NYSBA SPRING 2013 | VOL. 5 | NO. 1

# The Senior Lawyer

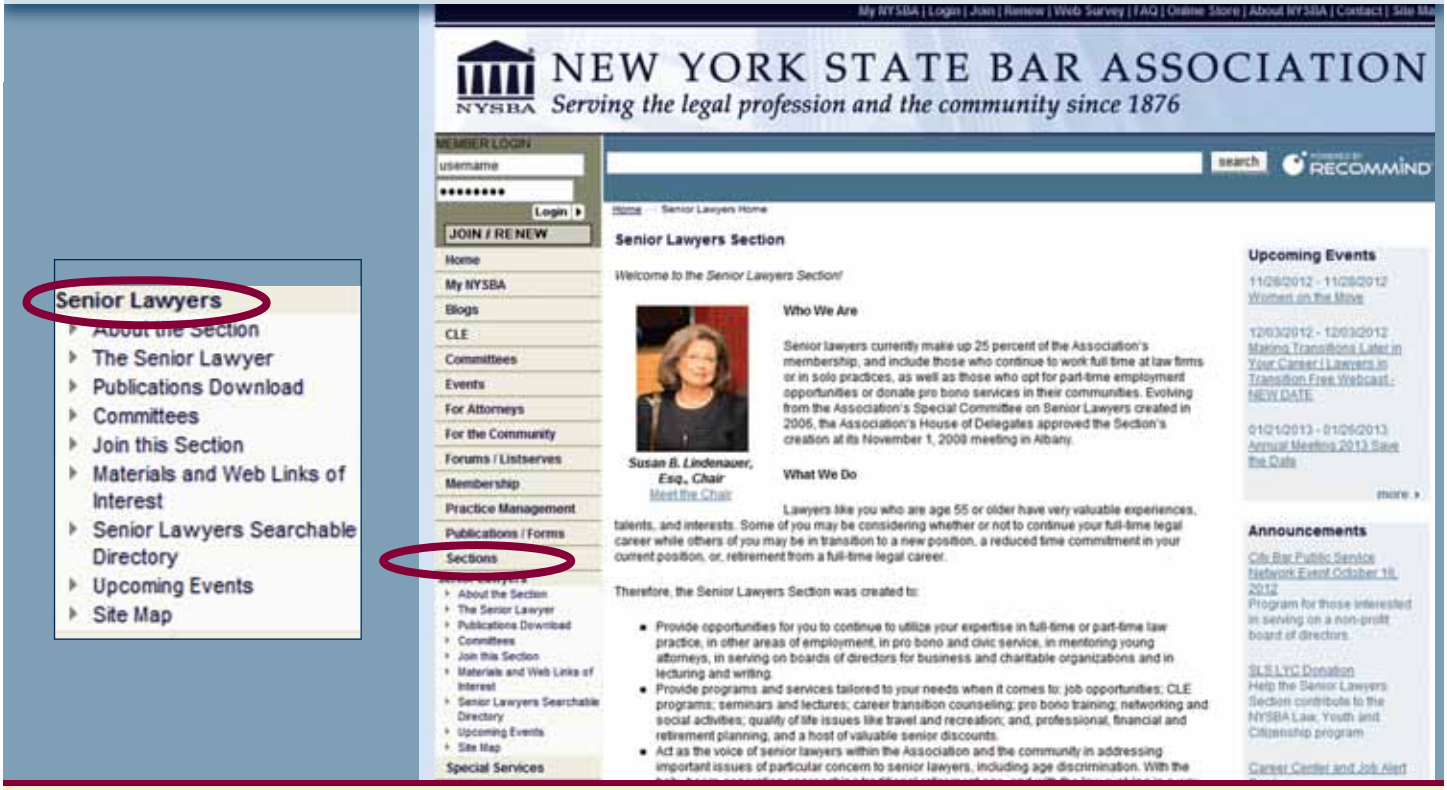
A publication of the Senior Lawyers Section
of the New York State Bar Association

## Inside


- NY Estate After ATRA 2012
- 3 Critical Components in Litigation Graphic Design
- Being Classified Under "Observation" Means Seniors Pay More
- Personal Look at the United States Supreme Court
- Balancing the Interests of a Minor and a Parent
- eDiscovery and Cloud Computing
- Who Owns Your Social Media Account?
- Social Media and Litigation
- Rights of Publicity and Social Media from *Bogart v. Burberry*
- Digital Estate Planning in the Facebook Age
- Power of Attorney After *Perosi v. LiGreci*
- Business Lawyers Transitioning Into Health Care
- Mediation
- Client Files
- Roles of Positivism and Ethics in Professional Responsibility
- The Quiz Show Scandal: Real vs. Reel


NYSBA

# Make the Most of www.nysba.org
## with Senior Lawyer Section Resources




## at *www.nysba.org/SLS*

- **About the Section** — Learn about the Section purpose, profile, scope of activities and officers
- ***The Senior Lawyer*** — Instant access to past issues and the electronic citation enhanced version of the Section publication
- **Committees** — Your opportunity for increasing your involvement with 11 substantive committees
- **Materials and Web Links of Interest** — 100+ links to a large variety of resources including scams to avoid, health, jobs, financials and entertainment
- **Senior Lawyer Searchable Directory** — Look up and network with your peers
- **Upcoming Events**

**Login now** to instantly access these tools designed for you.

# Table of Contents


Page

**A Message from the Section Chair** . . . . 4
*Susan B. Lindenauer*

**A Message from the Editor** . . . . 5
*Willard H. DaSilva*

## Feature Articles

Planning for NY Estate After ATRA 2012 . . . . 6
*Laurence Keiser*

3 Critical Components in Litigation Graphic Design That You're Not Doing . . . . 9
*David W. Mykel, M.A.*

Why Being Classified Under "Observation" While in a Hospital Means Seniors Pay Thousands More . . . . 11
*Anthony J. Enea*

A Personal Look at the United States Supreme Court . . . . 12
*Spiros Tsimbinos*

Balancing the Interests of a Minor and a Parent Where the Minor Is the Injured Party in a Personal Injury Action
Part One: Preliminary Issues for the Attorney to Consider . . . . 16
*Kathryn E. Jerian and Robert P. Mascali*

Balancing the Interests of a Minor and a Parent Where the Minor Is the Injured Party in a Personal Injury Action
Part Two: Establishing the Chosen Settlement Vehicle . . . . 19
*Kathryn E. Jerian*

The Challenges of eDiscovery and Cloud Computing . . . . 21
*Jonathan P. Armstrong, Eric J. Sinrod and Philip Favro*

Who Owns Your Social Media Account? . . . . 27
*Adam S. Walker*

Social Media and Litigation: A Marriage Made in Hyperspace . . . . 32
*Andrew B. Delaney and Darren A. Heitner*

Of All the Lawsuits, in All the Courts, in All the World, They Had to Settle This One
What We Didn't Learn About Rights of Publicity and Social Media from *Bogart v. Burberry* . . . . 39
*Cassidy Merriam*

Your Online Afterlife: Digital Estate Planning in the Facebook Age . . . . 43
*Jim D. Sarlis*

Amending a Trust Instrument with a Power of Attorney After *Perosi v. LiGreci* . . . . 48
*Helen Z. Galette and James M. Villani*

Proceed With Caution: Matters to Consider for Business Lawyers Transitioning Into Health Care . . . . 51
*Craig B. Garner*

Mediation: It's Not Just When the Marriage Breaks Up . . . . 56
*Antonia J. Martinez and Robert W. Shaw*

The Care, Upkeep and Planned Death of a Client File . . . . 58
*Kameron Brooks*

The Roles of Positivism and Ethics in Professional Responsibility . . . . 62
*Randall C. Young*

Krell's Korner: The Quiz Show Scandal: Real vs. Reel . . . . 64
*David Krell*

# A Message from the Section Chair

In January of each year, in connection with the NYSBA Annual Meeting, the *New York Law Journal* invites NYSBA Section Chairs to submit an article about the work of her or his Section. In my 2013 article I noted that more than one-third of the members of NYSBA are 55 years of age or older and thus eligible to be members of the Senior Lawyers Section. The mission of the Senior Lawyers Section is to appeal to the varied interests of this large and growing group by addressing the issues that these lawyers face in their practices and their lives.

The Section has achieved a remarkable rate of growth in the almost four years since it was established. That growth is due in large part to the vision of my predecessors, Justin Vigdor and Walter Burke, as well as to the varied programs developed by our Program and CLE Chair, Carole Burns, who is also Chair-Elect, and the wide-ranging content of our newsletter skillfully shepherded by Editor Willard Da Silva. A review of this issue of *The Senior Lawyer* provides ample evidence of the breadth of the Section's interests.

The eleven committees that the Section has established address a broad range of issues of interests to our membership and all of them welcome active participation by current and new members of the Senior Lawyers Section. In this Message I shall highlight the work of a number of these committees by presenting excerpts of descriptions prepared by the committee chair. It is my intention to have at least a page in each future issue of *The Senior Lawye*r that provides an update on the work of the various SLS committees.

**Age Discrimination Committee**: The basic purpose of the Age Discrimination Committee is to help senior lawyers, as well as younger members of the bar, to become familiar with this area of the law as it may affect their careers and to help promote changes that will end age-related discriminatory practice affecting attorneys. As part of this effort, the Committee intends to continue the excellent work of the NYSBA Special Committee on Age Discrimination in the Profession which issued a report on mandatory retirement practices in the profession that was approved by NYSBA in 2007.

**Law Practice Continuity Committee**: The Committee supports efforts to assist solo and small firm practitioners in planning for the orderly transition of their practice, as well as to identify ways in which mechanisms can be established to protect the interests of the clients of deceased, disabled or absent solo or small firms practitioners who have not made adequate provision in advance for his or her inability to continue representing clients.

**Legislation Committee:** The Committee reviews pending State and Federal legislation of interest to Senior Lawyers, and proposals under consideration by NYSBA to support or oppose legislation and, where appropriate, makes recommendations to the NYSBA Executive Committee as to action. The Committee also reviews recommendations received from the Section or from the NYSBA Executive Committee with respect to prospective proposals.

**Pro Bono Committee**: Staffed civil legal service programs are able to serve only a small portion of low-income New Yorkers who need assistance. Private attorneys who volunteer their time, pro bono, help reach those who otherwise would not be aided. Senior lawyers, whether retired or not, have a wealth of experience to contribute. This Committee seeks to meet more of the needs of the public, while at the same time providing an avenue for meaningful service. The Committee intends to promote strong ties between the Section and the NYSBA Empire State Counsel Program and also to the Attorney Emeritus Program of the court system, which is directed to members of the New York Bar who are 55 years of age or older.

**Program and CLE Committee**: The mission of the Committee is to present programs of interest to the Section's membership. Since SLS membership is quite diverse, the programs cover a variety of subjects including: financial planning for the transitional attorney; incorporating new technology into your law practice; practice management for solo and small firms when an emergency occurs; alternatives to the full-time practice of law; different models for pro bono service, and the use of social media in the practice of law. Suggestions for topics, speakers and programs are welcome.

**Retirement Planning and Investment**: The emphasis is on planning rather than retirement. The Committee addresses financial and life planning issues and next steps for attorneys and their clients. The Committee's objective is to provide programs and information on professional options, work / leisure / life balance and financial and insurance planning vehicles.

**Technology**: The Committee focuses on processes, tools and services relating to the use of technology in the practice of law and looks for those tools, services and software that assist and streamline the practice of law. It provides a forum for discussion and analysis of evolving issues at the intersection of technology, computer systems security and effective use of law office technology. Its membership include solo, small firm and large firm practitioners.

As you can see from the brief descriptions that I have provided, the activities of the SLS are quite varied. I urge members of the SLS to become active on our Committees and members of NYSBA to join our Section and our Committees.

**Susan B. Lindenauer**

# A Message from the Editor

Do you remember the days when you were in grammar school? The Winter, when school was in session, seemed forever. Eventually, Spring arrived and—finally, Summer. Summer when there was no school. And the Summer seemed endless—up to a point when Labor Day was around the corner.

Time sometimes seemed almost to stand still as we enjoyed a respite from school. Eventually, Summer was over.

Now, as years have gone by (they have actually gone "bye bye"), the Winter has come and has whizzed by. We are now in Spring—soon to be Summer—and before we realize it—Fall and then Winter.

The years of our lives have speeded up with time and we (at least most of us) can be called "mature." With the perceived acceleration of time (and years as we age), I realize that another issue of *The Senior Lawyer* is about to go to press as I write this.

The moral of what I have just thought and put on this paper is: enjoy life, enjoy work, enjoy family, enjoy friends—enjoy every activity and relationship. Life is now whizzing by.

It has been said that nothing is certain other than death and taxes. Hopefully, for all of us death can be put on the back burner for many years. But taxes are here now and have been and continue to be always a major concern.

The past year we have seen an election race for President that focused in large part on "money"—especially, money for taxes, especially federal taxes.

The uncertainty of the fate of estate taxes was highly in doubt. Now, about six months later, the estate tax quandary has, to a large extent, been resolved (for the time being) by new federal legislation.

A synopsis of where we were, as to estate tax, and where we are now is illuminated in our lead article "Planning for NY Estate After ATRA 2012" by Laurence Keiser. Reading this article on the current status of estate tax law is a "must."

It is said that "a picture is worth a thousand words." David W. Mykel's article "3 Critical Components in Litigation Graphic Design That You're Not Doing" is a "wake up call" for all of us who are involved in litigation and persuasive writing. Visualization is a valuable tool for persuasion, and this article gives insight into how to use that tool.

A prolific and authoritative writer, Anthony J. Enea, has written an article, the title of which is self-explanatory: "Why Being Classified Under 'Observation' While in a Hospital Means Seniors Pay Thousands More."

For those of us who deal in torts, included in this issue of *The Senior Lawyer,* is a two-part article on "Balancing the Interests of a Minor and a Parent Where the Minor Is the Injured Party in a Personal Injury Action."

The world of cyberspace and its impact upon lawyers and legal practice are becoming more important daily.

A group of articles focusing on the growing impact of the use of the Internet and computerization in the way we practice law (in addition to the impact on our personal lives) has prompted a group of articles. Of special current interest is "Cloud Computing" and its effect not just on our practice of law but even upon our personal lives.

Even a cursory review of the index to the articles in this journal will reveal the scope and general content of the articles.

What is even more important is the call for more original articles for publication in this journal. To implement that endeavor, a Publications Committee has been formed to implement the scope and type of articles. It is now in its formative stage. Please contact me if you would like to become a member of our editorial board. As always, comments, letters to the editor and suggestions are encouraged.

**Willard H. DaSilva, Editor**

# Planning for NY Estate After ATRA 2012

By Laurence Keiser

Senior lawyers who are married, especially those who live and practice in states that have an estate tax, will need to know for themselves and for clients the new regime for estate planning, especially the rules about portability.

It should be well known by now that after a decade of uncertainty in estate and gift tax rules, Congress passed on January 2, 2013 the American Tax Relief Act of 2012 which made "permanent" the changes enacted to rates and exemptions in 2010. (Of course, the rules are only "permanent" until Congress decides it wants to change them.)

This journey began in 2001. In 2000, George W. Bush campaigned for the Presidency on a pledge to repeal the estate tax. With Republican control of both parties, a bill was passed in 2001. Because of Congressional budgeting rules, however, the tax was not to be repealed, but designed to be phased out over 9 years. Maximum rates would fall from 55% in 2000 to 45% in 2009, and the exclusion would increase from $675,000 in 2000 to $3.5 million in 2009 (although the gift tax exclusion would remain at $1 million). In 2010, the Gift, Estate and Generation Skipping transfer tax would be repealed. (It should be noted, however, that in 2010 when the taxes were repealed, there would also be no step-up in basis at death. Heirs would assume the testator's historical basis in computing capital gains tax on sale. In essence, the U.S. traded off an estate tax for an increased capital gains tax.)

Again, because of Congressional budgeting requirements, the entire 2001 Act was to be repealed in 2011. That meant the transfer taxes were to be restored in that year. The exclusion would fall back to $1 million. The tax rate would rise to 50%.

Of course, most practitioners (and clients) never really believed that the estate tax would be repealed. Everyone thought legislation would be enacted before we got to January 1, 2010. However, no legislation was forthcoming.

In 2008, Barack Obama campaigned for the Presidency on a pledge to repeal the "Bush tax cuts" but wanted to protect the middle class (i.e., those making less than $250,000 per year). The estate tax provisions were tied to the income tax provisions. In 2003, the income tax rates had been further cut, and the rate on dividends and capital gains was cut to 15%. The across-the-board income tax cuts enacted in 2001 and 2003 would also expire on December 31, 2010.

After the Congressional elections in 2010, compromises were reached. The Bush tax cuts would remain for ***all*** taxpayers for 2 years. The Estate, Gift and Generation Skipping transfer taxes would be reenacted for the same period retroactive to December 31, 2010. The exclusion (for all taxes including the gift tax) was increased to $5 million and the rate was deceased to 35%. But only for 2 years. Everything would come to a crashing halt on December 31, 2012.

It was argued that an income tax increase would be disastrous for middle class taxpayers. And the President still wanted to retain the lower rates for those who were not wealthy (which he defined as taxpayers who made less than $200,000 single, and $250,000 married joint, per year). Despite Republican resistance to the increase, the new 39.6% bracket was passed with a somewhat higher threshold and now there is a new 39.6% income tax bracket for those whose income exceeds $400,000 single and $450,000 married, joint.

The rate on capital gains and qualified dividends also increased to 20% (from 15%). All should note, however, that a 3.8% Medicare tax on Net Investment Income was already scheduled to become effective on January 1, 2013 as part of the Affordable Care and Patient Protection Act (not as part of ATRA). This tax is applied to interest, dividends, capital gains and other investment income. The effective rate on capital gains therefore is 23.8%.

On the estate side in ATRA 2012, all of the changes created by the 2010 Act were extended ***permanently*** except that the maximum rate on the gift, estate and generation skipping taxes was increased from 35% to 40%. The $5 million exclusion continues to be indexed for inflation so that the 2012 exclusion was $5,120,000 and the 2013 exclusion is $5,250,000.

At the end of 2012, many people, thinking that the $5 million estate and gift tax exclusion could drop to $1 million, set up trusts and made gifts prior to year-end.

Many older taxpayers created trusts for their grandchildren funded with $5,120,000. (In the Tri-State area, Connecticut residents had to be careful of Connecticut's gift tax which begins to be effective at $2 million). These trusts used up the gift exclusion and the GST exclusion, and assured the use of the larger exclusion even if it was reduced in the future.

Further, these trusts were created as grantor trusts for income tax purposes. (Although these were completed gifts, there are powers in IRC Sections 674 and 675 that will cause trust income to be taxed to the grantor.) By paying the tax on future income which accrued to the trusts, clients' taxable estates were further reduced by the income tax paid.

All of this planning continues to be available for 2013 and following years. Clients who haven't taken advantage of this may do this.

However, the desire to use gifts to reduce estate total transfer tax liability has to be tempered by the effect of the gifts on the basis of property. Property inherited from an estate gets a step-up in basis. Property acquired by gift does not. Capital gains tax now could be 23.8% if the step-up is not available. You have to run the numbers. It may be that the capital gains tax cost outweighs the estate tax savings.

For the past 8 years the Federal tax on long-term capital gains was 15%. That was increased to 20% in ATRA. And it's further increased by the new 3.8% tax on investment income. The effect of the capital gain is worse for NYS residents and even worse for NYC residents. Of course, the beneficiaries may be in lower capital gain brackets which would reduce the tax sting somewhat.

## Planning for Domiciliaries of New York

When the Federal exclusions began to increase, many states including New York did not. Ever since the law created a difference between the Federal and NY exclusions, NY testators have faced a dilemma in planning. If a credit shelter trust was to be funded with the Federal amount, which was more than the NY exclusion (i.e. $1 million), there would be a NY estate tax on the excess. Maximizing the use of the Federal exemption created a significant NY tax. With 2013's rates, the NYS tax cost of funding the credit shelter with the maximum Federal amount is approximately $500,000 at the first death. But the alternative would be to subject the excess $4 million to tax in the surviving spouse's estate that could potentially cost perhaps $1.6 million.

To provide flexibility, practitioners have been using disclaimer provisions. One would draft the Will with a Credit Shelter Trust (CST) funded with the $1 million NY exemption, and leave the excess to the surviving spouse. The Will would further provide that any amount disclaimed by the spouse would pass into the CST. This allowed the tax decision to be deferred up to 9 months after the date of the first death.

## Portability

The introduction of portability was intended to simplify estate planning. It has done that in some respects. But in many respects, the application of the rules is very complex.

Prior to portability, the manner in which spouses held title to their property, and the order of the spouses' deaths, was very important.

Suppose in 2009, when the applicable exclusion amount was $3.5 million, the wife owned $4.5 million of property and her husband owned $2 million of property. Both Wills provided that a CST would be set up, funded by the amount that could pass tax free of Federal estate tax. W died first, passing $3.5 million to the CST and $1 million outright to H. W's estate paid no tax. When H died, his taxable estate was $3 million (his $2 million plus the $1 million inherited). His estate, too, paid no Federal estate tax.

However if H died first, his estate paid no Federal tax, but W's estate of $4.5 million would be subject to tax when W died. In essence, H wasted his ability to pass a full $3.5 million tax-free. (He used only $2 million, because that was all he had.)

Now with portability, at H's death, his executor could make a portability election by timely filing a Form 706 (even though a return is not otherwise required). W would then have her $3.5 million plus H's $2 million. In that way, W could use the amount that H's estate couldn't use. Her estate would pay no tax.

As stated, portability must be elected by filing Form 706 even though the estate may be under the threshold and may not have to file. The executor has sole authority to make the election. Although the surviving spouse may be the only one impacted by the making or unmaking of the election, he or she can't require the executor to file the return. The return will contain a computation of the deceased spouse's unused exemption ("DSUE"). The IRS has authority to examine the return of the deceased spouse, even after the period of limitations on assessing tax on that return has expired. This is because the amount of the DSUE is always relevant when the surviving spouse dies, regardless of how many years have passed. A surviving spouse uses the DSUE before using his or her own exemption. (And, indeed, use it or perhaps lose it. If W marries H2 and then he dies, W inherits the DSUE from H2 and loses the DSUE from H1).

There are many complex portability provisions which this Article will not explore. For example, what happens if the deceased spouse has paid gift taxes? What happens if tax credits are available to the deceased spouse? What happens if the surviving spouse remarries? How do the rules affect non-citizens and qualified domestic trusts?

Portability does not apply for generation skipping transfer tax purposes. And importantly, portability does not apply for NY estate tax (or Connecticut or New Jersey).

## Future Planning for NY Residents

There are several alternatives for married couples.

The first is traditional credit shelter planning. Try to equalize each estate. Put credit shelter trusts in each Will. Limit the credit shelter amount to the amount which can pass free of NY taxes ($1 million). Leave the rest to the

spouse outright and provide that any amount disclaimed will pass to the trust.

Second is portability planning. Now that portability is in the law permanently, draft Wills that leave all to each other and rely on portability to get both exclusions against the total assets. The surviving spouse will then have his or her $5 million exclusion plus the DSUE. Factors to consider include:

A. Asset protection.

B. Control of destination.

C. Exclusion of appreciation from the second estate.

D. Basic step-up in second estate.

Assume that H, a NY domiciliary, has a $5 million estate. H's will establishes a CST to take advantage of the amount that can pass free of NY estate tax. (Recall that New York does not recognize portability.) What should happen with the $4 million excess? Should it pass to W outright or should it also pass to a CST?

Clearly a trust would provide protection from the claims of W's possible creditors (and perhaps we should add here protection from future suitors or future spouses).

A CST trust will allow H to control to whom the assets ultimately pass; H can be assured that the assets will pass to his children. If the assets are left directly to W, she is free to disburse her estate as she sees fit.

Amounts left to a CST will not be included in W's taxable estate. If the $4 million goes up to $9 million, the $9 million of assets (including the $5 million of appreciation) won't be taxed. On the other hand, the assets won't get a second step-up in basis to the fair market value at W's death.

Again some projections and number-crunching must be done. If there is projected to be no future Federal estate tax, the only savings would be the New York estate tax (max. 16%). The additional step up in basis will reduce future income tax at 23.8% on the property, if sold.

## Conclusion

Portability was not seriously considered by some practitioners in 2011 and 2012, because no one was sure it would be continued. Now that it is permanent, it is definitely a factor to be considered in planning.

It will be difficult to meld the concept of portability and the New York estate tax which will be due because the exclusion is only $1 million. It seems unlikely that New York will increase its exclusion, or enact portability. (Consider the difficulties to be faced if the surviving spouse leaves NY and moves to another jurisdiction.) Planning will continue to be interesting.

**Laurence Keiser, LL.M. (TAX), CPA, Stern Keiser & Panken, LLP with offices in White Plains and New York City.**

# 3 Critical Components in Litigation Graphic Design That You're Not Doing

By David W. Mykel, M.A.

As litigators, we are standing at the edge of another revolution in trial advocacy. In the 1990s and early 2000s, the technology revolution transformed courtrooms around the country into multi-media presentation theaters. The next revolution is going to ensure that audiences are just as engaged as they are at an IMAX: prepare for the Visual Revolution. With almost 70% of the population being visual learners (Deza, Michel Marie & Elena (2009), *Encyclopedia of Distances*, Springer) and more and more people getting their information from the Internet (49% according to Pew Research Center for the People & the Press—http://www.people-press.org), the threshold is near. Knowing this, each and every case that comes through a modern courtroom needs to be told in a visually compelling manner that turns complex facts into a clear and coherent story. We are dealing with a different breed of audience; one that embraces technology, who spends 141 hours in front of a television and 41 hours a month online (*A2/M2 Three Screen Report*, Nielsen Media. Vol. 5, 2Q, 2009). Our audience is pioneering this Visual Revolution and we too need to make this transition by creating an engaging story utilizing multimedia tools to meet the ever-changing needs of this modern, visual, and "instant information" culture. The more effective your courtroom presentation is, the more persuasive your argument is going to be, and the easiest way to accomplish this is with a visual framework and strategy.

In my twelve-year career as a litigation consultant, I have witnessed numerous graphics that have not embraced this ever-changing culture's wants and needs. I have reviewed and critiqued countless visuals that have been carelessly laid out and unintentionally colored, while scrutinizing others that were difficult to read and even more difficult to understand. Visuals have departed from their original, intended purpose of telling a cohesive visual story and have become glorified word processing or a mix of improperly laid out, poorly selected images with an obscene election of colors.

In this day and age of "web-based learners," our communication strategy needs to be structured and adhere to the same concepts our audiences are exposed to daily. This article will demonstrate how to implement easy-to-follow tactics into your next presentation in order to take your communication to the level your audience expects.

## Properly Placed Titles and Subtitles in Consistent and Prominent Areas

Placing titles and subtitles in the same spot time after time teaches your audience where to look each and every instance a new visual is introduced. The overwhelming majority of the population reads left to right and top to bottom. Beginning your title in the upper left-hand corner takes full advantage of how your audience learns and educates it where to expect something important to be. Placing your title and subtitle, which should also be your takeaway, in this strategic position, ensures that your audience sees and understands the context and the theme of the graphic first, before other aspects are viewed and considered. We recommend creating two to three template variations that allow for horizontal and vertical positioning of the title and subtitle to accommodate different types of information. Creating a few templates allows more latitude in choosing the best layout to display a variety of documents, images, charts, etc., yet still focuses your audience's attention to the same location for your theme, i.e. takeaway.

A client on a recent case commented that "a good demonstrative can immediately convey a message in a single look," and in our experience, nothing makes this easier than a perfectly worded and placed title.

## Consistently Formatted Text, Data, and Images

Adhering to the same principles above, it is a smart practice to consistently format text, data, and images. Effective presentations should always support two principles: education and persuasion. Just as we are educating our audiences about our case, we are also aiding/training them to recognize the visual structure of the presentation, the goal being for the viewer to "know" where to look for important points. By placing important text, data, and images in a consistent manner throughout your presentation, you are subconsciously training your audience where to look if something is attention-worthy. Conversely, if you constantly shift where important text, data, and images appear your audience will become confused as to whether or not this data is meaningful, leaving it up to the audience to decide. Remember, if you don't aid your audience in assessing what is important to your case, it will do it for you, and the result may not be what you wanted or intended.

Presenting information in this fashion enables both presenters and readers to readily "find" critical data during testimony. As communication experts, we know individuals are more likely to be emotionally and/or logically tied to a decision when they themselves have reached it, compared to when another party determines it for them.

## Consistent Application of Color in Diagrams, Icons, Labels, and Backgrounds

Since color plays a vital role in our everyday psychology, it would be irresponsible if we ignored it in our presentations. Color has the ability to influence our feelings and emotions in a way that few other mediums can. Color is a catalyst for affecting human mood, behavior, thinking, and rationale. Color invokes emotions, which is why marketing gurus have been integrating color into their strategies for centuries. Do you think the Coca Cola cans have remained red for decades by accident? If you're thoughtlessly mixing colors throughout your presentation, you may end up unintentionally influencing your audience in the wrong direction.

When creating presentations, use blue or green, since it represents honor, trust, and calmness to identify your side of the case. To the contrary, use the most emotionally intense color, red, for the opposition, because it represents danger and caution. By assigning a consistent color to the parties in a case, each side is easily discernible and the point of view being advocated is clearly drawn. Color cannot only be used to differentiate parties, but also to help focus your audience on key information within a graphic. When trying to call attention to something, utilize yellow highlighting (associated with liveliness and energy) to focus the audience's concentration and let it know, "Hey, this is important."

Colors can be a powerful tool to entice and engage your target audience and, when used in a decisive manner, can be the difference between a visual that persuades and a visual that confuses or distracts.

## Conclusion

You may notice something "consistent" about these points. Consistency in your strategy, your communication, and your presentation should go hand-in-hand. Grabbing your audience's attention is not simply about communication processes; it is a strategic necessity, and the only true way to do this is to invest as much time in your visual framework as your strategy. You could craft the most persuasive themes ever uttered in a courtroom, but if you present them in a convoluted and unorganized manner, your case will fall short of your desired verdict. Think of it this way: What good is the perfect oratory presentation if your audience is deaf? Remember, nearly 70% of the population are visual learners, so we need to ensure we are addressing our audiences' wants and needs at THEIR level, not OURS.

After completing hundreds of post-trial interviews with jurors, one thing is clear: if you don't supplement your case strategy with compelling, deliberately well-crafted visuals, your audience will be distracted and tune out, forgetting your themes and dismissing the merits of your case. Following these simple yet imperative rules will ensure that your audiences stay engaged throughout your presentation and empowers them to advocate your themes throughout deliberations and verdict.

**David W Mykel is a Litigation Communications Consultant with VisuaLex, LLC. Mr. Mykel has over 12 years of experience in the litigation consulting industry and has consulted on over 200 high profile cases for Fortune 100 companies as well as *American Lawyer's* Top 100 law firms.**

**Mr. Mykel comes from a psychology background earning his Master's degree in Forensic Psychology from Marymount University in Arlington, Virginia.**

**He can be reached at DMykel@VisuaLexLLC.com.**

# Why Being Classified Under "Observation" While in a Hospital Means Seniors Pay Thousands More

By Anthony J. Enea

Over the last 3 years Medicare patients in a hospital being classified as an "outpatient" under "observation" rather than being formally admitted as an "inpatient" has increased twenty-five (25%) percent, according to a recent study conducted by Brown University. Even without this recent study, the fact that this is occurring more frequently can readily be attested to by many elder law attorneys who are witnessing their clients having to personally pay for the costs of their rehabilitation in a skilled nursing care facility rather than said costs being paid for by Medicare.

Generally, it is not unusual for a hospital to classify a patient in its Emergency Department to be a patient under "observation" and not an "inpatient" that has been formally admitted. However, it appears that in order to avoid penalties being imposed by Medicare as a result of the re-admission of the patient, and to avoid costly audits by Medicare of their admission claims, hospitals are keeping Medicare patients in "observation" status rather than formally admitting them as an "inpatient." As a result of this, the Medicare patient's hospital stay is covered by Medicare Part B rather than Part A, which unfortunately results in the patient having more out-of-pocket costs.

This additional cost to the senior is significantly compounded if the senior needs to be discharged from the hospital to a skilled nursing facility and / or a rehabilitation facility. If the hospital patient has been classified as an "inpatient" while hospitalized and has spent three (3) nights in the hospital, then in that event upon his discharge from the hospital to a skilled nursing and / or rehabilitation facility his or her stay in said facility would be covered in full for the first 20 days, and from day 21 to day 100 Medicare in New York will pay for everything except $144.50 per day as long as skilled nursing and / or rehabilitation services are required by the patient. With the average cost of $369.00 per day in a skilled nursing and / or rehabilitative facility, it is obvious that the classification of the patient as being under "observation" can result in thousands of dollars of additional costs to a patient requiring skilled care and / or rehabilitative services upon his or her discharge from the hospital.

