that the conduct occurred off-campus. Although it is true that Layshock logged onto the website at his grandmother's house, the record before the Court also revealed that many other students knew about the impostor profile because they, too, had viewed the MySpace profile from their home computers. Indeed, the wide dissemination of the impostor profile—potentially to the millions of individuals with access to MySpace, including the other students at Layshock's school who viewed the MySpace page about Mr. Trosch—appears to cast doubt on the theory that Layshock's conduct was confined to a single personal computer with insufficient links to the school. Although the apparent takeaway from *Layshock* is that the *situs* of the conduct is dispositive, another district court within the Third Circuit took a contrary view.

The facts of *Layshock* and *Snyder v. Blue Mountain School District*[23] are essentially indistinguishable. Like the student in *Layshock*, the student in *Snyder* created an impostor MySpace profile of her high school principal, "which indicated, *inter alia*, that he is a pedophile and a sex addict."[24] Although the profile did not identify the principal by name, "it identified him as a principal and included his picture which had been taken from the school district's website."[25] As in *Layshock*, the discipline in *Snyder* was swift. The student received a ten-day suspension from school. And like the student in *Layshock*, she brought a lawsuit against the school, also alleging that the school's disciplinary action violated her First Amendment right to free speech.[26]

In its analysis of the parties' respective motions for summary judgment, the Court examined *Tinker*, *Morse*, and several other cases balancing the free speech rights of public school students with the right of school administrators to maintain an educational environment free from distraction. Here, however, the Court focused on the content of the MySpace profile, rather than where it was created. The Court noted that the profane language contained in the impostor profile greatly diminished its First Amendment protection, and that, based on *Morse*, the "school can validly restrict speech that is vulgar and lewd…and promotes unlawful behavior."[27]

The Court was not persuaded by the student's argument—met with success in *Layshock*—that she cannot be "punished for the website at school although she created it off campus."[28] The Court noted that there was a strong connection between the off-campus conduct, the creation of the impostor profile, and its "on-campus effect."[29] Indeed,

> [t]he website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district's website.[30]

The foregoing indicia of an on-campus connection was critical to the Court's decision dismissing the complaint, and it is perhaps what distinguishes it from *Layshock*. However, the similarities are striking enough to raise serious questions about the applicability of law developed in the pre-Internet age to issues that arise in cyberspace.

Both decisions were affirmed on appeal to the Third Circuit.[31] However, once the conflict between the rulings in *Layshock* and *Snyder* became apparent, the Third Circuit vacated the decisions and ordered *en banc* rehearings. It will certainly be interesting to see how the Third Circuit reconciles these conflicting decisions, and whether its future *en banc* ruling will provide some much-needed clarity in this complicated realm of cyberlaw.

B. MySpace Prank That Went Too Far

While the fallout from the pranks involved in *Layshock* and *Snyder* can largely be characterized as hurt feelings and bruised egos, few would dispute that a MySpace prank in Missouri had devastating consequences.

There, prosecutors charged that Lori Drew:

> with the help of her daughter and a family friend who worked for Ms. Drew, had created a phony identity and MySpace account for a teenage boy, "Josh Evans," on a computer in Ms. Drew's home in suburban St. Louis. According to evidence at the trial, Ms. Drew then used the account to conduct an online courtship with Megan Meier, an emotionally disturbed 13-year-old girl who had once been a friend of her daughter.[32]

When Drew abruptly ended the "relationship," Meier committed suicide.[33] Local authorities declined to prosecute, but federal prosecutors indicted Drew in Los Angeles, where MySpace maintains its servers, and she was convicted on charges of computer fraud.[34] That conviction was later vacated.[35]

Some have commented that the inability to convict Drew for her role in the hoax suggests a need to modify criminal statutes to prosecute crimes in the digital age, and once again shows how the advancement of technology has spawned new and complex issues of liability in cyberspace.

C. Sexting: Felony or Foolishness?

In what may be the first Court of Appeals case to ever define the term "sexting," the Third Circuit recently affirmed a ruling enjoining a district attorney in Pennsylvania from indicting a group of teenagers who used their cell phones to exchange nude or semi-nude photographs.[36] The facts of *Miller* are as follows: in October 2008, school officials in Tunkhannock, Pennsylvania, "discovered photographs of semi-nude and nude teenage girls, many of whom were enrolled in their district, on several students' cell phones."[37]

School officials seized the phones and turned them over to the local district attorney, who launched an investigation. Believing that a crime had been committed, the District Attorney ("DA") sent a letter to the parents of between 16 and 20 students "threatening to bring charges against those who did not participate in what has been referred to as an 'education program[.]'"[38] The program was designed to last six to nine months and was to focus on education and counseling.[39]

One of the photographs depicted two teenagers "wearing white, opaque bras."[40] Another showed a teenager "wrapped in a white, opaque towel, just below her breasts, appearing as if she just had emerged from the shower."[41]

Most of the parents objected to the program, and the threat of criminal charges. They filed temporary restraining order (TRO) enjoining the DA from initiating criminal charges for the photographs. The TRO was granted, and the DA appealed.[42]

In an extensive opinion, the Third Circuit held that a future prosecution would be a retaliatory act in violation of a parents' Fourteenth Amendment right to parental autonomy and a student's First Amendment right against compelled speech.[43] To that end, the Court held that the DA cannot assume the role of a parent and "impose on their children his ideas of morality and gender roles."[44] As to the students' First Amendment claim, the Court held that the "sexting" at issue was essentially a moral—and not legal—matter over which the DA lacked authority.[45]

The Third Circuit's decision is yet another example of how government officials have grappled with new and expanding modes of expression that involve issues of sex, morality and expression. It may also serve to alert parents of teenagers to monitor their children's cell phone usage.

II. Cyber Websites and Why Law Firms Need to Be Wary

A. An Online Battle Royale

Although MySpace serves as the starting point for our discussion of some of the legal issues in cyberlaw, it is certainly not the only source of "cybercontroversy." Take, for example, the AboveTheLaw.com website. That site permits readers to anonymously post comments about all things legal. In fact, some users frequently post negative comments about specific law firms, while others leak internal firm memo's that are subsequently published on the AboveTheLaw.com website. While it is true that law firms are much different than public schools, it seems reasonable to ask whether a First Amendment defense could be invoked by a government attorney who posts comments about issues of public concern on the AboveTheLaw.com website. Or whether a website like AboveTheLaw.com could be held liable for disseminating a firm's internal memo.

Of course, not all postings on websites like AboveTheLaw.com involve issues of public concern. And not all posters have altruistic motives. Take, for example, the case of Aaron Brett Charney. He sued the prominent law firm of Sullivan & Cromwell LLP in New York State court, and his sex discrimination complaint was displayed prominently on AboveTheLaw.com. The complaint, which is still available for download on AboveTheLaw.com, alleges, among other things, that a

Sullivan & Cromwell partner threw a document at Charney's feet and remarked: "bend over and pick it up—I'm sure you like that[.]"[46]

What AboveTheLaw.com managed to do in this instance is take a rather acrimonious dispute between two parties and publish it to a much larger audience. Now consider the impact. Current and potential clients may become aware of the dispute and develop reservations about the firm. Sullivan and Cromwell employees may become aware of the firm's "dirty laundry" simply by logging on to AboveTheLaw.com. And plaintiffs like Charney may use the unwanted exposure as a leverage point in settlement discussions.

Sullivan and Cromwell hasn't been the only firm to find itself in the cyberspace spotlight.

One attorney became so incensed with his former employer, Levinson Axelrod, P.A., a New Jersey-based personal injury law firm, that he created a website named—what else—www.levinsonaxelrodreallysucks.com.

The site was created and is maintained by Edward Heyburn, a former Levinson Axelrod associate. His strong negative feelings about the firm, and his ongoing legal battles with Levinson Axelrod, are well-documented on the website. In fact, in May 2010, the United States District Court of the District of New Jersey granted in part and denied in part a motion by Heyburn to dismiss a lawsuit filed by Levinson Axelrod.[47] The lawsuit seeks damages for "cybersquatting, trademark infringement, false designation of origin, trademark dilution, trafficking in counterfeit marks, and fraud."[48] The opinion noted that a prior court order directed Heyburn to shut down the website he previously used to sling mud at Levinson Axelrod: www.levinsonaxelrod.net.[49]

In its May 3 decision, the Court held that all but one of Levinson Axelrod's claims against Heyburn could move forward. The only cause of action dismissed from the lawsuit was a claim predicated on the New Jersey Consumer Fraud Act, which, as a matter of law, does not apply to attorneys.[50]

While it appears that the firm's efforts to shut down the prior website—www.levinsonaxelrod.net—were largely successful, it is also evident that the firm has failed to quash the dissent still emanating from www.levinsonaxelrodreallysucks.com. In fact, the associate's quest to smear his former firm has gained traction. In November 2009, *The AmLaw Daily* posted an article on the Internet chronicling the back-and-forth between Levinson Axelrod and its web-based rival.[51] The article notes that the website's operator "calls one Levinson partner 'a used cars salesman with a law degree' and opines that another 'looks like death.'"[52] It is thus clear that efforts to contain the damage generated by these sorts of websites may often backfire. Perhaps one would conclude that in this situation, Levinson Axelrod faced a Hobson's choice.

