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The Senior Lawyer

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

The Supreme Centenarian—The Story of the Life and Legal Career of Samuel Hazard Gillespie Celebrating 100 Years of Risks Taken

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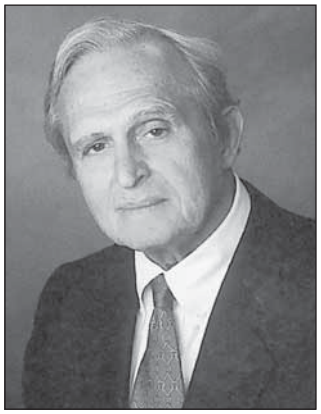


As you receive this third edition of our Section newsletter, it is my pleasure to greet you once again. This edition is largely produced by the hands of our newest co-editor and member of our Executive Committee, Marguerite Stenson Wynne, who has enthusiastically involved herself in our Section's activities. I think you will agree that its enriching contents present "something for everyone" and reflect the diverse interests of our active, intellectually eclectic senior members—from the inspiring career of our centenarian, S. Hazard Gillespie, to current Twitter networking technology.

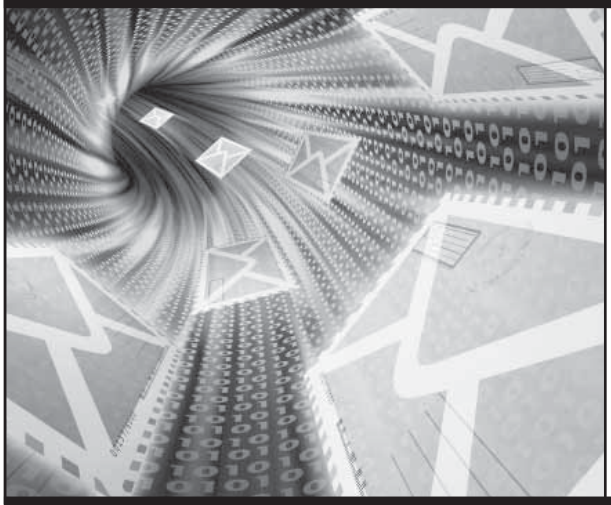
To those of you who were present at our Section's Fall meeting in White Plains last month, the articles on Alternative Dispute Resolution will sound especially familiar. That meeting, once again this year held jointly with the Elder Law Section, was of significant value professionally and, I might add, socially. If you missed it, you will certainly not want to miss our Section's Annual Meeting and reception at the New York Hilton on Friday, January 28, 2011, the program for which already promises to be of great interest. Please note that date on your calendar and keep in mind that you can stay current and informed about our Section's activities by periodic visits to the Senior Lawyer's pages at www.nysba.org/sls and reviewing the abundance of material posted there.

Permit me now to digress to share with you the following: my firm was recently asked to step in to settle the affairs of a busy local solo practitioner who passed away suddenly leaving both his clients and his family drowning in a sea of uncertainty. He left no Will or estate plan to ease the administration of his personal matters and no designation of or directions to a successor attorney to ease the transition of client files and client funds. Obviously, this solo practitioner should have taken his own advice to clients about the need for informing his family of all relevant financial and personal matters and executing a Will. Moreover, obviously he should have considered his obligations to his clients and their quandary in the event of his death, disability, incapacity or retirement. Both the American Bar Association and our own Bar Association have adopted resolutions urging the designation of successors and the obtaining of consent of the designee to take over in such events. This is a practical and ethical imperative for solo and small firm practitioners. Our Section's Law Practice Continuity Committee (chaired by Past President Anthony R. Palermo of Rochester) supports efforts to assist in planning for the orderly transition of legal practices and identifies mechanisms whereby a substitute qualified attorney can be authorized to intervene and protect client interests. This Committee's activities are reviewed and described at our website. I respectfully bring this to your attention in the hope that you will spread the word.