Medicare's pressure upon the hospitals to classify a patient as under "observation" stems predominantly from the fact that the reimbursement to the hospital for the patient in "observation" status is one-third of what it is for an "inpatient." Clearly, this is a significant financial consideration for both Medicare and the hospital. The pressure upon the hospital to make the determination that the patient is under "observation" is further complicated by the fact that if Medicare determines the hospital incorrectly classified the patient as an "inpatient" rather than under "observation" the hospital will be on the hook for the cost of the services it rendered to the Medicare patient. Clearly, the hospital is not in an enviable position. One could only surmise that this will become even more perilous for hospitals and seniors once the Patient Protection and Affordable Care Act ("Obamacare") is fully implemented.

Fortunately, there is federal litigation pending which was filed in November of 2011 by the Center for Medicare Advocacy and the National Senior Citizens Law Center to end these coverage methods. In the meantime, it is important that Medicare recipients be vigilant as to the status of their admission and with the help of their physicians insist that they be classified as an "inpatient." This is of particular importance if the senior will require skilled nursing and or rehabilitative services upon discharge.

**Anthony J. Enea, Esq. is the managing member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York and is the Chair of the Elder Law Section of the New York State Bar Association.**

*This article originally appeared in the Fall/Winter 2012 issue of the* Trusts and Estates Law Section Newsletter, *published by the Trusts and Estates Law Section of the New York State Bar Association.*

# A Personal Look at the United States Supreme Court

By Spiros Tsimbinos

## Introduction

About a year ago, I wrote an article entitled "A Personal Look at the New York Court of Appeals." The article proved to be quite popular, and was reproduced in several journals. This year, because of several high-profile cases, the members of the United States Supreme Court were thrust into the public spotlight. I therefore thought that it would be interesting and informative to also take a personal look at the members who comprise the Court and who are behind the Court's decisions. I begin with a look at the Chief Justice and continue with the eight Associate Justices of the Court listed in the order of seniority.

## Chief Justice John G. Roberts, Jr.

Chief Justice Roberts was appointed to his present position by President George W. Bush and began his service on the Court on September 29, 2005. With the opening of the October 2012-2013 term he will be commencing his 7th year as Chief Justice. Chief Justice Roberts was born in Buffalo, New York on January 27, 1955 and is now 57 years of age. He is married and has two children. He is a graduate of Harvard College and Harvard Law School. He began his legal career as a law clerk for Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit and then served as a law clerk for Justice William H. Rehnquist in the United States Supreme Court. He also held numerous positions in the United States Justice Department, and engaged in the private practice of law in Washington, D.C. from 1993 to 2003. Prior to his appointment to the United States Supreme Court, he served in the United States Court of Appeals for the District of Columbia.

During his tenure as Chief Justice, Justice Roberts has made an effort to obtain a greater consensus among the Justices, but the Court has continued to split in a 5-4 manner in many major decisions. Justice Roberts has managed to be on the winning side in most of these 5-4 splits, and during the past term he was in the majority 92% of the time. The Chief Justice is basically considered to be part of the conservative wing of the Court, and he often votes in the same manner as Justice Alito. During the last term, he and Justice Alito voted together slightly more than 90% of the time. During the past term, however, he split off from the conservative group in the highly controversial Obama Healthcare case, as well as in some criminal law matters. Whether he will continue to move toward the position of the more liberal grouping or will return firmly to the conservative bloc is something to watch as the Court begins its new term. In a recent interview reported in *Parade Magazine* of September 30, 2012, Former Supreme Court Justice Sandra Day O'Connor commented upon Chief Justice Robert's tenure, and stated "I felt that he made a remarkable effort to try to keep the Court on course, carefully considering and deciding these major issues." She also indicated that although the health care decision may have angered some conservatives, Justice Roberts' vote could prove to be good for the Court's reputation, since it shows that the Court is not acting on political instincts but is trying to resolve bona fide and tough legal issues.

## Associate Justice Antonin Scalia

Justice Scalia was appointed to the Supreme Court by President Reagan and he took his seat on the Court on September 26, 1986. He is thus presently the Senior Associate Justice on the Court, having served for 26 years. Justice Scalia was born in Trenton, New Jersey, in 1936 and is now 76 years of age. He is married and has nine children. He is a graduate of Georgetown University and Harvard Law School. Justice Scalia has had a varied career, participating both in private practice, the academic world, and government service. He served as Professor of Law at the University of Virginia and the University of Chicago. His governmental positions include General Counsel of the Office of Telecommunications Policy and Assistant Attorney General for the Office of Legal Counsel. Prior to his appointment to the Supreme Court, he served as a Judge of the United States Court of Appeals for the District of Columbia. Justice Scalia is viewed as being a member of the conservative bloc of the Court, but on certain criminal law issues he has authored decisions which have been favorable to the defense. These include the *Apprendi* line of cases involving sentencing and the *Crawford* ruling involving the right of confrontation. He often votes together with Justice Thomas and they did so more than 90% of the time during the past term. Justice Scalia has written several books, and has been more forthcoming in granting interviews regarding the workings of the Court and his personal viewpoint than other members of the Court.

## Associate Justice Anthony M. Kennedy

Justice Kennedy assumed his seat on the Court on February 18, 1988, pursuant to a nomination by President Reagan. He has now been on the Court for 24 years. Justice Kennedy was born in California in 1936, and is presently 76 years of age. He is married and has three children. He is a graduate of Stanford University and Harvard Law School. Prior to his elevation to the United States Supreme Court, he served for many years as a Judge in the United States Court of Appeals for the Ninth Circuit. During his legal career, he also was engaged in the private practice of the law for a period of time, and also served for

several years as a Professor of Constitutional Law at the McGeorge School of Law, University of the Pacific.

During the last several years, Justice Kennedy has assumed the role of the critical swing vote, and during the past term he was in the majority 93% of the time. With respect to criminal law matters, Justice Kennedy's critical vote has resulted in significant changes in juvenile sentencing, with the death penalty and mandatory life without parole for juvenile offenders being struck down by the Court as constituting cruel and unusual punishment under the Eighth Amendment. Although initially considered to be part of a conservative grouping, during the past term Justice Kennedy voted 25 times with the liberal wing of the Court, or as often as he did with the conservative group. During the past term, he also voted together with Justice Kagan 83% of the time. His middle position and his influence on the Court make him a key factor on any important case.

### Associate Justice Clarence Thomas

Justice Thomas was nominated to serve on the Court by President George H. W. Bush, and he began serving on the Court on October 23, 1991. Thus at the present time he has 21 years of service on the Court. Justice Thomas was born in Georgia in 1948 and is presently 64 years of age. He is married and has one child. He attended Conception Seminary and received an A.B. cum laude from Holy Cross College, and a J.D. from Yale Law School. He served as an Attorney General of Missouri from 1974 to 1977 and as Legislative Assistant to Senator John Danforth from 1979 to 1981. He also served as Chairman of the U.S. Equal Employment Opportunity Commission from 1982 to 1990. Prior to his elevation to the United States Supreme Court, he served as a Judge of the U.S. Court of Appeals for the District of Columbia.

Justice Thomas is viewed as a strong member of the conservative group and often votes together with Justice Scalia. Unlike some of his colleagues, Justice Thomas does not engage in much questioning during oral argument, and prefers to allow the attorneys to make their presentation.

### Associate Justice Ruth Bader Ginsburg

Justice Ginsburg was nominated to the Court by President Clinton and began serving on the Court on August 10, 1993. She was the second woman to serve on the Court following Justice Sandra Day O'Connor. Justice Ginsburg was born in Brooklyn, New York in 1933, and is presently 79 years of age. She is married and has two children. She is a graduate of Cornell University and Columbia Law School. She began her legal career by serving as a law clerk to the Honorable Edmund L. Palmieri, Judge of the United States District Court for the Southern District of New York. She also served as Associate Director of the Columbia Law School Project on International Procedure and was a Professor of Law at both Rutgers University School of Law and Columbia Law School. In 1971, she was instrumental in launching the Women's Rights Project of the American Civil Liberties Union, and served as the ACLU's General Counsel from 1973 to 1980, and on the National Board of Directors from 1974 to 1980. Prior to her appointment to the Supreme Court, she served as a Judge of the United States Court of Appeals for the District of Columbia.

Justice Ginsburg is known as an aggressive questioner during oral argument, and as a leader of the liberal bloc. Although vigorously advancing her position, Justice Ginsburg has often found herself in the minority, and during the last term she was one of the Justices who were in the majority in the least number of cases. During recent years, Justice Ginsburg has experienced some health issues, and although she was able to vigorously return to her duties, there has been some speculation that she may be retiring in the near future.

### Associate Justice Stephen G. Breyer

Justice Breyer was born in San Francisco, California in 1938 and is presently 74. He is married and has three children. He is a graduate of Stanford University and Harvard Law School. In the beginning of his legal career, he served as a law clerk to U.S. Supreme Court Justice Arthur Goldberg. He also served in several governmental positions, including the U.S. Attorney's Office, and Special Counsel of the U.S. Senate Judiciary Committee. For several years, he also lectured on legal subjects as a Professor at the Harvard University Kennedy School of Government, and as a Visiting Professor at the College of Law in Sydney, Australia. Before his elevation to the United States Supreme Court, he served for several years as Chief Judge of the United States Court of Appeals for the First Circuit. He was nominated to the Supreme Court by President Clinton, and took his seat on the Court on August 3, 1994. He has currently served on the Court for 18 years.

Justice Breyer is considered to be firmly entrenched in the so-called liberal bloc of the Court, and he often votes together with Justice Ginsburg. Along with Justice Ginsburg, he was in the majority in the least number of cases during the Court's past term.

### Associate Justice Samuel Anthony Alito, Jr.

Justice Alito was born in Trenton, New Jersey, in 1950. He is married and has two children. Most of his legal career has been spent in government service, including serving as an Assistant U.S. Attorney in the District of New Jersey, Assistant to the Solicitor General and Deputy Assistant Attorney General in the U.S. Department of Justice. From 1987 to 1990, he served as the U.S. Attorney for the District of New Jersey. Prior to his elevation to the Supreme Court, he had served as a Judge of the United

States Court of Appeals for the Third Circuit. He was nominated to the United States Supreme Court by President George W. Bush, and assumed his seat on the Court on January 31, 2006, and has now served on the Court for six years.

Justice Alito has consistently voted with the conservative bloc of the Court, and is generally viewed as one of its most conservative members. He often votes together with Chief Justice Roberts, and did so over 90% of the time during the Court's last term.

### Associate Justice Sonia Sotomayor

Justice Sotomayor was born in New York City, on June 25, 1954, and is now 58 years old. She is a graduate of Princeton University and Yale Law School, where she served as Editor of the *Yale Law Journal*. Early in her legal career, she served as an Assistant District Attorney in the New York County District Attorney's Office. From 1984 to 1992, she was engaged in the private practice of law, primarily dealing with international commercial matters. In 1991, she was appointed to the U.S. District Court for the Southern District of New York and she served on that Court from 1992 to 1998. She was elevated to the United States Court of Appeals for the Second Circuit in 1998, and served on that Court until 2009. In May of 2009, President Barack Obama nominated her as an Associate Justice of the Supreme Court, and she assumed her seat on the Court on August 8, 2009. She is now in her third year of service on the Court.

Although it was initially expected by some observers, due to her prosecutorial background and her record on the U.S. Court of Appeals, that Justice Sotomayor would occupy a middle position on the Court, somewhere between the conservative and liberal groupings, her voting record, since she has served on the Court, reveals that she is firmly included in the liberal voting bloc. She has basically sided with the defense on several major criminal law cases, and usually votes together with Justices Ginsburg and Breyer.

### Associate Justice Elena Kagan

Justice Kagan, the newest member of the Court, was also born in New York City. She was born on April 28, 1960 and is presently 53 years of age. She is a graduate of Princeton University and Harvard Law School. At Harvard, she served as the Supervising Editor of the *Harvard Law Review*. Justice Kagan has also had an extensive career in government service. She served as a law clerk to Supreme Court Justice Thurgood Marshall, and from 1995 to 1999 she was Associate Counsel to President Clinton, and also served as the Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Counsel. When President Obama was elected, he appointed her as Solicitor General of the United States, and she served in that capacity until her elevation to the United States Supreme Court.

Justice Kagan also spent two years in the private practice of law as an associate in a Washington, D.C. law firm. She also has extensive teaching experience, having served as an Assistant Professor at the University of Chicago Law school and as a Professor of Law at Harvard Law School. She was nominated to serve on the U.S. Supreme Court by President Obama, and she joined the Court on April 7, 2010. She is now on her second year of service on the Court. Because of her service as Solicitor General, Justice Kagan had to recuse herself on many matters which were decided by the Court, and her number of written decisions has been somewhat limited. However, commentators place her within the liberal grouping of the Court and she has often voted together with Justices Ginsburg and Sotomayor. Interestingly, however, during the last term, she seemed to have formed an interesting alliance with Justice Kennedy and they voted together 83% of the time. In fact, one of the major decisions written by Justice Kagan was in the case of *Miller v. Alabama*, 132 S. Ct. 2455, issued on June 25, 2010, in which the Supreme Court declared that it was unconstitutional to impose mandatory life imprisonment without parole for juvenile offenders, even in cases where juveniles have committed homicides. Along with Justice Kagan, Justice Kennedy cast the critical vote in this 5-4 decision.

### The Court as a Whole

The United States Supreme Court was created in 1789 by Article III of the United States Constitution. It is the only constitutionally established Federal Court, with all of the others being created by legislative statute. Throughout its history, the Court has not always had its current nine members. In fact, for many years, the Court served with six Justices. In 1869, Congress set the Court's size to nine members, where it has remained since. With the appointment of Justice Kagan, 112 Justices have now served on the Court. The Justices are nominated by the President of the United States and appointed after confirmation by the United States Senate. Justices of the Supreme Court have life tenure. During its history, the average length of service on the Court has been slightly less than 15 years. Since 1970, however, the average length of service has increased to about 26 years, and recent appointees to the Court have tended to be younger, and have averaged about 53 years of age. Currently, the salary received by members of the Supreme Court is $223,500 per year for the Chief Justice, and $213,900 per year for each of the Associate Justices.

During most of its history, members appointed to the United States Supreme Court have been white males of the Protestant religion. The first Jewish member, Justice Brandeis, did not join the Court until 1916; the first black member, Justice Marshall, was appointed in 1967, and the

first female member, Justice O'Connor, was appointed in 1981. Today, however, six members of the Court are of the Catholic faith (Roberts, Alito, Kennedy, Scalia, Thomas and Sotomayor), and three are Jewish (Breyer, Ginsburg and Kagan). There are currently no Protestant members of the Court. Three members of the Court are also women, the highest number to date. Justice Thomas is the only black member of the Court, and Justice Sotomayor is the only Hispanic.

Because of the sharp philosophical split in the Court during the last several years which has resulted in several 5-4 decisions in controversial matters, a recent survey has revealed that the public's approval rating for Supreme Court Justices has fallen to 44%, down from 66% in the late 1980s.

Although the Court is comprised of nine distinct individuals having varied backgrounds and differing philosophies, all the members of the Court continue to assert that despite their differences, they all remain on the most cordial of terms and have a great deal of respect for one another. Justice Kagan, in a recent appearance at St. John's University Law School, was quoted as stressing that although the Justices may have different views on cases, they really like each other and respect each other greatly. Justice Thomas also, in fact, was recently quoted in a public interview, when speaking of his colleagues, "these are good people." I hope that this article has provided a brief look at the good people behind the important decisions rendered by our nation's highest Court.

*This article originally appeared in the Winter 2013 issue of the* New York Criminal Law Section Newsletter*, published by the Criminal Justice Section of the New York State Bar Association.*

# Balancing the Interests of a Minor and a Parent Where the Minor Is the Injured Party in a Personal Injury Action

## Part One: Preliminary Issues for the Attorney to Consider

By Kathryn E. Jerian and Robert P. Mascali

### Introduction

An attorney who represents an injured infant and ultimately obtains a monetary award for personal injuries, either through immediate settlement or litigation, faces a second phase in finally resolving the case, which can be fraught with as many complications and obstacles as the primary litigation. As discussed in this article, the infant's financial and medical needs at the time of the award, as well as many years into the future, must be considered in order to assist the family in making the best decision about how to structure the award for the best interests of the infant. Those considerations are additionally limited by the parental obligation to provide the necessary support during infancy and, finally, by what the particular judge[1] presiding over the settlement may or may not approve now and going forward. This article will deal with the preliminary considerations for an attorney, and a later article will delve more deeply into some of the problems that can arise during the period of infancy.

### A. Initial Discussion with Your Client Following Settlement

Attorneys have several options to present to the parent or guardian of an infant for whom they have settled or obtained a personal injury award, with the caveat that any settlement proposal, even one agreed upon between the parents and the child's attorney to be in the best interest of the child, *must be approved by the court*.[2] A primary question to initially direct the attorney's advice relates to what public benefits, if any, the child is currently receiving, or may receive in the future either on the child's own account or derivative through their parents. Public benefits that are related to income level, such as Medicaid and Supplemental Security Income[3] (SSI), must be ascertained from the client in order to assist in planning a settlement. Since these benefits are means-tested, receipt of a monthly check or lump payment (outside of a trust) will affect the infant's eligibility for these benefits.

Attorneys handling these types of settlements should generally be familiar with the income levels for Medicaid eligibility[4] and the fact that the more income an individual receives, the less he or she will receive in SSI.[5] Furthermore, the attorney needs to discuss with the parents the legal obligation that they have to support their child during infancy and that the funds from the injury cannot be used to underwrite that obligation or to improperly collaterally benefit themselves or other family members. In that regard, it is necessary for the attorney to ascertain the overall financial situation of the parents and the overall dynamics of the family's living situation.

### B. Four Options

As a general proposition, there are four possible alternatives for use where the injured party is a minor: (1) guardianship under Articles 17 or 17-A of the Surrogate's Court Procedure Act;[6] (2) guardianship under Mental Hygiene Law Article 81;[7] (3) the establishment of a supplemental needs trust, alone or in conjunction with guardianship; and (4) a proceeding under CPLR Article 12. A detailed review of each of these procedural options is beyond the scope of this article but suffice to say that with respect to each of these options the basic issue remains the same—to safeguard the funds of the injured party during infancy while at the same time allowing for the possible utilization of these funds for the ultimate benefit of the infant.

#### 1. Surrogate's Court Procedure Act — Article 17 (17-A)

If desired, an application can be made to the local Surrogate's Court for appointment of a guardian of the person and property of an infant as a way to manage personal injury settlement funds. The Surrogate's Court Procedure Act governs applications to become guardian of an infant's person and / or property under Article 17[8] as well as guardianships of individuals with intellectual disabilities, whether an infant or not.[9] Guardianships provide for oversight of infant funds as the Court granting such guardianship retains control over the arrangement by means such as requiring a bond,[10] accounting of funds,[11] general approval by order necessary for expenditures,[12] and additionally imposing conditions which the Court deems necessary to safeguard the infant's funds.[13]

It should be noted that, to the extent that Article 17-A is silent on a matter, the provisions of Article 17 apply.[14]

### 2. Mental Hygiene Law—Article 81

Unlike guardianships under Articles 17 and 17-A of the Surrogate's Court Procedure Act, a proceeding to establish guardianship under Article 81 of the Mental Hygiene Law is available only to individuals consenting to such a guardianship or to "incapacitated persons."[15] The infant's incapacity must be determined by clear and convincing evidence that the infant is likely to suffer harm because of his or her inability to provide for his or her personal needs and/or property management *and* he or she does not adequately understand and appreciate the nature and consequences of his or her inabilities.[16] Given the more stringent requirements of Article 81, your infant client may not qualify for this type of guardianship and it would not likely be appropriate in any event.[17] In addition to the red tape required to obtain a guardianship under Article 81, more "red tape" is also required to maintain such a guardianship. All of these considerations, again, must be reviewed in detail with your client prior to choosing this option.

### 3. Supplemental Needs Trust (SNT)

In the instance where the client receives SSI[18] and/or Medicaid, a SNT may be the best vehicle for the infant's funds. SNTs are specially designed for individuals with qualifying disabilities and are specifically provided for under both federal and New York State Law and can either be privately administered or administered within a pooled trust that must be run by a non-profit organization.[19] SNTs allow disabled individuals to retain their public benefits while still receiving access to proceeds from personal injury settlements. A trustee or administrator coordinates the disbursement of funds from the trust so that the individual's public assistance will not be jeopardized by receipt of conflicting items, such as cash payments or payment for items for which SSI is meant to be used. Although the SNT is a special vehicle not available to all plaintiffs, depending on their level of disability, its terms should be carefully reviewed with the parent or guardian of the infant. Many clients balk at the restrictions placed on "their money" so a detailed discussion, perhaps to include the potential trust company, should be held to avoid confusion, manage expectations, and explain fully the advantages of a SNT.

### 4. Civil Practice Law and Rules—Article 12

If the infant receives no public assistance, Medicaid, or SSI, and is not sufficiently disabled to qualify for the use of a SNT, the remaining option consists of using Article 12 to possibly structure a settlement through use of an annuity, or by depositing the funds into a restricted bank account under joint control with the Court. The restricted bank account is generally not recommended[20] as it is quite restrictive as to access of funds that may be necessary and is often not favored by the Courts, especially if the terms of the Order allow the infant to gain full access to all funds at age 18. If after consultation with the client the decision is to structure the settlement through the use of an annuity, the main point to emphasize is that, once a structure has been chosen and "locked in," and later ordered by the Court, the client may not accelerate the payments without a subsequent court order[21] and significant financial penalty. Given the current glut of advertising by structured settlement factoring companies,[22] it is particularly important to explain to your clients the danger in factoring their settlement in the future.

Given that any of the above proposals must be ultimately approved by a judge, attorneys should advise their clients that these decisions are subject to change if the Court sees fit.

### C. Resolution of Liens

If the infant received Medicaid benefits relating to treatment of the litigated condition, the county Medicaid office which provided that assistance will likely have a lien against the settlement proceeds. The attorney should notify the Medicaid office(s) where the infant currently resides as well as where he or she resided in the past, particularly at the time the injury occurred, to determine whether any liens exist.[23] Attorneys should request a detail of Medicaid benefits provided and amounts charged so that they are in the best position to negotiate with the corresponding county regarding what the lien relating to their particular injury claim may be.

In limited instances, an infant may also be a Medicare beneficiary.[24] Handling the resolution of Medicare liens is beyond the scope of this article but it is an issue of which practitioners should be well aware.

## Conclusion

One thing that is clear is just how complicated the choices are facing infant clients, and their legal representative, following the settlement of a personal injury claim. Attorneys must be familiar with the intricacies of these various settlement vehicles and the legal routes to their establishment. Part II of this series will discuss in more depth the additional problems that may follow once the settlement has been confirmed by a Court and the vehicle for the funds has been established.

## Endnotes

1. Article 12 of the C.P.L.R. outlines the procedures required when the action of an infant has been settled.
2. *See id.*
3. Generally, children under 18 with low income and who are "disabled" under the law can qualify for these monthly benefits. *See* http://www.ssa.gov/ssi/text-eligibility-ussi.htm for SSI eligibility requirements (last visited Apr. 17, 2012).

4. 2012 Medicaid eligibility requirements can be found here: http://www.health.ny.gov/health_care/medicaid/#qualify (last visited Apr. 17, 2012).
5. *See* "Understanding Supplemental Security Income: 2011 Edition," http://www.ssa.gov/ssi/text-income-ussi.htm (last visited Apr.17, 2012).
6. *See* N.Y. Surr. Ct. Proc. Act Arts. 17 and 17-A (McKinney 2012).
7. *See* N.Y. Mental Hyg. Law Art. 81 (McKinney 2012).
8. N.Y. Surr. Ct. Proc. Act. §§ 1701-1726 (McKinney 2012).
9. Article 17-A guardianships are only available to individuals who have been classified as "mentally retarded" or "developmentally disabled." *See* N.Y. Surr. Ct. Proc. Act §§ 1750-1761 (McKinney 2012).
10. N.Y. Surr. Ct. Proc. Act § 1708 (McKinney 2012).
11. N.Y. Surr. Ct. Proc. Act §§ 1719, 1721 (McKinney 2012).
12. N.Y. Surr. Ct. Proc. Act § 1713 (McKinney 2012).
13. *See* N.Y. Surr. Ct. Proc. Act § 702 (McKinney 2012).
14. N.Y. Surr. Ct. Proc. Act § 1761 (McKinney 2012).
15. N.Y. Mental Hyg. Law § 81.02(a) (McKinney 2012).
16. N.Y. Mental Hyg. Law § 81.02(b) (McKinney 2012).
17. There are several cases dealing with the propriety of Article 81 versus Article 17-A guardianships. *See Matter of Barbara Kobloth*, No. 10236/10 (Sup. Ct. Westchester Co., July 7, 2010); *Matter of Phillip Morris*, No. 10236/10 (Sup. Ct. Westchester Co., July 7, 2010); *Matter of John J.H.*, 27 Misc. 3d 705 (Sup. Ct. N.Y. Co. 2010); *Matter of Joyce G.S.*, 30 Misc. 3d 765 (Surr. Ct., Bronx Co. 2010); *Matter of Chaim A.K.*, 26 Misc. 3d 837 (Surr. Ct. N.Y. Co. 2009).
18. Even where a child does not receive SSI either because the parent never applied or applied but was rejected, a Court may still order that a child qualifies for the use of a SNT. This is an option to discuss with the parent.
19. N.Y. E.P.T.L. 7-1.12 (McKinney 2012); 42 U.S.C. § 1396p(d)(4)(A); 42 U.S.C. § 1396p(d)(4)(C).
20. However, if the net settlement proceeds to the infant are relatively small, such that an annuity's costs are prohibitive, a bank deposit may make sense.
21. Fortunately, the New York Structured Settlement Protection Act provides some barrier between settlement factoring companies and your client. *See* N.Y. Gen. Ob. L. §§ 5-1701, et seq. *See In the Matter of the Petition of J.G. Wentworth Originations, LLC v. Maurello, et al.*, 2012 N.Y. Misc. LEXIS 678 (Sup. Ct. N.Y. Co. Jan. 24, 2012) (holding that a proposal that the annuitant receive $19,600 in a lump payment in exchange for future payments presently valued at $35,289.87 was excessive and not fair or reasonable); *In the Matter of Benes v. American General Annuity Service Corp., et al.* 2011 N.Y. Misc. LEXIS 6174 (Sup. Ct. Nassau Co. Dec. 12, 2011)(denying request for transfer, holding that although transfer was fair and reasonable, it was not in the "best interest" of the annuitant).
22. Some of these companies are famous for slogans such as "Need Cash Now? Why Wait?" and "I Want My Money and I Want It Now!".
23. Soc. Serv. L. § 104-b requires that this notice be provided.
24. Children who have end-stage renal disease or Lou Gehrig's disease may be eligible. "Benefits for Children with Disabilities," http://www.ssa.gov/pubs/10026.html#a0=4 (last visited April 20, 2012).

**Kathryn E. Jerian, Esq. is Assistant General Counsel for NYSARC, Inc. located in Delmar, New York. Her article, "What's a Legal System to do? The Problem of Regulating Internet Pharmacies," was published in the *Albany Law Journal of Science and Technology* in 2006. Ms. Jerian was also the 2006 recipient of the Judge Bernard S. Meyer Scholarship. She is an honorary member of the Justinian Society and is admitted to practice in all New York State Courts and the United States District Court for the Northern District of New York. She is a member of the New York State Bar Association, the New York State Trial Lawyers Association, and the Capital District Women's Bar Association.**

**Robert P. Mascali is Associate General Counsel at NYSARC, Inc. and serves as counsel to NYSARC Trust Services. He is a member of the NYS Bar Association and its Elder Law Section and its Executive Committee and the Trusts and Estates Law Section, and is the Co-Chair of the Special Needs Planning Committee of the Elder Law Section. Mr. Mascali is also a member of NAELA and is a member of Board of Directors of the New York Chapter of NAELA. Mr. Mascali is a graduate of St. John's University (1973) and Law School (1976).**

*This article originally appeared in the Summer 2012 issue of the* Elder and Special Needs Law Journal, *published by the Elder Law Section of the New York State Bar Association.*

# Balancing the Interests of a Minor and a Parent Where the Minor Is the Injured Party in a Personal Injury Action

## Part Two: Establishing the Chosen Settlement Vehicle

By Kathryn E. Jerian

### 1. Introduction

Part I of this article reviewed the preliminary issues for attorneys to consider as they settle a personal injury claim for an infant. This article will provide further information for attorneys regarding the various processes involved after the court confirms an infant's settlement by order and the settlement funds either have been or are about to be distributed to the child by means of a bank deposit, supplemental needs trust ("SNT"), or annuity.[1]

As a general note, some clients may want to seek counsel of a financial advisor, depending on the complexity of the decisions involved with the settlement. Attorneys should not, of course, offer financial advice on anything more than the most basic financial decisions if they are not qualified to do so.

#### a. Supplemental Needs Trust

Should a supplemental needs trust be in your client's best interest, you will need to choose the trust company and should include some details of its administration fees and application materials in your motion to the Court. The attorney can suggest that the full settlement amount be deposited right away into the trust account or instead may want to have an annuity fund the trust over time. If the trust account will earn more interest than an annuity, for example, the attorney might advise the client or his or her representative accordingly. Since parents are generally required to continue to provide "necessaries, treatment and education" for their minor children,[2] despite the fact of any settlement monies, it may be advisable to keep a majority of the infant's funds in the highest interest rate vehicle until he or she reach the age of majority. Again, this may be a decision best made by a financial advisor.

Given the parents' continued obligation to support their child regardless of the infant's receipt of settlement funds,[3] the attorney should make it clear to the parents or legal representative that they should not count on many disbursements from the trust account prior to age 18. This conversation is worth having with the trust company as well so that your client is made fully aware even before the trust is established of the limitations on disbursements. If there are acceptable items the client or parents know they plan to request before the age of majority, you should discuss whether it makes sense to put those items in the proposed order. This approach gives the trustee more security in making those kinds of disbursements, which can include items like electronic equipment, vehicles, and the like.

Once the trust has been established, the client (or his or her representative) should be communicating directly with the trust company for disbursement requests.

#### b. Annuities

If your client has chosen an annuity, it is wise to request that the Court make the specifics of the chosen structure part of its order by means of providing the details in the body of the order as well as making the proposal an exhibit. Once the Court has ordered a structured settlement, the attorneys can finalize their previously quoted annuity and proceed with the remainder of the paperwork necessary to establish the annuity for their client.

Usually several months after the infant's representative has signed the agreements in connection with the annuity, the chosen company will forward the policy documents to the attorney or directly to the client. It is advisable for the attorney to review policy documents in the event there are any errors in the agreed-upon payout. When final policy documents are provided to the client, the attorney should advise the infant's representative that he or she should inform the annuity company of all future changes in address so that the payments will ultimately be mailed to the correct location when they are finally scheduled to begin. Depending on the age of your client at the time of settlement, if the payments will not begin until age 18, it can be many years before the first payment following settlement. Attorneys should also advise their clients to create a will after age 18, unless they want the state's intestacy laws to control who will receive remaining annuity payments in the event of the payee's premature death. At that point, the attorney's relationship with the client and the claim generally ceases.

At some point after the court's final order, an infant's parent or legal representative (or the infant client once he or she reaches the age of 18) may desire to "accelerate" the annuity payments—also called "factoring" a settlement, which is a process where the right to receive future payments is sold in exchange for a lump sum. Under New York's Structured Settlement Protection Act, an application for approval must be made to either a judge in the Supreme Court for the county where the payee resides or the court that originally approved the structure.[4] Among other things, the statute requires that the proposed transfer be "in the best interest of the payee…and whether the transaction, including the discount rate used to determine the gross advance amount and the fees and expenses used

to determine the net advance amount, are fair and reasonable."[5] The Courts have generally employed a "totality of the circumstances" test to determine "best interest" absent more specific direction from the Legislature.[6] Some of the factors Courts will consider are previous factoring requests,[7] the discount rate,[8] impact on payee's long-term financial security,[9] and the welfare and support of the payee's dependents,[10] among other things.

Ultimately, this process can be administered without the attorney who achieved the personal injury settlement even being made aware of it. The factoring company can usually obtain all of the necessary documents directly from the annuity company and the infant's original attorney does not need to be notified of the proceeding. Also, and unfortunately, there is no prohibition against a parent or legal representative applying to the court for the factoring of an infant's funds prior to age 18. Although the payee's attendance is generally required at the hearing,[11] the Court is within its rights to order acceleration of the payments (or a portion thereof) if it finds that to be in the child's "best interest."

As Part I of this article briefly indicated, it is incumbent upon the attorney who settles the claim in the first instance to thoroughly inform their client of the relative finality of annuities and the problems that can arise should they attempt in the future to amend the structure.