In addition to the websites discussed here, there are a host of others dedicated to dissecting the legal profession. They include: The *Wall Street Journal* law blog (www.blogs.wsj.com/law); www.judged.com (billed as "insider source for real, unfiltered intelligence on law firms around the world"); and www.ratethecourts.com (where visitors can post comments about judges under the cloak of anonymity). It is important that readers look at these websites to see how much of the previously uncirculated private opinion has now been opened for millions to get at the click of the button.

III. Best Practices

So how can you avoid having your internal memorandum shared with the world via sites like AboveTheLaw.com, and what can be done to avoid the types of discontent that spawn websites such as www.levinsonaxelrodreallysucks.com?

First, keep in mind that anything you publish, whether in print or in e-mail, can easily be shared. If written communication—such as an internal memorandum—is necessary to effectively manage your operation, require each recipient to agree to maintain its confidentiality.

Second, follow the Golden Rule. Broadcasting abrasive e-mails late at night and early in the morning can foment unhappiness and lay the groundwork for an extensive cyberbattle.

Third, create and disseminate a comprehensive Internet usage policy that expressly prohibits anyone from posting information about your firm on any websites. You can also install software that blocks access to sites like AboveTheLaw.com.

Of course, this is not an exhaustive list of steps you can take to avoid the situations discussed in this paper, and you will have to tailor your decisions to the needs of your firm or your business. Moreover, it may be helpful to learn the lingo of cyberspace. To that end, included at the end of this article are the "Top 50 Popular Text Terms Used in Business," and the "Top 50 Acronyms Parents Need to Know, both courtesy of www.netlingo.com.

Conclusion

The advent of cyberspace presents a complex set of challenges for attorneys, their firms, their clients as well as for schools, parents and children. In the absence of legislative enactments and legal decisions, we caution that all of us, in order to protect our colleagues and families from cyber disaster, need to find creative and safe ways to navigate the unfamiliar—and constantly shifting—terrain of cyberspace.

Endnotes

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5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 593.
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10. *Id.* at 594.
11. *Id.*
12. *Id.* at 590.
13. 393 U.S. 503 (1969).
14. *Id.* at 503.
15. *Id.*
16. __ U.S. __, 127 S.Ct. 2618 (2007).
17. *Id.*
18. *Layshock*, 496 F. Supp.2d at 600.
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23. No. 3:-7cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), *aff'd*, 593 F.3d 286 (3d Cir. 2010), *reh'g en banc granted, op. vacated* (April 9, 2010).
24. *Id.* at *1.
25. *Id.*
26. *Id.* at *3.
27. *Id.* at *6.
28. *Id.* (Footnote omitted).
29. *Id.* at *7.
30. *Id.*
31. *See Layshock v. Hermitage School Dist.*, 593 F.3d 249 (3d Cir. 2010); *see also J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 593 F.3d 286 (3d Cir. 2010).
32. Rebecca Cathcart, *Conviction Is Tossed Out In MySpace Suicide Case*, N.Y. Times, July 3, 2009, at A4.
33. *Id.*
34. *Id.*
35. *Id.*
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37. *Id.* at 143 (footnote omitted).
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42. *Id.* at 145.
43. *Id.* at 150.
44. *Id.* at 151.
45. *Id.* at 152.
46. *Charney v. Sullivan & Cromwell LLP*, Index No. 07100625 (Sup. Ct. N.Y. Co. 2007).
47. *See Axelrod v. Heyburn*, Civ. No. 09-5627, 2010 WL 1816245 (D.N.J. May 3, 2010).
48. *Id.*
49. *Id.* at * 1.
50. *Id.* at *4.
51. http://amlawdaily.typepad.com/amlawdaily/2009/11/jerseyfirms.html.
52. *Id.*

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Top 50 Popular Text Terms Used in Business

AFAIC— As Far As I'm Concerned

ASAP— As Soon As Possible

BHAG— Big Hairy Audacious Goal

BOHICA— Bend Over Here It Comes Again

CLM— Career Limiting Move

CYA— Cover Your A** -or- See Ya

DD— Due Diligence

DQYDJ— Don't Quit Your Day Job

DRIB— Don't Read If Busy

EOD— End Of Day -or- End Of Discussion

EOM— End Of Message

EOT— End Of Thread (meaning: end of discussion)

ESO— Equipment Smarter than Operator

FRED— F***ing Ridiculous Electronic Device

FUBAR— F***ed Up Beyond All Recognition (or Repair)

FYI— For Your Information

GMTA— Great Minds Think Alike

HIOOC— Help, I'm Out Of Coffee

IAITS— It's All In The Subject

IANAL— I Am Not A Lawyer

KISS— Keep It Simple Stupid

LOPSOD— Long On Promises, Short On Delivery

MOTD— Message Of The Day

MTFBWY— May The Force Be With You

MYOB— Mind Your Own Business

NRN— No Reply Necessary

NSFW— Not Safe For Work

NWR— Not Work Related

OTP— On The Phone

P&C— Private & Confidential

PDOMA— Pulled Directly Out Of My A**

PEBCAK— Problem Exists Between Chair And Keyboard

PITA— Pain In The A**

QQ— Quick Question -or- Cry More

RFD— Request For Discussion

RFP— Request For Proposal

SBUG— Small Bald Unaudacious Goal

SME— Subject Matter Expert

SNAFU— Situation Normal, All F***ed Up

SSDD— Same Sh** Different Day

STD— Seal The Deal -or- Sexually Transmitted Disease

SWAG— Scientific Wild A** Guess -or- SoftWare And Giveaways

TBA— To Be Advised

TBD— To Be Determined

TWIMC— To Whom It May Concern

TIA— Thanks In Advance

WIIFM— What's In It For Me

WOMBAT— Waste Of Money, Brains And Time

WTG— Way To Go

YW— You're Welcome

* Information was obtained from Netlingo.com on May 17, 2010

Top 50 Acronyms Parents Need to Know

8—	Oral sex
1337—	Elite -or- leet -or- L337
143—	I love you
182—	I hate you
1174—	Nude club
420—	Marijuana
459—	I love you
ADR—	Address
AEAP—	As Early As Possible
ALAP—	As Late As Possible
ASL—	Age/Sex/Location
CD9—	Code 9—it means parents are around
C-P—	Sleepy
F2F—	Face-to-Face
GNOC—	Get Naked On Cam
GYPO—	Get Your Pants Off
HAK—	Hugs And Kisses
ILU—	I Love You
IWSN—	I Want Sex Now
J/O—	Jerking Off
KOTL—	Kiss On The Lips
KFY -or- K4Y—	Kiss For You
KPC—	Keeping Parents Clueless
LMIRL—	Let's Meet In Real Life
MOOS—	Member Of The Opposite Sex
MOSS—	Member(s) Of The Same Sex
MorF—	Male or Female
MOS—	Mom Over Shoulder
MPFB—	My Personal F*** Buddy
NALOPKT—	Not A Lot Of People Know That
NIFOC—	Nude In Front Of The Computer
NMU—	Not Much, You?
P911—	Parent Alert
PAL—	Parents Are Listening
PAW—	Parents Are Watching
PIR—	Parent In Room
POS—	Parent Over Shoulder -or- Piece Of Sh**
pron—	porn
Q2C—	Quick To Cum
RU/18—	Are You Over 18?
RUMORF—	Are You Male OR Female?
RUH—	Are You Horny?
S2R—	Send To Receive
SorG—	Straight or Gay
TDTM—	Talk Dirty To Me
WTF—	What The F***
WUF—	Where You From
WYCM—	Will You Call Me?
WYRN—	What's Your Real Name?
zerg—	To gang up on someone

* Information was obtained from Netlingo.com on May 17, 2010

When Divorcing Spouses Can Neither Collaborate Nor Cooperate, Texas Court Rules on Collaborative and Cooperative Law: *In re Mary Lynn Mabray*

By Meghan Hill

A recent Texas Court of Appeals decision legitimizes the use of a relatively new alternative dispute resolution process for divorce proceedings, known as "cooperative law agreements." *In re Mary Lynn Mabray*[1] addresses the potential conflict between collaborative law agreements, which are governed by Texas statute, and cooperative law agreements, which are not, and whether public policy conclusively prohibits cooperative law agreements. Although a lengthy dissenting opinion agreed with petitioner Mary Lynn Mabray's arguments challenging cooperative law agreements, the majority decided that such agreements do not violate Texas public policy.