Enjoy the pages that follow. I hope to see you in January in New York City.

Justin L. Vigdor
Chair, Senior Lawyers Section

Request for Articles



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

www.nysba.org/TheSeniorLawyer

A Message from the Editors


Marguerite Stenson Wynne

This is the third issue of *The Senior Lawyer*, and the first issue for which I am serving as Co-editor. As such, it is my pleasure and privilege to have this opportunity to express some thoughts here on behalf of my Co-editor, Willard H. DaSilva, and myself.

During the Summer 2010, Justin Vigdor, Chair of the NYSBA Senior Lawyers Section, telephoned me. I had met Justin in October 2009, at the Fall Meeting of the Senior Lawyers Section, and we had met again at the Annual Meeting of the Section in January, 2010. When Justin called me, he told me that Donald Snyder, then Co-chair of the Senior Lawyers Section Publications Committee, was unable to continue to serve in that position. Co-chair Willard DaSilva would continue, but sought the assistance of a new Co-chair, and I was invited to step into this role. After we spoke and I had accepted the invitation, I began to reflect on the path that had led me to join the Senior Lawyers Section in the first place. It had, after all, led me to this threshold.

In early 2009, I first heard news that the NYSBA had formed a new Senior Lawyers Section at about that time. I remember being a bit amused at the realization that I met—indeed surpassed—the age requirement for membership in the new Section. It had not occurred to me before to think of myself as a Senior, and I did not join the Senior Lawyers Section at that point. Later in 2009, perhaps not unlike some of you, I found myself to be a lawyer in transition. This state of affairs began to give me a different slant on pretty much everything in life.

I decided to try some new ideas, and among other things, I earned several CLE credits by attending the Basic Elder Law program given by the NYSBA Elder Law Section in May, 2009. Elder Law was not a familiar area of practice for me, though I did have some brief experience early in my career in estate probate and administration work. At the Elder Law program, I was attracted to some of the topics, others not as much, but in the end, I decided to join the Elder Law Section and to attend the Section's 2009 Fall Meeting. As it happened, the Elder Law Section would be conducting this meeting jointly with the new Senior Lawyers Section. In fact, Fall 2009 would be the inaugural Fall Meeting of the Senior Lawyers Section.

I remembered that I was eligible to join the Senior Lawyers Section, and I decided to do just that. I attended the 2009 Fall Meeting as a member of the Elder Law Section *and* the Senior Lawyers Section. I met so many wonderful, interesting people, and all of the programs I attended were very well done. I found the round-table workshop entitled *Preparing for "Senior Status"* to be of particular interest! The Senior Lawyers Section Annual Meeting in January, 2010, featured another program that I enjoyed, and once again, I met some wonderful people. During a cocktail reception hosted by the Senior Lawyers Section, I had the special fortune of meeting Section Member Shirley Adelson Siegel, a fascinating conversationalist with a distinguished legal career. Not long after our meeting, I saw Ms. Adelson Siegel featured in a March 29, 2010 *New York Times* article entitled *A Lawyer Rejoins a Cause That First Gripped Her 70 Years Ago* (available at www.nytimes.com/2010/03/30/nyregion/30bigcity.html). All of these experiences convinced me that I made the right decision to join the Senior Lawyers Section!


Willard H. DaSilva

Now let me turn to the articles featured in this issue of *The Senior Lawyer*. They are drawn from various sources and topics. We hope that at least some selections will appeal to all readers of *The Senior Lawyer*. Of course, this is the publication of the Senior Lawyers Section, so please share with the Co-editors your comments, thoughts, suggestions, and ideas about this issue, and about content for future issues of *The Senior Lawyer*. We look forward to hearing from you.