### c. Bank Deposit

CPLR Article 12 governs the requirements for the compromise of an infant, incompetent, or conservatee's claim. As indicated in Part I of this article, the Court may order that these funds be deposited into a restricted bank account, for example, with no withdrawals until further order of the Court. Specifically, CPLR § 1206(b)[12] provides that smaller settlements, those under $10,000, can simply be distributed to certain qualified individuals so long as the property is "held for the use and benefit of [the] infant, incompetent or conservatee." Otherwise, the Court has several options for approval including depositing the funds in a specified account at a bank or trust company, structuring the settlement, or investing in bonds,[13] to name a few. However, for any settlements involving infants' funds, expenditures of those funds are not to be authorized where the parents have the ability to financially support the child "and to provide for the infant's necessaries, treatment and education."[14]

If the Court orders a bank deposit, the attorney should handle establishing the account so that he or she can ensure that any restrictions placed upon the account are noted by the bank. Obviously, a copy of the Court's order should be provided to the bank with the initial paperwork. The attorney, in conjunction with the client, needs to decide who will receive statements and must also direct the client that he or she will be responsible for making future decisions regarding the maturation of certificates of deposit, for example. Although your clients will most likely have a preference of banking institution, it is recommended that the attorneys use, and have the Court order, a bank with whom they have a good business relationship so that they can ensure the account is properly administered on behalf of their clients.

## 2. Conclusion

Concluding the settlement of an infant's personal injury case is in many circumstances just as important as the primary litigation itself, and similarly contains important and significant decision making. As this article and its previous part demonstrate, attorneys for infants should be well-versed in the intricacies of the various settlement mechanisms, legal requirements, and available financial vehicles in order to assist their infant clients in making the best possible choices.

## Endnotes

1. There are other options a Court may consider which are not discussed here, such as cash to the child's representative in certain situations or a guardianship account, for example.
2. Uniform Court Rules for the New York State Trial Courts § 202.67(g).
3. *See In the Matter of Marmol*, 168 Misc. 2d 845, 852 (Sup. Ct., New York Co.) (Feb. 16, 1996) (denying an application by a parent to use $125,000 of the infant's settlement funds for purchase of a family home holding that it would "impose upon the child the obligation of support of his parents and siblings").
4. N.Y. Gen. Ob. Law. § 5-1705.
5. N.Y. Gen. Ob. Law. § 5-1706.
6. *In the Matter of the Petition of 321 Henderson Receivables, L.P.*, 13 Misc. 3d 526 (Sup. Ct., Erie Co.) (Aug. 11, 2006).
7. *Id.*
8. *Settlement Funding of New York, L.L.C. v. Transamerica Annuity Service Corp.*, 11 Misc. 3d 1061(A) (Sup. Ct., Bronx Co.) (Feb. 6, 2006).
9. *In the Matter of the Petition of Settlement Capital Corp.*, 1 Misc. 3d 446. 455 (Sup. Ct., Queens Co.)(July 7, 2003).
10. *J.G. Wentworth Originations, L.L.C. v. Point Du Jour*, 35 Misc. 3d 1219(A) (Sup. Ct., Queens Co.)(Apr. 27, 2012).
11. N.Y. Gen. Ob. Law. § 5-1705(e).
12. *See also* Uniform Court Rules for the New York State Trial Courts § 202.67(g).
13. CPLR § 1206(c) and (d).
14. Uniform Court Rules for the New York State Trial Courts § 202.67(g).

**Kathryn E. Jerian, Esq. is Assistant General Counsel for NYSARC, Inc. located in Delmar, New York. Ms. Jerian is a summa cum laude graduate of the University at Albany and a magna cum laude graduate of Albany Law School. Her article, "What's a Legal System to Do? The Problem of Regulating Internet Pharmacies," was published in the *Albany Law Journal of Science and Technology* in 2006. Ms. Jerian was also the 2006 recipient of the Judge Bernard S. Meyer Scholarship. She is an honorary member of the Justinian Society and is admitted to practice in all New York State Courts and the United States District Court for the Northern District of New York. She is a member of the New York State Bar Association.**

*This article originally appeared in the Winter 2013 issue of the* Elder and Special Needs Law Journal, *published by the Elder Law Section of the New York State Bar Association.*

# The Challenges of eDiscovery and Cloud Computing

By Jonathan P. Armstrong, Eric J. Sinrod and Philip Favro

One of the major developments in business over the last few years has been the rise in Cloud Computing. Often, however, the compliance aspects of moving data have been ignored. When moving data into the Cloud it is clear that careful planning will be needed. In this article we will try and make some sense of these issues and suggest practical ways forward. We'll look at some of the early regulatory pronouncements on eDiscovery in the Cloud and some of the wider issues corporations are likely to face when going through eDiscovery touching Europe. This article is divided into six main sections:

1. Data protection and privacy issues
2. Data export legislation
3. Works councils and employee rights
4. Contracting with your cloud provider
5. The USA PATRIOT Act and related laws
6. Conclusion

## Data Protection and Privacy Issues

The UK data protection regulator, the Information Commissioner's Office (ICO), gave some advice on putting data into the Cloud in its Personal Information Online Code of Practice, which it published in July 2010. The Code recognizes the increasing use of Cloud Computing but reminds data controllers that the primary responsibility when data is passed into the Cloud remains with them.

The Code sets out two very helpful checklists. The first is for data controllers who are thinking of putting data into the Cloud and the second is for vendors to check their own services. The questions in the data controller questionnaire include:

1. Can the vendor confirm in writing that it will only process data in accordance with the data controller's instructions and will maintain an appropriate level of security?
2. Can the vendor guarantee the reliability and training of its staff, wherever they are based? Does the vendor have any form of professional accreditation?
3. What capacity does the vendor have for recovering from a serious technological or procedural failure?
4. What are the vendor's arrangements and record regarding complaints and redress—does it offer compensation for the loss or corruption of data entrusted to it?
5. If the vendor is an established company, how good is its security track record?
6. What assurances can the vendor give that data protection standards will be maintained even if the data is stored in a country with weak, or no, data protection law or where governmental data interception powers are strong and lacking safeguards?

The ICO say that if the answers to any of these questions raise concerns about a vendor's ability to look after your information, you should not use the provider concerned and should seek alternatives. Whichever jurisdiction is involved it would seem that the ICO's checklist would be a good start. Care should also be taken in eDiscovery to make sure that other basic principles are followed in addition:

1. The data being uploaded should be minimized—only store in the Cloud what you need and only store it for as long as you need it.
2. Data should only be processed fairly and lawfully—the rights of data subjects, even if they are suspects in an investigation or have been guilty of wrongdoing themselves, must always be respected.
3. Ideally consent should be obtained to the uploading of data in the Cloud. Consent is unlikely to be the whole story, however, as the basic principles of data protection must also be followed even with consent, and consent can generally be withdrawn at any time.
4. The data must be kept securely—a data processor will remain liable for the security of the data whether it is in his hands or not.

### Where should data reside?

As a general rule it is best for personal data to stay local. In an internal investigation or discovery exercise, the least risk solution is almost always to look at the data in country. For example, in Europe if the data you need to examine relates to Spanish individuals it is best to do at least the first examination of that data in Spain. If that is not possible the second best option would be to do the first cut of the data in another European Economic Area (EEA) country. Ideally that data would stay in the EEA. Given the realities of multinational business, however, that is often not possible—for example, the data may be required for an investigation by authorities based in the U.S. or eDiscovery in litigation there. If that is the case then the first cut review of data should strip out any

personal data which does not need to be transferred. The transfer of data should be proportionate to the purpose for which it is needed—for example, if the eDiscovery relates only to events between 1998 to 2000, then the first assumption should be that data outside those dates should not leave the EEA.

Bear in mind, however, that even this approach can cause difficulties. Moving data from one country to another could result in a submission to the laws of that country if the data is not simply in transit. In the UK, for example under s.5 of the Data Protection Act 1998 (DPA) if a data controller is not established in the EEA but uses equipment in the United Kingdom for processing the data other than "for the purposes of transit through the United Kingdom" it will be subject to the DPA's provisions. It is proposed that these requirements are widened under the proposed new EU Regulation; for example, the behavioural monitoring of EU citizens will be sufficient to submit to the jurisdiction.

### Data security

It is important to check the security of the data both in transit and at its location. Increasingly data regulators across Europe have been concerned to secure personal data—the ICO, for example, has been involved in a number of regulatory actions concerning the transmission of data by post, email and fax and those investigations have resulted in fines of up to £325,000.[1] Of assistance in assessing whether security procedures are adequate may be the work done in November 2009 by the European Network and Information Security Agency (ENISA). ENISA was set up by the European Union (EU) to focus on information security issues in Europe. Its role is to carry out specific technical scientific tasks in the field of European security as a European Community Agency. Their Cloud Computing risk assessment is a worthy piece of work stretching to around 125 pages. It does not have the force of law but the report did include contributions from various academics and representatives of industry including Symantec.

In addition to the ICO and ENISA's work, many other data protection regulators in Europe have looked at some of the issues involved. In June 2010, for example, the Data Protection Commissioner of the German Land of Schleswig-Holstein issued his opinion on the legal issues around Cloud Computing. Germany has a split system of data protection regulation with the regulation of private companies conducted by a Data Protection Commissioner in each Land (roughly equivalent to a U.S. state). The Schleswig-Holstein Commissioner, Thilo Weichert, said that Clouds located outside the EU that hold data on Schleswig-Holstein citizens are per se unlawful even if the European Commission has passed an adequacy decision in favour of the country in question (as it has for Canada, for example). Dr. Weichert also cast doubt on whether the Cloud provider's self-certification to the U.S. Department of Commerce's Safe Harbor program could of itself provide an adequate level of protection when putting data into the Cloud. In February 2011 the Sedona conference reprinted Dr. Weichert's thoughts and in July 2012 he updated his guidance.[2] [3]

In an effort to bring some uniformity across Europe the Article 29 Working Party (WP29), a representative body made up of the data protection authorities in each EU member state, issued its own Opinion on Cloud Computing in July 2012.[4] The Opinion comments on EU law rather than any additions to that law in each individual country. It follows Dr. Weichert's concerns on adequacy and Safe Harbor. It reminds those putting their data in the Cloud that they must "choose a cloud provider that guarantees compliance with data protection legislation" and provides a list of issues that the contract with the provider should address, which are in many respects similar to those we have already discussed.[5]

### Data export legislation

Whilst the issues created by data protection law in Europe are challenging it would be wrong to think that that is the end of the story. In addition to data protection legislation, data export laws exist in some parts of Europe to try and curb "le fishing expedition." The French authorities have looked to legislate against French documents being used in foreign proceedings since 1968. In 2007 the French Supreme Court upheld the conviction of a French lawyer for violating a Penal Law which provides that:

> Subject to international treaties or agreements and laws and regulations in force, it is forbidden for any person to request, seek or communicate in writing orally, or in any other form, documents or information of an economic, commercial, industrial or financial nature leading to the constitution of evidence with a view to foreign judicial or administrative procedures or in the context of such procedures.

The lawyer concerned was fined €10,000.

Regrettably, courts in the U.S. have often been unwilling to consider the need to accommodate foreign data export laws when limiting eDiscovery. This has led to considerable concerns amongst the legal profession on both sides of the Atlantic. For example, the Sedona Conference, the American Bar Association and the New York State Bar Association have all highlighted the issue as problematical. In 2012 the American Bar Association passed its Resolution 103 where it urged that "where possible in the context of the proceedings before them, U.S. Federal, State, Territorial, Tribal and Local Courts consider and respect, as appropriate, the data protection and privacy laws of any applicable foreign sovereign and the interest of any person who is subject to or benefits from

such laws with regard to data sought in discovery in civil litigation." Disappointingly, however, U.S. courts continue to regard U.S. litigation as supreme. Just this year, in *TruePosition, Inc. v. LM Ericsson Telephone Co.*, a U.S. court felt that the "strong national interest of the United States" would override the "weak national interest of France in prohibiting disclosure of information." For most organisations the challenge is which law they will break as the choice seems to be the rock of disobeying an American court or the hard place of acting unlawfully in Europe.

## Works Councils and Employee Rights

In addition to the data protection and data export issues, those with substantial numbers of employees in Europe may need to consult with or inform their Works Council. Works Councils in Europe are bodies set up to protect employees' interests against the employer. The law on what a Works Council can and cannot do varies across Europe, although it is possible for some employers with more than 1,000 employees to have a European Works Council with whom they could negotiate for all of their facilities. A company's obligations when launching an eDiscovery project, or putting any data into the Cloud, may include the obligation to notify or consult with Works Councils.

Works Councils across Europe—including those in Germany, France, Netherlands and Austria—have objected to the way in which their member's data is handled. In France, for example, you may be legally obliged to tell your Works Council if you start any significant project for the introduction of new technology if that project is likely to have consequences for the employment, the classification, the pay, the training or the working conditions of your employees. Although it may not be a legal requirement to tell your Works Council about any movement of data into the Cloud, as your installation may not meet the test set by article L.2323-13 of the French Labour Code, it is good practice to tell your Works Council and this transparency generally increases acceptance. Traditionally, negotiations with Works Councils have been challenging, especially for any organisation reducing its workforce in Europe. Often Works Councils have used their rights to be consulted or informed about changes to data handling practices to extract concessions from employers in other areas. The courts in some countries, notably France and Germany, have been prepared to back employees against employers both in the implementation of schemes and also in halting schemes or investigations where the correct procedures were not followed. Europe does not recognize the concept of employment at will and employees often additionally have protection from dismissal save for cause and the right to a fair procedure even where cause is shown.

Having said that, there is at least some evidence that the tide in France may be turning slightly. In May 2012 a French regional court[6 7 8] upheld the dismissal of an employee who had sent confidential work-related data to his personal email account. The employee had sent 261 confidential technical files and he argued that the employer had violated his workplace privacy rights by examining his work emails to get the proof. The court disagreed and said that email sent by an employee using a computer provided by his employer for work purposes could be presumed to be professional mail that the employer could access without the employee's presence, unless the employee had identified the messages as personal.

Employee and Works Council rights must always be factored in to any governance and eDiscovery process. The law across Europe tends to be granular, with additional laws prohibiting interference with email communications. This category of law often carries heavier criminal sanctions than data protection legislation. Improperly collected evidence could be inadmissible in any subsequent proceedings and, in extreme cases, could land the collector with a criminal conviction. To address these concerns those leading the eDiscovery process will want to establish a list of the relevant countries involved in the process, and the number of individuals involved in each of those countries, at an early stage in the project. Armed with that information a proper assessment, using local counsel familiar with the legislation in each country, can be undertaken.

## Contracting with Your Cloud Provider

It is obviously important when putting data into the Cloud to make sure that you do proper due diligence on the Cloud solution vendor and put in place a proper written agreement with that vendor. Under data legislation in Europe a written agreement will be needed. In addition it is important to be clear in the contract with the vendor what you are buying. Amongst the issues to look at especially would be:

1. **Limits on the vendor's liability**. It is common for vendors to seek to cap their liability at an unrealistically small amount—maybe even at the level of fees paid to them. Will this be adequate? Given that a security breach may cost over $1m, does the vendor have enough of a share of the risk? Bear in mind this is not just an issue of risk tolerance. If the vendor has only limited responsibility, can the legal requirement that the vendor is complying with "obligations equivalent to those imposed on a data controller" be met?

2. **Termination provisions**. It is important that the agreement contains proper termination provisions including addressing the vendor's insolvency, given that it is predicted that there will be substantial fallout in this industry as Cloud computing matures.

3. **The jurisdiction of the agreement**. Is it a jurisdiction that you are familiar with and are you happy

to go there in a hurry if there is an issue with the vendor to take emergency proceedings to secure your data?

4. **Uptime**. All Cloud providers are not equal. What commitments will they give you to make your data available when you need it? Look also at how uptime will be calculated. Some vendors will only guarantee uptime and provide support during their business hours. If your main operations are based in Europe but the vendor is only committing to provide a service during business hours in California, how much use will that be to you? Will you be prepared to wait 8 or 9 hours until the support provider wakes up?

5. **Third party requests**. A good contract will put in place a contractual protocol which will detail how the Cloud vendor will respond to any third party requests for information (such as a subpoena) and whether the vendor is obliged to notify the company of those requests prior to producing the requested information. Be aware of the fact that the answer to this question is not always as simple as it may sound. Some countries (including the United Kingdom) have tipping-off provisions in some pieces of legislation. This could mean that the vendor would be committing a criminal offence if it complied with any contractual requirement to notify you before delivering up the requested information.

6. **The scope, type and purpose of the processing, the type of data and the category of data subjects**. An area which is unlikely to be controversial but seems to be specifically required by the Schleswig-Holstein opinion.

7. **Subcontracting**. Some almost virtual operations exist which sell Cloud computing and then subcontract any contracts that they have won. It is important that you know who you are contracting with. You will need to do due diligence and credit checks on your proposed vendor and their subcontractors. You should also try and find out where the facilities that will hold your data are located. If the data is held overseas, using corruption indices like those produced by Transparency International would also be wise. Anti-corruption law is toughening throughout the world (for example, with the UK Bribery Act 2010) but regrettably some outsourcing locations of choice still score poorly in corruption indexes. If those with the ability to access your data are poorly paid and from a country where corruption is rife, it stands to reason that the chances of your data being compromised are greater. A wise default position may be for the agreement to prohibit subcontracting of any kind without your prior written consent. The Schleswig-Holstein opinion also highlights this risk saying that *"due diligence should be done on subcontractors as well…at minimum, an independent entity must perform an outside audit and submit a report for the Cloud user's review. Because there are so many potential Cloud participants, the user must be informed as to which providers are actually processing the data at any given time…."*

8. **Timing and Assistance on Security Breaches**. Most reported security breaches these days seem to be vendor related. Dealing with the security breach is a fraught process and you will need co-operation from everyone involved. Your contract should make it clear that the vendor has to respond quickly. Remember that under the new EU proposals you may only have 24 hours to make multiple breach reports and so vendors are going to have to be able to assist you to prepare those reports promptly.

9. **Location.** You should also try and find out where the facilities that will hold your data are located. With many clients we have developed something we call for convenience the "Tripadvisor test." As the start in any data relocation exercise you should look up on Tripadvisor the location where your data will reside. If you are not comfortable going there on a business trip then consider whether it would be wise to send your data there.

   Any contract must include the minimum provisions of a data transfer agreement (DTA) even if all of the parties involved have signed up to the U.S. Department of Commerce's Safe Harbor scheme to protect the flow of data from the EU and or Switzerland to the U.S.. They should also include the ability to change the DTA elements of the agreement if the law changes.

   Also bear in mind that if you are moving data, DTAs need to be specific in some countries such as Spain and Germany. The EU model terms will not always work. Watch out also for strange provisions of U.S. or local law. For example, is there an export control prohibition on the type of encryption technologies that you are using to protect your data? If an investigation involves allegations of obscenity do you increase the risks by moving the data to another country which may be less tolerant of these issues?

## The USA PATRIOT Act and Related Laws

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (the USA PATRIOT Act), while expanding some government access to data in certain respects, did not create an entirely new regime of U.S. governmental access to information that greatly threatens data in the Cloud. Moreover, a recent comparative study

indicates that it is inaccurate to assume that access by the U.S. government to data stored in the Cloud is greater than the access of governments in other advanced countries, as they also have anti-terrorism laws that afford similar expedited access.

### Additional laws impacting government access

The FBI and other U.S. government agencies have previously been able to utilize a National Security Letter (NSL) as a type of administrative subpoena to seek records and data relating to government investigations. At the time the USA PATRIOT Act was enacted, there already were in place several U.S. Federal statutes, including the Electronic Communications Privacy Act (ECPA), authorizing the issuance of NSLs. The realm of NSLs was expanded in various respects by the USA PATRIOT Act and subsequent to this expansion the use of NSLs increased. NSLs gave rise to certain criticisms, some of which were abated by the USA Patriot Act Improvement and Reauthorization Act of 2005 (the Reauthorization Act). Nevertheless, while NSLs still are used, the data that can be sought from Cloud providers is generally limited to identification information, such as name, address, and length of service, but *not* the actual content of communications.

Often, the ECPA governs access to data maintained by a Cloud service provider. If U.S. authorities seek customer data from a Cloud provider, under the ECPA, a judge must issue a search warrant, an ECPA court order, or the government must issue a proper subpoena to the provider. When dealing with a court order or subpoena, notice usually is provided to the customer allowing for potential opposition, but this is not the case when it comes to search warrants.

### True impact of the USA PATRIOT Act

The aftermath of the USA PATRIOT Act does not necessarily mean that data needs to be stored on cloud servers outside of the United States or with non-U.S. providers to prevent the data from being accessed by U.S. governmental authorities. Indeed, the United States and a number of European governments have entered into Mutual Legal Assistance Treaties (MLATs). Pursuant to a MLAT, two countries usually agree to the most expansive level of mutual assistance with respect to investigations or criminal offense proceedings. And in 2003, the United States and the EU entered into a MLAT containing a data protection provision. According to the comments to this MLAT, this data protection provision is designed to ensure that assistance generally will be provided and only will be refused on data protection grounds in exceptional cases. As a result, even if data were stored in the Cloud on European servers, European governmental authorities likely would cooperate with respect to a U.S. investigation. And even though the European Commission recently proposed a new Regulation and new Directive relating to personal data privacy, the proposed new Directive appears to maintain significant law enforcement access to personal data.

### Approach of other countries

In addition, a recent review of the laws of the Australia, Canada, Denmark, France, Germany, Ireland, Japan, Spain, the United Kingdom and the United States reveals that the U.S. is not alone and that even countries that have strict privacy protections also have anti-terrorism laws that could allow for expedited government access to data stored in the Cloud.[9] Thus, "it is not possible to isolate data in the Cloud from governmental access based on the physical location of the Cloud service provider or its facilities."[10]

## Conclusion

It is likely that in the years ahead we are going to see the need for investigations to be done in a more culturally astute manner. That might mean that companies have to use eDiscovery providers who have the ability to collect data in-country, and do the first analysis of it in-country before sending selected data back to the U.S.. It might include seconding people from the U.S. to Europe to help manage these investigations. And it will almost certainly mean using local counsel who understand the issues in the particular jurisdiction concerned, and who can act as a critical friend to the corporation in the investigation, questioning them on whether it has become over-broad in approach or whether the investigation is simply out of proportion to the wrong that is being investigated.

Whilst we all know that a serious allegation of the type that Enron suffered will have to be investigated in a very comprehensive manner, and whilst we all know that taking three packets of post-it notes home should not be investigated in the same way as the Siemens' investigation, the challenge for most corporations is that whole big area in the middle. When is an investigation serious enough to warrant the troops being mobilized? These areas are likely to continue to be difficult and wise counsel will be at a premium.

As we have seen in an eDiscovery exercise involving data in the Cloud issues that will need to be addressed include:

- The need to limit the scope of the discovery exercise;
- The need to keep data in-country where possible;
- Restricting circulation—corporations need to get out of the habit of unintelligently copying people in "for information only," especially where those people are in a different jurisdiction. In discovery consideration should also be given to apply into the U.S. courts for a protective order. With investigations and regulatory enquiries consideration should be given to seeking to agree on the scope of the

discovery exercise and the possibility of steps like the anonymization of data;

- Arrangements in each relevant jurisdiction with outside counsel who could direct an investigation;
- Managing employee expectations before an incident—this could include sending a reminder to employees that their emails could be read where legally permitted;
- Doing due diligence on suppliers; and
- Checking data protection registrations.

The need then for law firms and eDiscovery consultants to know the culture in those countries where data is collected, as well as local law, will become ever more important. Data collection procedures will have to be tailored to suit each occasion to try and ensure both compliance with local law and the expectations of the court or regulator. Litigation teams will need to include data privacy specialists in all aspects of the investigation and may even need to include independent counsel to lay down ground rules on behalf of those being investigated.

Whilst this article has attempted to map out some of the challenges involved more will be encountered. Regrettably there is no one-size-fits-all approach. With that in mind the need for specialist assistance, proper resources and a clear mind is self-evident.

## Endnotes

1. The £325,000 monetary penalty was levied on 1st June 2012 against Brighton and Sussex University Hospitals NHS Trust. Details are here http://bit.ly/Jy9hVm Details of other ICO enforcement activity can be found at www.ico.gov.uk.
2. See www.bit.ly/kmyh95.
3. The Schleswig Holstein revised guidance is here https://www.datenschutzzentrum.de/presse/20120713-datenschutzkonformes-cloud-computing.htm.
4. A copy of the Opinion is here http://bit.ly/TbcXmn.
5. The French data regulator CNIL also issued a paper on Cloud Computing in June with similar recommendations, http://bit.ly/MfwwcO. Also in June the Spanish data regulator AEPD issued guidance to law firms on the use of Cloud technologies, http://bit.ly/MXVYOg.
6. Pierre B. Epsilon Composite, Cour d'Appel, Bordeaux.
7. No. 4164, 10/2/01. Here the Cour de Cassation established the general rule that employees have the right to workplace privacy and that an employer cannot search an employee's personal messages stored on the company's computer without breaching that right to privacy. In a 2005 decision the court ruled that an employer could only search files identified as personal on a work computer in the presence of the employee, unless there was a particular threat to the company.
8. Philippe Ex v. Société Cathnet-Science, Cour de Cassation, number 04.40017,5/17/05.H.
9. *A Global Reality: Governmental Access to Data in the Cloud*, Maxwell & Wolf, Hogan Lovells, 5/23/12, http://bit.ly/MIY5rK.
10. *Id.* at 2.

**Jonathan P. Armstrong is a UK-qualified lawyer practicing in technology and compliance at Duane Morris. Mr. Armstrong's practice includes counseling multinational companies on matters involving risk, technology and compliance across Europe. He has handled legal matters in more than 60 countries involving emerging technology, corporate governance, ethics code implementation, reputation, internal investigations, marketing, branding and global privacy policies. Mr. Armstrong has counseled a range of clients on breach prevention, mitigation and response. Mr. Armstrong has also been particularly active in advising multi-national corporations on their response to the UK Bribery Act 2010 and its interrelationship with the U.S. Foreign Corrupt Practices Act (FCPA).**

**Eric J. Sinrod is a strong and experienced advocate for his clients and has represented them before the United States Supreme Court, other appellate courts, and in a number of jury and court trials, arbitrations and mediations at Duane Morris. His practice has covered many important Internet, technology, intellectual property, information, communications, commercial, antitrust, eDiscovery, and insurance coverage issues. He has represented domestic and international clients in major class actions and where hundreds of millions of dollars have been at stake. Mr. Sinrod has been highlighted as "the leading IP attorney in the land," and he has been selected by his peers as one of the "Best Lawyers in America" in the area of Cyber Law and annually as a "Super Lawyer" for Business Litigation.**

**Philip Favro is a Discovery Attorney for Symantec Corporation in Mountain View, California. Phil advised techology companies and other clients regarding complex eDiscovery issues during his 11 year litigation practice. Phil's expertise has been enhanced by his legal scholarship. His line of research addresses the changes and challenges that electronic data have forcibly introduced into litigation and, in particular, on discovery practice. Phil now works with Symantec customers and company stakeholders on information governance and eDiscovery matters. Phil has been a licenced member of the California State Bar since 1999. He is a member of the American Bar Association and a member of the Electronic Document Retention and Production (WG1) Working Group of the Sedona Conference. Phil also serves as a Judge Pro Tempore for the Santa Clara County Superior Court.**

*This article originally appeared in the Winter 2012 issue of* Inside, *published by the Corporate Counsel Section of the New York State Bar Association.*

# Who Owns Your Social Media Account?

By Adam S. Walker

*Throughout history, technological and societal advances have led to the creation of new property rights.*[1]

## I. Introduction

Communication through interactive dialogue, otherwise known as social media, is reshaping the way those in society interact with one another. As social media accounts continually become more intertwined with the daily routines of our lives, the accounts themselves become increasingly more valuable to businesses. *PhoneDog v. Krazitz*,[2] a case currently pending in the Northern District of California, has the potential to significantly alter the legal landscape regarding social media rights. The claims in the case are rooted, at least in part, in ownership of various aspects of a social media user account, and the case raises an important question: to what extent does a social media account belong to the user?

## II. Background

In April 2006, Noah Kravitz began working at PhoneDog.com ("PhoneDog"), a mobile news and review resource company. Kravitz's duties required Kravitz, under the Twitter handle @PhoneDog_Noah, accessed only through a password, to regularly post his opinions and reviews of mobile products and services.[3] During Kravitz's employment with PhoneDog, the @PhoneDog_Noah accumulated approximately 17,000 Twitter followers.[4] In October, 2010, Kravitz's employment with PhoneDog ceased, and PhoneDog requested that Kravitz turn over to it control of the account and all account followers. Instead of complying, however, Kravitz changed the account handle to @noahkravitz and continued to post regularly.

PhoneDog sued Kravitz in the Northern District of California for: "(1) misappropriation of trade secrets; (2) intentional interference with prospective economic advantage; (3) negligent interference with prospective economic advantage; and (4) conversion."[5]

On November 8, 2011, the initial complaint survived a motion to dismiss filed by Kravitz. The court allowed the misappropriation of trade secrets and conversion claims to stand, and gave PhoneDog leave to amend its claim for intentional interference with prospective economic advantage.[6] Following the filing of the amended complaint, on January 30, 2012, the court denied Kravitz's motion to dismiss the tortious interference claim.[7]

## III. Who Has Ownership Rights to User Accounts?

The procedures to create an account on Twitter are simple. After accessing the Twitter website, a registrant needs to submit a name and an email address, create a user name and a password, and accept Twitter's terms of service to activate the account. Though the registration is fairly straightforward, the terms of service, to which every user must agree, include language that creates a significant, yet overlooked, distinction between ownership rights to the website and the website's services—the account and use of the account—on the one hand, and ownership of the account and ownership of the content, on the other.

Twitter's terms of service state: "All right, title and interest in and to the Services [defined as a user's "access to and use of the services and Twitter's websites"] (excluding Content provided by users) are and will remain the exclusive property of Twitter and its licensors."[8] These rights appear to be all-encompassing and to grant Twitter rights to the website, including all services provided. But the terms also state: "[y]ou retain your rights to any Content [any information, text, graphics, photos or other materials uploaded, downloaded or appearing on the Services] you submit, post or display on or through the Services."[9] The terms also provide:

> [b]y submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).[10]

Although the terms of service specifically state that they govern a user's "access to" and "use of" Twitter, they do not convey ownership rights to anything other than content posted by the user. The language in the terms clearly attempts to distinguish between ownership of the content (by the user) and of the website and its services (by Twitter).

In addition to contractual ownership rights in the website, the terms of service also assert intellectual property rights in the website and its services: "[t]he Services are protected by copyright, trademark, and other laws of both the United States and foreign countries."[11] Assuming that the Twitter software and the user account computer program(s) are copyrightable and Twitter is the "creator," as a matter of copyright law, all copyright rights in the software belong to Twitter. As a result, Twitter owns the user account, whereas the user holds a right or license

to *use* the account. In any event, the terms of service between Twitter and all users grant Twitter exclusive ownership of all aspects of the website. These contractual rights almost certainly would extend to ownership of the user accounts themselves (since the user accounts are part of the website) and to the right to allow use of a user account (a service offered by the website). The terms do not grant users ownership rights to any aspect of the Twitter services except content ownership.

In addition, as will be examined more hereafter, Twitter, not the user, exerts dominion and control over the user accounts. Twitter is the only entity that has the ability to activate and remove user accounts from the website, social network and the underlining software codes where the accounts are stored. Twitter's authority over the website reinforces the distinction between the rights of Twitter and the limited rights of users.

The question of who owns the website and user accounts has not yet been decided. In *PhoneDog*, Kravitz raised the issue in his initial motion to dismiss, but the judge refused to answer until more facts were in the record,[12] but copyright and contract law appear to lead to the same conclusion: the user accounts, either as a service offered by Twitter or as part of Twitter, are owned exclusively by Twitter. If this is true, PhoneDog may have a significant hurdle to overcome, particularly on its conversion claim, as it does not appear to be the owner of the services to and in Twitter's website and/or the user account in question. Demonstrating such ownership rights will be necessary for PhoneDog to prevail on its conversion claim.

## IV. Who Owns User-Posted Content?

To most individuals, Tweets (a post or status update on a user's Twitter account) appear to be nothing more than inconsequential mishmashes of 140 characters or less. In situations where an individual has created and/or is using an account for primarily personal, non-employment related postings, the posted content may be of little or no value to anyone. However, the importance of content ownership has increased dramatically since companies like PhoneDog have begun employing individuals to administer company social media accounts and make regular posts as part of the company's business.

Ownership rights in content posted by an employee ultimately may be determined by the circumstances in which the content was created, such as whether the content is copyrightable and whether the employer has an agreement with the employee regarding ownership of the content.

Under U.S. copyright law, with certain exceptions, such as works made for hire, once an original work is fixed in a tangible medium of expression,[13] the creator of the work owns the copyright.[14] Although the "originality" threshold is low under the law, the work must contain some minimal amount of creativity.[15] Meeting this standard may be difficult for Twitter users, since the radically compacted way Twitter promotes communication stifles creativity. Many posts of 140 characters or less about one's everyday occurrences lack any semblance of creativity. By contrast, someone who crafts something such as a poem is more likely to meet the creativity threshold since some level of creativeness has been exerted. As a result, whether a user's post on his or her Twitter account will be copyrightable will need to be determined on a case-by-case basis.