Background

When Mary Lynn and Gary Mabray divorced after thirty-five years, they fashioned with their attorneys a document titled "cooperative law agreement," that laid out guidelines for the resolution of their divorce through informal mediation techniques, and included a binding arbitration agreement if the parties could not resolve their differences more amicably within a prescribed period. The parties agreed to forgo formal discovery in favor of good faith-driven disclosures. When their self-appointed deadline rolled around and the proceedings were no closer to resolution, both parties asked for a court order submitting their case to arbitration. After the Court signed the order, Mary Lynn filed a motion seeking to invalidate many aspects of the cooperative law agreement, attempting to disqualify her husband's attorney despite the agreement to the contrary and to withdraw her consent to the arbitration agreement.

The trial court denied Mary Lynn's motions to disqualify Gary's counsel and to revoke consent, and ordered the parties to submit to arbitration. Unable to appeal the decision, Mary Lynn commenced mandamus proceedings, seeking relief from the Court of Appeals.

What Is the Difference Between Cooperative and Collaborative Law?

In Texas, statute governs collaborative law processes for the marriage dissolution.[2] The statute provides that the proceedings occur under general good faith standards, with each party making best efforts to resolve the dissolution of marriage without judicial intervention and agreeing to suspend judicial intervention while the process is under way. Both parties also agree to provide full and candid disclosures and to hire experts jointly. Their counsel agree to withdraw if the parties move past the collaborative process into litigation or arbitration.

Cooperative law is not codified in Texas. Rather, it is an emerging field that is somewhat of an offshoot of collaborative law. "Put simply, cooperative law agreements mirror collaborative law agreements in spirit and objective, but lack the [counsel] disqualification clause unique to collaborative law agreements."[3]

Does Collaborative Law Control or Invalidate Cooperative Law?

Mary Lynn claimed that because collaborative law is codified under statute in Texas, it preempts and/or controls the possible use of cooperative law agreements. Her argument was that the parties can evade neither the protections nor the strictures of Texas's collaborative law statute by using the word "cooperative" in the title of the agreement. The trial court found that cooperative law agreements differ sufficiently from collaborative law agreements, and therefore do not have to conform with Texas's collaborative law statute, especially given that the Mabrays' agreement never referenced collaborative law or the statute.

The Court of Appeals upheld this decision, reasoning that to dictate the application of the statute, the court would either have to mandate the use of collaborative law proceedings or to forbid cooperative law agreements. The Court looked both at the language of the statute and the legislative history, and determined that neither required this result. Texas recognizes four forms of alternative dispute resolution: arbitration, mediation, collaborative law, and informal settlement conferences. The Court further determined that in their agreement, the Mabrays cited to the arbitration and informal settlement conference provisions.[4] Because the Mabrays did not cite to the collaborative law statute, but did cite the "informal settlement" provision, the Court determined that the Mabrays intended to fashion a remedy outside the bounds of the collaborative law statute.

Does Cooperative Law Violate Public Policy?

The Court turned next to Mary Lynn's second set of arguments that she never agreed to the agreement and/or revoked her consent to arbitrate, or that Gary's actions constituted a breach of their agreement, as well as the claim that cooperative law as a practice violates Texas public policy.

The Court looked at Texas statutes to determine public policy, on the theory that Texas expresses its policy through its statutes. Both the policy to allow alternative dispute resolution and to allow parties freedom to contract are expressed in Texas statutes. Having established that statutes do not forbid the use of cooperative law agreements, the Court also found no common law prohibition against cooperative law. Because Texas law specifically allows parties freedom to design their own dispute resolution agreements, the Court declared that cooperative law agreements could violate public policy only in relation to the ability of attorneys to continue to represent their clients in an adjudicative proceeding following failed settlement discussions.

The Court acknowledged the "four-way disclosure threat" that is possible with a cooperative law agreement that proceeds to litigation or arbitration; not only the parties, but also the attorneys have informally received information through good-faith disclosure during the informal mediation stage of the proceedings, without the protection of discovery rules or attorney-client privilege. The court examined whether that possibility was injurious to the public good and held it was not.

The dissent views Texas public policy as prohibiting cooperative proceedings, in part because of that risk. First, under Texas family law, marriages are presumptively valid unless dissolved through recognized procedures.[5] Because cooperative law is not contained in statute, the dissent argues, it is not a valid form of marriage dissolution. Second, Texas public policy underlying the collaborative law statute is to protect divorce participants with certain procedural safeguards, including the disqualification of attorneys who have assisted in the non-adjudicative proceedings. In the Mabrays' case, "the overall picking and choosing among the provisions of the collaborative law statute shows the clear intent of the drafters of the [cooperative] Agreement to avoid the protections of [collaborative] law."[6]

However, the majority determined that the threat of disclosure also existed with collaborative law because the parties are free to disclose information they learned during mediation to their new counsel. That risk did not prevent Texas legislature from adopting the collaborative law statute, and therefore does not prevent the use of cooperative law agreements. Further, the parties knew what they were doing when they designed this agreement, and they signified their intent by citing to the statutory provision allowing for informal, unspecified resolution processes.

For these reasons, collaborative and cooperative law can coexist, at least in Texas.

Endnotes

1. No. 01-09-01099-CV, 2010 WL 3448198 (Tex. App. Hous. (1 Dist.) August 31, 2010).
2. Tex. Fam. Code Ann. §6.603 (West 2009).
3. *Mabray*, 2010 WL 3448198 at *5.
4. Tex. Fam. Code Ann. §§6.601, 6.604 (West 2009).
5. Tex. Fam. Code Ann. §1.101 (West 2009).
6. *Mabray*, 2010 WL 3448198 at *25 (Keyes, J., dissenting).

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Reflections on the Use of Trademarks in Social Networking Website Vanity URLs

By Eric Joseph Shimanoff

I. Introduction

The rise in popularity and legitimacy of social networking websites has changed the face of the Internet, not just for Internet users but also for businesses that advertise through the medium. Many businesses now put effort into directing consumers to their Facebook pages and Twitter streams equal to that devoted to their own websites. However, as with any new medium, advertising through social networking websites opens up the possibility that third parties may misappropriate the trademarks of these businesses in violation of their valuable intellectual property rights.

While traditional principles of trademark law should protect trademark owners against many unlawful third-party uses, case law holding that the use of trademarks in post-domain paths of the URL is non-infringing could pose an obstacle to businesses that seek to prevent third parties from misappropriating their trademarks in Facebook and Twitter vanity URLs.

This article posits that the conventional view that post-domain paths of the URL merely show how data is organized within a website, and thus that uses of trademarks therein are not indicators of source or sponsorship, is most likely inapplicable in the context of social networking websites URLs. To the contrary, the content that follows the ".com" in a Facebook or Twitter URL may be just as source-indicative as the content that precedes it.

II. Social Networking Websites

Social networking websites such as Facebook and Twitter have opened new marketing channels for businesses seeking to promote their goods and services via the Internet. Just as businesses in the mid- to late-1990s began to recognize the Internet as a valuable marketing medium, businesses today have begun to recognize the importance of advertising via social networking websites to reach a larger audience.[1]

Social networking sites provide a unique advertising experience for consumers. For example, businesses can easily and at minimal cost set up a "page" on Facebook on which to post and frequently update information about the company and its goods and services. Similarly, businesses can establish Twitter accounts and post "tweets" about their goods and services, including information about time-sensitive discounts and promotions. Through each website, consumers can elect to follow and be notified immediately of these Facebook posts and Twitter "tweets," such that information is passed from the business to consumer nearly instantaneously.

Given its interactive nature, unlike traditional one-way advertising through print, television, and radio, Facebook and Twitter allow users to forward content posted by businesses to other users on the network, to post their own comments about and become fans of businesses that establish pages or send tweets, and to share their own comments and fan status with other users on the network. Social network users who partake in these activities essentially become, perhaps unwittingly, unpaid advocates for the business, dramatically increasing consumer exposure and brand recognition at no additional cost to the business. Moreover, the overall media costs to businesses for advertising on social networking websites are significantly lower than via traditional advertising media. It thus should come as no surprise that numerous businesses, including multi-national corporations such as Coca-Cola and McDonald's, have set up their own Facebook pages and Twitter accounts.[2]

III. Vanity URLs

Just as domain name registrars allow businesses to set up source-identifying domain names utilizing their trademarks (e.g., mcdonalds.com, coca-cola.com), Facebook and Twitter allow users to establish "vanity" user name URLs where businesses can select a personalized address utilizing their trademark to point to their Facebook page or Twitter account (e.g., http://www.facebook.com/mcdonalds, http://twitter.com/mcdonalds). But what can a business do if an unauthorized third party decides to set up a Twitter or Facebook account utilizing a business's trademark in the vanity URL? In the early days of domain name registration, before many corporations had registered their trademarks as domain names, cybersquatting was rampant, as third parties cheaply purchased and hijacked domain names comprised of famous marks in hopes of ransoming them for profit. The offering of vanity URLs by social networking sites creates similar concerns.