In this issue, Donald J. Snyder gives us a wonderful account of the remarkable life and legal career of S. Hazard Gillespie in *The Supreme Centenarian—The Story of the Life and Legal Career of Samuel Hazard Gillespie Celebrating 100 Years of Risks Taken*. Also featured is Mr. Gillespie's acceptance speech upon receiving the NYSBA Gold Medal Award in January, 2010. Then we have a reprint of *Women and Minorities Joined Firms as Rivalry Opened for Business*, by S. Hazard Gillespie, originally published in 2001.

Walter Burke, Senior Lawyers Section Chair-elect, recommended two articles. The first is, *Not Done Yet*, by Barbara Rose, which recounts the current stories of several senior lawyers. The second is, *Tipping the Scales of Justice: The Rise of ADR*, by John M. Barkett, which discusses ADR forums and the opportunities for senior lawyers to become involved in ADR. The ADR theme is continued in *Creative Mediated Solutions*, by Irene C. Warshauer, which

looks at a number of creative alternatives devised by mediators to resolve disputes.

Recent amendments to New York's Power of Attorney Law are succinctly discussed by David Goldfarb in *New York State Power of Attorney Law and Proposed Amendments*, originally published in Summer 2010, after the bill passed the New York Assembly and Senate, but before signature by the Governor. Governor Paterson subsequently signed the bill, and the law became effective September 12, 2010. Another recent statute is discussed by Robert N. Swidler in *New York's Family Health Care Decisions Act: The Legal and Political Background, Key Provisions and Emerging Issues*.

E-technology is a common thread among four selections in this issue. First is *The Modernized, Streamlined Contract: Electronic Contracts and Signatures—Redux* by Bran Noonan. Next is *E-Discovery "Worst Practices": Ten Sure-Fire Ways to Mismanage a Litigation Hold* by Jack E. Pace III and John D. Rue. And, there are two articles by Steven C. Bennett, *Legal Implications of Twitter Networking Technology*, and *Ethics of Lawyer Social Networking*.

What Do We Tell Seniors About the Tax Impact of a Surrender or Sale of a Life Insurance Contract?, by Dean S. Bress, addresses this question for those seeking ways to provide funds for a secure retirement. Finally, *The Story of a Shelter: Intervention and Prevention of Elder Abuse*, by Deirdre M.W. Lok and Joy Solomon, describes the origins and workings of The Harry and Jeannette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale.

We hope you enjoy this issue of *The Senior Lawyer*. Let us hear from you. I have written this column for my Co-editor, Willard H. DaSilva, and myself.

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

About the Senior Lawyers Section

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

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

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

To join this new NYSBA Section, see page 72 for a Membership Application, go to www.nysba.org/SLS or call (518) 463-3200.

The Supreme Centenarian—The Story of the Life and Legal Career of Samuel Hazard Gillespie Celebrating 100 Years of Risks Taken

By Donald J. Snyder

Samuel Hazard Gillespie, following his first year of law school, wasn't sure if the practice of law was the right career for him. Hazard, as he was called, was born on July 12, 1910 in Morristown, New Jersey. He was born with a silver spoon into a life of privilege. His life consisted of magnificent mansions, chauffeured automobiles, stables of saddle horses, groomsmen, sailboats and express cruisers. He attended the Hill School and completed the four year course in just three years. Then he was off to Yale as the male members of his family had done before him. In the fall of 1928, during Hazard's freshman year at Yale and just after his 18th birthday, his parents came to visit him. They were the bearers of sad tidings. His parents announced that they had lost everything. If Hazard was to remain at Yale he would be responsible for all his expenses, including tuition, room and board, books, etc. At this point in our interview Hazard said that this news was probably the primary reason for any success he may have achieved in life! He immediately set out to provide for his needs at Yale. He waited tables at Woolsey Hall and in return he received his meals. The silver spoon was gone! Hazard visited the student aid office and with their help he obtained part time employment. He would work at various events and parties, serving hors d'oeuvres to the elite and the rich and famous guests. During the summer months he taught sailing to the children of prominent individuals. In his senior year at Yale Hazard was asked to tutor a young man, who had spent three years trying unsuccessfully to get accepted into college. Hazard took this young man under his wing and together they traveled to Europe. They spent a year traveling, studying history, French and the social amenities needed by this young friend. During this year, Hazard's young friend matured and gained sophistication. When the pair returned to the U.S. in 1933, the young man was accepted into Columbia University. For his services Hazard earned $2,400, as well as all of his expenses. As a result he was able to afford to attend Yale Law School.