If posted content is not copyrightable, the determination of ownership is likely to depend on a number of factors, the most important of which may be whether the employer has affirmatively addressed the issue in an employment agreement, social media policy, etc. with clear language transferring all rights to content posted to the employer. Absent such language, the employer may still retain ownership of posted social media content if the posts were made within the employee's scope of employment and, under the law of agency,[16] all benefits and rights resulting from the actions of the agent will be attributed to the employer.[17]

With respect to copyrightable posts, the employer may own the copyright as a work-for-hire (1) if the work was created within the scope of the employee's work duties or (2) if the work was specially ordered or commissioned.[18] To determine who is an employee under the work-for-hire doctrine, courts look to a number of factors under the general common law of agency, such as: (1) control by the employer over the work; (2) control by the employer over the employee; and (3) the status and conduct of the employer.[19] "Specially ordered or commissioned work" applies to works created by independent contractors who are not employees under the general common law of agency. Work performed by independent contractors will be a work-for-hire only if *both* of the following conditions are met: (1) the work was performed within one of the nine categories of work listed under the statutory definition, and (2) there is a written agreement between the parties specifying that the work is a work-for-hire.[20] Failure to satisfy these requirements will result in the independent contractor, and not the employer, retaining ownership in the copyrights created.

Nothing in the record in *PhoneDog* indicates that Kravitz was acting as an independent contractor, and neither party disputes that the posts were done outside the scope of his employment or outside the instruction of PhoneDog.[21] An employer-employee relationship appears to have existed between Kravitz and PhoneDog. If the posts are copyrightable, PhoneDog is likely to maintain copyright ownership.

Finally, situations where copyrightable posts are created that have no relation to the employee's work and/or were created outside the scope of the employee's duties

will likely result in the employee retaining rights in the content posted. Essentially, the less a correlation there is between the content posted by an individual and his or her employment duties with the employer, the less likely the employer will be able to make an argument that the content was posted in furtherance of or as part of, the employee's employment duties; as a result, the content posted will be deemed to be the property of the employee and not the employer. This may seem obvious, but as Twitter and other social media platforms become increasingly intertwined with the way companies do business, and as social media usage by individuals becomes increasingly popular, the line between personal and professional content becomes blurred.

Although ownership of the content posted on social media accounts may seem of no great consequence in light of the fact that a user could attempt to recreate a similar or identical post, maintaining ownership of the content significantly limits the possibility that an ex-employee will be able to benefit from content created on behalf of the company—especially if the work is copyrightable, is difficult to recreate, and/or is highly valuable to the company. As noted, determining ownership of the content could depend on one or more of the following: the nature of the content; what agreements, if any, the employer and employee have with each other; and the relationship between the postings and the employee's employment duties.

Although there is no evidence in the *PhoneDog* trial record of any intention by PhoneDog to claim ownership of the posts at issue or of the existence of an employment agreement specifying control over the Twitter account, an employer-employee relationship appears to have existed that will convey all benefits of Kravitz's work to PhoneDog, including ownership of the posted content and/or any copyrights in the posts.

## V. Who Owns the Followers of a User Account?

Invariably, one of the true benefits of Twitter, Facebook or any other social media platform is the user's ability to subscribe to another user's post, status, etc. Those subscribing to the feed are known as *followers*. One element of the *PhoneDog* litigation is PhoneDog's belief that a follower is of economic value and benefit to a user and that users "own" their followers. But whether a follower is of economic benefit to a user, and, more important, whether a follower has monetary value, is a question that in *PhoneDog* will likely be subsidiary to the issue, raised by PhoneDog's conversion claim, of whether a user owns his followers.

The elements of conversion, similar to most theft-based tort claims, are intertwined with one's right to own or possess[22] tangible and, depending on the jurisdiction, intangible property as well.[23] According to *Black's Law Dictionary*, ownership "implies the right to possess a thing;"[24] "possession" is defined as "the exercise of dominion over property."[25] Examining PhoneDog's conversion claim based on Twitter's terms of service casts doubt on whether a user has ownership rights over followers on a social media platform.

Twitter's terms of service provide that Twitter retains exclusive ownership rights to the website and to services offered by the website and/or intellectual property embodied in the website—all of which, either individually or combined, are likely to entail rights to the user accounts. This conclusion is strengthened by Twitter's exercise of dominion and control over all accounts.

Twitter's terms of service state: "We [Twitter] reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services and to terminate users or reclaim usernames."[26] Even if a user "deactivates" his account, Twitter does not remove the code from its operating programs; only the visual representation of the account is removed, i.e., the account name and listing. When a user "reactivates" a recently deactivated account, all of her prior information is reinstated. This is because Twitter, not the users, retains control over the source code or software that contains all account information. Possession of the user accounts belongs solely to Twitter; users simply have the right to use an account.[27] Thus, if all followers are account holders, and if Twitter owns all rights to all accounts, then it follows that a user cannot own a follower.

Twitter and other social media platforms afford users the ability to be self-selecting. Users are free to be friends with only those they wish and to follow only the feeds that interest them. More importantly, users are free to defriend those with whom they do not wish to be friends, and users are a click away from removing themselves from following people and things they no longer want to follow. This self-selection ability illustrates that a follower cannot be owned, at least by another user, because the holder of the account being followed has no control over—and thus no ownership rights in—the account's followers.

Due to the contractual limitations imposed in Twitter's terms of service and/or the lack of dominion and control over account followers, PhoneDog's claim of ownership in the account followers is significantly diminished. Unless PhoneDog is able to assert legal control and/or possession over account followers, PhoneDog is unlikely to meet its burden of proof for conversion of the account followers by Kravitz.

## VI. What Should Businesses Do?

The facts of *PhoneDog* illustrate that as a company's business model becomes increasingly intertwined with social networking, businesses need to take steps to allevi-

ate any confusion as to use and/or control over company controlled social media accounts and content.

Protecting a company's rights in social media accounts can be achieved in a variety of ways. Registering user accounts under the company's name will minimize confusion as to the purpose of the account and for whose benefit it exists. Companies also can seek injunctive relief against infringement of their trademarks[28] and/or dilution[29] in social media. A number of social media sites offer the option to terminate or transfer ownership of accounts that infringe third-party rights or have the potential to confuse other users.[30] Both seeking injunctive relief and/or utilizing social media remedial procedures are ways to combat unauthorized use of a company's intellectual property or other tortious conduct. Preventing access to the account upon termination of an employee reduces the risk of an embattled ex-employee hampering or damaging the company's social media presence. Conversely, if companies are hesitant to grant access and use of the account to a select few individuals, certain social media platforms allow more than one person to be an administrator of an account.

As may be evident from *PhoneDog*, arguably the most important measure a company can take to protect its interest in a user account is to establish clear and concise contractual rights as to all aspects of the company's social media account(s) in the event of termination of the administrator of the account. In addition, specifying precisely the scope of the employee's duties can minimize confusion as to whether the employee's actions were or were not job-related. Although, as discussed above, an employment contract may not be able to convey ownership rights in the account to the employer (because the service operator is the owner), a contract can, at a minimum, specify control over use of the account—thus reducing the potential for a dispute such as that between PhoneDog and Kravitz.

## VII. Conclusion

Examining Twitter's terms of service reveals that users maintain no ownership rights, aside from ownership in the posted content, to the services of or in the Twitter website; users merely have the right to use or access the services and the website. Users also lack ownership rights to account followers since users exercise no dominion and control over followers, because followers are self-selecting and are free to decide and choose their actions without interference or influence from the account holder. Due to the limited rights afforded to it, PhoneDog is unlikely to succeed in meeting its burden of proof to any claim of conversion or theft of account followers.

In order to adequately protect themselves from the pitfalls currently facing PhoneDog, companies should familiarize themselves with the rights afforded to them under a social media website's terms of service, and craft clear and concise social media guidelines and/or language in the company's employment contracts that address control and use of any company social media account and social media content posted by the user prior to account activation.

## Endnotes

1. Courtney W. Franks, *Analyzing the Urge to Merge: Conversion of Intangible Property and the Merger Doctrine in the Wake of Kremen v. Cohen*, 42 HOUS. L. REV . 489, 503 (2005) (quoting Juliet M. Moringiello, *Seizing Domain Names to Enforce Judgments: Looking Back to Look to the Future*, 72 U. CIN. L. REV. 95, 115 (2003)) (examining how a party maintains ownership rights in intangible property).
2. PhoneDog v. Kravitz, No. C 11-03474, 2011 WL 5415612 (N.D. Cal Nov. 8, 2011).
3. *See id.* at *1.
4. *Id.*
5. *Id.*
6. *See id.* at *7, 10.
7. *See* PhoneDog v. Kravitz, No. C 11-03474, 2012 WL 273323, at *1 (N.D. Cal. Jan. 30, 2012) (dismissing Kravitz's motion to dismiss based on PhoneDog's amended complaint, alleging tortious interference). The court stated that it was "able to draw the reasonable inference that PhoneDog had an economic relationship with at least one-third party advertiser that was disrupted by Kravitz's alleged conduct, causing it economic harm." *Id.*
8. Twitter Terms of Service, TWITTER, https://twitter.com/tos (last visited Mar. 18, 2012).
9. *Id.*
10. *Id.*
11. *Id.*
12. PhoneDog v. Kravitz, No. C 11-03474, 2011 WL 5415612 at *5–6.
13. 17 U.S.C. § 102 (2010).
14. *See id.* at § 201(a).
15. *See* Feist Publ'n v. Rural Tel. Serv., 499 U.S. 340, 358 (1991). The Court held that the "originality requirement [of copyright law] is not particularly stringent," requiring only "some minimal level of creativity." *Id.*
16. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining agency as "the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") [acting] on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act").
17. *See id.* at § 3.05. The employer must still ratify the actions of the employee to be binding under agency law.
18. *See* 17 U.S.C. §§ 101, 201(b) (2012).
19. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).
20. *See* 17 U.S.C. § 101. The nine categories of a work made for hire are (1) contribution to a collective work, (2) part of a motion picture or other audiovisual work, (3) a translation, (4) a supplementary work, (5) a compilation, (6) an instructional text, (7) a test, (8) answer material for a test, or (9) an atlas.
21. *See* PhoneDog v. Kravitz, No. C 11-03474, 2011 WL 5415612 at *2 (N.D. Cal. Nov. 8, 2011).
22. RESTATMENT (SECOND) OF TORTS § 222A (1965). Conversion is defined as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."

23. Courts are split as to whether ownership rights can extend to intangible property. Jurisdictions that recognize ownership rights in intangible property generally do so when the intangible property is "merged" into a tangible medium; *see* Brass Metal Prods., Inc. v. E-J Enters., Inc., 984 A.2d 361 378 (Md. App. 2009) (citing Allied Inv. Corp. v. Jasen, 731 A.2d 957, 965 (1999) (stating that to succeed on a claim for conversion of intangible property, the Maryland courts have held that the owner's rights must be "merged or incorporated into a transferable document.")).

24. BLACK'S LAW DICTIONARY (9th ed. West 2009).

25. *Id.*

26. https://twitter.com/tos.

27. *Id.* The beginning clause of Twitter's terms of service states: "These Terms of Service ("Terms") govern your access to and use of the services and Twitter's websites (the "Services"), and any information, text, graphics, photos or other materials uploaded, downloaded or appearing on the Services (collectively referred to as "Content"). Your access to and use of the Services is conditioned on your acceptance of and compliance with these Terms. By accessing or using the Services you agree to be bound by these Terms." The language carefully states "your access to and use of the services…." Nowhere in this section, or any other section in the terms of service, except in the User's Rights section, does Twitter use the words "rights to, rights in, ownership in," etc.; rather, the wording relating to users always states "access to" and "use of."

28. *See* Lanham Act, 15 U.S.C. § 114, which states that one is liable for trademark infringement if he or she "use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive…." In order to be liable for trademark infringement in the social media realm the account must satisfy the "use in commerce" requirement, such as selling goods through the account.

29. *See id.*; *see also* 15 U.S.C. § 1127. Remedies for dilution extend only to famous marks.

30. *See* http://support.twitter.com/articles/18367-trademark-policy Twitter's policy] (last accessed May 1, 2012); *see also* http://www.facebook.com/legal/copyright.php (last accessed May 1, 2012) [Facebook policy].

**Adam S. Walker is a graduate of Syracuse University (2005) with a B.A. in History and a graduate of the University of Baltimore School of Law (2008) with a double concentration in Business Law and Intellectual Property Law. Mr. Walker is currently the In-House Transactional Attorney for Nutramax Laboratories, Inc., and a member of the Maryland, D.C. and New York State Bar Associations. He has been published in the *Journal of the Copyright Society of the USA* in 2009 and the American Bar Association Young Lawyers Section in June and September 2010.**

*This article originally appeared in the Summer 2012 issue of the* NY Business Law Journal, *published by the Business Law Section of the New York State Bar Association.*

# Social Media and Litigation: A Marriage Made in Hyperspace

By Andrew B. Delaney and Darren A. Heitner

***Editor's Note:*** *The discussion surrounding issues raised in this article may continue with the authors on the EASL Blog. Please send comments pertaining to social media and litigation to me at* ***eheckeresq@eheckeresq.com****, and I will add these to the dialogue.*

## Introduction

Almost half of America is using social media and that number is rising rapidly.[1] It permeates our daily lives. As of 2009, over 70% of lawyers had accounts on social-media networks.[2] Over 85% of "younger" lawyers use social media.[3] The person who lacks at least one social-media profile will soon become the exception rather than the rule. As a litigator, this social media provides a wealth of information available at one's fingertips—information that just a few years ago required the hiring of a personal investigator to obtain. Though this immense wealth of information exists, its presence is not without pitfalls.

This article will:

- Dispense background information about the various types of social media;
- Discuss how social media can be used, both in the courtroom and for other legal purposes;
- Provide strategies for introducing information obtained through social media into evidence;
- Examine the ethical and legal concerns raised by social media and its uses; and
- Present suggestions for further study.

## Types of Social Media

This section covers the more common forms of social media one might encounter in a legal practice. It will briefly focus on the various social media sites that lawyers are most likely to come across when delving into social media based research.

### Facebook

Facebook is the most popular social media platform. Facebook started as a hobby,[4] which is now arguably one of the most successful businesses launched in recent history.

In 2004, Mark Zuckerberg, while a student at Harvard, started "thefacebook" with some financial help from Edward Saverin. Originally, membership was limited to Harvard students.[5] Access to the social network soon expanded to Stanford and Yale. By August 2006, membership was open to 30,000+ "recognized schools, colleges, universities, organizations, and companies within the U.S., Canada, and other English speaking nations."[6] That September, Facebook ended its strict exclusivity rules and became open to everyone.[7]

The rest, as they say, is history. As of this writing, Facebook reports that it has more than one billion users who log in at least once per month,[8] half of which will log in to Facebook any given day.[9] People share immeasurable amounts of information on Facebook, including status updates, pictures, videos, and links to stories published on third-party websites, and Facebook stores a great deal of information about its users. One recent article reports that Facebook stores up to 800 pages of personal information *on each user*.[10]

That wealth of information can be a valuable resource for the litigator. Depending on the applicable privacy settings, a quick check on Facebook could provide information that could make or break a case. Certain users allow anyone browsing the Internet, with or without a Facebook account, to access information posted on their profile pages. As will be discussed below, even information that may at first appear unavailable can later be accessed through discovery, subpoena, and court order.

### LinkedIn

LinkedIn is geared toward professional networking, though it shares attributes with other social-networking sites. For example, users can update statuses, add connections, join groups, and network. LinkedIn, however, is specifically geared toward business networking, and users will not find in-site game applications. Nor does LinkedIn boast a chat feature like Facebook's. However, users can post their educational and work histories, request testimonials from their connections, and supply information about their specialties and publications.

LinkedIn reports that it "started out in the living room of co-founder Reid Hoffman in 2002."[11] It officially launched in May 2003, and by the end of its first month, had 4,500 members. As of this writing, LinkedIn reports that it has 175 million members in over 200 countries.[12] It is also a publicly traded company on the New York Stock Exchange with the ticker symbol LNKD.

Although LinkedIn is not as ubiquitous as Facebook, it is still useful to the litigator. LinkedIn provides information about employment, friends, and connections. One interesting feature on LinkedIn is the "recommendations"

feature. In a sense, LinkedIn seeks to enhance the traditional résumé with a more-accessible and interactive electronic version.[13]

LinkedIn may indeed be useful to the litigator in its intended use. While some lawyers might be hesitant to create a Facebook-style social media profile, LinkedIn provides a more-reserved alternative for the legal professional. LinkedIn boasts several law-oriented groups, as well as other networking opportunities.

### Twitter

One might say that Twitter took the "status update" from Facebook and refined it. Users are limited to 140-character "Tweets," which update "followers" on their activities and other items of interest. Twitter also appears to be premised on the "Do one thing and do it well" UNIX philosophy.[14]

Theoretically, Twitter is the product of a failed podcasting platform.[15] Some controversy exists around its founding. It was a project that started out slowly. During its beginning stages, the platform had fewer than 5,000 users after two months, and the CEO of its parent company bought back investors' stock for an estimated five million dollars. The company is now estimated to be worth in the neighborhood of five billion dollars.[16]

Twitter's value to the litigator lies in the real-time status updates that potential litigants may post. Twitter archives are searchable and largely public. Indeed, the Library of Congress hosts an entire Twitter archive that is continuously updated.[17]

### Other Sites

Although only three social media sites have been discussed in detail, there are myriad others devoted to social networking. Google+ is a new entrant to the scene that at least one person describes as a "throwback to Facebook 2004."[18] MySpace is still around, although it no longer enjoys the level of traffic it did in 2006, when it was still more popular than Facebook.[19] Further, MySpace has shifted its focus to content instead of pure social networking, and has attempted to become "the social network for music."[20]

This article has focused on Facebook, LinkedIn, and Twitter because these sites are currently the most popular social networking sites. It remains to be seen what new developments will bring.

When considering social media, one must keep in mind that none of the "top three" are even a decade old. Social media is ever evolving. At any point in time, a new social networking site may sprout from the depths of the unknown and become a popular destination for individuals to post content that is shared amongst the online community. Litigators must stay on top of the latest developments.[21]

## Uses of Social Media

Social media is helpful to lawyers in researching claims, preparing defenses, trial preparation, and litigation. These uses are discussed below in turn.

### Research

Social media can provide an invaluable tool for initial evaluation of a claim. For example, one might be able to use Facebook and LinkedIn to learn where a potential defendant works, what kind of assets that person might have, content uploaded regarding the future claim, and how that person sees himself or herself in the context of the potential case. Performing this research can help one to be more informed prior to filing suit. In some cases, this research might help a litigator to avoid bringing a claim that sounds great on the surface but breaks down under scrutiny. In other instances, a plaintiff's attorney may uncover valuable information that can be inserted into a complaint's general allegations and perhaps added as exhibits to bolster the plaintiff's count(s).

If one is particularly fortunate, there may be an admission on a social media profile that will go a long way toward building one's case. Lawyers are certainly permitted to conduct research on social-media networks. "Obtaining information about a party available in a [public] Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted."[22]

On Facebook, any person, Facebook user or not, has access to content that is published on someone's Facebook profile (subject to the Facebook user's Privacy settings). The Privacy setting may be changed by the subject to restrict access, by blocking others from "subscribing" to one's updates and changing other permissions. However, no privacy setting will completely restrict a party in a lawsuit from access to published Facebook content. Within Facebook's Privacy Policy in a section titled, "Some other things you need to know," is the following statement:

> We may access, preserve and share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so. This may include responding to legal requests from jurisdictions outside of the United States where we have a good faith belief that the response is required by law in that jurisdiction, affects users in that jurisdiction, and is consistent with internationally recognized standards. We may also access, preserve and share information when we have a good faith belief it is necessary to: detect, prevent and address fraud and other illegal activity; to protect

> ourselves, you and others, including as part of investigations; and to prevent death or imminent bodily harm. Information we receive about you, including financial transaction data related to purchases made with Facebook Credits, may be accessed, processed and retained for an extended period of time when it is the subject of a legal request or obligation, governmental investigation, or investigations concerning possible violations of our terms or policies, or otherwise to prevent harm.[23]

Similarly, all content published on Twitter may be available for consumption by the general public. While users are given the option to block their Tweets from anyone who has not been admitted as a follower, those same Tweets may be re-published by permitted followers many times over, reaching a much larger audience than intended by the publisher. Further, Twitter has its own "Law and Harm" policy, which states:

> Notwithstanding anything to the contrary in this Policy, we may preserve or disclose your information if we believe that it is reasonably necessary to comply with a law, regulation or legal request; to protect the safety of any person; to address fraud, security or technical issues; or to protect Twitter's rights or property. However, nothing in this Privacy Policy is intended to limit any legal defenses or objections that you may have to a third party's, including a government's, request to disclose your information.[24]

In 2010, a New York court addressed the protection of a Facebook user's posted content in a case involving a driver injured in a car accident.[25] The defendant, Harleysville Insurance Company of New York (Harleysville Insurance), did not believe that the plaintiff, Kara McCann, had sustained serious injuries, and made a request for the production of photographs from McCann's Facebook account as a means of verification.[26] The trial court denied (which the Appellate Court affirmed) Harleysville Insurance's motion to compel discovery, finding that the motion was overbroad, along with an apparent lack of proof regarding the relevancy of the Facebook photos.[27]

Parties do not have the ability force the production of all content published on Facebook. In order to require a party to produce published Facebook content, one must be specific in its demand and demonstrate the relevancy of the requested information. The court stated that Harleysville Insurance "essentially sought permission to conduct a 'fishing expedition' into Plaintiff's Facebook account based on the mere hope of finding relevant evidence."[28] The court did not concern itself with the type of privacy setting the plaintiff attributed to her Facebook content; instead it denied the motion to compel discovery because the defendant did not make a clear showing of the relevance of the evidence.

However, in another 2010 case in New York, the court found the evidence to be relevant, and the party seeking to compel discovery requests was permitted to receive not only current and historical Facebook content, but also pages that had been deleted by the user.[29] The key question is whether the evidence is *material and necessary*. The court stated that disclosure of "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" is required.[30] The court also stated that preventing access to *private postings* would be "in direct contravention to the liberal disclosure policy in New York State."[31]

### Defense

Occasionally, a person may claim one set of facts in public, but in the so-called "privacy" of his or her online network, an entirely different set of facts will come to light. In this situation, the litigator has a unique opportunity to defend against a claim that might otherwise seem unwinnable.

By effectively using social media to prepare a defense, one can realize a great advantage in preparedness. In one case, a University of Kentucky student sued a nightclub in federal court after she slipped and fell while dancing on a bar at the nightclub. She was injured and alleged that the bar was slippery and wet, and that the nightclub should have done more to prevent the accident. The defendant nightclub sought access to the plaintiff's and a witness's private Facebook pages. At one point, in a unique twist on in camera review, the magistrate judge overseeing the case offered to create a Facebook profile and "friend" witnesses "for the sole purpose of reviewing photographs and related comments."[32] The witnesses, however, never responded to the judge's "friend" requests.[33]

Though the judge ordered Facebook "to produce photographs, messages, wall posts and other information on the profiles of the injured patron and a friend who witnessed the accident," Facebook was able to successfully argue that the Stored Communications Act prohibited disclosure of members' information.[34] Eventually, the plaintiff's profile was reviewed in camera pursuant to the plaintiff's consent, and some content was presumably disclosed to the defense. The case settled on the proverbial courthouse steps, one day before it was scheduled to go to trial.[35] One can only speculate as to the motivation for the settlement, but the potential social media evidence may have been a significant factor.

Once information is available on social media sites, removal can be difficult—and in certain cases, disastrous. A recent wrongful death action from Virginia graphically illustrates this point.[36] In that case, the plaintiff had potentially damaging material posted on his Facebook

profile. His attorney advised the plaintiff to "clean it up," and deactivate the account. Although the plaintiff received a substantial jury verdict, the amount was cut post-trial due to the plaintiff's and counsel's behavior, and both were ordered to pay significant sanctions, including the defense attorney's fees and costs.[37] In addition to over $500,000 in sanctions, the attorney was fired from his firm, allegedly no longer practices law, and faces possible further sanctions from the state bar association.[38]

### Trial Preparation

If a claim appears headed to litigation, then social media provides an invaluable tool for trial preparation. If the percentages mentioned above hold true, then roughly half the witnesses will have a social media profile. An obvious advantage to gleaning information from social media profiles is that one can be much better prepared for cross-examination of adverse witnesses—social media can provide ideas for questions that will keep the adverse witnesses off balance. A lawyer can give the impression that he or she knows things about the witnesses that the other side does not. This kind of information can provide an insurmountable tactical advantage. The jury will notice.

Another, more subtle advantage to gleaning information from social media profiles is the corollary to the above-mentioned ability to be disconcerting. The more one knows about one's witnesses, the better prepared one can be when the other side tries to put one off balance.

The key to being prepared is to prepare. Such a statement might sound less than profound, but its beauty is its simplicity. The more one prepares for trial, the better one comes across to a jury. Being prepared brings with it a sense of confidence that cannot be feigned. Social media provides an excellent source of preparation.

### Litigation

While social media provides a source of preparation for trial, how can it be used in the courtroom? After all, are not most statements made on a social media site the very definition of hearsay?

### Authentication

There are no hard and fast rules when it comes to authenticating social media-based evidence. For example, in a recent Connecticut criminal law case, a defendant sought to impeach a prosecution witness with Facebook printouts from her account. The court refused to allow the evidence. It held that "it was incumbent on the defendant, as the proponent, to advance other foundational proof to authenticate that the proffered messages did, in fact, come from [the prosecution witness] and not simply from her Facebook account."[39]

A recent whitepaper from an e-discovery processing firm notes the problem of authenticating social media based evidence. How, exactly, does one make the jump from the computer screen to the courtroom? The author explains:

> Under US Federal Rule of Evidence 901(a), a proponent of evidence at trial must offer "evidence sufficient to support a finding that the matter in question is what its proponent claims." Unless uncontroverted and cooperative witness testimony is available, the proponent must rely on other means to establish a proper foundation. A party can authenticate electronically stored information ("ESI") per Rule 901(b)(4) with circumstantial evidence that reflects the "contents, substance, internal patterns, or other distinctive characteristics" of the evidence. Many courts have applied Rule 901(b)(4) by ruling that metadata and file level hash values associated with ESI can be sufficient circumstantial evidence to establish its authenticity.[40]

As the paper further explains, metadata and file level hash values are not easy to preserve when collecting social-media-based evidence. Indeed, the author's corporation is in the business of collecting and preserving social media based evidence.[41] Preservation and authentication of ESI is a highly technical and specialized field.

One option to help ensure eventual authentication of social media based evidence is then, of course, to hire a professional engaged in the business of preserving this data. Another option is to educate oneself to the point of expertise in the field.[42]

Although it may be expensive to hire an e-discovery expert, the initial expense is likely to be outweighed by the future benefit. If one is attempting to keep the cost of litigation manageable, it may make sense to have an investigator or paralegal perform the initial research. One can then follow up with a professional if appropriate.

### Admission by Party Opponent

The most natural use for social media in the courtroom is the admission by a party opponent. The admission by a party opponent is not an exception to the hearsay rule, but is actually considered non-hearsay under the Federal Rules.[43]

New York recognizes the same exception.[44] Accordingly, one of the first places one should look for possible evidence is the opposing party's or parties' social media profiles. There could very well be something out there in hyperspace that could be highly relevant to a claim or defense.

### Impeachment

Social media might be used to impeach a witness. A lawyer representing his or her client in litigation may access and review the other party's published social media contact to search for potential impeachment material.[45]

As an example, in the previously mentioned Connecticut criminal case, the defendant likely could have introduced the contradictory Facebook printouts for impeachment purposes had the evidence been authenticated properly. Social media can provide fertile ground for impeachment evidence.

### Effect on the Listener

One of the broader exceptions to the hearsay rule is the effect it has on the listener. For example, if one's client saw a Facebook post that infuriated him or her, then the attorney might be able to inquire as to how a certain post made the client feel. It can help to give context or to explain why a client acted in a certain way in a given situation.

There is also an additional benefit to the effect-on-the-listener exception. One should keep in mind that it is "hard to unring the bell, once that bell has been rung." As a practical matter, evidence introduced for the effect it has on the listener—although not offered for its truth—still gets before the jury. As another saying goes, "If you throw a skunk into the jury box, you can't instruct the jury not to smell it." We certainly do not advocate using this tactic indiscriminately, but on occasion, it may be one's best bet for getting effective and relevant—yet technically inadmissible—evidence before the finder of fact.

### Independent Legal Significance

If a statement has independent legal significance, then it is admissible, even though it might otherwise be considered hearsay. Contracts can be created online through social media. Libel, slander, and threats can all be expressed via social media. It only matters that the thing of independent legal significance was said, not that it is true.

### Courtroom Closing Notes

There are certainly other uses of social media based evidence, and ways to introduce it. This article has sought to provide some of the more common methods one might employ for introducing social media into evidence. This is not an exhaustive list. One could make an argument, for example, that Facebook postings are business records. Ultimately, whether or not one is allowed to use social media based evidence in a courtroom setting will depend on the trial judge, the other litigants, and one's creativity.

## Pitfalls

No matter how enticing the information one might glean from social media profiles, it must always be viewed with a healthy dose of skepticism. It would be foolhardy to suggest that glancing at a few social media profiles will prepare one for a trial. People lie. One can never be absolutely sure that the person behind the profile is the same person he or she purports to be. Content may be posted on someone's social media profile by a third party without the owner's permission and/or knowledge. Social media's greatest value lies in providing a starting point. It should never be regarded as a substitute for further research.

Social media profiles are not, as a rule, overly easy to access. Various privacy controls can prevent a member of the general public from viewing a person's personal profile. In most cases, the lawyer using social media to investigate a claim, prepare a defense, or prepare for trial will fall into the member-of-the-general-public category. In addition, at least one ethics opinion has held that it is unethical for an attorney to "friend" an adverse party or potential witness in a case without disclosing the purpose for the friend request.[46]

The New York State Bar Association, however, has clearly held that publicly available Facebook and MySpace postings are fair game.[47] That said, various jurisdictions have stated that social network information must be discovered ethically, and that lawyers are prohibited from using deception to gain access to such material.[48]

Ultimately, one will have to vet social media based evidence using the same criteria that one would use for any other type of evidence. This is an exciting and developing area of the law, but attorneys must exercise professional judgment in using social media in the courtroom and otherwise.

## Suggestions for Further Study

The Electronic Discovery Reference Model is a group created in 2005 "to address the lack of standards and guidelines in the electronic discovery (e-discovery) market."[49] The group, in conjunction with FindLaw, provides an "Interactive Guide to Electronic Discovery," which is a helpful resource for understanding the e-discovery process and best practices.[50]

Regarding the ethical considerations associated with use of social media, a recent *Delaware Law Review* article argues that competency and diligence require attorneys to account for social media in investigation and discovery.[51]

Another recent *Duke Law Journal* article explores sanctions for e-discovery violations and ESI, and identifies "230 sanction awards in 401 federal cases."[52] This article provides an excellent overview of the issue of pitfalls in preservation of ESI and sanctions.

There are many blogs devoted to e-discovery and social media as it relates to the practice of law. One such blog that was very helpful in writing this article is the Next Generation eDiscovery Law & Tech Blog.[53] E-discovery and the use of social media in litigation are fast-developing—perhaps the *fastest* developing—areas in the practice of law. New resources become available every day and the potential for innovation is wide open. We encourage readers to continue the discussion on the EASL Blog.