IV. Website Policies

Aware of the potential for trademark infringement, prior to offering vanity URLs, Facebook allowed businesses to pre-register their federally registered trademarks with Facebook so that once the URLs were offered, no other user could misappropriate the trademark. However, those users without federally registered trademarks, whose rights in their trademarks may have arisen under the common law, were not afforded the opportunity to take advantage of this pre-registration process and instead were left to fend for themselves when Facebook began to grant vanity URLs on a first come, first served basis. Twitter had no such registration process for holders of federally registered trademarks. What recourse would businesses have against potential trademark infringement via the Facebook and Twitter vanity URLs?

Both Facebook and Twitter have internal policies that prohibit the unauthorized use of a business's trademark in a vanity URL that would result in consumer confusion, and they each have procedures and forms for reporting such violations.[3] However, social networking websites are not necessarily in the best position to make determinations on complex trademark issues such as likelihood of confusion. In some circumstances, they may refuse to make any determination at all. If a trademark holder with a claim of infringement based on the use of a trademark in a vanity URL is unable to obtain relief from the social networking site, what remedies might it obtain from the courts? Given past precedent concerning the use of trademarks in domain names and URLs, the answer is unclear.[4]

V. How Domain Names Differ from Vanity URLs

Before delving into that issue, a review of the basics of domain names is in order. Domain names are divided into different levels. The top level domain name (TLD) is the end of the domain name, such as ".com," ".gov," ".org" and ".biz." Immediately to the left of the TLD is the second level domain (SLD). Thus, in the domain name facebook.com, ".com" is the TLD and "facebook" is the SLD.[5] Because consumers typically expect the name of the business controlling or authorizing the website to be the name in the SLD, trademark infringement or cyberpiracy may be found when another party uses without authorization a trademark that is not its own as an SLD in manner that is likely to cause consumer confusion as to the source of the website.[6] Thus, a consumer who is directed to the website located at http://www.coca-cola.com would likely expect that website to be controlled by or affiliated with the Coca-Cola beverage corporation.[7]

The use of a business's trademark in a Facebook or Twitter vanity URL, however, is *not* the use of a trademark in a domain name, since the user's trademark does not appear within the SLD.[8] Instead, in the vanity URL, the trademark appears to the right of the TLD in what is known as the post-domain path of the URL (e.g., http://www.facebook.com/**coca-cola**, http://twitter.com/**mcdonalds**) (bolding added).

VI. Case Law Concerning the Post-Domain Path of the URL

Read literally, the decisions concerning the unauthorized use of trademarks in the post-domain path of a URL have not been favorable to trademark holders. In *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*,[9] the leading case on the issue, the plaintiff, owner of the trademark LAP TRAVELER for portable computers, filed a suit for trademark infringement against computer resellers for the use of the mark in the post-domain path of the defendants' URL, which appeared as http://www.a2zsolutions.com/desks/floor/**laptraveler**/dkfl-lt.htm (bolding added). The URL at issue, however, did not resolve to a webpage offering plaintiff's LAP TRAVELER branded computer for sale. Instead, it led to one offering a competitor's model for sale.

Although the Sixth Circuit found there was no likelihood of confusion by the use of the plaintiff's LAP TRAVELER trademark, the court made the sweeping statements that, unlike a SLD, "[t]he post-domain path of a URL… does not typically signify source. The post-domain path merely shows how the website's data is organized within the host computer's files.… Because post-domain paths do not typically signify source, it is unlikely that the presence of another's trademark in a post-domain path of a URL would *ever* violate trademark law."[10] Based on this broad generalization about consumer perception of domain names and URLs, subsequent courts have refused to find infringement in cases involving the post-domain path of the URL.[11]

This precedent represents a significant obstacle for a trademark owner who is compelled to seek judicial intervention to prevent the unauthorized use of its trademark in a Facebook or Twitter vanity URL.[12]

VII. Inapplicability of Existing Case Law

In a Web 2.0 world, is the Sixth Circuit's reasoning about the source-identifying properties of a post-domain path of a URL truly applicable to a situation involving a Facebook or Twitter vanity URL? Social network vanity URLs do much more than "show[] how the website's data is organized within the host computer's files."[13] Indeed, their primary function is to make a user's or business's vanity URL their personal destination or home on the Internet and to provide an easy-to-remember way to find a user or a page.[14]

Unlike the unwieldy post-domain URL path at issue in *Interactive Prods. Corp.*, which the court reasoned would probably not be typed into a browser by a consumer searching for the plaintiff's LAP TRAVELER products,[15] a consumer looking for information from a business via a social networking website, especially information about discounts, promotions, or new products and services, likely would type a business's Facebook or Twitter vanity URL directly into a browser. Indeed, many businesses now include the URL of their Twitter and Facebook pages in their traditional television, radio, and print advertising. Also, using a vanity URL helps ensure that a business's Facebook Page or Twitter account will come up near the top of the results of a search engine like Google, the top results usually being business-sponsored links.

Thus, unlike the post-domain path of the URL in *Interactive Prods. Corp.*, vanity URLs on social networking websites may function as source indicators, and it may be that a high percentage of consumers likely would believe that the page located at http://www.facebook.com/mcdonalds and the tweets posted on the URL http://www.twitter.com/mcdonalds were authorized by the McDonald's restaurant chain.

VIII. Conclusion

Like the broader Internet, social networking websites such as Facebook and Twitter serve a multitude of functions for an expansive and diverse community. In a sense, they are like their own mini-Internets. Just as consumers became more familiar with the Internet and came to expect SLDs to be the indicators of source for traditional domain names, in many social networking platforms, consumers may now have come to recognize the post-domain paths of the URLs as source indicators.

In cases involving social networking websites, where numerous sources may be affiliated with one domain name through various vanity URLs, courts should avoid reliance on the broad generalization made by the Sixth Circuit that post-domain name URL paths do not serve as source indicators. Instead, courts should take a different approach more in keeping with likely consumer perception in the social networking website context. New media uses have always altered traditional notions of consumer perception, and new uses on social networking websites should be no exception.

Endnotes

1. Facebook boasts over 500 million active users who collectively spend over 700 billion minutes per month on the website. Facebook Press Room, *Statistics,* http://www.facebook.com/press/info.php?statistics (last visited Feb. 28, 2011). Twitter has over 16 million users. SFGate, *(Almost) Everybody's on Facebook*, http://www.sfgate.com/cgi-bin/blogs/techchron/detail?entry_id=83924 (last visited Mar. 1, 2011).
2. The Coca-Cola Page on Facebook has over 22,000,000 fans. *See* http://www.facebook.com/cocacola (last visited Feb. 28, 2011). Over 200,000 Twitter users have subscribed to receive Coca-Cola's tweets. *See* http://twitter.com/cocacola (last visited Feb. 28, 2011). The McDonald's page on Facebook has over 7,000,000 fans. *See* http://www.facebook.com/McDonalds (last visited Feb. 28, 2011). Almost 90,000 Twitter users have subscribed to receive McDonald's' tweets. *See* http://twitter.com/McDonalds (last visited Feb. 28, 2011).
3. Twitter Help Center, http://support.twitter.com/groups/33-report-a-violation (last visited Feb. 28, 2011); Facebook Help Center, http://www.facebook.com/help/#!/help/?page=439 (last visited Feb. 28, 2011).
4. No court has yet ruled on this precise issue. Although at least one case was brought against Twitter alleging false association due to the unauthorized of a celebrity's name to post tweets purportedly attributable to the celebrity, the case was voluntarily dismissed after the parties reached a settlement. *See LaRussa v. Twitter*, No. 09 Civ. 2503 (N.D. Cal.).
5. *See GoForIt Entm't, LLC v. DigiMedia.com L.P.*, No. 08 Civ. 2011, 2010 U.S. Dist. LEXIS 120338, at *6-*7 (N.D. Tex. Oct. 25, 2010).
6. *See*, *e.g.*, *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999) (holding that defendant's use of domain name moviebuff.com violated plaintiff's trademark rights in the mark MOVIEBUFF); *Sporty's Farm L.L.C. v. Sportsman's Mkt., Inc.*, 202 F.3d 489, 499 (2d Cir. 2000) (holding that defendant's registration and use of sportys.com domain name in violation of plaintiff's rights in its SPORTY'S trademark constituted cyberpiracy under Anti-cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d)).
7. *See Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1177 (9th Cir. 2010) ("When a domain name consists *only* of the trademark followed by .com, or some other suffix like .org or .net, it will typically suggest sponsorship or endorsement by the trademark holder.") (emphasis in original); *Sporty's Farm*, 202 F.3d at 493 ("The most common method of locating an unknown domain name is simply to type in the company name or logo with the suffix .com.").
8. *See GoForIt Entm't*, 2010 U.S. Dist. LEXIS 120338, at *20 ("Defendants maintain that a third level domain—the level in question in this case—is outside the scope of the statute, because it is not 'registered with or assigned by' a domain name registrar. The court agrees. The only part of a web address that must be registered is the second level domain.").
9. 326 F.3d 687 (6th Cir. 2003).
10. *Id*. at 696-98 (emphasis added).
11. *See*, *e.g.*, *Nagler v. Garcia*, 370 Fed. Appx. 678, 680 (6th Cir. 2010) (use of mark DIET RESULTS in post-domain path of URL as http://www.beautyinaflash.com/dietresults.html "cannot support a claim for trademark infringement"); *Knight-McConnell v. Cummins*, 2004 U.S. Dist. LEXIS 14746, at *8 (S.D.N.Y. July 29, 2004) ("defendant's use of the plaintiff's name in the post-domain path of a URL and placement of URLs using the plaintiff's name in the post-domain paths on chat forums, discussion boards, and search engines do not give rise to any source confusion").
12. Resort to relief under the Anti-Cybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d), or the Uniform Domain Name Dispute Resolution Policy likely would be unsuccessful, since both provide remedies for the use of a trademark in a "domain name" and not in the post-domain path of the URL.
13. *Interactive Prods. Corp.*, 326 F.3d at 696-97.
14. *See* The Facebook Blog, *Coming Soon: Facebook Usernames*, http://blog.facebook.com/blog.php?post=90316352130 (last visited Feb. 28, 2011).
15. 326 F.3d at 697.