During his freshman year, Hazard discovered that he had serious doubts about becoming a lawyer. In order to help him decide, he sought a legal internship at the Davis Polk Law Firm in New York City. It was 1934 when he was accepted into this internship, the first of its kind. He was made a messenger boy and also served legal documents on litigants. He worked on some legal matters as an assistant and helped to prepare documents that became instrumental in influencing the change of legal precedents. During this internship Hazard discovered a love for the legal profession and role of a litigator. So he returned to law school.

While at college, Hazard was a member of the crew team. In one competition as a coxswain he played a vital role in the defeat of Harvard. He recalled vividly that meet between Yale and Harvard. In a previous meet Harvard had defeated Yale. Hazard was determined that this would not happen during his participation on the Yale team. Remembering that day, he said that Harvard was in the lead. As coxswain it was his job to raise a red flag 20 strokes before the finish line. This was the signal to his team to dig deep with their oars and to pull hard. Since Hazard did not want Harvard to win he pulled the red flag at a point 40 strokes before the end. Suddenly the Yale boat passed the Harvard crew. They pulled deep and hard and crossed the finish line before Harvard. Hazard was a hero!

During his second year of law school, Hazard tried out for the 1935 Olympic ski team. At the top of the treacherous course his position was last out of 61 contestants. After approximately 60 minutes, it was Hazard's turn to traverse the steep mountain side. His run was so successful that he was offered the 19th spot on the 20 man team. This was one of the greatest moments in Hazard's life. At that point in time, Hazard was engaged to be married. He decided to seek the advice of his future father-in-law as to whether or not he should accept this spot on the team and the honor and notoriety that went along with it. His future father-in-law asked him if he wanted to be a ski bum or a lawyer. Hazard's answer was to withdraw from the U.S. team.

When asked to what he owed his longevity Hazard said he owed it to several things. First, he owed it to genes since his mother lived for 99 years. Secondly, he believed vigorous exercise every day as a coxswain on the crew team, as a skier, and to his vigorous walks every day. He also said you must have a commitment to something, a task you must complete. Finally, he said he owed it to the good Lord.

Hazard, today, serves as senior counsel at the Davis Polk Law Firm. He goes to work each day, just as he has since 1934 when he was an intern. He was absent only during the Second World War.

Hazard's father had served in the First World War as a Major of a Mounted Battalion. He was sent to fight the President of Mexico as an ally of Germany. Hazard's recall of the First World War is remarkable. He remembers the armistice in November 1918 and the return of our soldiers as they marched down 5th Avenue in New York City to a ticker-tape parade.

At the time of the Second World War Hazard received a notice from the Draft Board. Due to poor eyesight, he was not eligible. Because of his father's service during the First World War Hazard still wanted to serve and attempted to enlist; once again, he was turned down.

Eventually Hazard was able to serve in the war effort. Because of his litigation experience and success in interrogating witnesses, he was chosen to serve along with other attorneys. He was commissioned as a full colonel and sent to London, England. His commission as an officer gave him the authority needed to perform his duties. He was to serve as a debriefer of military personnel. In this capacity he would interview returning aircraft crews following their bombing raids. He interpreted the technical statements and reports so that this information could be understood and used in future raids.

During the Eisenhower presidency, Hazard was offered a lifetime appointment as a U.S. Federal District Judge. He declined since he didn't believe it was a good fit for him. Thereafter, he was appointed as a States Attorney for the Southern District of New York.