## Endnotes

1. See Nadine R. Weiskopf, Tweets and Status Updates Meet the Courtroom: How Social Media Continues to be a Challenge for E-Discovery in 2011, 2 (2011) (citing a study by Arbitron Inc., which finds that 48% of Americans age 12 or older have a profile on one social networking site—a 100% increase from 2008).
2. Survey Reveals Substantial Growth in Online Social Networking by Lawyers Over the Past Year, MARTINDALE.COM, Sept. 18, 2009, http://www.lexisnexis.com/community/lexishub/blogs/legaltechnologyandsocialmedia/archive/2009/09/18/survey-reveals-substantial-growth-in-online-social-networking-by-lawyers-over-the-past-year.aspx.
3. Merri A. Baldwin, Ethical and Liability Risks Posed by Lawyers' Use of Social Media, AMERICAN BAR ASSOCIATION, July 28, 2011, http://apps.americanbar.org/litigation/committees/professional/articles/summer2011-liability-social-media.html.
4. Sid Yadav, Facebook—The Complete Biography, MASHABLE.COM, Aug. 25, 2006, http://mashable.com/2006/08/25/facebook-profile/.
5. Nicholas Carlson, At Last—The Full Story Of How Facebook Was Founded, BUS. INSIDER, Mar. 5, 2010, http://www.businessinsider.com/how-facebook-was-founded-2010-3.
6. Yadav, supra note 4.
7. Michael Arrington, Facebook Just Launched Open Registrations, TECHCRUNCH.COM, Sept. 26, 2006, http://techcrunch.com/2006/09/26/facebook-just-launched-open-registrations/.
8. Somini Sengupta and Nick Bilton, *A Billion Users Raise Stakes at Facebook for Revenue,* NY Times, Oct. 4, 2012, http://bits.blogs.nytimes.com/2012/10/04/facebook-passes-1-billion-active-users/.
9. FACEBOOK, *Statistics, available at* http://www.facebook.com/press/info.php?statistics.
10. Matthew Humphries, *Facebook Stores up to 800 Pages of Personal Data per User Account*, GEEK.COM, Sept. 28, 2011, http://www.geek.com/articles/geek-pick/facebook-stores-up-to-800-pages-of-personal-data-per-user-account-20110928/.
11. LinkedIn, *About Us*, http://press.linkedin.com/about.
12. George Anders, *Why You Suddenly Can't Resist Updating Your LinkedIn Profile*, Forbes, Oct. 12, 2012, http://www.forbes.com/sites/georgeanders/2012/10/12/why-you-suddenly-cant-resist-updating-your-linkedin-profile/.
13. Indeed, one of the features of LinkedIn is that users are encouraged to upload a traditional "paper" résumé in order to complete their profile.
14. *See* Scott Merrill, *Do One Thing, and Do It Well: 40 Years of UNIX*, TECHCRUNCH.COM, Aug 21, 2009, http://techcrunch.com/2009/08/21/do-one-thing-and-do-it-well-40-years-of-unix/ (explaining UNIX's underlying philosophy).
15. Or so the story goes. *See* Nicholas Carlson, *The Real History Of Twitter*, BUS. INSIDER, April 13, 2011, http://articles.businessinsider.com/2011-04-13/tech/29957143_1_jack-dorsey-twitter-podcasting (explaining that Twitter evolved from the failure—or unfeasibility—of the Odeo podcasting platform, which was intended originally to be used with Apple products).
16. *Id.*
17. Matthew Raymond, *How Tweet It Is!: Library Acquires Entire Twitter Archive*, LIB. OF CONG. BLOG, Apr. 14, 2011, http://blogs.loc.gov/loc/2010/04/how-tweet-it-is-library-acquires-entire-twitter-archive/.
18. Charlene Madson, *Status Update on Google+*, GOOGLE+, July 8, 2011 ("I like this…it's like a throwback to Facebook 2004.").
19. Yadav, *supra,* note 4.
20. *See* Emma Barnett, *MySpace mounts last ditch effort to retain social music crown*, THE TELEGRAPH, Oct. 27, 2010, http://www.telegraph.co.uk/technology/myspace/8088227/MySpace-mounts-last-ditch-effort-to-retain-social-music-crown.html.
21. One should also note that a great deal of information can be found on private and public blogs, gaming sites, and discussion boards. The social-media sites chosen herein represent the "tip of the iceberg," so to speak.
22. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (9/10/10).
23. *Data Use Policy*, FACEBOOK, http://www.facebook.com/about/privacy/other.
24. *Twitter Privacy Policy*, TWITTER, https://twitter.com/privacy (last visited Nov. 11, 2011).
25. *See* McCann v. Harleysville Ins. Co. of N.Y., 912 N.Y.S.2d 614, 615 (N.Y. App. Div. 2010).
26. *Id.*
27. *Id.*
28. *Id.*
29. *See* Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010).
30. *Id.* at 652.
31. *Id.* at 655.
32. Brandon Gee, *Coyote Ugly Calls Facebook to the Stand*, THE TENNESSEAN, April 24, 2011, *available at* http://www.wbir.com/news/article/167347/2/Coyote-Ugly-calls-Facebook-to-the-stand.
33. *Id.*
34. *Id.* The Stored Communications Act, *codified at* 18 U.S.C. §§ 2701–2712.
35. Brandon Gee, *Coyote Ugly, Student Reach Deal in Injury Case*, THE TENNESSEAN, May 6, 2011, *available at* http://www.ongo.com/v/878816/-1/042AE76454CBD8C5/coyote-ugly-student-reach-deal-in-injury-case.
36. Lester v. Allied Concrete Co., Nos. CL.08-150, CL09-223 (Va. Cir. Ct. Sept. 1, 2011); Lester v. Allied Concrete Co., Nos. CL08-150, CL09-223 (Va. Cir. Ct. Oct. 21, 2011).
37. K&L Gates, *Client & Counsel Sanctioned for Spoliation where Plaintiff was Instructed to "Clean Up" His Facebook Page*, ELECTRONIC DISCOVERY L., Nov. 18, 2011, http://www.ediscoverylaw.com/2011/11/articles/case-summaries/client-counsel-sanctioned-for-spoliation-where-plaintiff-was-instructed-to-clean-up-his-facebook-page/.
38. John Patzakis, *Facebook Spoliation Costs Lawyer $522,000; Ends His Legal Career*, (deleted parties) NEXT GEN. EDISCOVERY L. & TECH BLOG, Nov. 15, 2011, http://blog.x1discovery.com/2011/11/15/facebook-spoliation-costs-lawyer-522000-ends-his-legal-career/.
39. State of Connecticut v. Eleck, 2011 WL 3278663 (Conn. App. 2011).
40. John Patzakis, *Overcoming Potential Legal Challenges to the Authentication of Social Media Evidence*, X1 DISCOVERY (2011), *available at* http://x1discovery.com/download/X1Discovery_whitepaper_Social_Media_2011.pdf.

41. *Id.*

42. While this may be within the realm of possibility for some readers, an instruction manual is well beyond the scope of this article. We encourage all readers to consider the "Suggestions for Further Study" located on pp. 24-25 of this article for more information.

43. Fed. R. Evid. 801(d)(2) (2012).

44. Satra Ltd. v. Coca-Cola Co., 252 A.D.2d 389 (1st Dept. 1998).

45. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (9/10/10).

46. Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02 (March 2009).

47. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (9/10/10).

48. *See* N.Y. City Comm. on Prof'l Ethics, Formal Op. 2010-2; Phila. Bar Ass'n. Op. 2009-02.

49. ERDM, *Frequently Asked Questions*, http://www.edrm.net/joining-edrm/frequently-asked-questions (last visited Dec. 10, 2011).

50. FindLaw's Interactive Guide to Electronic Discovery, FINDLAW.COM, http://technology.findlaw.com/electronic-discovery/electronic-discovery-guide/.

51. Margaret M. DiBianca, *Ethical Risks Arising From Lawyers' Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179 (2011).

52. Dan H. Willoughby, Jr., Rose Hunter Jones, Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 790 (2010), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1487&context=dlj.

53. Though it is a commercial project, the blog provides an excellent resource for getting up to speed on social media and e-discovery issues. Next Gen. eDiscovery Law & Tech Blog, X1DISCOVERY, http://blog.x1discovery.com/.

**Andrew B. Delaney, Esq. is an attorney with Martin & Associates, P.C. in Barre, Vermont. He does "a little bit o' everything" but focuses his practice primarily on state and federal civil litigation. He earned his J.D., cum laude, from Vermont Law School in 2010, where he was Technology Editor for the *Vermont Law Review*. In his spare time, Andrew plays guitar in a punk rock band and writes sarcastic and irreverent law-related articles and blog posts. On rare occasions, he will write serious pieces, such as this chapter.**

**Darren Heitner is a writer for *Forbes*, focusing on the business of sports, and the Founder/Chief Editor of Sports Agent Blog, a publication covering the niche sports agent industry. Heitner is also a professor of Sport Agency Management at Indiana University-Bloomington and a Miami, Florida-based attorney focusing on sports law, entertainment law, music law, and intellectual property law. Heitner has achieved significant recognition, including being listed by SportsPro as 1-of-10 stars of the sports business industry under the age of 30 at the age of 26 and is the youngest member of the Vermont Law School Sports Law Institute's Board of Advisors.**

*This article originally appeared in the Winter 2012 issue of the* Entertainment, Arts and Sports Law Journal, *published by the Entertainment, Arts and Sports Law Section of the New York State Bar Association.*

# Of All the Lawsuits, in All the Courts, in All the World, They Had to Settle This One

## What We Didn't Learn About Rights of Publicity and Social Media from *Bogart v. Burberry*

By Cassidy Merriam

### Introduction

In early 2012, Burberry, the London-based luxury brand, launched a Facebook "Timeline," replacing its traditional Facebook page. The Timeline featured numerous images depicting the company's history, beginning with a photo of the first Burberry store in 1856. It included an image of the late Humphrey Bogart in the final scene of the 1942 film "Casablanca." In connection with the photograph, Burberry included the description: "Humphrey Bogart wearing a Burberry trench coat in the final scene of Casablanca (1942)."[1] According to Burberry, the image was licensed from Corbis for editorial use.[2]

On April 10, 2012, Bogart, LLC (Bogart), owned primarily by Humphrey Bogart's children, contacted Burberry and demanded that it cease using the image. When Burberry did not remove the image, Bogart contacted Burberry at least two more times and "made a significant monetary demand," asserting that Burberry's use of the Bogart publicity rights and trademarks falsely implied an endorsement or affiliation with the brand for commercial purposes.[3]

This article explores the Bogart right of publicity claim under California state law and what the case, had it been litigated, may have said about new media and the line between commercial speech and non-commercial speech.

### The Burberry Complaint

On May 2, 2012, Burberry filed a declaratory judgment lawsuit in the Southern District of New York seeking a judgment of trademark non-infringement, trademark non-dilution, and for non-infringement of any right of publicity. The primary argument for all three causes of action centered on Burberry's First Amendment right to use the image without infringement. The complaint alleged that "Burberry's use of [the] photo and description w[as] intended to reflect on the long history, significance and influence of Burberry fashion in society,"[4] rather than for commercial or advertising purposes.

### The Bogart Complaint

Later in the day on May 2, 2012, on the other side of the country, Bogart filed its own lawsuit against Burberry for misappropriation of a right of publicity under California Civil Code §3344.1, federal trademark infringement under 15 U.S.C. §1125(a), unjust enrichment, and quantum meruit.[5] The complaint alleged that Burberry used Bogart's iconic image for "the express purpose of commercially linking their Burberry brand and products to the persona and character of Humphrey Bogart in the minds of [Burberry's] potential and actual customers."[6]

### The Right of Publicity

The right of publicity is the right to control the commercial use of one's own identity.[7] It has roots in both the misappropriation doctrine and the law of privacy[8] and is governed by state law. Currently, 19 states have a statutorily recognized right of publicity, while an additional 28 recognize a common law right of publicity,[9] therefore, protection varies greatly from state to state. Generally, the right to publicity forbids the unauthorized use of the name, image, or likeness of another individual for commercial purposes without consent. Courts have extended such protection, in varying amounts, to include recognizable non-facial features,[10] look-alike models,[11] voice,[12] sound-alike recordings,[13] and in the Ninth Circuit interpreting California common law, copying a "persona."[14]

In all states that recognize a right to publicity, the right extends to public figures, and in a majority of states courts will also allow non-public figures to claim the right to publicity. A majority of states also provide that the right of publicity survives death if a transferee or survivor exists. As mentioned above, each state may either ground its right of publicity in misappropriation theory or in privacy theory. Those that view the right of publicity as a branch of privacy law typically do not recognize a *post mortem* right of publicity, because privacy rights are considered personal. New York and a few other jurisdictions terminate the right of publicity upon death of the individual for this reason.[15] The majority of states base the right of privacy on a misappropriation theory and treat it as a property right, which survives the death of an individual. The duration of *post mortem* publicity rights varies from state to state, with California's protection extending 70 years after death.[16] Due to the vast difference in the scope of protection from state to state, choice of law becomes a critical issue in right of publicity infringement actions. The general rule is that the existence of a *post mortem* right of publicity is determined by the law of the domicile of the estate.[17]

Depending on the state, the right of publicity is either analyzed under the tort of invasion of privacy or through the law of unfair competition. Additionally, there are other areas of law that are often similar to the cause of action for infringement of the right of publicity and are frequently brought as separate causes of action. Common related actions are not discussed in this article, but deserve brief mention. They include: trademark infringement (often the plaintiff owns the trademark of the individual's name or other similar marks), false advertising, copyright infringement, misappropriation tort of the right of privacy, and false light right of privacy.[18]

## Bogart's Case for Misappropriation of the Right of Publicity

To prevail on a *prima facie* case for liability of infringement of the right of publicity, a plaintiff must prove: (1) that the plaintiff owns an enforceable right in the identity or person; and (2) that the defendant, without permission, has used some aspect of the identity or persona in such a way that the person is identifiable from the defendant's use; and (3) that the defendant's use is likely to cause damage to the commercial value of that persona.

Interestingly, in its complaint, Bogart did not assert a separate common law right of publicity claim. The California statute makes it clear that remedies available under statutory claims are in addition to and not in lieu of common law rights.[19] While a common law claim would not have had a high likelihood of success,[20] California courts interpret common law right of publicity claims more broadly, and asserting a common law claim would certainly not have harmed Bogart's case.

Bogart's first cause of action in the suit was a claim of misappropriation of right of publicity under California Civil Code §3344.1.[21] The statute protects against uses of a deceased person's likeness for advertising purposes. Specifically, the statute prohibits use of a person's name, photograph, and likeness "on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without prior consent[.]"[22] Unlike California's Section 3344 statute regarding the right of publicity for living persons, a violation of *post mortem* rights under Section 3344.1 does not require that the defendant have any form of knowledge or intent.[23]

In the *Bogart v. Burberry* context, the parties did not dispute (1) that Bogart owned the publicity rights of Humphrey Bogart; and (2) that Burberry, without permission, used a photograph of Bogart on its Facebook Timeline. The third element, whether damage to the commercial value of the persona has occurred, is generally presumed once unpermitted use is proven and does not need to be "proven" as part of the *prima facie* case.[24] The case, had it been litigated, would have instead turned on Burberry's defenses and whether its use of the Bogart image was protected under the First Amendment or fell within one of the statutory exceptions in Section 4433.1.

## Burberry's Use of the Image on Its Facebook Timeline: Protected by the First Amendment?

Burberry's complaint in its declaratory judgment lawsuit in the Southern District of New York rested heavily on the argument that its use of Bogart's image was "squarely protected under the First Amendment to the United States Constitution."[25] Had the case been litigated in California under a Section 3344.1 claim, perhaps Burberry would not have gone directly to the First Amendment claim, but because it played so heavily in the case as it was, the feasibility of Burberry's constitutional claim is worth a brief discussion. If a court decides that a defendant's use is protected by the free speech policies of the First Amendment, statutory defenses will be bypassed.

The three primary purposes of the First Amendment, as articulated by Justice Brandeis are: (1) "Enlightenment"—which encompasses political, social and scientific "news" as well as "entertainment"; (2) "Self-fulfillment"—the need for human self-expression in all forms; and (3) "The Safety Valve"—the societal need for free expression as an alternative for or sublimation of social or political violence.[26]

Burberry's use of Bogart's photo would certainly not fall within speech with highest levels of protection such as political speech; however, there is an argument that this Timeline would be considered "news," as Burberry suggested in its complaint. After all, a magazine featuring the latest fashion trends,[27] a publication of historical information about a former athlete's accomplishments,[28] and an article in a newspaper asking readers to vote for their favorite members of a rock band[29] have all been deemed "newsworthy" under the First Amendment.

Before Burberry should get too comfortable, however, it must be noted that while "news" generally has a high constitutional priority, advertising or "commercial speech" is given the lowest level of priority and any given use may fall within multiple priorities.[30] "Where the 'message' is 'buy,' the content is labeled as 'commercial speech' for First Amendment purposes"[31] as opposed to more protectable "expressive speech." Commercial speech still enjoys a minimal amount of First Amendment protection under a strict basis described as, "A restriction on nonmisleading commercial speech may be justified if the government's interest in the restriction is substantial, directly advances the government's asserted interest, and is no more extensive than necessary to serve the interest."[32]

The question would turn on whether Burberry's Facebook Timeline was "commercial." The lines between expressive and commercial speech are extremely blurry. The Ninth Circuit has stated, "Although the boundary between commercial and noncommercial speech has yet

to be clearly delineated, the "core notion of commercial speech" is that it "does no more than propose a commercial transaction."[33] It is arguable that the Facebook Timeline does much more than propose a commercial transaction. In fact, no commercial transactions occur on the Facebook page. Social media, however, is not just a place where companies seek to enlighten the world—social media is used as an incredible, interactive marketing tool that has spun advertising and commercialism in a way where consumers themselves contribute to brand building and brand value. The question is an unclear one and will remain so until a similar issue arises again and is litigated.

## Burberry's Use of the Image on Its Facebook Timeline: Within a §4433.1 Exemption?

A more reasonable hope for Burberry would be that its use of the Bogart image on the Burberry Facebook Timeline fell within one of the statutory exemptions under §4433.1. The exemptions relevant to *Bogart v. Burberry* would be use in news and public affairs[34] or use in media commercially sponsored or containing paid advertising.[35] The newsworthiness exemption is extended to at least everything with constitutional First Amendment protection, so it could very potentially include the Facebook Timeline, and due to the standard of review would likely have more success than if analyzed under the constitutional claim.

The exemption most beneficial to Burberry would be for use in commercially sponsored media. Due to Facebook's overwhelming success as a marketing platform, it is likely that a court would conclude that while the Timeline may have had significant historical, informational, and educational value, the primary purpose of the Timeline was for the commercial purpose of attracting consumers to the brand, especially through the rich, iconic history. In these cases, it is a question of fact whether unpermitted use of the identity "was so directly connected with the commercial sponsorship or with the paid advertising" as to constitute a statutory violation.[36] The court may allow an exemption if a material would be otherwise constitutionally protectable, but-for its location within commercially sponsored media.[37] The Burberry Timeline is a perfect example of this exemption, because it is both educational and historical while also having an extremely commercial purpose.

## The Intersection of Fashion and the Subject

In cases involving fashion "news," McCarthy suggests that New York courts "have missed the point as to what aspects of the photograph are constitutionally protected. The real content of a fashion 'story,' as in Pagan and Stephano, is the wearing apparel, not the person. The model's identity or the identity of those included in the background for 'local color' is not a matter of 'public interest'—the clothes are. Only the wearing apparel is 'news.'"[38]

In *Bogart*, this seems to be a possibility. The purpose of the photograph on the Timeline was not just historical value, but the iconic Burberry trench coat itself. Within the legal analysis of "newsworthiness," the passage of time since the "event" has little effect on whether it is still considered "news."[39] In this case, the 1942 image still has value as not just a piece of history, but a newsworthy event in the history of the brand and in fashion as well.

## Conclusion: New Norms in Social Media and Why a New Look at "Commercial" Might Be in Order

In a world controlled by social media, it is inevitable that the boundaries begin to shift. One website such as Facebook is not confined to a single purpose. It can be a social site for users' personal photos and words, while simultaneously acting as a source for news, a place where art and music are disseminated, and where brands build their strength. Consumers now participate in a brand's image though "Liking" it on Facebook and Tweeting about it. The old world of intellectual property, especially trademark law, was founded on a concept where a brand's value was created by the brand itself. In today's world where consumers contribute to adverting and the brand's value, perhaps it is time that our intellectual property and right of publicity laws shift to reflect this new commercial reality.

This is not to suggest that publicity and intellectual property rights should not be protected, but it might be more effective to loosen the standard in certain cases with an eye on policy, potential harm, and the social context of our rapidly changing digital world. Where social media becomes increasingly commercial, often without a complete understanding by consumers, the lines continue to blur between "expressive" and "commercial" speech. It seems that it is only reasonable that analysis of legal issues regarding the right of publicity should not be dependent upon a standard that treats these two types of speech as opposite ends of the spectrum of protection.

## Endnotes

1. Burberry Complaint at 3, Burberry Ltd. & Burberry Group PLC v. Bogart, LLC, 12-CV-3491 (S.D.N.Y. May 2, 2012).
2. Note that two separate property rights may exist in one work, such as a copyright and a publicity right. Ownership (or non-infringing use) of a copyright is not a defense to an assertion of infringement of a plaintiff's state law right of publicity. *See*, J. Thomas McCarthy, The Rights of Publicity and Privacy §11:61 (2d ed 2000).
3. *See* note 1.
4. *Id.*
5. Bogart Complaint at 1, Bogart, LLC v. Burberry Group, PLC, Burberry Ltd—USA, BC483967 (Super. Ct. Cal. L.A. Cnty. May 2, 2012).
6. *Id* at 9.

7. McCarthy, *supra* note 2, at §1:3.
8. See Restatement (Third) of Unfair Competition § 46 (1995).
9. Statutes, Right of Publicity, http://rightofpublicity.com/statutes.
10. Cohen v. Herbal Concepts, 482 N.Y.S.2d 457 (1984).
11. Onassis v. Christian Dior, 472 N.Y.S.2d 254 (1984). (*But see Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) (no violation of the right of publicity where people would recognize that it was a look-alike and not actually Woody Allen's photograph).
12. *See e.g.*, California Civ. Code § 980 (amended 1985).
13. Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988), cert. denied, 112 S. Ct. 1513 (1992).
14. Wendt v. Host Int'l, Inc., 125 F.3d 806 (9th Cir. 1997) (characters from the television show "Cheers" depicted as animatronic robots were actionable by actors associated with the characters, despite also being properly licensed). The Ninth Circuit has been subject to much criticism for this extension of the right and its holding has been rejected by other circuits. *See e.g.*, Cardtoons v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996).
15. *See e.g.*, Pirone v. MacMillan, Inc., 894 F.2d 579, 585-86 (2d Cir. 1990).
16. Reichman, Jonathan D., *Right of Publicity 2011, United States*, Getting Through the Deal, Dec. 2010, at http://www.kenyon.com/newspublications/publications/2010/12-14.aspx, or directly here: http://www.kenyon.com/newspublications/publications/2010/~/media/Files/Publication%20PDFs/2010/Publicity%20%20US%202011.ashx, at79.
17. *See Cairns v. Franking Mint Co.*, 24 F. Supp. 2d 1013 (C.D. Cal. 1998). In other cases, the decision is less clear, such as in *Shaw Family Archives Ltd. v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309, 310-11 (S.D.N.Y. 2011) (A case involving the estate of Marilyn Monroe, where defendant was a New York-based company, Monroe was either domiciled in New York or California at her time of death, and the action complained of occurred in Indianapolis, Indiana. Action was brought under Indiana law and defendant defended under New York and California law. Rather than determining state of domicile, the court concluded that the publicity rights had expired under both New York and California law.).
18. For brief descriptions of these causes of action and discussion of their interaction with the right of publicity, *see* Thomas Phillip Boggess, Causes of Action for an Infringement of the Right of Publicity, 31 Causes of Action 2d 121 (2006).
19. Cal. Civ. Code §3344(g) and §3344.1(m) (statutory remedies are "cumulative and shall be in addition to any others provided for by law.") (*See also*, McCarthy, *supra* note 2, at §6:48.).
20. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 842 (1979) (Common law right of publicity was recognized, but limited by the "lifetime exploitation" requirement.).
21. Bogart Complaint, *supra* note 5 at 10. (§3344.1 relates specifically to unauthorized use of a deceased person, whereas §3344 is the California right of publicity statute in general.).
22. Cal. Civ. Code §3344.1(a)(1) (West 2012).
23. Note, however, that as implicitly required by Cal. Civ. Code § 3294, in order to recover punitive damages, the defendant must have had some form of "malice."
24. McCarthy, *supra* note 2, at §3:2.
25. Burberry Complaint at 5, 7, and 8.
26. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
27. Stephano v. News Group Publications, Inc., 474 N.E.2d 580 (N.Y. 1984).
28. Gionfriddo v. Major League Baseball, 114 Cal. Rptr. 2d 307 (1st Dist. 2001).
29. New Kids on the Block v. News America Pub., Inc., 745 F. Supp. 1540) (9th Cir. 1992).
30. McCarthy, *supra* note 2, at §8:12.
31. *Id* at §7:3.
32. Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980).
33. Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184 (9th Cir. 2001).
34. Cal. Civ. Code §3344.1(j).
35. Cal. Civ. Code §3344.1(k).
36. McCarthy, *supra* note 2, at §6:33.
37. *See e.g.*, New York Times Co. v. Sullivan, 367 U.S. 254, 266 (1964).
38. McCarthy, *supra* note 2, at §8:102.
39. *See e.g.*, Street v. National Broadcasting Co., 645 F.2d 1227, 1235 (6th Cir. 1981).

**Cassidy Merriam is a third-year student at Brooklyn Law School, where she is the Vice President of the Brooklyn Entertainment and Sports Law Society. She is also a member of the Fashion Law Committee of EASL. She is interested in pursuing opportunities in trademark, copyright, privacy, entertainment, and fashion law. She may be contacted at cassidy.merriam@gmail.com and welcomes comments or discussion.**

*This article originally appeared in the Fall/Winter 2012 issue of the* Entertainment, Arts and Sports Law Journal, *published by the Entertainment, Arts and Sports Law Section of the New York State Bar Association.*

# Your Online Afterlife: Digital Estate Planning in the Facebook Age

By Jim D. Sarlis

Like most people these days, you probably do at least some of your banking online. You may have e-mail accounts on multiple providers, such as Gmail, Yahoo! and AOL. You likely spend more time on Facebook and Twitter than you would care to admit. You post on LinkedIn and Pinterest. You buy and sell on Amazon and eBay, using PayPal. You pay your mortgage and utility bills by automatic withdrawal. You have a website and a blog. You may even have investments with a company that has no "bricks-and-mortar" location. In fact, not only are your photo, music, and video collections stored online, your documents may even be stored on a "cloud" server.[1]

By now, most people realize how easy it is to accumulate a significant online presence, given the multitude of web interactions we engage in regularly. By now, most people also realize how important it is to protect usernames and passwords, to avoid having online accounts and other activities compromised, which could lead to identity theft and other disastrous results. What most people don't realize, however, is that the very same precautions taken to secure online data and protect passwords could result in a denial of access to fiduciaries and loved ones in the event of incapacity or death.

Digital estate planning addresses these concerns. It is meant to create a plan whereby access to your digital assets is given to a person chosen by you, your wishes are expressed, and authority to carry them out is conferred.

## Digital Assets Defined

Digital assets are online accounts and information stored on a computer, server, or other electronic storage medium. These include social networking sites (e.g., Facebook, Twitter, LinkedIn), e-mail accounts (e.g., Gmail, Hotmail, Yahoo!), online banking, financial or brokerage accounts (e.g., E-Trade, ING, ScottTrade), video and image storage sites (e.g., YouTube, Picasa, Flickr), online consumer transaction sites (e.g., eBay, Yelp, PayPal), and blogs, domain names and URLs (from sites like GoogleBlogger, GoDaddy, or 1and1). They can even include things like avatars[2] on video games and virtual worlds such as Second Life. Of course, digital assets also include files stored on a personal computer, laptop, notebook, tablet, smartphone, or server, such as business documents, financial records, customer lists, contact information, even family photos, diaries and journals, personal stories, family recipes, and just about any other items that people would want their heirs to eventually have—*i.e.*, any content that is economically or sentimentally valuable to the user. While this applies to the average user, for some people—notably computer programmers, graphic or web designers, photographers, writers, musicians, and artists—such digital assets may have substantial monetary and intellectual property value. An interesting example of a digital asset (and a good illustration of why digital planning is so important) is that when famed composer-conductor Leonard Bernstein died in 1990, he left only an electronic, password-protected, draft of his memoir, *Blue Ink*; unfortunately, the manuscript is so well-protected that no one has yet been able to crack the password.[3]

## The Policies of Some Online Sites

Online sites have started addressing these issues. However, their policies vary considerably. Facebook, for example, essentially has three options in the event of a user's death: convert the account into a memorial site, terminate the account, or do nothing. If a decedent's family converts a user's account into a "memorial state," this removes features like status updates and lets only confirmed friends view the profile and post comments on it.[4] If the next-of-kin ask to have deceased user's profile terminated, Facebook will comply; however, it will not turn over a user's password to let family members access the account, ostensibly so that privacy can be maintained. The personal representative of a decedent's estate can have access to a download of account data as long as he or she has prior consent from the deceased or if the law mandates it.

Twitter will, upon a family member's request to its Trust & Safety Department, close a deceased user's accounts and provide archives of public Tweets.[5] Microsoft (which is the owner of Hotmail and a few other services) lets relatives order a CD of the account's content upon submitting a user's death certificate or certified proof of incapacity, and proof of kinship.[6] As to Gmail, Google requires not only a death certificate, but also a copy of an e-mail that the deceased had sent to the person who is requesting the information.[7]

By contrast, Yahoo! terminates an e-mail account upon a user's death and fights to keep such accounts private,[8] even going to Court to protect this policy. In fact, Yahoo!

was criticized by many for its actions when, in 2005, relatives of Cpl. Justin Ellsworth, a 20-year-old Marine killed in Iraq, requested access to his e-mail account so that they could make a scrapbook. Yahoo! refused, but the family sued and prevailed.[9] However, when Yahoo! was ordered by the Probate Court of Oakland County, Michigan to release Cpl. Ellsworth's e-mails to his father, John Ellsworth, Yahoo! complied by copying the messages to a CD but did not turn over the account's password.[10]

## The Evolving Law on the Subject

There is not yet much established law in the field of digital estate planning. Only five states, for example, have enacted statutes on the subject. Connecticut's statute[11] was among the earliest. Enacted in 2005, it only covers e-mail, which is not surprising since the explosion of social networks and other online services was just beginning at that time. For example, Facebook was just getting started in 2004 as a site for use only by students attending certain colleges, and Twitter began in 2006. The Connecticut statute allows access to a decedent's e-mails by an executor or an administrator.[12] Rhode Island's statute,[13] enacted in 2007, is also limited to e-mail and is very similar to Connecticut's.

Indiana's statute,[14] enacted in 2007, covers electronically stored documents of the deceased that could include e-mails and other digital assets. The statute provides that the "custodian" of the electronically stored documents is to provide access or copies of the decedent's documents or information to the personal representative to the decedent's estate.[15]

Oklahoma's 2010 statute[16] is more comprehensive and provides that the executor or administrator may take over the decedent's social networks, blogs, e-mails, and Twitter-like accounts.[17] Idaho's 2011 statute[18] is virtually identical to that of Oklahoma. Two other states—Nebraska and Oregon—are considering similar laws. For example, on January 5, 2012, Senator John Wightman of Nebraska introduced a bill[19] in his state legislature that would be similar to that of Oklahoma and Idaho.

In addition, the National Conference of Commissioners on Uniform State Laws (commonly known as the Uniform Law Commission)[20] recently approved a study committee on fiduciary power and authority to access digital property and online accounts during incapacity and after death, with the goal of creating uniform law on the subject. Although the uniform law process takes years, it would ultimately provide much-needed clarity and uniformity to how digital assets would be handled in these situations.

New York has not enacted a statute directly addressing these issues.[21] However, research of related case law reveals that there have been some developments that may affect these issues. For example, in a recent pivotal case,[22] the Court of Appeals abandoned long-standing precedent requiring tangible physical property to be the subject of a conversion action, and permitted a conversion action based upon intangible electronic computer data. Acknowledging the need to update the common law to reflect modern realities of widespread computer usage, the Court recognized that such digital data has intrinsic value, in and of itself, and need not be printed out or otherwise made tangible for property rights to attach.

Similarly, the New York Supreme Court has held that "E-mail is 'comparable in principle to sending a first-class letter[,]'"[23] thereby presumably extending to e-mails the body of law conferring property rights with respect to letters, including copyright protection to the author as well as possession and succession rights to the recipient.[24]

While the law surrounding digital assets is unsettled or even nonexistent in most jurisdictions, there is considerable legal scholarship advocating for the treatment of digital assets in the same way as traditional assets, including the crucial concept that digital assets are the property of the author, creator or account user, rather than the online sites that service or store them.[25]

## Online Services Offer Afterlife Help with Digital Assets

An interesting online industry has sprung up that caters to people looking to pass on their online presence in the event of disability or death. On a typical site, users sign up and pay a fee to upload everything from online passwords to gym locker combinations into a private account. Upon the user's disability or death, the individuals they have designated to receive this private information are notified about how to open the account and access the information. These people may also receive final wishes and a farewell e-mail from the deceased.

Some sites even allow users to store estate planning documents such as wills and advance directives. For example, AsssetLock (formerly YouDeparted.com) offers a "secure safe deposit box" to hold such things as digital copies of important documents, final messages for family and friends, passwords, hidden accounts, and lock combinations. Once a minimum number (set by the owner) of recipients sign in and confirm the owner's death, the account is unlocked after a time delay (which also can be set by the owner). Similar services are offered by Deathswitch, LegacyLocker and Slightly Morbid.

Other services focus on sending final messages to loved ones. GreatGoodbye allows users to store e-mails, photos and videos that will be sent to a list of people selected by them in the event of their confirmed death. Similar services are offered by EternityMessage and Last Post.

Among the issues to consider with these types of sites are: How safe is it to give such a site all of your security

information? Just how reliable is the site to do what it says it will do? Will the site even exist and have the resources to complete the tasks involved when a disability or death arises?