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Surrogate Decision Making for Incapable Adult Patients with Mental Disabilities: A Chart of Applicable Laws and Regulations[1]

By Robert N. Swidler

Introduction

The Family Health Care Decisions Act governs health care decisions for patients in hospitals or nursing homes who lack capacity and who did not previously appoint a health care agent. However, a section in the FHCDA identifies circumstances where decisions for adult patients with mental disabilities are governed by laws or regulations other than the FHCDA, specifically NY Surrogate Court Procedure Act Article 17-A (the Health Care Decisions Act for People with Developmental Disabilities), MHL Article 80 (Surrogate Decision Making Committees), or OPWDD or OMH surrogate decision-making regulations.[2]

The following two charts are intended to help hospitals and nursing homes identify the applicable decision-maker, and the applicable law or regulation, for consent to treatment, or to withdraw or withhold life-sustaining treatment, for adult hospital and nursing home patients with mental disabilities in different circumstances. There is a chart for patients with developmental disabilities, and a chart for patients with mental illness.

During Nov. 2010 - Jan. 2011, Greater New York Hospital Association convened a group that reviewed and proposed corrections and improvements to an earlier version of these charts.[3] Eileen Zibell, Associate Attorney for OPWDD, John Tauriello, Counsel to OMH, and John Carroll, Deputy Counsel to OMH, also participated in that review, and suggested edits to the charts. This revised version is the product of that review.

A few caveats:

- These charts reflect only the views of the author.
- These charts do not reflect the official guidance of any state agency.
- Some of these issues are not clearly resolved, or are subject to conflicting interpretations.
- These charts point to the applicable laws and regulations and the decision maker, but do not summarize other requir-ments or conditions relating to such decisions.
- Ultimately, users must rely upon the language of the applicable laws and regulations, and any official guidance provided by the applicable agency. These charts are not a substitute for legal advice.

Even with those caveats, these charts should be useful. Please direct any corrections, suggestions to swidlerr@nehealth.com.

The Need for Reform

The charts describe what the law is, not what it should be. But it is difficult to examine these charts without recognizing a need for reform. Indeed, the very fact that there is a need for complex charts like these to navigate among multiple laws and regulations reveals a pressing need for simplification, such as through the consolidation, elimination, or reconciliation of some of these laws and regulations. The Legislature, when it enacted the FHCDA, anticipated this need and directed the NYS Task Force on Life and Law to form a special subcommittee to consider extending the FHCDA to cover life-sustaining decisions for persons with mental disabilities, thereby replacing at least some other laws and regulations. L.2010, ch.8, § 28.1.

But the charts also reveal other specific problems and anomalies that could be addressed more promptly, without waiting for or intruding upon the Task Force's assignment. In this author's view, the following steps would help reduce confusion, and improve decision making for persons with mental disabilities:

1. Amend SCPA §1750-b to confirm that a surrogate decision is not necessary if the developmentally disabled person made a prior oral or written decision, or appointed a health care agent, and had capacity at the time. (This would confirm Chart 1 boxes 1B and 2B).
2. Amend 14 NYCRR §633.10(a)(7)(iv)(c) to include domestic partner or close friend on OPWDD's surrogate priority list. (This would affect Chart 1 boxes 4B and 6B).
3. Amend the FHCDA to make the MHL Art. 80 surrogate decision-making committee (SDMC) available as an optional alternative to securing a decision pursuant to the FHCDA, as opposed to the required decision-maker. (This would affect Chart 1 boxes 5A and 5B).

4. Amend SCPA §1750-b to allow a DNR order to be entered based on medical futility for a patient who does not have a family member or friend to act as surrogate, eliminating the need to SDMC approval of such cases. (This would affect Chart 1 box 5B).

5. Repeal PHL Article 28-B, the DNR Law for patients of mental hygiene facilities, because there is no need for the law. For patients in OPWDD facilities, DNR orders generally are issued pursuant to SCPA §1750-b, not PHL Art. 29-B. For patients in psychiatric hospitals and general hospital psychiatric units, DNR orders should be made subject to the FHCDA—a change that would eliminate the confusion and illogic of inconsistent DNR procedures within general hospitals that have psychiatric units. (This would confirm Chart 1 boxes 6B and 7B, and affect Chart 2 boxes 6B and 7B).

6. Amend SCPA §1750 to restore role of MHLS with respect to DNR orders to what it was under the former DNR Law: for patients who are in or transferred from a mental hygiene facility, notice of a DNR order went to the mental hygiene facility director, not to MHLS; and the order would be temporarily stayed if there was an objection by the facility director, not by MHLS. As an alternative, require notice of DNR orders to MHLS but provide that its objection will not cause a stay of the DNR order unless it sets forth a specific basis for asserting that the DNR order is improper. (This would affect the procedures within Chart 1 column B rows 3-7).

A final note: If the Legislature adopts amendments that impact these charts, revised charts will be placed on the NYSBA Family Health Care Decisions Act Information Center website, www.nysba.org/fhcda.

The NYSBA Family Health Care Decisions Act Information Center

The NYSBA Health Law Section has a web-based resource center designed to help New Yorkers understand and implement the Family Health Care Decisions Act—the law that allows family members to make critical health care and end-of-life decisions for patients who are unable to make their wishes known.

www.nysba.org/fhcda

Surrogate Decision Making for Incapable Adult Patients with Developmental Disabilities:

A Chart of Applicable Laws and Regulations

	Follow the rules in the first row that applies:	**Decisions in Hospitals and Nursing Homes**	
		A **Consent to treatment**	**B** **Decision to withdraw or withhold life-sustaining treatment (including entering a DNR Order)**
1	**Patient, previously when capable, left prior written or oral directions**	Follow patient's prior oral or written directions[4]	Follow: (i) patient's prior written directions, or (ii) patient's prior oral directions if made during hospitalization before two witnesses[5]
2	**Patient, previously when capable, appointed health care agent***	Health care agent decides per PHL 29-C[6]	Health care agent decides per PHL 29-C[7]
3	**Patient has a court-appointed guardian per SCPA Art. 17-A***	Guardian decides per SCPA §1750-b[8]	Guardian decides per SCPA §1750-b[9]
4	**Patient resides in community (and not an OPWDD-licensed residence) and has involved family***	Surrogate decides per FHCDA[10]	Involved family member decides per SCPA §1750-b.[11] The prioritized list of qualified family member is set forth in 14 NYCRR §633.10(a)(7)(iv)(c). Note—A domestic partner or close friend would not qualify.[12]
5	**Patient resides in community (and not an OPWDD-licensed residence) but has no involved family***	Surrogate Decision Making Committee (SDMC) decides per MHL Art. 80[13]	SDMC decides per SCPA §1750-b[14]
6	**Patient resides in OPWDD-licensed or operated facility, is temporarily in a hospital or NH, and has involved family***	Involved family member decides per 14 NYCRR §633.11[15]	Involved family member decides per SCPA §1750-b. The prioritized list of qualified family member is set forth in 14 NYCRR §633.10(a)(7)(iv)(c).[16] Note—A domestic partner or close friend would not qualify.
7	**Patient resides in OPWDD-licensed or operated facility, is temporarily in the hospital or NH, but has no involved family***	SDMC decides per 14 NYCRR §633.11	SDMC decides per SCPA §1750-b.[17]

* Applies only if no row above it applies.