Hazard's law career at Davis Polk from his law school internship in 1934 to today spans 76 years. During this long career, Hazard has worked on, participated in, and argued matters before the United States Supreme Court from the case of *Erie vs. Tompkins* in the 1930s to the case of the *United States of America vs. Fruehauf*, many years later. These cases established precedent and even overturned longstanding doctrines of law.

Hazard was married in his last year of law school. Following graduation in 1936, he entered the employ of the Davis Polk law firm. His salary was approximately $1,800 per year. Out of that sum he paid rent of $75 per month on a 2-bedroom apartment on 71st Street in NYC. In 1937, their first child, Ruth, was born. Following Ruth's graduation from Wellesley College, she traveled to Spain with a girlfriend. Ruth was killed that summer in an automobile accident. The driver, her friend, survived the accident and lives today. Their second child, Jane, was born in 1941. Jane graduated from Wellesley College and went on to become the president of the United States Tennis Association. Their third child, Samuel Hazard Gillespie III, was born in January 1942, following the attack on Pearl Harbor. Like his father, Samuel is an attorney.

Hazard authored an article in 2001, in the NYSBA *Journal*, on women and minorities in the law. His subject is just as pertinent today as it was almost ten years ago. For that reason that article has been reprinted in this issue of *The Senior Lawyer*.

In January 2010, Hazard was presented with the New York State Bar Association Gold Medal Award for proficiency in the law, and dedication to public service, among other things. He received this award from Michael Getnick, NYS Bar President at the time, and protested that he did not deserve the award and recognition. As president of the New York State Bar Association in 1957-58, Hazard presented this same Gold Medal Award to Secretary of State John Foster Dulles. Hazard stated that being chosen for the 1935 Olympic ski team and the Gold Medal Award were the two most outstanding honors of his life. His acceptance speech when given the Gold Medal Award is also reprinted in this issue of *The Senior Lawyer*. Hazard has enjoyed a remarkable legal career and life.

As we concluded this interview Hazard recounted a special event in his life. He was chosen on June 20, 1934 to escort Eleanor Roosevelt to a ceremony at Yale University on the occasion of President Franklin D. Roosevelt, her husband, being presented with an honorary Doctor of Laws degree from the president of Yale. Hazard spent several hours with the First Lady. He has always cherished this fond memory.

This article is the result of several interviews with Samuel Hazard Gillespie. Peter Krulewitch also had many interviews with Hazard, and graciously provided many of his notes, which are incorporated herein. Peter Krulewitch is compiling interviews with outstanding New Yorkers in their 90s and beyond and will be publishing a book on this subject.

It has been a very special experience learning about this remarkable man of our time, Samuel Hazard Gillespie, a Supreme Centenarian. The name HAZARD well suits this man. He was one who clearly took many risks during his lifetime. He overcame many obstacles that might have equaled defeat for a lesser man. Congratulations Hazard! Happy 100th Birthday!

Donald J. Snyder, of West Winfield, has been a member of the Herkimer County Community College Board of Trustees since 1991, and has served as Chairman since 2000. Mr. Snyder is a semi-retired attorney providing counsel since 2002 to the firm of Cosentino, Snyder & Quinn. He was a partner with Cosentino, Snyder & Snyder from 1966-98. Presently he serves as defense attorney for numerous insurance carriers as counsel to the law firm of Gitto and Neifer of Binghamton and New Hartford. Mr. Snyder also served as assistant District Attorney for Herkimer County from 1966-78 and as Senior Court Attorney for Judge Henry LaRaia of the Herkimer County Family Court from 1991-2002. He also was attorney for the Town of Winfield (1970-98), Village of West Winfield (1966-78), and Mount Markham Central School (1971-98).

Mr. Snyder earned a Bachelor of Science degree from Siena College and Juris Doctor and L.L.B degrees from Albany Law School. He also is a graduate of the United States Army Information School at Fort Slocum, New York. Upon his retirement, as Court Attorney, he enrolled at Herkimer County Community College and earned an Associate in Arts degree in Fine Arts.