### Why Leave It to Chance? The Need to Do Digital Estate Planning

Just as we recommend to our clients that doing a will is more prudent than letting the laws of intestacy dictate what happens to traditional assets after death, we should also explain that doing digital estate planning is more prudent than letting the uncertain and fluctuating state of the law, or the policies of individual online services, dictate what happens to digital assets. For one thing, just as in the case of doing a will, the reasonable cost and minor inconvenience of doing a will is minuscule compared to the potential for financial injury and undesirable outcomes of not having one. Moreover, the value of digital assets cannot be underestimated. First, there are the things of priceless sentimental value: photos, videos, stories, recipes, etc. Then, there are the accounts holding money and investments that have to be secured. Finally, there will be instances—especially with celebrities, certain professionals, politicians, and athletes—where e-mails, images, memoirs, diaries, manuscripts, and other digital assets will have significant monetary value.

### Step 1: Take Inventory of Your Digital Assets

The first thing that digital estate planning involves is taking inventory of your online presence. Needless to say, when you take into account all of the possible digital assets discussed above, that can be quite a lengthy list. After assembling the inventory, the next step is ensuring that your agent or executor is aware of these assets and is able to get access to them.

### Step 2: Create a List and Leave Instructions

The best plan is probably the simplest: make a list of all your devices and accounts and their usernames, passwords, PINs, and the answers to those prompt-questions many sites have (you know, your mother's maiden name, your first pet, etc.), and then make sure the right person knows how to get access to it. The hardest part will likely be remembering all the passwords you have accumulated, and keeping the list up to date. You will want to include information on how to access:

- Computers, laptops, notebooks, tablets, and smartphones;
- Internet service providers and Web hosting services;
- E-mail accounts;
- Blogs;
- Photo, music, video, and other information / media storage sites;
- Social networking sites such as Facebook, Twitter, and LinkedIn;
- Online subscriptions (for example, magazine subscriptions that renew automatically);
- Financial sites such as banks, brokerages, college savings plans, and retirement accounts;
- Mortgage lenders and their servicers;
- Entities (such as banks or utilities) where you have set up automatic bill-paying; and
- Software programs.

One way to handle this is to include a "Letter of Instructions" as part of your estate plan and keep it in a safe place together with your will, advance directives, and other estate planning documents. The Letter of Instructions would convey information that an agent or executor would need, including logins and passwords. You should also consider storing this information on a CD, flash drive, or other storage medium, that can be kept with your estate planning documents. You must update this information regularly.

### Step 3: Consider Granting Authority to Your Fiduciaries

It would also be a good idea to include language in your Power of Attorney, will, or trust that allows your agent or executor to handle your digital assets.[26] In delegating who will handle your digital assets, some care must be exercised. Just like any other fiduciary, the person you select must be available, knowledgeable, and trustworthy. It may also be a good idea to make a bifurcated or split delegation of authority; this would be just like when there is a split between the individual put in charge of the "person" versus the individual put in charge of the "property" in situations involving minors or incapacitated persons. The person who is best able to read the media, navigate online and manage access may not be the best person to decide what is important or how to fulfill your wishes.

The delegation of authority may require more than one fiduciary so that there is appropriate competence to handle the digital aspects of the estate as well as the other assets. Alternatively, the fiduciary may need to delegate agents for certain tasks and the estate plan should give the fiduciary that authority. You could even create a separate Power of Attorney addressing only the digital assets.

For more valuable assets, storage with an attorney or in a safe deposit box may be appropriate. In fact, for assets that have significant importance—financial or otherwise—transfer of the account or information from

where it is currently held to an online provider that is more flexible to your needs could be warranted. In some cases, it may even be a good idea to transfer ownership to an LLC or solely held corporation or some similar form of ownership—or form one if necessary—so that, if possible, the assets are owned by an entity with perpetual life. Needless to say, this would be a significant undertaking, but for blogs, domain names or other assets of significant value, the investment may be well worth it.

## What Not to Do

It is not a good idea to put private information like usernames and passwords in your will; a will becomes a public document after your death, when it is filed with the local probate court. Although your agent or executor could change all the passwords once he or she got access, why go through all the trouble and why take chances? Similarly, although you could theoretically include your passwords in an Inter Vivos Trust Agreement, which is a private document, given how often online accounts and their related passwords change, that is probably not an optimal idea either. Instead, keeping the information on a separate document makes the most sense.

## Conclusion

As our online presence continues to occupy more and more importance in our lives, the value of digital estate planning will certainly grow. The laws governing such situations will inevitably evolve to keep up with the changing times, online providers will become more attuned to their users' concerns in order to stay competitive, and consumers will become more savvy and demanding. In the meantime, putting digital planning in place when you are doing traditional estate planning is the prudent thing to do.

*Disclaimer: All brands, trademarks, copyrights, and other intellectual property rights related to the websites and online services mentioned in this article are the property of their respective owners, and are referred to by their commonly known trade names for clarity. No product or service mentioned in this article is endorsed by, nor is its content necessarily the opinion of, the author or publisher of this article.*

## Endnotes

1. *I.e.*, remote storage of computer information by a third-party provider via the Internet.
2. For the uninitiated, an avatar is the digital or on-screen representation of the user (or the user's alter-ego or character) in a computer game or virtual world.
3. Helen W. Gunnarsson, *Plan for Administering Your Digital Estate*, 99 Ill. B.J. 71 (2011).
4. Report a Deceased Person's Profile, FACEBOOK, *available at* http://www.facebook.com/help/contact.php?show_form=deceased, last visited August 14, 2012.
5. How to Contact Twitter About a Deceased User, TWITTER, *available at*: http://support.twitter.com/groups/33-report-a-violation/topics/148-policy-information/articles/87894-how-to-contact-twitter-about-a-deceased-user, last visited August 14, 2012.
6. *See* My family member died recently/is in coma, what do I need to do to access their Hotmail account?, MICROSOFT ANSWERS, *available at* http://answers.microsoft.com/en-us/windowslive/forum/hotmail-profile/my-family-member-died-recently-is-in-coma-what-do/308cedce-5444-4185-82e8-0623ecc1d3d6, last visited August 14, 2012.
7. *See* Accessing A Deceased Person's Mail, GOOGLE GMAIL, *available at* http://support.google.com/mail/bin/answer.py?hl=en&answer=14300, last visited August 14, 2012.
8. When you sign up for a Yahoo! e-mail account, you have to agree to their "Terms of Service and Privacy" contract. It states: "No Right of Survivorship and Non-Transferability. You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted." This policy is set forth *available at* http://info.yahoo.com/legal/us/yahoo/utos/utos-173.htm.
9. *In re Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005).
10. *See* Tresa Baldas, *Slain Soldier's E-Mail Spurs Legal Debate: Ownership of Deceased's Messages at Crux of Issue*, 27 Nat'l L.J. 10, 10 (2005); *see also* Yahoo Releases E-Mail of Deceased Marine, CNET, *available at* http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-Marine/2100-1038_3-5680025.html, last visited August 14, 2012.
11. Connecticut Public Act No. 05-136: An Act Concerning Access to Decedents' Electronic Mail Accounts codified at Conn. Gen. Stat. Ann § 45a-334a (2005).
12. Connecticut's law states: "An electronic mail service provider shall provide, to the executor or administrator of the estate of a deceased person who was domiciled in [Connecticut] at the time of his or her death, access to or copies of the contents of the electronic mail account of such deceased person upon receipt... of: (1) A written request for such access or copies made by such executor or administrator, accompanied by a copy of the death certificate and a certified copy of the certificate of appointment as executor or administrator; or (2) an order of the court of probate that by law has jurisdiction of the estate of such deceased person."
13. Rhode Island HB5647: Access to Decedents' Electronic Mail Accounts Act, codified at Rhode Island General Laws Title 33 Chapter 33-27 (§33-27-1 et seq.).
14. Indiana SB 0212, 2007: Electronic documents as estate property, codified at Indiana Code 29-1-13.
15. Indiana's law states that the "custodian shall provide to the personal representative of the estate of a deceased person, who was domiciled in Indiana at the time of the person's death, access to or copies of any documents or information of the deceased person stored electronically by the custodian upon receipt...of: (1) a written request for access or copies made by the personal representative, accompanied by a copy of the death certificate and a certified copy of the personal representative's letters testamentary; or (2) an order of a court having probate jurisdiction of the deceased person's estate."
16. Oklahoma HB2800: Control of certain social networking, micro-blogging or e-mail accounts of the deceased, codified at Oklahoma Statutes Section 269 of Title 58 (§58-269).
17. Oklahoma's law states: "The executor or administrator of an estate shall have the power...to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any micro-blogging or short message service website or any e-mail service websites."
18. Idaho SB1044: Control of certain social networking, micro-blogging or e-mail accounts of the deceased, amending Idaho Code Section 15-3-715.
19. Legislative Bill 783.

20. The National Conference of Commissioners on Uniform State Laws (NCCUSL) is a non-profit organization commonly referred to as the U.S. Uniform Law Commission. It consists of commissioners appointed by each state, the District of Columbia, the Commonwealth of Puerto Rico, and the United States Virgin Islands. Its purpose is to discuss and debate areas of law in need of uniformity among the states and territories and to draft acts accordingly. The results of these discussions are proposed to the various jurisdictions as model legislation or uniform acts. NCCUSL is perhaps best known for its work on the landmark Uniform Commercial Code (UCC), drafted in conjunction with the American Law Institute.

21. New York has enacted criminal legislation entitled "Offenses Involving Computers," New York Penal Code Article 156 (§§156.00 *et seq.*), and has for quite some time had the estate law statutory exemption intended to protect the surviving spouse and children by preserving a modicum of certain useful personal effects for them, New York Estates, Powers and Trusts Law § 5-3.1, but these statutes do not directly or comprehensively address the concerns at issue here.

22. *Thyroff v. Nationwide Mutual Insurance Company*, 832 N.Y.S.2d 873 (2007).

23. *People v. Lipsitz*, 663 N.Y.S.2d 468, 473 (Sup. Ct. 1997) (*quoting ACLU v. Reno*, 929 F. Supp. 824, 834 (E.D. Pa. 1996)).

24. *See, e.g.*, analysis at Jonathan J. Darrow and Gerald R. Ferrera, *Who owns a Decedent's E-mails: Inheritable Probate Assets or Property of the Network?* 10 N.Y.U. J. Legis. & Pub. Policy 281 (2007); also *available at* http://www.law.nyu.edu/ecm_dlv/groups/public/@nyu_law_website__journals__journal_of_legislation_and_public_policy/documents/documents/ecm_pro_060742.pdf.

25. *Id.*

26. Expanding upon the pattern of the more comprehensive state statutes would probably be the recommended way to go; for example, something along these lines:

> I hereby grant to my [agent/executor/trustee] the power and authority (1) to take over, take control of, conduct, continue, or terminate any online accounts that are in my name, or over which I have control, including on any e-mail service website, any social networking website, any micro-blogging or short message service website, any banking, financial or brokerage website or entity, any music, video or image storage website, any online consumer transaction site, any blogging website, as well as any domain names and URLs on any website or entity, and avatars on video game and virtual world websites; and (2) to access, take possession and control of, copy, or transfer the data and information (including but not limited to personal and business data files, word processing files, customer lists and contact information, calendars and schedules, electronic mail, tweets, blog entries, software, and other stored content or data) located on any websites, computers, servers, hard drives, workstations, laptops, notebooks, tablets, smartphones, and other storage devices or items containing digital data, including flash-drives, disks of any kind, and electronic storage media (including in any and all directories or subdirectories), that I own, that are in my name, or over which I have control.

Needless to say, any wording would have to be tailored to suit the particular people, situations and assets involved. Some people would want a more narrow power given, while others would want the broadest power possible.

**Jim D. Sarlis' office is in Rosedale. He is a graduate of Columbia University as well as Fordham University School of Law, where he was a member of the *Urban Law Journal*. He also studied taxation in the Master of Laws (LL.M.) program at New York University School of Law. Mr. Sarlis has been a guest lecturer at New York Law School on the subject of Will Drafting, and has taught Real Estate Law and Legal Writing in the ABA-governed paralegal program of the City University of New York. Mr. Sarlis is admitted to the New York State Bar, the Federal Courts for the Southern and Eastern Districts of New York, and the U.S. Tax Court.**

*This article originally appeared in the Fall 2012 issue of the* Elder and Special Needs Law Journal, *published by the Elder Law Section of the New York State Bar Association.*

# Amending a Trust Instrument with a Power of Attorney After *Perosi v. LiGreci*

By Helen Z. Galette and James M. Villani

Helen Z. Galette

In *Perosi v. LiGreci*,[1] the Supreme Court, Richmond County ruled that, absent express authority, an agent under a power of attorney could not amend a trust created prior to the execution of the power of attorney. Based on this decision, we were comfortable that the various riders we had drafted to supplement the durable statutory short-form power of attorney to account for the specific contingency, which arose in that case, were in place. While the Appellate Division, Second Department reversed the lower court's decision, and ruled that the agent had acted within her authority and could amend or revoke past estate planning devices, we still believe that we will best serve our clients if we remember to draft our powers of attorney with broad powers that encompass a variety of possible estate planning scenarios.

## 1. The Lower Court's Decision

In *Perosi v. LiGreci*, the settlor, Nicholas LiGreci, executed a trust in 1991 containing a provision that the trust was irrevocable and not subject to any alteration or amendment.[2] The settlor appointed his brother and accountant as trustees.[3] In April 2010, Mr. LiGreci executed a durable statutory short form power of attorney and a statutory major gifts rider, appointing his daughter as his agent. The power of attorney granted the agent "full authority to act on his behalf, as well as all the modifications listed one through eleven on the statutory form."[4] In May 2010, the agent under the power of attorney, along with all of the beneficiaries under the trust, executed an amendment to the trust removing the settlor's brother and accountant as trustees and naming the settlor's grandson as the trustee. Because the irrevocable trust was silent as to the right to amend the trust, the amendment was effectuated pursuant to EPTL § 7-1.9(a) with the agent under the power of attorney acting on Mr. LiGreci's behalf.[5]

Once the "amendment" was effectuated, the newly appointed trustee filed a petition in the Supreme Court, Richmond County seeking, among other things, an accounting from the former trustees. The former trustees cross-moved for an order setting aside and rescinding the amendment removing them as the original trustees.[6]

James M. Villani

While the lower court noted that the language contained in the trust did not permit the settlor to amend the trust, it nonetheless took cognizance of EPTL § 7-1.9(a) as the statutory mechanism by which a settlor and all beneficiaries under a trust can revoke or amend an irrevocable trust. However, the lower court questioned whether one of the beneficiaries of a trust, who was also the attorney-in-fact for the settlor, could utilize this statutory mechanism to remove a trustee. The lower court ruled that the amendment, executed by the attorney-in-fact, was ineffective. In doing so, the court focused on the fact that the statutory short form power of attorney and gift rider did not expressly grant the authority to amend or revoke "past estate planning devices, such as trusts."[7] The court opined that "furthermore, even construing the terms of the power of attorney at its broadest, the authority granted to the agent with regard to trust and estate instruments extends only to actions taken prospectively. The power of attorney executed by Nicholas LiGreci grants no authority to his agent to reform his estate planning."[8] Pursuant to this reasoning, the lower court denied the new trustee's petition, vacated the amendment, and granted the former trustees' cross-motion to have them reinstated as trustees.[9]

When reviewing this decision, we believed it to be reasoned, yet inflexible. If followed, it would create a significant onus on attorneys to draft broad provisions to deal with various scenarios that an agent may encounter under a power of attorney. While most trusts and estates lawyers would likely include language in a rider, providing an agent with unrestricted power to act with respect to trusts, including but not limited to, creating and funding, revoking or modifying, an existing or subsequently created trust, the general practitioner preparing a power of attorney for a client may not be so thorough.

## 2. The Appellate Division's Reversal

On July 11, 2012, the Appellate Division reversed the lower court's decision.[10] The Second Department framed the issue as follows: "On this appeal, we are asked to decide whether an irrevocable trust, which can be amended or revoked by the creator of such a trust with the written

consent of the trust beneficiaries, can also be amended by the creator's attorney-in-fact."[11]

In her appeal, the petitioner argued that GOL §§ 5-1502G[12] (pertaining to estate transactions) and 5-1502N (pertaining to all other matters)[13] granted her the requisite authority to effectuate the amendment to the trust whereby the original trustees were removed. The Second Department, in reviewing the power of attorney in conjunction with GOL §§ 5-1502G and 5-1502N, determined that these provisions are limited to acts which a principal can do through an agent, stating, "Thus contrary to the petitioners' contention, neither the power of attorney nor article 15 of the General Obligations Law specifically authorizes the attorney-in-fact to amend the Trust."[14]

However, the Second Department's continued analysis into the transaction and case law pertaining to an agent's authority turned the tide in this matter. The Second Department, relying on its decision in *Zaubler v. Picone*,[15] described an attorney-in-fact as an "alter ego" of the principal. Quoting *Zaubler*, the Second Department stated, "An attorney-in-fact is essentially an alter ego of the principal and is authorized to act with respect to any and all matters on behalf of the principal with the exception of those acts, which by their nature, by public policy, or by contract require personal performance."[16]

There are only few exceptions to the powers that can be granted to an attorney-in-fact under these stated guidelines, namely, the power to execute a principal's Last Will and Testament; the power to execute a principal's affidavit upon personal knowledge; and the power to enter into the principal's marriage or divorce.[17]

Accordingly, the Second Department held that the amendment to the trust executed by the attorney-in-fact, pursuant to EPTL § 7-1.9, was permissible. The amendment was neither an act contrary to public policy nor a contractual requirement to be performed personally by the principal. The Second Department concluded that a "specific delegation" of authority was not necessary, because a presumption that a creator cannot act through his or her agent should be made by the Legislature, and not the courts.[18]

Questions arise if the decision's impact is to be considered by practitioners. Based on the Second Department's ruling, may we assume that there is a presumption that an agent can act on behalf of his or her principal based on the "alter ego" theory, as long as the exercised authority does not violate the aforementioned exceptions? Is it better not to add broad and various powers? What if a scenario is not foreseen in the power of attorney? Would agents be able to rely on the "alter ego" theory to essentially exercise broad authority on behalf of their principal, in which case a general statutory power of attorney without any modifications would be sufficient?

It is our opinion that notwithstanding the "alter ego" theory, we still believe that the prudent approach is to continue to draft broad riders / modifications to the power of attorney to encompass as many situations as possible, and as a fallback provision argue that the "alter ego" theory serves as a "catchall" to an agent's authority.

## Endnotes

1. 31 Misc. 3d 594,918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533 (2nd Dept. 2012).
2. 31 Misc. 3d at 595.
3. *Id.*
4. *Id.* at 596.
5. EPTL § 7-1.9(a) provides in relevant part, "(a) Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke or amend the whole or any part thereof by an instrument in writing acknowledged or proved in like manner, and thereupon the estate of the trustee ceases with respect to any part of such trust property, the disposition of which has been revoked. If the conveyance or other instrument creating a trust of property was recorded in the office of the clerk or register of any county of this state, the instrument revoking or amending such trust, together with the consents thereto, shall be recorded in the same office of every county in which the conveyance or other instrument creating such trust was recorded." EPTL § 7-1.9(a) (McKinney 2012).
6. *Perosi v. LiGreci* at 594.
7. *Id.* at 599.
8. *Id.*
9. *Id.*
10. *Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533 (2nd Dept. 2012).
11. *Id.* at 3.
12. The Second Department scrutinized General Obligations Law § 5-1502G(2), which provides that with respect to estate transactions, "To the extent that an agent is permitted by law thus to act for a principal, to represent and to act for the principal in all ways and in all matters affecting any estate of a decedent, absentee, infant or incompetent, or any trust or other fund, out of which the principal is entitled, or claims to be entitled, to some share or payment, or with respect to which the principal is a fiduciary." *See, Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533, 3 (2nd Dept. 2012) (citing General Obligations Law § 5-1502G(2) (McKinney 2012)).
13. The Second Department also reviewed General Obligations Law § 5-1502N, entitled Construction—all other matters, which provides that "[i]n a statutory short form power of attorney, the language conferring general authority with respect to 'all other matters' must be construed to mean that the principal authorizes the agent to act as an alter ego of the principal with respect to any and all possible matters and affairs which are not enumerated in sections 5-1502A to 5-1502M, inclusive, of this title, and which the principal can do through an agent." S*ee Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533, 4 (2nd Dept. 2012) (citing General Obligations Law § 5-1502N (McKinney 2012)).

14. *Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533, 4 (2nd Dept. 2012).

15. *Zaubler v. Picone*, 100 A.D.2d 620, 473 N.Y.S.2d 580 (2nd Dept. 1984).

16. *Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533, 4 (2d Dept. 2012) (quoting *Zaubler v. Picone*, 100 A.D.2d 620, 473 N.Y.S.2d 580 (2d Dept. 1984); *see also*, *In re Arens v. Shainswit*, 37 A.D.2d 274, 324 N.Y.S.2d 32, *aff'd*, 29 N.Y.2d 663, 324 N.Y.S.2d 32 (1971); *Bismark v. Incorporated Vil. of Bayville*, 21 A.D.2d 797, 250 N.Y.S.2d 769 (2d Dept. 1964); *Mallory v. Mallory*, 113 Misc. 2d 912, 450 N.Y.S.2d 272 (Sup. Ct., Nassau Co. 1982).

17. *Perosi v. LiGreci*, 31 Misc. 3d 594, 918 N.Y.S.2d 294 (Sup. Ct., Richmond Co. 2011), rev. 948 N.Y.S.2d 629, 2012 N.Y. Slip Op. 05533, 5 (2nd Dept. 2012).

18. *Id.*

**Helen Z. Galette and James M. Villani are long-time friends and colleagues who formed the firm of Villani & Galette, P.C., and practice in the areas of elder law, guardianships, and trusts and estates. Helen is the immediate past president of the Bay Ridge Lawyers Association and has served on the Elder Law and Grievance Committees for the Brooklyn Bar Association. James was on the Planned Giving Council of the American Cancer Society and has lectured extensively on Elder Law and Medicaid Planning matters and Charitable Giving.**

*This article originally appeared in the Winter 2013 issue of the* Entertainment, Arts and Sports Law Journal, *published by the Entertainment, Arts and Sports Law Section of the New York State Bar Association.*

# Proceed With Caution: Matters to Consider for Business Lawyers Transitioning Into Health Care

By Craig B. Garner

## Introduction

While the subject of health care law makes headlines daily across the nation, there is still a sizeable chasm between health care lawyers and their business counterparts. Sometimes complicated, health care law is by no means exclusive, and opportunities abound for an able practitioner. Notwithstanding this, in today's climate of reform it is essential that those practicing American health care law honor and obey the hierarchy surrounding its discipline as it struggles to stay afloat amid a rising tide of constitutional, partisan and fiscal challenges.

In most states, attorneys are mindful that when venturing into areas of law outside their usual practice, rules of professional conduct apply. A District Court in the District of Columbia recently repeated a familiar quote that health care law, and the Medicare statutes in particular, are "among the most completely impenetrable texts within human experience." Complications notwithstanding, there is a pressing need to advance this body of authority, not to mention the nation's health care system, beyond its fledgling form (commonly referred to as the Affordable Care Act). What began as a mere 2,700 pages of codified reform may eventually be tens of thousands. This will require active participation from attorneys representing practically all areas of law, although when it comes to matters of health care law, it is always best to proceed with caution.

When venturing into areas of law outside their usual practice, attorneys should be mindful of the state-specific standards to which they are held. Rule 3-110 of the California Rules of Professional Conduct sets the standard on the west coast, just as Rule 1.1 of the New York Rules of Professional Conduct applies on the east. Absent the requisite skill to accommodate a client's needs, an attorney may still engage and adhere to the statutory definition of competence by "associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent" or "by acquiring sufficient learning and skill before performance is required."[1] In 2003, a California Appellate Court explained: "attorneys are expected 'to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques.'"[2]

However, due to the sheer volume and complexity of information generated regularly in the wake of reform, modern health care law exists in a league of its own. To be sure, there is nothing otherworldly about health care law,[3] and a conscientious advocate can find the answers he seeks given enough time and resources. Yet even the savviest business lawyer should be mindful before accepting a new assignment involving health care concerns, as the fiduciary pathway can be treacherous and unforgiving. The ever-evolving body of laws governing today's health care industry bears at least partial blame for the inherent disconnect between traditional notions of business (referenced occasionally in a state's Corporations,[4] Corporations and Associations[5] or General Business Code,[6] for example) and the business of health care (found within a plethora of statutory domiciles in various states, including California,[7] New York[8] and Texas,[9] among others).[10] Regardless of where it is encountered, health care law should never be underestimated, even if its underlying logic exists outside the scope of case law and statutes frequented by a business lawyer on any given day.

## The False Claims Act, 150 Years in the Making

To further confuse the issue, many of the core tenets central to health care law are inherently inconsistent with those meanings employed on a regular basis by the corporate attorney, such as "goods and services," "financial interests," "referrals," "discounts" and "rebates." The situation has not improved with the passage of the Patient Protection and Affordable Care Act,[11] as amended by the Health Care and Education Reconciliation Act[12] (collectively referred to as the Affordable Care Act or health care reform) particularly in regard to matters of health care fraud and abuse. Dating back to the American Civil War, the False Claims Act (FCA) has over time become both the federal and state governments' "primary litigative tool for combating fraud."[13] At its core, the FCA imposes liability on anyone who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval."[14]

What began as a way to protect the Union Army from purchasing substandard horses, faulty weaponry, and inedible provisions has evolved considerably since Congress passed the FCA in 1863.[15] In its present incarnation under the Affordable Care Act, a health care provider must return any "overpayment" of federal funds within sixty days after identifying the error or risk liability under the FCA.[16] However, the meaning of the term "overpayment" extends beyond a simple miscalculation of price in response to which a refund or store credit will suffice.

Under federal law, overpayments can result from unintentional billing errors, overutilization or by working with an excluded vendor. They can also occur when a facility does not employ accurate procedures for billing and

collecting in connection with hard work on behalf of real patients, unnecessary work with not-so-real patients, and necessary work for patients within 72 hours of a hospital inpatient admission or discharge.[17] An overpayment may include a duplicate payment to a hospital by a patient and her automobile insurer.[18]

It may also apply in "the situation where a provider is given money by Medicare to pay for certain health care services, and the provider contracts with a third party who, in turn, provides those services, but the provider fails to liquidate the liability by paying the third party within a designated period of time."[19] There may exist both "anticipated" overpayments as well as "erroneous" overpayments,[20] and a delay of as much as fourteen years in attempting to recover an overpayment should be considered reasonable.[21]

## Exclusion From the Medicare Program

Yet another concept that has grown far more expansive under the Affordable Care Act is the notion of what it means to be "excluded" from participation in a health care program funded at least in part by the Federal government, and the potential ramifications of such exclusion from a business standpoint.[22] As a general rule, the Federal government requires advanced approval of every entity that participates in the delivery of health care under a federal program such as Medicare. In the event that any one participant in a provider's delivery of health care is either unauthorized or excluded[23] from participation by the Federal government, everything related to the actual remuneration of these health care services by the Federal government may constitute an overpayment and/or false claim.[24] In essence, any items or services furnished by an excluded individual or entity are not reimbursable by any Federal health care program, including monies paid to another, third party provider or supplier that is an authorized participant, such as a doctor or hospital. This creates an implied indemnification of any health care provider who receives Federal funds in exchange for the delivery of medical services, yet fails to afford that same provider any viable remedy against a third party who bears technical culpability for the break in the chain, thereby rendering the entire reimbursement *void ab initio*. A single weak link effectively nullifies the entire chain.

No matter where on the vertical ladder of delivery an excluded provider may stand, reimbursement is not permissible for anyone, and violations may result in potential criminal penalties.[25] This includes those administrative and management services that are not directly related to health care but are nonetheless a necessary component in the ultimate delivery of health care services. Services performed by excluded parties such as nurses, pharmacists, ambulance drivers, social workers, claims processors, or even the person who sells, delivers and/or refills an order for a medical device are thereby prohibited.[26] Failure to follow these rules closely exposes a health care provider to potential civil money penalties of $10,000 for each item or service that bears some nexus to an excluded individual, treble damages for the amount of each specific claim, and possible exclusion for the health care provider himself or herself, who may have been unaware of the circumstances rendering his or her treatment problematic in the eyes of the government.[27]

It should thus come as no surprise that under the Affordable Care Act, participation in the Medicare program may require a heightened level of advanced screening, such as criminal background checks, fingerprinting, licensure verification and unannounced visits.[28] As of March 25, 2012, these procedures will apply to nearly everyone involved in the delivery of care under the Medicare program, either directly or indirectly.[29] While this may on the surface appear to be somewhat disruptive, its intent is to protect providers from unwittingly collaborating with excluded parties who may cause them not only to forfeit their right to reimbursement, but also incur substantial penalties. Although typically associated with criminal law cases, the legal metaphor "fruit of the poisonous tree"[30] provides an excellent analogy for the ways in which the slightest oversight can lead to substantial financial penalties.

## The Fraud and Abuse Labyrinth

In an attempt to curtail the ever-present specter of medical fraud, both state and federal governments have created a series of provisions designed to police providers and highlight areas where conflicts of interest may arise. Fraught with complexity and comprised of volumes upon volumes of information in the form of statutory authority, case law decisions, and secondary references, Stark laws, Anti-Kickback statutes and laws governing outpatient referral[31] give the Commerce Clause[32] a run for its money in terms of complexity. And yet, it is not the nature of the laws that is problematic from the viewpoint of a business lawyer, but rather the 28 pages of double-columned regulatory exceptions (also known as "Safe Harbors")[33] to the criminal penalties for acts involving federal health care programs.[34] When used accordingly, these statutory exceptions can potentially insulate a health care provider from liability under the Stark and Anti-Kickback laws, not to mention the few hundred advisory opinions generated by the Office of the Inspector General.[35]

Some of the more common Safe Harbor provisions include investment interests, office space and equipment rental, personal services and management contracts, the sale of a practice, referral services, discounts, employees, group purchasing organizations, waiver of beneficiary coinsurance and deductible amounts, physician recruitment, investments in group practices, ambulatory surgical centers, ambulance replenishing, and electronic health records.[36] Outside of the health care context, many such transactions are considered ordinary at best, and there

are without question other specialty areas among business lawyers that also include higher standards of care. However, with health care expenditures (NHE) accounting for almost 18% of the nation's gross domestic product, amounting to approximately $2.5 trillion as of 2009,[37] it is not entirely unexpected that health care law is trying to keep pace, and the physical and mental demands such labyrinthine legislation may impose upon the unwary business lawyer should never be underestimated. With such an expansive regulatory reach and potential liability emanating from so many possible points of origin, extreme vigilance and an ever-present eye to copious, sometimes seemingly unreasonable or unfair, details must serve as the foundation for any health care law practice.

## Health Care's Version of the Recall

It is not uncommon for federal or state laws to mandate that businesses notify their customers in certain events, such as during product safety recalls in automobiles, potential health threats relating to food products, and substantive or technical concerns in the pharmaceutical industry. Due to concerns over patient privacy, the health care industry must take the idea of patient notification to a whole new level. Under the Health Information Technology for Clinical and Economic Health (HITECH) Act,[38] any "covered" entity that maintains "unsecured" protected health information (PHI) and "discovers" a "breach of such information" must notify each individual whose PHI "has been, or is reasonably believed by the covered entity to have been, accessed, acquired, or disclosed as a result of such breach."[39] This rule also applies to business associates working with an entity for which disclosure is required under the HITECH Act.[40]

The regulations provide for the method of notification (mail, email, or telephone, in certain instances),[41] establish protocol should the issue involve more than ten individuals, and set forth further requirements for issues involving more than 500 individuals.[42] Federal regulations also specify what the notice must include for each type of infraction.[43] Finally, there is often a fine when a breach is proven, and neither HITECH nor HIPAA (Health Insurance Portability and Accountability Act of 1996)[44] offers exceptions. With civil penalties ranging from $100 to $50,000 for each HIPAA or HITECH-related violation, cumulative penalties can amount to as much as $1,500,000 in any calendar year.[45] Where there is an "intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, the penalty may not exceed $250,000, imprisonment up to 10 years, or both."[46]

## We Cannot Refuse the Right to Serve

In an effort to counteract "patient dumping," wherein hospitals refuse to treat people due to lack of insurance or inability to pay, Congress passed the Emergency Medical Treatment and Active Labor Act (EMTALA) in 1986.[47] EMTALA requires every hospital that receives federal funding to treat any patient with an emergency condition in such a way that, upon the patient's release, no further deterioration of the condition is likely. No hospital may release a patient with an emergency medical condition without first determining that the patient has been stabilized, even if the hospital properly admitted the patient. Under EMTALA, patients requesting emergency treatment can only be discharged under their own informed consent or when their condition requires the services of another hospital better equipped to treat the patient's concerns.[48]

There has been an abundance of debate regarding the propriety of these requirements, specifically regarding their impact on the emergency health care system in the United States.[49] Simply put, the idea behind EMTALA places a considerable burden on participating emergency departments by allowing a buyer of certain goods (*i.e.*, the patient) to obtain certain goods (*i.e.*, medical care) from a seller of certain goods (*i.e.*, the hospital), though the seller must still perform his or her duties regardless of whether the buyer is able to pay, and there exists no viable remedy to prevent such a scenario from happening repeatedly. While other industries have specific remedies for addressing such issues,[50] these methods rarely apply in the health care sector.[51] Even provisions to protect business transactions upon seller's discovery of buyer insolvency do not translate well in the realm of health care law,[52] placing providers in the unenviable position of having to provide their services atop a business model too weak to allow for continued sustainability.