Surrogate Decision Making for Incapable Adult Patients with Mental Illness[18]
A Chart of Applicable Laws and Regulations[19]

	Follow the rules in the first row that applies:	**Decisions in Hospitals (excluding MH unit) and Nursing Homes**	
		A **Consent to Treatment**	**B** **Decision to withdraw or withhold life-sustaining treatment (including entering a DNR Order)**
1	**Patient, previously when capable, left prior written or oral directions**	Follow patient's prior oral or written directions	Follow: (i) patient's prior written directions, or (ii) patient's prior oral directions if made during hospitalization before two witnesses
2	**Patient, previously when capable, appointed health care agent***	Health care agent decides per PHL 29-C	Health care agent decides per PHL 29-C
3	**Patient has court-appointed guardian per MHL Art 81 with health care decision-making authority.***	Guardian with health care decision-making authority decides per the FHCDA[20]	Guardian with health care decision-making authority decides per the FHCDA[21]
4	**Patient resides in community (including an OMH-licensed residence) and has family or close friend***	Surrogate decides per FHCDA[22]	Surrogate decides per FHCDA[23]
5	**Patient resides in community (including and OMH-licensed residence) but has no family or close friend***	(i) Surrogate Decision Making Committee (SDMC) decides per MHL Art. 80 if the patient is eligible [24] (ii) Otherwise, attending physician decides per FHCDA[25]	Attending physician or court decides, per FHCDA[26]
6	**Patient brought to hospital or NH from OMH-licensed or operated psych hospital or unit. Patient has family or close friend.***	(i) If patient was discharged from the OMH-licensed or operated psych hospital or unit, then surrogate decides per FHCDA[27] (ii) If patient was not discharged, then spouse, parent or adult child decides per 14 NYCRR §27.9	(i) For DNR, surrogate decides per PHL Art 29-B (ii) For other decisions, surrogate decides per FHCDA[28]
7	**Patient brought to hospital or NH from OMH-licensed or operated psych hospital or unit. Patient has no family or close friend***	Decision by either (i) SDMC per MHL Art. 80 (ii) Court per §27.9[29]	(i) For DNR, attending phys'n decides per PHL Art. 29-B (ii) For other decisions, attending physician or court decides, per FHCDA[30]

*Applies only if no row above it applies

Endnotes

1. This document is the January 12, 2010 version of a document that appears on the NYS Bar Association Family Health Care Decisions Act Information Center, www.nysba.org/fhcda. It is reprinted here with the permission of the NYS Bar Association.

2. The relevant clauses of the FHCDA are PHL § 2994-b.3-4, which state:

    > 3. Prior to seeking or relying upon a health care decision by a surrogate for a patient under this article, if the attending physician has reason to believe that the patient has a history of receiving services for mental retardation or a developmental disability; it reasonably appears to the attending physician that the patient has mental retardation or a developmental disability; or the attending physician has reason to believe that the patient has been transferred from a mental hygiene facility operated or licensed by the office of mental health, then such physician shall make reasonable efforts to determine whether paragraphs (a), (b) or (c) of this subdivision are applicable:
    >
    > > (a) If the patient has a guardian appointed by a court pursuant to article seventeen-A of the surrogate's court procedure act, health care decisions for the patient shall be governed by section seventeen hundred fifty-b of the surrogate's court procedure act and not by this article.
    > >
    > > (b) If a patient does not have a guardian appointed by a court pursuant to article seventeen-A of the surrogate's court procedure act but falls within the class of persons described in paragraph (a) of subdivision one of section seventeen hundred fifty-b of such act, decisions to withdraw or withhold life-sustaining treatment for the patient shall be governed by section seventeen hundred fifty-b of the surrogate's court procedure act and not by this article.
    > >
    > > (c) If a health care decision for a patient cannot be made under paragraphs (a) or (b) of this subdivision, but consent for the decision may be provided pursuant to the mental hygiene law or regulations of the office of mental health or the office of mental retardation and developmental disabilities, then the decision shall be governed by such statute or regulations and not by this article.
    >
    > 4. If, after reasonable efforts, it is determined that a health care decision for the patient cannot be made pursuant to subdivision two or three of this section, then the health care decision shall be made pursuant to this article.

3. The chart review group was convened by Lorraine Ryan, Senior Vice President, Legal, Regulatory and Professional Affairs Greater NY Hospital Association and Sara Kaplan-Levenson, Project Manager, Regulatory and Professional Affairs, Greater NY Hospital Association. Participants included John V. Campano (NY Presbyterian), Joan Hauswald (NY Presbyterian), Deborah Korzenik (Continuum Health Partners); Lynn Hallarman, M.D. (SUNY Stony Brook Health Science Center); Jonathan Karmel (NYS Department of Health); Karen Lipson (NYS Department of Health); Carolyn Wolf (Abrams Fensterman). Paul Kietzman (NYSARC) also commented independently. I am very grateful to these reviewers—their work has improved these charts greatly.

4. It would seem that the designation of a surrogate (whether under SCPA §1750-b, 10 NYCRR §633.11 or the FHCDA) is not necessary if the incapable person, previously when capable, personally consented to the treatment.

5. It would seem that the designation of a surrogate (whether under SCPA §1750-b, 10 NYCRR §633.11 or the FHCDA) is not necessary if the incapable person, previously when capable, left clear and convincing evidence of a wish to forgo treatment under the circumstances presented.
The FHCDA, in PHL §2994-d.3(a)(ii), provides guidance as to the type of evidence that would suffice.

6. NY PHL §2982.

7. NY PHL §2982.

8. NY SCPA §1750-b.1.

9. NY SCPA §1750-b.1.

10. NY SCPA §1750-b is inapplicable because its non-court process for authorizing an involved family member, Consumer Advisory Board or SDMC to act as a "guardian" is limited to decisions to withdraw or withhold life-sustaining treatment. See §1750-b.1(a). When a health care decision for the patient cannot be made pursuant to the SCPA or Mental Hygiene Law or regulations, the FHCDA becomes applicable. NY PHL §2994-b.4. Accordingly, the FHCDA becomes applicable, and a FHCDA surrogate can consent to such treatment per PHL §2994-d.

11. NY SCPA §1750-b(a) applies because its non-court process for authorizing a family member to act as guardian applies to decisions to withdraw or withhold life-sustaining treatment. See §1750-b.1(a). Qualified family members are identified in 14 NYCRR §§633.10(a)(7)(iv)(c).

12. The OPWDD surrogate list promulgated pursuant to NY SCPA §1750-b(a) does not provide for the authorizing of a "close friend" to act as "guardian." See 14 NYCRR §633.10(a)(7)(iv)(c). However, NY SCPA §1750-b.1(a) provides that when no other surrogate is available, the MHL Article 80 SDMC may act as guardian for purposes of making the withdrawal or withholding of treatment decision.

13. Most patients with developmental disabilities and who do not a have a guardian or family will qualify for decisions by an SDMC. See MHL §80.3(b).3 (definition of "patient in need of surrogate decision-making"). Moreover, once a person is eligible for decisions by an SDMC, the person remains eligible regardless of a change in residential status. MHL §80.03(b). As a result, the FHCDA provisions on consent for patients without surrogate generally are not applicable. See §2994-b.3(c). In the relatively rare event where SDMC lacks jurisdiction for a patient, the FHCDA would apply.

14. Per NY SCPA §1750-b.1(a), when no other surrogate is available, the MHL Article 80 SDMC may act as guardian for purposes of making the withdrawal or withholding of treatment decision.

15. 14 NYCRR §633.11 provides surrogate decision-making rules for persons who are "residents of a facility operated or certified by OPWDD." Such persons, when hospitalized, are still residents of OPWDD facilities and subject to this regulation.

16. 14 NYCRR §633.10 implements SCPA 1750-b for residents of OPWDD-licensed and operated facilities.

17. See n.11

18. Per PHL §2994-a.21: "Mental illness" means a mental illness as defined in subdivision twenty of section 1.03 of the mental hygiene law, and does not include dementia, such as Alzheimer's disease, or other disorders related to dementia. Per MHL §1.03(2): "Mental illness" means an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation.

19. This chart points to the applicable law or regulation, but does not provide a complete summary of the applicable law or regulation.

20. PHL §2994-d.1(a).

21. Id.

22. Id.

23. Id.

24. PHL §2994-b.3(c) provides that if a health care decision can be made pursuant to the Mental Hygiene Law, then the decision is governed by such statute. Accordingly, if the decision can be made pursuant to MHL Art. 80 then the decision is governed by MHL Art. 80. Under MHL Art. 80, a decision can be made by an SDMC for a person who is "a resident of a mental hygiene facility including a resident of housing programs funded by an office of the department [of mental hygiene] or whose federal funding application was approved by an office of the department or for whom such facility maintains legal admission status therefor; or receiving home and community-based services for persons with mental disabilities provided pursuant to section 1915 of the federal social security act; or receiving individualized support services .... " Also, note that MHL Art. 80 and the FHCDA have some differences in the scope of major medical treatments that can be authorized pursuant to their procedures.

25. PHL §2994-b.4 provides that " If, after reasonable efforts, it is determined that a health care decision for the patient cannot be made pursuant to subdivision two or three of this section, then the health care decision shall be made pursuant to this article." Accordingly, if MHL Art 80 is inapplicable, then the FHCDA, and specifically PHL §2994-g, becomes applicable.

26. There is no applicable Mental Hygiene Law or OMH regulation. Accordingly, PHL §2994-g.5 applies.

27. If the patient was discharged from the OMH-regulated facility or unit, then OMH regulations become inapplicable, and the FHCDA applies.