Samuel Hazard Gillespie's Acceptance Speech on Receiving the New York State Bar Association Gold Medal in January of 2010

Thank you, thank you, thank you. My previous connection with this medal was in 1957 when I was fortunate enough to be President of the New York State Bar Association. And that year we gave, or we awarded, the Gold Medal to the United States Secretary of State John Foster Dulles, who was a close personal friend of mine, whose children I had taught sailing to in my undergraduate days at Yale. And Mr. Dulles made his final public speech on the occasion of accepting this medal. He left that night for Walter Reed Hospital. He never left the hospital after that and died four months later.

But my respect for Mr. Dulles was such that receiving this same award is to me overwhelming. I couldn't believe it when Mike Getnick called me in late October and told me the State Bar had awarded this medal to me. It was an absolute shock. The only thing that I can recall in my lifetime that came close to this was in 1935.

I was still in law school, I had one more year to go and I was very, very anxious if possible to make the United States Olympic Ski Team. I skied competitively pretty well and I qualified to run from the summit of Mt. Washington down to Pinkham Notch—14 miles. It was called the Inferno and rightly so because the path, the track came down over the head wall of Tuckerman's Ravine. Climbing up that headwall earlier in the day on the event of this Inferno, a man by the name of Proctor from Dartmouth College got out a machine and measured the angle. It was 61 degrees. I was petrified climbing up it. I didn't know how I'd get down it.

There were 61 starters—I was number 61 to start. The forerunner was a man by the name of Alec Bright who may be known to some of you. He created the ski club Hochgebirge at Harvard. He won the Bermuda Race, he was a great yachtsman. He disappeared over the cone of the summit of Mt. Washington and that was the last we saw of him during the race. But he was followed by such great skiers as Dick Durrance, whose brother Jack Durrance....

When my time came, I was the only person left on the cone except for Joe Dodge, who started all of the races with a little radio and told them at the bottom of 14 miles away that they had started. When I was up there alone they were about a minute between each one of the races. It was almost an hour before I got started. The sun was setting and I pushed off and I was so worried about going over the headwall that I practically stepped down the headwall. I skidded down, they had some control flags that you had to go through but I didn't fall. Many, many skiers, I was told, fell below the control flags but I didn't. I made it over the control flags and I ran down to the bottom.

About two days later in law school I had a telephone call from the United States Olympic Committee and they said, you finished 19th out of 60 and qualified for training on Mt. Rainier. We're calling to ask you whether you would be willing to come to Mt. Rainier. At that time the Olympic athletes all paid their own way. And I said, well I'll have to figure out if I can raise the money, I'll call you back.

Well I was so excited. Here I'd made the Olympic squad, I was the 19th out of 20 on the squad. I called my future father-in-law and I thought he'd be as excited as I was. And his remark to me was, are you going to be a ski bum or are you going to be a lawyer? That ended my Olympic career and skiing. However, I'd had this wonderful, wonderful surprise. It's the only thing that I can compare with having Mike Getnick call me and tell me that I had been awarded the Gold Medal of the New York State Bar Association.

Now, I am still surprised why. I think that there was a far better reason for my getting on the Olympic skiing squad than there was for my getting the New York State Bar Gold Medal. And I can tell you that there is no question in my mind that I never would have had that Gold Medal but for eight or nine lawyers who assisted me in my career. I wasn't thinking of the Gold Medal at that time but I was thinking a lot about the legal matters that we were handling.

The first of those is Henry King. I hired Henry King at the Yale Law School. He came down and together we held off the breakup of the Bell System for a period of 10 years. It wasn't until the Bell System decided itself that it wanted to be broken into different parts that this actually occurred, but we worked both in the state courts and in the federal courts, and I know that's one reason that I was considered for this Gold Medal. And I want Henry King to know how much I appreciated that.