Health care law is by no means exclusive, and opportunities abound for an able practitioner hoping to transition at any stage of his or her career. In today's climate of reform, it is essential that those practicing American health care law honor and obey the hierarchy surrounding its discipline as it struggles to stay afloat amid a rising tide of constitutional challenges. It comes as no surprise that even after the Supreme Court's landmark decision in June confirming the constitutionality of the Affordable Care Act,[53] health care law continues its reign in the spotlight. Even though Chief Justice Roberts set the stage for the November elections while casting uncertainty for the future of the Affordable Care Act,[54] health care lawyers are sure to remain standing.

## Endnotes

1. Cal. Rules of Prof'l Conduct R. 3-110(C) (1992); *see also* Ala. Rules of Prof'l Conduct R. 1.1 (2012); Colo. Rules of Prof'l Conduct R. 1.1 (2008); N.Y. Rules of Prof'l Conduct R. 1.1(b) (2009); Tex. Disciplinary Rules of Prof'l Conduct R. 1.01 (2005).
2. Camarillo v. Vaage, 130 Cal. Rptr. 2d 26, 32 (Cal. Ct. App. 2003) (quoting Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975)); *see also* McIntyre v. Comm'n for Lawyer Discipline, 169 S.W.3d 803, 807–08 (Tex. App. 2005); *In re* Jayson, 832 N.Y.S.2d 696, 698 (App. Div.

2007); Davis v. Alabama State Bar, 676 So.2d 306, 310 (Ala. 1996); Disciplinary Counsel v. Hoppel, 2011-Ohio-2672, 129 Ohio St. 3d 53, 54, 950 N.E.2d 171, 173.

3. *But see* Catholic Health Initiatives—Iowa v. Sebelius, 841 F. Supp. 2d 270, 271 (D.D.C. 2012) ("Picture a law written by James Joyce and edited by E.E. Cummings [sic]. Such is the Medicare statute, which has been described as 'among the most completely impenetrable texts within human experience.'") (quoting Rehab. Ass'n of Va., Inc. v. Kozlowski, 42 F.3d 1444, 1450 (4th Cir. 1994)). The District Judge also noted that "[t]he Court clarifies, however, that by making this analogy, it is referring not to Joyce's early work, such as *Dubliners* or *A Portrait of the Artist as a Young Man*, but his later period, specifically *Finnegan's Wake.*" *Catholic Health*, 841 F. Supp. 2d at 271 n.1.
4. *See, e.g.*, Cal. Corp. Code.
5. *See, e.g.*, Md. Code Ann., Corps. & Ass'ns Code.
6. *See, e.g.*, N.Y. Gen. Bus. Law.
7. *See e.g.*, Cal. Health & Safety Code, Cal. Welf. & Inst. Code, Cal Ins. Code, Cal. Lab. Code, and Cal Gov't Code, among others.
8. *See, e.g.*, N.Y. Ins. Law, N.Y. Pub. Health Law, N.Y. Mental Hyg. Law, N.Y. Retire. & Soc. Sec. Law, N.Y. Vol. Ambul. Workers' Ben. Law and N.Y. Workers' Comp. Law, among others.
9. *See, e.g.*, Tex. Health & Safety Code Ann. and Tex Loc. Gov't Code Ann., among others.
10. *See also* 42 U.S.C. (2012) (Public Health and Welfare); 25 U.S.C. §§ 1601–83 (2012) (Indian Health Care); 31 U.S.C. (2012) (Money and Finance); 38 U.S.C. §§ 7301–68 (2012) (Veterans Health Administration). In addition to these state and federal statutes, there exists an equally expansive body of state and federal regulatory authority. *See, e.g.*, 8 U.S.C. (2012) (Industrial Relations); 17 U.S.C. (2012) (Public Health); 28 U.S.C. (2012) (Managed Health Care); *see also* 25 C.F.R. (2012) (Indians), 38 C.F.R. (2012) (Pensions, Bonuses, and Veterans' Relief), 42 C.F.R. (2012) (Public Health).
11. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
12. Healthcare and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 (2010).
13. United States *ex. rel.* v. Boeing Co., 9 F.3d 743, 745 (9th Cir. 1993) (quoting Senate Judiciary Committee, False Claims Amendments Act of 1986, S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266).
14. 31 U.S.C. § 3729(a)(1)(A) (2012).
15. *See* 12 Stat. 696 (Mar. 2, 1863).
16. *See* 42 U.S.C. § 1320a-7k (2012); *see also* 18 U.S.C. § 1035 (2012) (false statements relating to health care matters); 18 U.S.C. § 1001 (2012) (false statements as to matters under federal jurisdiction); 31 U.S.C. § 3729(a)(1) (the Fraud Enforcement and Recovery Act). *Cf.* Medicare Program; Reporting and Returning of Overpayments, 77 Fed. Reg. 9179 (Feb. 16, 2012) (to be codified at 42 C.F.R. pts. 401 and 405) (clarifying the requirements for providers and suppliers receiving funds under the Medicare program to report and return overpayments).
17. *See generally* 42 U.S.C. § 1320a-7b (2012) (outlining criminal penalties for acts relating to federal health care programs).
18. Buckner v. Heckler, 804 F.2d 258, 259–60 (4th Cir. 1997).
19. *See In re* Slater Health Center, 398 F.3d 98, 100 (1st Cir. 2005).
20. Carleson v. Unemployment Ins. Appeals Bd., 64 Cal. App. 3d 145, 153 (Cal. Ct. App. 1976); *see also* Holy Cross Hosp. of Silver Spring, Inc. v. Maryland Employment Sec. Admin., 421 A.2d 944, 946 (Md. 1980).
21. *See generally* Robert F. Kennedy Med. Ctr. v. Department of Health Srvs., 61 Cal. App. 4th 1357 (Cal. Ct. App. 1998).
22. This includes Medicare and Medicaid.
23. The Federal government, and specifically the Office of the Inspector General, is required by law to exclude from participation in all Federal health care programs individuals or entities convicted of certain offenses, such as Medicare or Medicaid fraud, patient abuse or neglect, or felony convictions for other health care related fraud or misconduct. *See, e.g.*, 42 U.S.C. § 1320A-7(a) (2012). The OIG also has discretion to exclude from participation in all Federal health care programs individuals or entities with misdemeanor convictions related to health care fraud, fraud in a non-health care program that is funded by a federal, state or local government agency, or for providing unnecessary or substandard service. *See, e.g.*, 42 U.S.C. § 1320A-7(b) (2012).
24. *See, e.g.*, 42 C.F.R. § 1001.1901 (2012).
25. 42 U.S.C. § 1320a-7b (2012).
26. *See, e.g.*, 42 U.S.C. § 1395x(b) (2012) (defining inpatient hospital services).
27. *See, e.g.*, 42 U.S.C. § 1320a-7a (2012); 42 C.F.R. § 1001.3002 (2012).
28. 42 U.S.C. § 1866j(2) (2012).
29. Medicare, Medicaid, and Children's Health Insurance Programs; Additional Screening Requirements, Application Fees, Temporary Enrollment Moratoria, Payment Suspensions and Compliance Plans for Providers and Suppliers, 76 Fed. Reg. 5862, 5865 (Feb. 2, 2011).
30. *See* Nardone v. United States, 308 U.S. 338, 341 (1939) (first use of the phrase "fruit of the poisonous tree"); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (first articulation of the concept behind the phrase).
31. *Stark* (the Medicare self-referral prohibitions, codified at 42 U.S.C. § 1395nn (2012)), *AKS* (the Federal Anti-Kickback statutes, 42 U.S.C. § 1320a-7b(b) (2012), and *PORA* (California's Physician Outpatient Referral Act, CAL. BUS. & PROFS CODE § 650, *et seq.*).
32. U.S. CONST. art. I, § 8, cl. 3 ("To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").
33. *See* 42 C.F.R. § 1001.952 (2012).
34. *See, e.g.*, 42 U.S.C. § 1320a-7b (2012).
35. The OIG issues advisory opinions about the application of its fraud and abuse authorities to the requesting party's existing or proposed business arrangement. 42 U.S.C. § 1320a-7d(b) (2012); 42 C.F.R. § 1008 (2012).
36. *See* 42 C.F.R. § 1001.952 (2012).
37. United States Department of Commerce, Bureau of Economic Analysis; Centers for Medicare & Medicaid Services, Office of the Actuary, National Health Statistics Group. The NHE calculates total annual spending for health care in the United States (goods and services), in addition to total administrative spending each year, as well as the net cost of private health insurance, among other things. *See* Micah Hartman et al., *Health Spending Growth at a Historic Low in 2008*, 29 HEALTH AFF. 147 (Jan. 2010) (citing Centers for Medicare & Medicaid Services, national health expenditure accounts: definitions, sources, and methods used in the NHEA 2008).
38. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Feb. 17, 2009, 123 Stat 115.
39. 42 U.S.C. § 17932.
40. 42 U.S.C. § 17931(a).
41. 42 U.S.C. § 17932(e).
42. 42 U.S.C. §§ 17932(e)(3), (e)(4).
43. 42 U.S.C. § 17932(b), (f).
44. Health Insurance Portability and Accountability Act, Pub. L. No. 104–191, Aug. 21, 1996, 110 Stat 1936.
45. 42 U.S.C. § 1320d-5(a)(3).
46. 42 U.S.C. § 1320d-6(b)(3).

47. An Act to provide for reconciliation pursuant to section 2 of the first concurrent resolution on the budget for fiscal year 1986 (S. Con. Res. 32, Ninety-ninth Congress), Pub. L. No. 99–272, Apr. 7, 1986, 100 Stat 82.

48. 42 U.S.C. § 1395dd (2012). Notwithstanding the requirements of EMTALA, including an undisputed obligation to treat undocumented or illegal aliens, the Affordable Care Act does not provide for any mechanism to insure this same category of individuals.

49. *See, e.g.*, Renee Y. Hsia, M.D., *Factors Associated with Closures at Emergency Departments in the United States*, 305 (19) JAMA 1978 (May 18, 2011); S. Trzeciak and E.P. Rivers, *Emergency Department Overcrowding in the United States*, 20 EMERG. MED. J. 402–05 (2003).

50. *See. e.g.*, CAL. PENAL CODE § 487 (grand theft larceny); MINN. STAT. § 609.52 (theft); FLA. STAT. § 812.012 (theft, robbery and related crimes); U.S. CONST. amend. V (Takings Clause).

51. A recent California Supreme Court decision held that emergency department physicians who do not contract with a health maintenance organization (HMO) may not bill the HMO's members for any amounts that remain unpaid by the HMO, an industry practice commonly known as "balance billing." Prospect Med. Grp. v. Northridge Emerg. Med. Grp., 198 P.3d 86 (Cal. 2009); *but see* CAL. PENAL CODE § 484b ("Any person who receives money for the purpose of obtaining or paying for services, labor, materials or equipment and willfully fails to apply such money for such purpose…and wrongfully diverts the funds to a use other than that for which the funds were received, shall be guilty of a public offense….").

52. *Compare* CAL. COM. CODE § 2702 *and* IND. CODE § 26-1-2-702 ("Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery….") *with* Christopher Palmeri, *California Faces Cash Shortfall by March on Low Receipts, Controller Says*, BLOOMBERG, Jan. 31, 2012, http://www.bloomberg.com/news/2012-01-31/california-faces-cash-crisis-by-march-controller-chiang-says.html ("Unlike 2009, when [Controller John Chiang] was forced to issue IOUs to creditors, the controller said the current cash shortfall can be managed through payment delays, as well as external and internal borrowing.").

53. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

54. Although the Affordable Care Act survived the Supreme Court, whether or not it will escape partisan politics unscathed remains to be seen. In his conclusion, Chief Justice Roberts aptly set the stage for what is to come in November: "the Court does not express any opinion on the wisdom of the ACA. Under the Constitution, that judgment is reserved to the people." *Id.* at 2608.

**Craig B. Garner is an adjunct professor of law, health care consultant and attorney, focusing on issues surrounding modern American health care and the ways it should be managed in its current climate of reform. Between 2002 and 2011, Craig was the CEO at Coast Plaza Hospital in Los Angeles County, California. In addition to teaching a course on Hospital Law at Pepperdine University School of Law in Malibu, California, Craig is also a frequent contributor to several different health care publications where he offers analysis and insight as it relates to health care, and in particular the 2010 Patient Protection and Affordable Care Act.**

*This article originally appeared in the Winter 2012 issue of the* NY Business Law Journal, *published by the Business Law Section of the New York State Bar Association.*

# Mediation: It's Not Just When the Marriage Breaks Up

By Antonia J. Martinez and Robert W. Shaw

Antonia J. Martinez

Individuals are familiar with the concept of mediation in divorce and child custody disputes as a cost-effective alternative to litigation. It can be an equally effective alternative to litigated guardianship proceedings, or to resolve heated disputes among feuding siblings with opposing views concerning where mom should reside, how much assistance dad really needs, or how money is being spent. The potential for mediation to resolve these sorts of disputes is only beginning to emerge and New York State still has a long way to go.

Mediation should be distinguished from arbitration, another form of alternative dispute resolution. Arbitration utilizes an independent fact-finder to make decisions for the parties based on the facts presented by all involved in the arbitration. The decision of the arbitrator is final and the parties to the conflict are bound to his or her decision. In mediation, the mediator does not make decisions for the parties. Instead, participants make their own decisions under the mediator's guidance.

## A. Diverse Mediation Models

There are several different types of mediation and mediator styles. The *evaluative model* focuses on the law and legal questions pertinent to the matter at hand. That is, the legal issues presented will be the primary focus of the mediation. A second model in which law is not used as the means to resolve a dispute is the *transformative model*, where the mediator is there to help the parties reach agreement, but does not necessarily have a background in the subject matter of the dispute. A third and ideal model for the family conflict arena is the *facilitative model*. In the facilitative modality, the law is brought into the mediation not for the purpose of resolving the dispute, but rather to guide the parties in how the dispute will be settled in the courtroom if the parties are unable to reach an agreement. In a family dispute scenario, a mediator experienced in the field of Elder Law and Trusts and Estates Law is an asset to the resolution of the dispute.

Types of family disputes in which mediation should be considered include the following:

1. A parent is suffering from physical decline and / or early stage dementia. The children, residing in multiple states, are fighting amongst themselves or with the parent on what type of care plan should be initiated;
2. A now incompetent senior has a validly executed Power of Attorney appointing two separate agents who disagree on what actions will be taken. This is particularly critical where the document requires them to act jointly;

Robert W. Shaw

3. A parent recently died and two adult siblings are fighting over the terms and validity of the Will, resulting in delaying probate and appointment of the Estate's Executor. One of the adult children resides in the deceased parent's house and had lived with decedent until his death. The two argue over whether the house should be sold or a financial arrangement put in place allowing the adult child to continue residing in the home. The sibling who does not reside there wants to initiate a lawsuit to force a sale of the premises since the two cannot agree on the arrangement;
4. The continued effectiveness of a care plan already in existence for a senior is now in dispute. Is a home attendant sufficient or does the senior now need assisted living or nursing home care? The three adult children each have a different point of view and the senior's perspective has not been articulated during the heated arguments that have ensued among bickering siblings.

## B. Underlying Interests

What is each dispute really about? Is it really about settling the estate, or is it about the resentment Susie bears towards Bill for all the years mom and dad favored Bill, and bought him expensive gifts, even though he was financially well established? Susie feels unappreciated for everything she did for her parents over the many years she was the one who lived close by, provided care, arranged medical appointments and gave of herself at the expense of her own family of three children and husband who grew resentful over her involvement. The dispute for her is not about the money in the estate but over the lack of recognition she received throughout her life.

In all of the above examples, there are multiple advantages to avoiding a courtroom as a forum for dispute resolution. Familial "issues" going back to childhood are often the real reasons behind hardened positions. These are relationship conflicts not only between parent and child, but between siblings. Mediation offers the opportunity to go beyond the surface issue and explore the family dynamics behind the problem. Mediation gives the parties an opportunity to vent, and when done successfully will go beneath the issues to uncover what the real needs are of each party, as opposed to their announced purported positions. Often, a family crisis and a stalemate preventing a resolution, stems from a failure to look at underlying needs and

feelings of the parties. The courtroom is not an appropriate forum to address these underlying interests, whereas mediation gives the parties the room and time they need to hear one another's positions. An understanding of the other party's perspective can result in a shift of position once the mediation looks beyond the surface issues.

### C. Efficiency of Mediation in the Elder Law and Probate Arenas

Mediation is an alternative to putting a case through the court system, where cases may be drawn out for several years, costing many thousands of dollars, and utilizing limited court resources. Time, in particular, is critical to senior citizens and the disabled. Mediation, as an alternative, offers a speedier resolution, allows the voice of the senior to be heard, and offers greater privacy as an alternative to litigation.

The benefits of family dispute mediation are both a reduction of stress to the individual parties and the chance for creative problem solving. A mediation can be conducted in a less formalized setting than a trial court, and with the help of the mediator, determine the topics of discussion, including what issues to raise and which ones can be limited. It is an opportunity for the parties to vent with greater flexibility of time than available on a court calendar.

### D. Elder Law Attorneys and Mediation

Many elder law attorneys incorrectly perceive themselves as family mediators. They are not. The role of the elder law attorney is significantly different and is that of advocate who must represent his or her client with reasonable diligence.[1] It is rather the role of the mediator to facilitate a solution or set of solutions to parties ensnared in a dispute originating from competing interests that originate with family dynamics and resentments harbored over the course of many years, and sometimes decades. The elder law attorney will make recommendations to provide particular planning options, whereas the elder mediator offers a forum for each voice to be heard. The role of the elder law attorney is to bring the legal issues to resolution promptly and efficiently, whereas the mediator's role is to oversee a process that allows all parties to fully articulate their positions and exchange their personal views.

### E. Elder and Probate Mediation: Is It in New York State's Future?

In New York State, given the current state of overloaded court calendars, the climate is ripe for mediation in guardianship proceedings and contested probate matters. Should New York State create a specific framework and methodology to establish criteria for mediation in certain probate proceedings? What is to be gained by such action? First, significant savings of legal expenses will inure to the benefit of the litigants. Second, mediation will conserve limited court resources. Even when mediation fails to resolve all aspects of a dispute, the issues remaining before the Court for resolution are more narrowly focused as a result. Third, the parties to the mediation, no longer constrained by the Rules of Evidence and eager to be heard, will have a forum to talk about the underlying issues that resulted in the conflict. Even in situations in which mediation fails, the litigants return to Court with a better understanding of the court process.

Mediation has been an important part of alternative dispute resolution in other states throughout the United States for many years. It is time to bring mediation to the forefront in New York for the many areas of conflict one encounters in Elder Law and in Trusts and Estates Law practice. Should New York follow other states that have initiated mediation programs such as Texas, Florida, California, Georgia, Hawaii, Arizona, Michigan, New Hampshire, Utah, and Washington? Given that New York was the very last state in our country to authorize no-fault divorce, one cannot be hopeful that such legislation will be forthcoming anytime soon. At a Symposium at Albany Law School in March 2012, New York's Chief Judge Jonathan Lippman noted the courts were contemplating strategies to reduce expenses, increase efficiency and lighten calendars.[2] The climate is ripe for the establishment of criteria in the area of trusts and estates and guardianship matters to permit litigious parties to resolve disputes with better long-term results through mediation. It is the responsibility of the bar to inform and educate the public about the opportunity and advantages afforded parties to a mediation.

### Endnotes

1. N.Y. State Rules of Prof'l Conduct Rule 1.3 (2012).
2. Mark Mahoney, *Judges From Several States Seek Answers to Court Problems*, New York State Bar Association State Bar News, May / June 2012, at 28.

**Antonia J. Martinez, Esq., devotes substantially all her professional time to Trusts and Estates and Elder Law matters. Ms. Martinez is Co-Chair of the Elder Law and Disabilities Committee of the New York Women's Bar Association and a member of the Executive Committee of the New York State Bar Association Elder Law Section and serves as Vice Chair of its Veteran's Benefits and Mediation Committees, and a member of the ADR in the Courts Committee of the Dispute Resolution Section of the New York State Bar Association. Ms. Martinez is a speaker at Continuing Legal Education programs as well as community programs. Her articles in *The Elder Law Times, Professional Planning for Wealth & Lifestyle Preservation* are distributed to the general public. She is a 1982 graduate of Harvard Law School.**

**Robert W. Shaw, Esq., is an attorney in White Plains, New York. He focuses his practice in the areas of elder law and estate planning. Mr. Shaw received his J.D. from the University of Toledo College of Law and his B.A. from Lycoming College. He is a member of the National Academy of Elder Law Attorneys (NAELA) and the Elder Law and Trusts & Estates Law Sections of the New York State and Westchester County Bar Associations. He is a member of the Mediation Committee of the NYSBA Elder Law Section.**

*This article originally appeared in the Winter 2013 issue of the* Elder and Special Needs Law Journal, *published by the Elder Law Section of the New York State Bar Association.*

# The Care, Upkeep and Planned Death of a Client File

By Kameron Brooks

My hope is that this article will give some guidance to those required to keep a "Client File," whether they be seasoned practitioners or newly admitted attorneys. It is important to keep in mind, even with fifty years of experience, you may not have better client and file management skills than an associate of fifty days. You may read this article and say under your breath, "I already do all this stuff!" And if you do, then you've just received a confirmation that you're doing a lot of things right. If you read this and mutter under your breath "Oh my malpractice carrier, I never thought of some of this stuff," then maybe I have helped in some way. I do not pretend to know everything there is to know about file management and client relations, but after 34 years, I've at least made enough mistakes to learn a few things and share them with you. As you read this article, you may even have some additional ideas than those expressed… great, develop and implement them. In any event, let us explore the six rules of file management I have discovered thus far.

### Rule #1: Know Where the File Will End Up Before You Begin

Know the answer before the question: Where and how is the file (paper and / or digital) going to wind up in your office or storage facility? As important as it is to know how to open a new file in a logical manner, an equally important question is how to close it and where its final resting place will be. In the usual case, we are consumed with how to properly create the file and set up the client in whatever system we are using. Like little children at Christmas time, we can't wait to begin work and start producing for the client—that's the technician in us. However, equally important is planning for that time in history when work on the file is over and someone—not you of course—must accept the responsibility to remove the file from the "active" area (file wall or cabinet) and place it storage, that abyss that all "closed" files find themselves after no one wants to see them anymore.

Arguably, the way in which one determines to close a file is largely a function of age and technological sophistication. If you are a "paper" person (ok, the implication is that you're older), the file will consist largely of paper product that will have to be physically "shelved" in some office / warehouse location…there to collect dust for eternity or until someone (whose job it is to identify and locate this type of dinosaur) removes it for destruction.

If you are among the more technologically advanced, then your files are more digital than paper. Saving valuable client information is easier when it's right there in the computer…somewhere? O.K., we know exactly where it is and can retrieve it anytime. But how long is "anytime"? Just how long do we obligate ourselves to keep client information, and what about changes in technology, from the 5¼ floppy drives to flash drives? If we have stored client information on 5¼ floppies, how do we retrieve the information in a world of no "A" drives (let alone 5¼ drives)?

Either way, we need to figure out what considerations are made when slimming down the file before it hits its final resting place, and how long does it rest there? Are there multiple copies of the same document in the file? Are there extraneous letters or notes kept in the file that are no longer of use? For example, should we hold on to the enclosure letter to the county clerk regarding the recording of a deed, long after the deed has been recorded? If your file is digital, maybe you don't really care about space, but if your file is paper, size does matter. My practice is to keep what I determine to be important, and delete / shred what is not.

It is my experience that most firms do not have a "file destruction" policy and are therefore seemingly committed to keep their clients' files forever. Experience tells me that this is exactly what clients believe. Unless there is a clear understanding with our clients regarding the upkeep and holding of their files, then we remain open to the interpretations of judges, and the like, concerning our liability. As a result, I recommend that clients are provided with a contractual agreement determining what documents will be kept and for how long. For example, we use language in our final "disengagement" letter that lets the client know that we will be storing their file for seven years, noting that after that time it is subject to destruction in accordance with our firm's policy. We do not tell a client that his or her file *will* be destroyed; we only explain that it is subject to the firm's destruction policy. Refraining from automatic destruction, we retain a level of flexibility and control, and we abstain from making any concrete promises. Moreover, we know that some of our clients' files will not be destroyed, due to the nature of the client, and thus, this policy allows us the leeway to make client-based decisions (a class AA client may be deserving of more special attention than others).

### Rule #2: Set Up All the Basic Information You Need First in an Organized Manner on a Client Information Sheet

A client information sheet is a must, it a way to organize basic details about a client in a clear and concise manner, creating a client snapshot. When beginning a case, it is imperative that you obtain as much information as possible, because it will only serve to help you later. Depending on the nature of your client's matter, the information will vary. For instance, I practice in the estate and asset protection planning field, so I find that I need additional information beyond the usual name, address, and telephone number, but also those of their children and other close relatives involved in the estate plan. This information can then be printed on a client information sheet for the file, so that it becomes an efficient reference. The sooner that you are able to capture this information, the more proficient your work flow becomes. Usually, I find that requesting this information in writing yields the best results, because if a mistake is made, better it be in the client's handwriting than your own. You know your practice and a quick reflection of your "typical" case will reveal the type of information most commonly needed.

Use a system that makes sense. Most of us use computer accounting systems that keep track of our time and general ledger items (income and expenses). If you do not, then there should be further reflection regarding its absence, and I strongly recommend that such a system be adopted. Software can keep track of clients by either name or number, however, I recommend using numbers. A good tracking system can assign a "client number" and then a "matter number." It works well to keep the same number for a client, while keeping track of separate matters (or cases) for that client. As Kameron Brooks may have a client number of 1263, while a matter number for a particular case may be 11001; yielding a file number on that file as 1263.11001 (client number plus the case number, which by the way indicates that it was matter number 1 in 2011).

### Rule #3: Create a System to Keep Track of the File as It Goes from Opening to Closing—With All Stops in Between

Once your file system is set up, then it's time to create a mechanism to keep track of it, from beginning to end. You should never be wondering where a physical file is located, or what's being done on it, especially since there will likely be several timekeepers working on it during its active life. Further, if you are not the only person working on the file, it's nice to have the status kept electronically within an office network, and that way all persons have access to the "status board" simultaneously.

In our office, the above is accomplished via a program which allows each user to submit and access journal entries regarding its current state, and this information is saved on the server. We utilize STI's Practice Master™ program for this, although Microsoft Outlook™ has a function to make client notes and save them to a client folder (I've used this and saved the information in a "Notes" folder I created in WordPerfect as a sub-folder in the client's WP folder [you can do the same in Word]). These platforms let others (and remind me) of where the file is and who is doing what with it. Thus, if someone needs to know what's going on, he or she can check the notes on the file to find out. I cannot tell you how many times a client has called with a question that can be answered by almost anyone in the office, simply because they are able to instantly look up the information within the "system." Eliminating the commitment of calling the client back for quick answerable questions leads to a more efficient workplace, for the need to search the entire file and interrupt one's co-workers is minimized.

Note-taking is a matter of taste, and in our case, we try to minimize keystrokes in an effort to avoid reading superfluous verbiage. Oftentimes, cryptic notes seem to work best, designating abbreviations the order of the day. A telephone call with a client becomes "tcw / client" in the status board notes, and affidavit becomes "aff." Obviously, a system of abbreviations that everyone in the firm can identify becomes necessary, but with some work, you and your team members will come up with them. I recommend involving your team members in the process, because you might just find that the word "affidavit" intuitively is shortened to "aff" by all of your team members, even though you (me in my case) thought "afdt" was the obvious choice. As a consequence of involving the team, I now use "aff" (besides, it's one character shorter).

Your system of choice should also accommodate the final conclusion of the file. Our system (Practice Master) has a "completed" date you can select, which drops the matter from the "active" list. We can still access the notes by using the client and matter number to see all of the activity associated with the file, but it no longer appears on our "To Do" list. It is effectively added to the "To Done" list and we don't have to be concerned with it thereafter, save noting when the file may be destroyed after a certain date, usually seven years later.

### Rule #4: Create a System to Give Client Copies of Relevant Contents During the Life of the File and Adopt a "File Destruction Policy"

It is important to remember that much of your file belongs to the client. Your worksheets do not, but copies of documents, pleadings and correspondence do. I believe the best practice is to give a copy of these to the client as they are generated or received. This keeps the client informed as to what is happening and allows him or her to "build" a file that is a companion to yours. I have even given clients a file folder with a matter label, to keep these copies (or originals, if appropriate) as I send them. I advise them to keep all copies of documents in their file, so

at the end of the case they will have a complete copy of my file (except for the attorney work papers). I have also let them know that at the end, there would be no reason for them to contact me for copies of documents, since they will have them right along as the case proceeds.

I have to admit I also do this for my own selfish reasons. I usually don't want clients calling me one or two years later asking for a copy of this or that. Instead, I want to be able to tell them we already gave it to them… remember? If they still need the copy, then at least we are in the position to charge a search fee to retrieve the closed file from what staff members refer to as "the dungeon," and make the copies to mail them off. Do the math—how much time and expense is required to comply with the client's request? I would argue that the task takes far more time than one would think without studying the issue. What's worse is when clients from ten years earlier call for copies of a particular document. This would be the point when your firm's file destruction policy would come in handy. If you previously advised those clients that you will store their file for seven years, and then apply your firm's destruction policy, then you may with full legitimacy explain that you no longer have their file. It is my personal belief that without a destruction policy, one has the everlasting liability to preserve information we have chosen to keep on hand long after its usefulness has passed.

It is imperative that you develop a system for retrieving closed files, along with a set of applicable charges. However, there should be no reason for the client to call with such a request, if you have provided him or her with documents along the way, as I have recommended above. Nevertheless, the average client is likely not as organized as you are, and he or she *will* invariably lose, misplace or forget to file copies of the documents you have provided them. And if that is the case, and in my experience it surely is, who should shoulder the burden of replacing the document? The attorney, who did everything right, or the client, who lost the document? Having said all this, I realize that there are some clients that I would never charge for copies. They are AA clients who have paid large fees to me for their legal work. But again, in my experience, they are not the worst offenders.

### Rule #5: Create Sufficient Subfolders

Another aspect of this process is the organization of the file itself because it is important to keep separate folders for different categories of work; this aids efficiency and allows for greater accessibility to other timekeepers. What makes the world go round is the separation of estate planning documents from funding documents. In our office, we keep a file for trust or estate work with the attorney and the legal assistants keep a journal file of their own with all of the information necessary for legal accounting and income tax reporting. Frequent meetings should be scheduled, about every two weeks (with notes in the status board), to keep everyone in the loop. If you practice in litigation, you may want subfiles for correspondence, original pleadings, notes and research, etc.

Working copies of documents are another helpful thing to have, and a subfolder with photocopies of a document that you can write on or otherwise abuse without damaging the original is, as Martha Stewart would say, "a good thing." Years ago I practiced with a litigation attorney who would immediately begin making notes on copies of litigation documents he received from opposing counsel, only to have a legal assistant liquid paper out his comments months later because he needed a clean copy to attach to his pleadings. That example really applies to the rest of us, and thus, one must make a photocopy first, and then color away like a kindergartener, keeping the original pristine.

### Rule #6: Send Closing Letters to Clients at the End of Each Case

In two words…**use them**. We all know (or should know) that the statute of limitations for legal malpractice begins to run when our representation ends. So, when does it end? A closing letter to the client will identify that date. The purpose of a closing letter, in my opinion, is to reaffirm to the client the work you have performed, to thank the client for entrusting you, and to make sure that the client understands that your representation on that particular matter has concluded. I mean finished, done, finito, fini, complete, fin if you're French or if your client is…you get the picture.

A closing letter is vital for several reasons, legal liability issues being one of many. Both you and your staff need to know when it is time to stop working on the file, so you can measure the profitability of the firm's work. You can only determine if a matter was a win or a loss if you can shut off the time charged to it, and compare the total time to the fees realized. Additionally, the client needs to know when your services will end for the fee the client was quoted. This is true even if you bill by the hour, unless your client has given you a blank check to bill against. I do not believe hourly billing is a true measure of an attorney's work product worth; however, I do recognize that at least some client matters may be best served via an hourly rate. Having said that, usually the clients want to have some range that their fees will fall into, and if you commit to a range, then it becomes very important to know when the fees should end and the work has finished. The closing letter is the device that will help identify this point in time to the client, and it also provides the attorney with an opportunity to quote and begin billing the cycle again for the next round of work.

Without declaring an end to the first engagement, the attorney (and his or her staff) will be continuing the record and billing for what will then be considered additional work, which may keep the "continued representa-

tion" argument ongoing regarding the old case. Once you identify that all the required work is finished on the original matter, it's time to let the client know that the matter has been concluded, and so is your representation regarding it—and in the words of Professor Seigel, "be sharp about it!" The closing letter should also dovetail into your firm's file destruction policy—see Rule 4 above.