28. If the patient was discharged from the OMH-regulated facility or unit, then OMH regulations become inapplicable, and the FHCDA applies. But even if the patient was not discharged, there still is no applicable Mental Hygiene Law or OMH regulation. (MHL Art. 80 is inapplicable because it does not authorize the SDMC to make decisions to withdraw or withhold life-sustaining treatment). Accordingly, per PHL§2994-b.4, the FHCDA becomes applicable.

29. Both provisions are available as a means to secure consent to treatment.

30. There is no applicable mental hygiene law or regulation. (MHL Art. 80 is inapplicable because it does not authorize the SDMC to make decisions to withdraw or withhold life-sustaining treatment). Accordingly, PHL §2994-g.5 applies.

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The Clinical Impact of the Family Health Care Decisions Act on the Role of Guardians and Other Surrogates

By Barbara Paris and Jennifer Breznay

Barbara Paris

Jennifer Breznay

Technological advances in medicine allow people increasingly more opportunities to choose among a wide array of treatment options ranging from aggressive life-sustaining treatments to end of life comfort care. People are living longer with complex, chronic and acute illnesses and understanding various options is difficult and confusing. For example, the same treatment may be life sustaining, futile, or palliative, depending on the medical circumstances. Patients' and surrogates' choices are also influenced by the physical, emotional and financial burdens for themselves and their loved ones that they envision will be incurred by these decisions.

Although adults in New York State have the right to accept or refuse all life-sustaining treatments, approximately 40% of hospitalized adults cannot make their own treatment decisions[1] and health providers, proxies, surrogates and guardians are all challenged with making these decisions based on a hierarchy of bioethical standards, patient's known wishes, substituted judgments and patient's best interests,[2] as well as adhering to the law. The law reflects society's values including self-determination, personal wishes, preferences and desires and strives to implement the least restrictive interventions to preserve a person's autonomy. Most recently, the Family Health Care Decisions Act (FHCDA),[3] enacted in 2010, gives surrogates and guardians more flexibility in their capacity to participate in decisions about life-sustaining treatment. For example, as outlined in the health care proxy statute enacted in 1991 in New York State,[4] a proxy can make all health care decisions except decisions about artificial nutrition and hydration unless the agent has reasonable knowledge of the patient's wishes in this regard. Under the more recent FHCDA, surrogate decision makers, including guardians, can withhold and withdraw life sustaining treatments if the surrogate determines that the treatment would pose an extraordinary burden on the patient and two attending physicians concur that the patient's life expectancy is six months or less, or the patient's illness is incurable.

Pertinent to this, The New York Times featured a guardianship case on March 4, 2011.[5] The article discusses an older legal immigrant, hospitalized for almost a year in a persistent vegetative state following a brain hemorrhage. Two of the patient's six children are American citizens and have been involved in their mother's care whose life has been sustained with a feeding tube. The hospital had a legal guardian appointed citing concerns as whether the family members were legally appropriate decision makers. The guardian subsequently withdrew the patient's feeding tube, stating that the family could not demonstrate that their mother would have wanted to live in a persistent vegetative state sustained by a feeding tube. The guardian presumably invoked the principles of known prior wishes and best interests in deciding to withdraw the feeding tube and limit the patients care to comfort-only measures. This case begs the question as to whether guardians have the same level of compassion and "interest" in the patient as do loving family members. Although the family was described as distraught over "ending someone's life by hunger as morally wrong and unrecognized in their culture," they were ineffective in demonstrating to the guardian or to the hospital that they were representing their mother's values. From a medical standpoint, this patient is dying of her underlying medical illness that left her in a persistent vegetative state. As patients in a persistent vegetative state do not perceive hunger, the feeding tube is only serving to prolong the dying process. Many would view the palliative approach taken by the guardian as the more humane and compassionate plan in the face of family members who were unable to step away from their own grieving and allow their mother to die comfortably. Some will use this case to argue that we are moving one step closer to "death panels" with dispassionate decision makers whose only interest is saving health care dollars. On the other hand, as guardians may be remunerated for their services, they may actually have monetary incentives to prolong the patient's life.

Historically, guardians have taken a much more conservative approach to end-of–life decision-making and withholding or withdrawing of life-sustaining treatments. Indeed, prior to the implementation of the FHCDA prioritizing guardians as surrogates, a guardian was required to petition the court in order to withhold or withdraw nutrition and hydration, as well as to withdraw other life-sustaining treatments such as breathing tubes. With the implementation of the FHCDA, life-sustaining treatment decisions can be made in facilities working with hospital staff adhering to specific guidelines.

A recent systematic review of 40 studies[6] providing data on 2,844 surrogates, over half of whom were family members, concluded that making treatment decisions has a negative emotional effect on at least one third of the surrogates which can be substantial and last for months to years. The greatest stress involved end-of-life treatments. As poignantly noted in this article, stress can undermine the surrogate's ability to make decisions that protect the patient's interests and promote the patient's preferences. Conversely, other research has shown that families may not view a surrogate's deviation from their own preferences as an affront to their autonomy, recognizing the burden of these decisions. Indeed, many surrogates rely on other factors such as their own best interests or mutual interests based on documents with which they have little familiarity.[7]

Guardians for a person are likely to increase as the proportion of older persons in the population increases. Many of these guardians will be court-appointed strangers to the patient, rather than family members. How can we be confident that when we are no longer able to advocate for ourselves, someone else will make decisions in an objective unbiased way? The Health Care Proxy Law was an attempt to achieve that goal, yet less than 20% of the population has appointed a health care proxy, and many who have did so without discussing their wishes or values with the proxy. Others, who have discussed their wishes with their proxy, either verbally or in a living will, in many instances also will not succeed in having their wishes implemented, as proxies can be uncomfortable limiting treatments. Even when the patient retains decision-making capacity, a proxy can be very persuasive. A recent article entitled *The Power Proxy* discusses the case of an elderly patient who chooses to be guided by his son who insists on a trial of chemotherapy for his metastatic cancer. The patient dies, inadequately palliated, because the family held out for a miraculous recovery. In the end, the son is able to assuage his own guilt by recalling that the patient himself signed the consent for chemotherapy.[8]

The FHCDA is a major step in the right direction in approaching the objectives of respecting patients' values and acting in their best interests. By broadening the powers of surrogates, and therefore guardians, facilities and health care providers, working with families and other guardians, have more opportunities to make decisions about all medical treatments without having to petition the court, yet with many safeguards in place to protect the patient. The urgency for clinicians to learn how to support patients as they make choices that are best for them is eloquently articulated in an editorial titled *What Is the Right Intensity of Care at the End of Life and How Do We Get There*?[9]

Health care providers and surrogates must all now embrace this opportunity to responsibly communicate and use this newfound power to develop medically appropriate compassionate goals of care for patients who are approaching end-of-life.

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Ethics Update

Ann Lapinski and Randall Young

Opinions of the NYSBA Committee on Professional Ethics

NYSBA Comm. on Professional Ethics, Formal Op. 846, issued October 27, 2010, extends the reasoning of Opinion 828 regarding the extent to which agency attorneys may consult with investigators who communicate with represented parties. This is particularly relevant to attorneys who represent regulatory agencies. The Committee on Professional Ethics determined that attorneys may assist with drafting forms even if there is a chance that they will be received by counter parties who may already have legal representation. Further, Rule 4.2 is not triggered by non-lawyer employees of an insurance company sending forms to claimants if the company's attorney was not consulted about specific claimants who were to receive the forms even though the attorney designed the forms.

NYSBA Comm. on Professional Ethics, Formal Op. 845, issued October 14, 2010, addresses fee sharing among attorneys. The Committee determined that Rules 1.7, 1.8(f) and 8.4(f) allow an attorney acting solely as a real estate broker to share commissions with other attorneys who refer buyers or sellers, so long as the fee sharing arrangement did not place the referring attorney in violation of the Rules. Accordingly, if the referring attorney represented either the buyer or the seller in the transaction, the broker-attorney could share her commission only if the referring attorney obtained the client's informed consent to the arrangement and remitted or credited the referral fee to the client.

NYSBA Comm. on Professional Ethics, Formal Op. 844, issued October 8, 2010, addresses the issue of whether a part-time county legislator may accept a court appointment as an attorney for a child in most Family Court proceedings. The Committee decided in the negative. Because the legislature approves the appointments of the County Attorney and counsel for the Department of Social Services and sets their budgets, accepting an appointment to represent a child in a Family Court proceeding in which the County Attorney or Department of Social Services attorney appeared would violate Rules 8.4(d) and 1.11(f)(2). Rule 8.4 states that lawyers shall not engage in conduct prejudicial to the administration of justice. Rule 1.12(f)(2) prohibits lawyers who are also public officials from using their public position to influence a tribunal in favor of a client.[1]

NYSBA Comm. on Professional Ethics, Formal Op. 843, issued September 10, 2010, states that lawyers may access public pages of an opposing party's social networking site for the purpose of gathering impeachment material in pending litigation. The Committee reasoned that using information contained in public profiles on social networks such as Facebook or MySpace is analogous to information contained in other forms of media.