Every article has a good conclusion, so this is mine. Leroy Jethro Gibbs (for you NCIS fans) always adheres to his 50-some odd rules of work, only violating one when absolutely necessary and with aforethought, so your office and mine should do the same when it comes to our files.

**Kameron Brooks, Esq. is a partner in the Private Client Law firm of Brooks & Brooks, LLP, Little Valley, NY. He is a member of the American Bar, New York State Bar and Cattaraugus County Bar Associations; is Secretary/Treasurer and Board member of the Cattaraugus Local Development Corporation, and President of the Greater Chautauqua Region Estate Planning Council. Kameron has been in practice for 34 years and concentrates in the areas of higher level estate, tax, asset protection and elder law planning, and also trust and estate administration. His client base encompasses all of Western New York and parts of the Finger Lakes Region. He is a frequent writer and lecturer in the topics of Tax and Estate Planning, has taught paralegal courses at Jamestown Community College (Jamestown Campus), Elder Law topics at The People's Law School (an outreach program of the American Inns of Court) and Elder Law topics for the NYS Bar Association.**



*This article originally appeared in the Fall 2012 issue of the* Elder and Special Needs Law Journal, *published by the Elder Law Section of the New York State Bar Association.*

# The Roles of Positivism and Ethics in Professional Responsibility

By Randall C. Young

The legal profession is uniquely concerned with the meaning of words and the application of language, yet lawyers are notably careless with the terms applied to governance of their conduct. In particular, we use the word "ethics" to describe any matter that pertains to professional responsibility.

Law students refer to their Professional Responsibility class as their ethics course. Mandatory Continuing Legal Education requirements include a minimum of four hours of credits in "Ethics and Professionalism."[1] However, lawyers and MCLE providers refer to these only as "ethics" credits. More to the point, many—if not most—of these courses focus on the intricacies of the Rules of Professional Conduct with scant discussion of ethics as such. Bar associations have Committees on Professional Ethics which, again, focus primarily on application of the Rules of Professional Conduct.

*"[T]he application of rules by an outside authority to govern conduct is legal positivism—a system in which compliance with the rules is an end in itself regardless of value judgments."*

Ethics and Professionalism involve more than consideration of ethics alone.[2] Ethics is normative and involves an effort to determine what constitutes moral behavior or what distinguishes right from wrong. Immanuel Kant described ethics as internal values that form a basis for self-control.[3] By contrast, the application of rules by an outside authority to govern conduct is legal positivism—a system in which compliance with the rules is an end in itself regardless of value judgments.[4]

The distinction between law and ethics can also be practically illustrated. Following any given course on professional responsibility, the discussion among the attendees is likely to include some expression of dissatisfaction with the idea that one can teach ethical behavior in a class or determine whether behavior is ethical by application of specific rules such as the Rules of Professional Conduct.

Lawyers who believe that ethical behavior cannot be determined by reference to printed rules are not wrong.[5] Laws may be based on the moral judgments of the lawmaker, but compliance with the law does not necessarily require consideration of ethical values. One can violate a law for a good purpose, and one can comply with a law to achieve selfish or even malicious ends.

Professional Responsibility includes both legal positivism—compliance with the Rules of Professional Conduct—and a system of ethics. However, using the phrase "legal ethics" synonymously with application of the Rules of Professional Conduct obscures the regulatory nature of the Rules of Professional Conduct, and can lead lawyers to perceive the rules as ethical norms rather than regulations.

Not long ago, I attended a course on the Rules of Professional Conduct during which one of the panelists admitted that he primarily guided his conduct by whether he thought he would be able to look himself in the mirror after taking a particular action. In a different forum, a renowned trial attorney lecturing about the art of litigation told the audience that he primarily relied "on his gut" when deciding how to handle ethical problems that arose during litigation.

These lawyers appear to have an innate perception that matters of professional responsibility are issues of ethics, rather than questions of law. How else could one explain any lawyer relying on his or her intuition to determine whether behavior comports with regulations? Would an attorney ever advise clients facing a question of compliance with a regulation governing their business to simply rely on their gut or look themselves in the mirror to determine what to do? No. But, the accepted view that questions of professional responsibility are matters of ethics rather than issues of regulatory compliance—as reflected in our use of word ethics—apparently leads some lawyers to do exactly that.

Lawyers who argue against the ability to teach ethical behavior in classrooms may be correct about the distinction between ethics and positive law, but they are mistaken if they conclude that this distinction makes the study of ethics irrelevant. The issue of professional conduct is not solely a matter of whether behavior complies with the Rules.[6] It is a question of understanding the system of values that the Rules protect so the lawyer can properly apply the Rules and make discretionary decisions that enhance the profession.

Unlike most sovereign commands, the Rules often defer to the judgment of the governed. For example, a lawyer may limit the scope of representation.[7] A lawyer may exercise judgment to waive a right or position of the client or accede to reasonable requests.[8] A lawyer may disclose confidential information under certain circumstances.[9] A lawyer may represent a client despite a potential conflict of interest if certain conditions are met.[10] A lawyer may advance costs and fees for an indigent or pro bono client.[11] Whether the lawyer should engage in such permissible

activities as part of representation is within the lawyer's control and subject to personal ethical judgment.

Similarly, if the Rules and the cases applying them are ambiguous or fail to address a particular situation, the lawyer can turn to other attorneys or the Committee on Professional Ethics for guidance about what is proper behavior within the profession. This guidance must be drawn from judgments about the priorities and values of the legal profession as a whole—a philosophy of ethics.

The Rules themselves are an expression of the ethical values of the profession, and studying their nuances and history can provide insight into those values. Consider that under the Code of Professional Conduct, the Committee on Professional Ethics was sometimes called upon to weigh the Canons calling for zealous representation against other professional obligations, such as candor, preservation of confidences, and public confidence in the judicial system.[12] The Rules of Professional Conduct do not reference zealous representation. This represents an expression of what the values of the profession are and should be. Such changes can have significant meaning—if they are recognized and internalized by attorneys.

Professionalism entails both the application of the Rules and promotion of an overarching system of ethics in which they are rooted. With this understanding, lawyers should treat the Rules of conduct as the regulations that they are, but also study and discuss the normative ethics that are expressed through the Rules.

## Endnotes

1. 22 N.Y. Comp. Codes R. & Regs. § 1500.12(a) ; 22 N.Y.C.R.R. § 1500.22(a).
2. See 22 N.Y.C.R.R. § 1500.2(c).
3. Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right (W. Hastie, ed., location 213).
4. John Austin, The Philosophy of Positive Law (Robert Campbell ed., 6th ed., Murray Press 1869).
5. Rule Utilitarianism asserts that compliance with laws has an inherent moral value when the laws are drafted to provide the best general outcome; however, even this theory cannot escape the problem of subjective determinations about what is "good." One can also point to laws and entire systems of law through history that were enacted and enforced for the "greatest good" with horrific consequences.
6. 22 N.Y.C.R.R. § 1500.2(c).
7. 22 N.Y.C.R.R. § 1200.0. 1.2(c).
8. 22 N.Y.C.R.R. § 1200.0 .1.2(e).
9. 22 N.Y.C.R.R. § 1200.0. 1.6(b).
10. 22 N.Y.C.R.R. § 1200.0. 1.7(b).
11. 22 N.Y.C.R.R. § 1200.1. 1.7(e)(2).
12. See, inter alia, N.Y. St. Bar Assoc. Comm. on Prof. Ethics, Ops. 522 (1980); 533 (1981); 674 (1995); and 809 (2007).

**Randall C. Young is a Regional attorney for NYSDEC Region 6, author of two law-related books, and co-chair of the NYSBA Environmental Law Section's Task Force on Professional Ethics. Opinions expressed in this article are his own and do not represent the position of the NYSDEC.**

*This article originally appeared in the Winter/Spring 2012 issue of the* The New York Environmental Lawyer, *published by the Environmental Law Section of the New York State Bar Association.*

Krell's Korner

*Krell's Korner is a column about the people, events, and deals that shape the entertainment, arts, and sports industries.*

# The Quiz Show Scandal: Real vs. Reel

By David Krell

In 1956, two gladiators captured the nation's heart.

They did not compete to the death, nor did they compete in a boxing ring, on a gridiron, or on a baseball diamond.

They competed in glass booths, guided by a silky smooth referee announcing the rules, guiding the course of play, and emanating charisma.

They were Charles Van Doren and Herbert Stempel.

Van Doren and Stempel competed on NBC's *Twenty One,* a television quiz show in the 1950s. The quiz show format was a staple of 1950s television—everyday people answered arcane questions for massive prizes.

Quiz shows were exciting.

Quiz shows were tense.

Quiz shows were rigged.

The revelations about the scandal broke the nation's heart. Yet the scandal did not begin with Van Doren and Stempel as was portrayed in the 1994 movie *Quiz Show*. Rather, it began with an aspiring actor and comedian in his mid-twenties—Edward Hilgemeier, a standby contestant on CBS' *Dotto.*

On August 16, 1958, Hilgemeier met with Melvin Stein and Joseph Stone of the Manhattan District Attorney's office.

A senior assistant district attorney, Stone ran the Complaint Bureau. CBS had cancelled the daytime version of *Dotto* on the previous day and NBC had cancelled *Twenty One* three days prior.

> Stein was a recent Columbia Law School graduate, with the D.A.'s office only a few months; I had fifteen years' experience as a city prosecutor dealing with more kinds of fraud than most people could imagine existed, but I had never heard this one before. But after spending an hour with the complainant, a tall, thin aspiring actor in his mid-twenties named Edward Hilgemeier, I was not inclined to give much credence to his story: discovering that a contestant on a daytime quiz called "Dotto" was given answers in advance to questions used on the air, he complained to the producers who then paid him $1,500 in return for his signature on documents that waived any further claim against them.[1]

Hilgemeier met with representatives from the D.A.'s office again on August 22, 1958. His argument relied on a notebook that he discovered while waiting as a standby contestant for *Dotto,* a game based on connect-the-dots. Each correct answer created a connection between two dots—when all the dots connected, they formed the face of a famous person.

Before the May 20, 1958 live broadcast, Hilgemeier served as a standby contestant. The two contestants for the broadcast were Marie Winn and Yeffe Kimball Slatin.

> As Hilgemeier related it, two "Dotto" staff members, associate producers named Art Henley and Gil Cates, came in to take the two women separately to another room for "warm-up" sessions, during which they went over scripted dialogue to be used in the so-called interview segment or chat before the actual quizzing; material used in the interviews was based on personal background information provided to the producers by the contestants. After returning to the dressing room from her warm-up, Hilgemeier observed, Winn spent some time writing in a notebook, holding it tightly on her knee to keep what she was writing to herself.
>
> Shortly before the broadcast, a dress rehearsal took place before the cameras, and Hilgemeier noted what he called "an undue amount of familiarity" between Winn and the studio personnel. When the broadcast began, he watched from the wings and thought that Winn "had everything on the tip of her tongue." Suspicious, he returned to the dressing

> room and found Winn's notebook on a table, where she had left it, and thumbed through it. On one page he saw what he thought could be answers to the questions Winn was being asked on the broadcast, and he tore the page out.[2]

Stone analyzed the legal implications of the events surrounding Hilgemeier—possible extortion by Hilgemeier and Slatin, larceny if the producers rigged *Dotto* to favor one contestant over another, and bribery if the producers received a kickback from the winner.[3]

On August 25, 1958, the Manhattan District Attorney's office announced its investigation of *Dotto.* Hilgemeier's identity remained unknown at this point, though press reports revealed his persona and his affidavit to the Federal Communications Commission (F.C.C.).

> It has been said in trade circles that the complainant is an actor who occasionally has appeared in off-Broadway stage productions. He was a stand-by contestant for "Dotto" last May but never appeared on the program.
>
> *Broadcasting magazine*, a trade publication, quoted an F.C.C. source yesterday as acknowledging that a complaint about "Dotto" had been received and that the F.C.C. had asked C.B.S.-TV for an explanation.[4]

Three days later—August 28, 1958—the Manhattan District Attorney's office incorporated NBC's *Twenty One* into the investigation. A former contestant triggered the decision.

> Gotham's latest TV spectacular—District Attorney Frank Hogan's investigation of small-screen quiz shows—added a big name yesterday with the disclosure that question-and-answer titan "Twenty-One" was one of the programs being probed.
>
> A spokesman for Hogan's office admitted that "Twenty-One" was brought into the widening inquiry as the result of a complaint from a former contestant, one time "Human Univac" Herbert Stemple [sic]."[5]

Stempel won $49,500 on *Twenty One* until Charles Van Doren dethroned him. Daniel Enright, the co-producer of *Twenty One*, responded to Stempel's allegation immediately. On August 29, 1958, Enright publicized a prior written statement contradicting the allegation.

> In a statement signed Mar. 7, 1957, and made public today, Stempel says he never had been given any answers before appearing on the show. Daniel Enright, co-producer of the show, said Stempel made the written statement after the producers learned Stempel "had been making charges damaging to the integrity of Dan Enright and the '21' program."[6]

Enright produced the show through the company he co-owned with host Jack Barry & Enright Productions. NBC bought the company for $4.8 million dollars in 1957, giving it ownership of *Twenty One* and five additional programs.[7] The purchase price reflected NBC's confidence in the potential investment return. "Although $4,800,000 is a huge sum to pay for a show, N.B.C. calculated that it could get a favorable return on its investment if *Twenty One* remained on the air for another three years, or until the summer of 1960."[8]

Enright amplified his defense against Stempel at a press conference on September 2, 1958 in the Biltmore Hotel. Along with Jack Barry, Enright played a tape recording of a conversation indicating that Stempel attempted to blackmail Enright. The recording documented a meeting in Enright's office on March 1, 1957, when Stempel allegedly demanded $50,000 or he would tell the newspapers that the producers rigged *Twenty One* by giving contestants the answers and directing him to purposely lose to Charles Van Doren on a specific date.

On the tape recording a voice, presumably Mr. Enright's, was heard to say:

> "You came in with a blackmail scheme Friday, and I think to describe it any other way would be avoiding the issue. It was a blackmail scheme. Do you agree?"
>
> The voice purported to be that of Mr. Stempel replied: "Uh [pause] yes."[9]

Enright's defense weakened as further information revealed that Stempel's allegations rested on truth, not fabrication. James E. Snodgrass, a *Twenty One* contestant during April, May, and June 1957, also alleged the fixing of *Twenty One.* However, Snodgrass had more than an allegation—he had written proof. With a grand jury convening to investigate the quiz shows, Hogan's office subpoenaed Snodgrass. The 35-year-old artist told his story to the press on September 26, 1958:

> He said that he had given the grand jury three sealed letters that he had sent to himself by registered mail. These letters, he asserted, contained the questions and answers for the second, third and fourth programs in which he participated.
>
> He mailed them, he said, before the shows were televised. The letters are being examined by the police to insure that the seals have not been tampered with.[10]

Snodgrass also indicated a mystery person behind the rigging.

> Mr. Snodgrass said that an official of Barry & Enright, producers of "Twenty-One," had approached him after his first appearance on the show and said that there would be a long series of tie matches with his opponent, Hank Bloomgarden, and that he would eventually lose. He did not identify the official.
>
> He emphasized, however, that he had had no dealings with Jack Barry or Dan Enright, or with Mr. Bloomgarden. The latter, who won a total of $92,500, also testified at the District Attorney's office yesterday, but he declined public comment. Barry & Enright announced that they had been advised by their attorneys to "release no statements at this time."[11]

Snodgrass also indicated that the subpoena ignited his revelation.

> Mr. Snodgrass said he would never had brought up the matter had he not been subpoenaed, along with many other former quiz show contestants, by the investigating units.
>
> He said that when he had first been given the answers he had "assumed it was an accepted practice being given answers so I would not fail on the first round."[12]

The revelations peeled back the layers of illusion regarding the quiz show genre. What was thought to be tests of knowledge soon became known as farcical exercises in acting. The most famous perpetrator was Charles Van Doren, a scion of a literary family, a college professor at Columbia, and the contestant responsible for dethroning Stempel. Vivienne Nearing toppled Van Doren, but not before he won $129,000, appeared on NBC's *Today* as a regular contributor, and fascinated the nation with his apparent recall of arcane historical information.

In downtown Manhattan, quiz show contestants became targets of the D.A.'s office, primarily for perjury charges. Ultimately, their involvement in the quiz show scandal led to a dead end regarding penalties.

> One by one the defendants came to the end of their legal tethers. The first, Nearing, pleaded guilty on May 8 [1961] and received a suspended sentence. Thirteen more motions to dismiss the informations [sic] were filed on behalf of the remaining defendants, each requiring a rebuttal by us, each occasioning a delay of the final reckoning. In addition to fine points and variations on the theme of Nearing's previous motions regarding the legality of the original grand jury investigation and questions of self-incrimination and immunity, there were demands to examine grand jury minutes and a frivolous attempt to invalidate the charges on the basis of the contention that since I lived in Queens I was not legally an assistant district attorney of Manhattan.
>
> Between June and the end of December 1961, Dudley, Horan, Miller, Rosner, and Truppin pleaded guilty and received suspended sentences. As 1962 opened, the cases of thirteen of the original twenty remained to be tried. Finally, on January 17, Van Doren, Von Nardroff, Bloomgarden, and the others pleaded guilty. Judge Breslin, a former chief assistant district attorney in the Bronx who on the bench dealt mostly with street crime, was mellow when he asked for my recommendation in sentencing. I told the judge I had lived with the cases for a long time and was in a position to say how contrite the defendants were. No one involved could see any point in punishing them more than they had already been. Breslin suspended the sentences without imposing probation.[13]

No participants in the quiz show scandals went to prison—the Manhattan District Attorney's charges concerned perjury, not fraud.

In addition to the Manhattan District Attorney, the House of Representatives Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce investigated the quiz show scandals. Its hearings led to passage of 1960 amendments to the Communications Act of 1934—the amendments outlawed the fixing of television game shows.

During the hearings, Charles Van Doren admitted his culpability. A model for education because of his prominent celebrity sourced in being a *Twenty One* juggernaut, Van Doren fell from grace on November 2, 1959. His prepared statement began with an acknowledgment of his fraud.

> I would give almost anything I have to reverse the course of my life in the last 3 years. I cannot take back one word or action; the past does not change for anyone. But at least I can learn from the past.
>
> I have learned a lot in those 3 years, especially in the last 3 weeks. I've learned

> a lot about life. I've learned a lot about myself, and about the responsibilities any man has to his fellow men. I've learned a lot about good and evil. They are not always what they appear to be. I was involved, deeply involved, in a deception. The fact that I, too, was very much deceived cannot keep me from being the principal victim of that deception, because I was its principal symbol.
>
> There may be a kind of justice in that. I don't know. I do know, and I can say it proudly to this committee, that since Friday, October 16, when I finally came to a full understanding of what I had done and of what I must do, I have taken a number of steps toward trying to make up for it.
>
> I have a long way to go. I have deceived my friends, and I had millions of them. Whatever their feeling[s] for me now, my affection for them is stronger today than ever before. I am making this statement because of them. I hope my being here will serve them well and lastingly.[14]

Van Doren reigned as the *Twenty One* champion for 14 weeks in the Winter of 1956 and the Spring of 1957. It began on the December 5, 1956 broadcast with beating Herbert Stempel, an ex-G.I. and student at City College of New York. In a 2008 article authored for *The New Yorker*, Van Doren described Stempel's manufactured persona, coached mannerisms, and earned status.

> Each week, Stempel had been told what to do: how many points to choose, how to deliver his answers. He was to pat his brow (it was hot in those glass booths) but not rub it, to avoid smearing his makeup. In addition, he was instructed to get a Marines-type "whitewall" haircut, to wear an ill-fitting suit (it had belonged to his deceased father-in-law), and to describe himself as a penurious student at City College. In fact, he was a Marines veteran married to a woman of some means who once appeared on the set wearing a Persian-lamb coat and was quickly spirited away so that she wouldn't blow his cover.
>
> Stempel was also told to wear a six-dollar wristwatch that "ticked away like an alarm clock," as he later testified, and was audible when he stood sweating in the booth, earphones supposedly damping all outside sound. Once, he wore a new suit and had let his hair grow out, for which he was severely chastised by Enright. As Enright apparently believed, a successful game show needed two distinct personalities, one unsympathetic and unattractive, the other the opposite.[15]

Apparently cast as the fair-haired prince, Van Doren complied with the quiz-show paradigm—get the answers in advance of the broadcast. He stood out like a beacon in the darkness because of his appearance, family status, and educational background. His celebrity continued to be synonymous with the 1950s quiz show scandal.

Joseph Stone sought Van Doren's assistance during the research phase for his book *Prime Time and Misdemeanors*. "Many years later [after the quiz show scandals], Stone wrote to me asking me to help him publish a book about the quiz-show scandal. He said that he'd never meant to hurt me and in fact had tried to protect me. I threw his letter away and never answered it."[16]

Van Doren also refused a $100,000 consulting fee for the 1994 film *Quiz Show*.[17]

*Quiz Show* condenses the events from the perspective of Richard Goodwin, Special Counsel to the Subcommittee on Legislative Oversight. It ignores, however, the initial role of the Manhattan District Attorney. In fact, it creates a fictional relationship between Goodwin and Van Doren bordering on friendship. Actually, Van Doren did not meet Goodwin until August 1959 while *Quiz Show* indicates that they met in 1956 as Goodwin followed a hunch regarding the fixing of quiz shows.

Additionally, *Quiz Show* portrays Van Doren as purposely losing a question to relieve himself of the pressure concurrent with celebrity—attention can be overwhelming, particularly if it is based on a fraud.

The question concerned foreign royalty, correctly depicted in *Quiz Show*. But Van Doren had received instructions to lose to Vivienne Nearing, an attorney. He did not singularly take a dive.

> I didn't know what to do nor where to turn and, frankly, I was very much afraid. I told [*Twenty One* producer Al] Freedman of my fears and misgivings, and I asked him several times to release me from the program. At the end of January 1957, when I had appeared 8 or 10 times, I asked him once more to release me, and this time more strongly. He agreed to allow me to stop, but it was some time before it could be arranged. He told me that I had to be defeated in a dramatic manner. A series of ties had to be planned which would give the program the required excitement and suspense. On February 18 I played a tie with Mrs. Vivian Nearing, and the following week

> played two more ties with her. Freedman then told me that she was to be my last opponent, and that I would be defeated by her. I thanked him. He told me that I would have to play twice more after February 25. The next program was on March 11. When I arrived at the studio Freedman told me that since there were now only three programs a month, this was not time enough to "build up" another contestant and so I was to lose that very night. I said: "Thank God." Mrs. Nearing defeated me in the first game played that night. My total winnings after 14 appearances were $129,000.[18]

The revelations regarding the quiz shows—*Twenty One*, *The $64,000 Question* and *Dotto*, among others, replaced the awe of contestants' erudition with the shock of contestants' fraud. After the scandals, Van Doren lost his teaching position at Columbia and his contract with NBC for appearances on *Today*. He later worked for *Encyclopedia Britannica*. Currently, he teaches at the University of Connecticut.

Quiz shows went dormant as prime time fodder but returned to a golden era in the 1970s and 1980s daytime programming blocks.

Additionally, *Twenty One* returned to prime time on NBC in 2000 after ABC's extraordinarily successful prime time game show—*Who Wants To Be A Millionaire?*

The *Twenty One* envisioned for the 21st century lasted less than a year. Perhaps it would have fared better featuring a rematch of Herbert Stempel and Charles Van Doren.

## Endnotes

1. Joseph Stone and Tim Yohn, Prime Time and Misdemeanors: Investigating the 1950s TV Quiz Scandal—A D.A.'s Account 13-14 (Rutgers University Press 1992).
2. *Id.* at 16.
3. *Id.* at 19.
4. Val Adams, *Inquiry Is Begun Into 'Dotto' Show: District Attorney's Office Investigating 'Irregularities' on TV Quiz Show*, N.Y. Times, Aug. 26, 1958, at 59.
5. Harvey Aronson, *DA Adds 'Twenty-One' To TV Quiz-Show Quiz*, Newsday, Aug. 29, 1958, at 5.
6. *Stemple Statement In 1956 Refutes His Quiz Show Charges*, Daily Boston Globe, Aug. 30, 1958, at 1.
7. *'21' On TV Tonight Amid Controversy*, N.Y. Times, Sept. 1, 1958, at 27.
8. *Id.*
9. Val Adams, *Record Is Played On TV 'Blackmail':'21' Producers Offer Taped Conversations to Support Their Extortion Charge*, N.Y. Times, Sept. 3, 1958, at 67.
10. Richard F. Shepard, *'Twenty-One' Quiz Is Accused Again: Second Contestant Says He Got Answers in Advance—Talks to Grand Jury*, N.Y. Times, Sept. 27, 1958, at 42.
11. *Id.*
12. *Id.*
13. Stone and Yohn, *supra* note 1, at 308-309.
14. *Investigation of Television Quiz Shows: Hearing Before the H. Committee on Interstate and Foreign Commerce*, 86th Cong. (1959) (statement of Charles Van Doren), http://historymatters.gmu.edu/d/6566/.
15. Charles Van Doren, *All the Answers: The quiz-show scandals – and the aftermath*, The New Yorker, July 28, 2008, *available at* http://www.newyorker.com/reporting/2008/07/28/080728fa_fact_vandoren.
16. *Id.*
17. *Id.*
18. *Hearing*, *supra* note 14.

**David Krell is the author of *Blue Magic: The Brooklyn Dodgers, Ebbets Field, and the Battle for Baseball's Soul*. Publication in 2013 is expected. David has spoken at the Society for American Baseball Research's Frederick Ivor-Campbell 19th Century Baseball Conference, National Baseball Hall of Fame's Annual Cooperstown Symposium on Baseball and American Culture, New York Mets 50th Anniversary Conference, Society for American Baseball Research's Jerry Malloy Negro Leagues Conference, and the Mid-Atlantic Nostalgia Convention. David is a featured guest on the podcast Dishing Up the Dodgers where he talks about the history of the Dodgers baseball team. Additionally, David has written for the Dodgers-themed web site Lasordaslair.com, the publishing industry web site publishingperspectives.com, and magazines including Patriots of the American Revolution, Mi Patente, and Filmfax. David is the Co-Editor of the New York State Bar Association's sports law book *In the Arena*, to be published in 2013. David is a member of the Bars of New York, New Jersey, and Pennsylvania. David's web site is www.davidkrell.com.**

*This article originally appeared in the Winter 2013 issue of the* Entertainment, Arts and Sports Law Journal, *published by the Entertainment Law Section of the New York State Bar Association.*

# Section Committees and Chairs

The Seniors Lawyers Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers (listed on page 71) or Committee Chairs for further information about these Committees.

**Age Discrimination**
Gilson B. Gray III
Duane Morris LLP
1540 Broadway
New York, NY 10036-4086
gbgray@duanemorris.com

John R. Dunne
Whiteman Osterman & Hanna LLP
One Commerce Plaza, 19th Floor
Albany, NY 12260
jdunne@woh.com

**Diversity**
Susan B. Lindenauer
45 Gramercy Park North
New York, NY 10010
alindenauer@nyc.rr.com

David L. Edmunds Jr.
NYS Liquor Authority
Suite 303
535 Washington St.
Buffalo, NY 14203
DEdmunds@abc.state.ny.us

**Employment Opportunity**
Perry Balagur
Law Offices of Perry Balagur
8313 Bay Parkway, Suite 1d
Brooklyn, NY 11214
perry@balagur.com

Ellyn D. Kessler
Law Office of Ellyn D. Kessler PLLC
45 East 89th Street
New York, NY 10128
Ekesslerlaw@gmail.com

**Law Practice Continuity**
Susan B. Lindenauer
45 Gramercy Park North
New York, NY 10010
alindenauer@nyc.rr.com

Anthony Robert Palermo
Woods Oviatt Gilman LLP
700 Crossroads Building
2 State Street
Rochester, NY 14614
apalermo@woodsoviatt.com

**Legislation**
A. Thomas Levin
Meyer, Suozzi, English & Klein P.C.
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, NY 11530-9194
atl@atlevin.com

**Membership**
Charles A. Goldberger
McCullough, Goldberger & Staudt, LLP
1311 Mamaroneck Avenue, Suite 340
White Plains, NY 10605-5221
cgoldberger@mgslawyers.com

Adam Seiden
Mount Vernon City Court Judge
9 West Prospect Avenue
Mount Vernon, NY 10550
adamseiden2002@aol.com

John S. Marwell
Shamberg Marwell & Hollis PC
55 Smith Avenue
Mount Kisco, NY 10549
jmarwell@smhattorneys.com

Anthony J. Enea
Enea, Scanlan & Sirignano LLP
245 Main Street, 3rd Floor
White Plains, NY 10601
aenea@aol.com

**Pro Bono**
Fern Schair
Fordham Law School
33 West 60th Street, 9th Floor
New York, NY 10020
schair@law.fordham.edu

Stephen G. Brooks
607 G Street, SW
Washington, DC 20024
sgbrooksdc@verizon.net

**Program and CLE**
Carole A. Burns
64 Twilight Road
Rocky Point, NY 11778-9790
cabb1@optonline.net

Ellen G. Makofsky
Raskin & Makofsky
600 Old Country Road, Suite 444
Garden City, NY 11530-2009
EGM@RaskinMakofsky.com

**Publications**
Willard H. DaSilva
DaSilva, Hilowitz & McEvily LLP
585 Stewart Avenue, St. L-16
Garden City, NY 11530-4701
whdasilva@aol.com

Stephen G. Brooks
607 G Street, SW
Washington, DC 20024
sgbrooksdc@verizon.net

**Retirement Planning and Investment**
Walter T. Burke
Burke & Casserly, P.C.
255 Washington Avenue Ext.
Albany, NY 12205-5504
wburkeesq@gmail.com

Rosemary C. Byrne
Step-By-Step Coaching LLC
319 Audubon Road
Englewood, NJ 07631
rcbcci@aol.com

**Senior Lawyer Quality of Life**
M. Barry Levy
Sharretts, Paley, Carter & Blauvelt, P.C.
75 Broad Street, 26th Floor
New York, NY 10004
mbarrylevy@spcblaw.com

**Technology**
James P. Duffy III
36 Maple Place, Suite 207
Manhasset, NY 11030
jpduffy@bergduffy.com

C. Bruce Lawrence
Boylan Code LLP
The Culver Road Armory
145 Culver Road, Suite 100
Rochester, NY 14620
cblawrence@boylancode.com

## *THE SENIOR LAWYER*

**Editor**
Willard H. DaSilva
DaSilva, Hilowitz & McEvily LLP
585 Stewart Avenue, Suite L-16
Garden City, NY 11530
whdasilva@aol.com

### Submission Guidelines

*The Senior Lawyer* welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. Articles should be submitted to any one of the Co-Editors whose names and addresses appear on this page.

For ease of publication, articles should be submitted via e-mail to the Editor, or if e-mail is not available, on a disk or CD, preferably in Microsoft Word or WordPerfect (pdfs are NOT acceptable). Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Editor request that all submissions for consideration to be published in this journal use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Editor regarding further requirements for the submission of articles.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editor, Board of Editors or the Section or substantive approval of the contents therein.

*The Senior Lawyer* is published for members of the Senior Lawyers Section of the New York State Bar Association.

We reserve the right to reject any advertisement. The New York State Bar Association is not responsible for typographical or other errors in advertisements.


ISSN 1949-8322 (print) ISSN 1949-8330 (online)

## SENIOR LAWYER SECTION

### Section Officers

**Chair**
Susan B. Lindenauer
45 Gramercy Park North
New York, NY 10010
alindenauer@nyc.rr.com

**Chair-Elect**
Carole A. Burns
64 Twilight Road
Rocky Point, NY 11778-9790
cabb1@optonline.net

**Vice-Chair**
Elizabeth J. McDonald
6 Hall of Justice
Rochester, NY 14614
bethmcd@att.net

**Secretary**
Rosemary C. Byrne
Step-By-Step Coaching LLC
319 Audubon Road
Englewood, NJ 07631
rcbcci@aol.com

**Treasurer**
Charles E. Lapp, III
Lapp & Lapp
100 Cedarhurst Avenue
P.O. Box 435
Cedarhurst, NY 11516
c111angels@aol.com

**Accommodations for Persons with Disabilities:**
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

NEW YORK STATE BAR ASSOCIATION
SENIOR LAWYERS SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON-PROFIT
U.S. POSTAGE
**PAID**
ALBANY, N.Y.
PERMIT NO. 155

# A Pro Bono Opportunities Guide For Lawyers in New York State *Online!*

Looking to volunteer? This easy-to-use guide will help you find the right opportunity. You can search by county, by subject area, and by population served. A collaborative project of the New York City Bar Justice Center, the New York State Bar Association and Volunteers of Legal Service.

*powered by* probono.net

You can find the Opportunities Guide on the Pro Bono Net Web site at **www.probono.net**, through the New York State Bar Association Web site at **www.nysba.org/probono**, through the New York City Bar Justice Center's Web site at **www.nycbar.org**, and through the Volunteers of Legal Service Web site at **www.volsprobono.org**.

NEW YORK STATE BAR ASSOCIATION

CITY BAR JUSTICE CENTER

VOLS Volunteers of Legal Service