However, the Opinion also provides guidance regarding what attorneys may not do. Any use of deception to obtain information would violate Rule 8.4(c) which prohibits a lawyer from engaging in conduct involving "dishonesty, fraud, deceit, or misrepresentation," as well as Rule 4.1, which prohibits a lawyer from making a false statement of fact or law to a third person. For example, using a third person to "Friend" the opposing party to access social network pages not available to the public would violate the Rules.[2]

The Committee offered a footnote stating that Rule 4.2 and 4.3 could apply to "Friending" or otherwise contacting parties through a social network. Rule 4.2 prohibits attorneys from contacting represented parties without the consent of opposing counsel, and Rule 4.3 requires that attorneys make their role clear to parties whose interests are likely to conflict with the interests of the attorney's client.

NYSBA Comm. on Professional Ethics, Formal Op. 842, issued September 10, 2010, advises that attorneys may use online data backup if they use "reasonable care" to ensure the provider will protect client confidences. This requires the lawyer using such a service to take several specific steps set forth in the Opinion to investigate the level of security and confidentiality provided by the service and to ensure confidential data can be obliterated from the system if the lawyer becomes dissatisfied.

NYSBA Comm. on Professional Ethics, Formal Op. 841, issued April 12, 2010, states that an attorney handling a product liability matter may send e-mails to other attorneys requesting that they refer cases involving injuries caused by that product to the requesting attorney. Rule 7.3 restricts how lawyers may solicit clients, but a "solicitation" is an "advertisement" initiated by or on behalf of the lawyer. Because Rule 1.0(a) specifically excludes communications between lawyers from the definition of "advertisements" for the purposes of the Rules, the e-mails in question were not impermissible solicitations.

NYSBA Comm. on Professional Ethics, Formal Op. 840, issued March 26, 2010, explains a change regarding an attorney's payment of litigation expenses for clients being represented pro bono. Previously, attorneys could only pay a client's litigation expenses if the attorney was representing the client pro bono **and** the client was indigent.[3] Rule 1.8(e) now states that a "a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client." (Emphasis added.)

Appellate Division Decisions of Interest

Matter of D'Ambrosio [4th Dept 10-1-2010] Slip Opinion 07016

An attorney disciplined by another jurisdiction may be disciplined in New York for the underlying misconduct unless, among other things, the proceedings in the foreign jurisdiction deprived the attorney of due process of law. 22 N.Y. Com. Codes R. & Regs. Tit. 1022.22.

Respondent contended that the referee in a foreign disciplinary proceeding denied him due process of law by taking judicial notice of a third jurisdiction's rule of professional conduct. The Fourth Department held that Respondent received due process because he had notice of the allegations against him; he participated in a hearing at which he was represented by counsel; and a court reviewed the record and briefs of the disciplinary tribunal before sustaining the charges.

Matter of Cristella B. [2d Dept 10-5-2010] Slip Opinion 07165

Although a child in a neglect proceeding is entitled to legal representation, Rule 4.2 (the "no contact rule") applies only to attorneys and does not prohibit department of social services case workers from interviewing the child, nor does it require that the case workers notify the child's attorney before such interviews. The constitutional and statutory duties of the agency toward children distinguish the agency's case workers from attorneys who represent parents or other parties in Family Court proceedings.

In re Antoine, 74 AD 3d 67 (1st Dept 2010)

Individuals licensed to practice as legal consultants in this state are subject to professional discipline in the same manner and to the same extent as members of the bar in New York.[4] However, summary revocation of a license to practice is not permitted.

Commission on Public Integrity Matters

Advisory Opinions

Opinion 10-02

In response to a question from DEC about two attorneys who were providing volunteer services for the Office of General Counsel, the Commission issued an opinion stating that two-year and lifetime bar provisions set forth in Public Officers Law (hereinafter "POL") §73(8) apply to persons who volunteer as part-time staff attorneys in the Department of Environmental Conservation's Office of General Counsel.

Opinion 10-04

The Department of Environmental Conservation ("DEC") asked the Commission to reconsider the 30-day recusal period set forth in Advisory Opinion No. 06-01 with respect to employees who have been targeted for layoffs. In Advisory Opinion No. 06-01, the Commission articulated guidelines for a State officer or employee to follow when engaging in communications with a prospective employer, with whom he or she, or whose agency, has matters pending, regarding potential post-government employment. The Commission clarified Advisory Opinion No. 06-01 to the extent that the 30-day recusal period set forth in the post-government employment guidelines is set aside for those State officers and employees who may be subject to layoffs, or who have the option of accepting a position at a reduced salary or in another location in lieu of a layoff, provided the employee recuses him or herself from all matters pertaining to any private entity with which the employee has employment-related discussions.

Enforcement Actions

The Commission charged Clifton Van Guilder, a former employee of DEC, with violations of POL §§73(5) and 74(3)(d), (f) and (h) based upon Mr. Van Guilder's behavior while he was employed as an Environmental Engineer at DEC. Mr. Van Guilder allegedly solicited the U.S. Department of Energy (hereinafter "DOE") to fund a position for him at the Knolls Atomic Power Laboratory while he had an active matter before KAPL. DOE has a permit from DEC. Mr. Van Guilder settled the matter with admissions to violations of the POL and a fine of $15,000.

Guidance

The Commission on Public Integrity issued a guidance document to state employees limiting attendance at legislative receptions to circumstances where the event meets the following "widely attended gathering" criteria: 1) the event must be open to at least twenty-five people; 2) principal purpose must be to promote the exchange of information (not a "meet and greet"); 3) attendees must represent a diverse range of interests; and 4) public officials' attendance must relate to their official job duties. Compliance is an obligation for state employees who might attend such a reception and lobbying firms who sponsor such events.

Endnotes

1. *See also* NYSBA Comm. on Professional Ethics, Formal Op. 798 (2006).
2. *See* Philadelphia Bar Op. 2009-02 (2009).
3. NYSBA Comm. on Professional Ethics, Formal Op. 786 (2005) and DR-5-103(B)(2).
4. 2 NY Comp. Codes R. & Regs. tit. 22 §§ 521.5, 1200.

Ann Lapinski is an Associate Attorney with the New York State Department of Environmental Conservation's Office of General Counsel. Randall Young is co-chair of the NYSBA Environmental Law Section's Task Force on Professional Ethics. The abstracts above are provided for informational purposes. Consult the full text of the Rules of Professional Conduct, advisory opinions, and judicial opinions when dealing with specific issues. Nothing in this column reflects the position of the NYSDEC.

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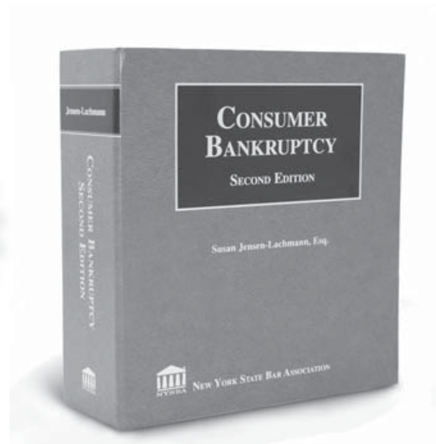
Consumer Bankruptcy, Second Edition is authored by Susan Jensen-Lachmann who previously co-authored the first edition of this book with the Honorable Jeremiah E. Berk. Susan Jensen-Lachmann is counsel to the Committee on the Judiciary of the U.S. House of Representatives, where she is primarily responsible for bankruptcy and commercial legislation. Ms. Jensen-Lachmann is also the author of law review articles and has contributed to various treatises on bankruptcy law and practice.



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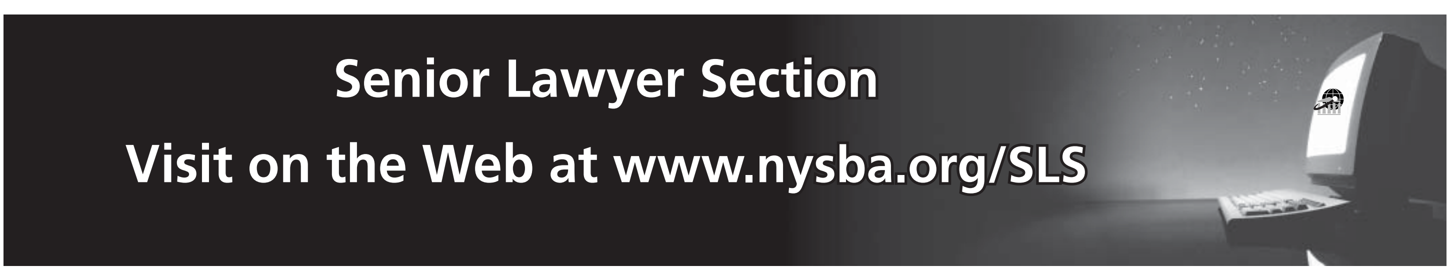

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