The next one is Bob Fiske. Bob Fiske and I worked at the U.S. Attorney's Office together. We also worked... Our biggest case, of course, of all was United States against the Texas Gulf Sulphur Company, an insider trading case in which the Securities and Exchange Commission charged directors of the Texas Gulf Sulphur Company, including Thomas S. Lamont, whose portrait is up here on the wall of the room in which we sit as former President of the

Harvard Club. We successfully defended Thomas S. Lamont. Every other defendant in that case was held liable and faced all kinds of legal penalties, financial penalties. But Thomas S. Lamont was fully exonerated and I owe a great deal to Bob Fiske for his assistance in that.

The third person that I have in mind and who is here tonight, is James Kerr. He and I together procured the reversal by the 9th Circuit U.S. Court of Appeals of an injunction against the construction of the Squaw Valley Ski Corporation. We went to California. I was on the board of the Squaw Valley Ski Corporation. The district court blocked the construction of a $100 million hotel at Squaw Valley financed by the Swiss.

With Jim Kerr's assistance we got the 9th Circuit, which was three years behind, to expedite the appeal. They took the case and they rendered a decision from the bench reversing the district court, vacating the injunction and we won that. We won that case and I owe Jim Kerr a great deal regarding that.

One other, two other people I want to thank tonight. One is Ginger Warden. Ginger Warden, who is seated at the table here, helped me in the last criminal case that I tried. I tried it during the winter in Syracuse, New York and she and her mother came up three days after Ginger's daughter Ann was born. And she went from the courtroom every two hours and took care of the nourishment of her daughter but was with me during the trial of this criminal case. I know that this received a lot of public attention. We were successful and I'm tremendously grateful to her.

Now with her and assisting us at the trial was the last person who I want to mention and that is a man by the name of Scott Muller, who is also seated at this table. He had just come out of law school and he assisted Ginger Warden in the preparation of that trial. And he would work at night over the record made during the day and then meet us for breakfast and prepare me for cross examination during that trial. He and I have been associated in the practice of law ever since then and I owe much of what success that I have to Ginger Warden and to Scott Muller.

I would close what I'm going to say in recognition of this award. There is in the audience tonight a former Chief Judge of the New York Court of Appeals, Judith Kaye. She has filed a lawsuit seeking to increase the compensation of judges. That case is currently pending in the highest court of the State of New York. She is no longer—she retired on account of age requirements. Her successor recused himself and did not sit on the case but that case is pending.

And there's one message I would leave with you people tonight. And that is that lawyers owe a great debt to the bench to make sure that judicial officers, court officers are adequately compensated. Thank you very much.

Women and Minorities Joined Firms As Rivalry Opened for Business

By S. Hazard Gillespie

In the spring of 1934 at the end of a year at Yale Law School, I talked my way into a summer job with what was then Davis Polk Wardwell Gardiner & Reed. Its office was two doors from Wall Street at 15 Broad Street, but like many well-known law firms with offices in greater Manhattan, but not right on Wall Street, its legal practice in the corporate, litigation, estates, taxes and real property fields had come to be known as "Wall Street Practice." Back then, the title "summer associate" had never been heard of. In fact, I believe I was the first law student to get summer employment at Davis Polk.

From the outset, it was made clear that my status would be nothing more than "deputy court clerk," an outside messenger, if you will, and that my place of work would be a seat on a 10-foot bench near the front door, which I would share with four or five venerable court clerks for whom I would be substituting during their summer holidays. It was also made abundantly clear that I should not attempt to perform any library or other legal services (apparently lest a firm opinion or brief be tainted by the input of someone who was not yet a licensed practitioner).

Wide Array of Changes

Since those days, I have seen many beneficial changes in Wall Street practice, particularly greatly increased participation in the practice by women and minorities. An open rivalry has also emerged among law firms for professional business (*e.g.*, "Beauty Contests," journalistic, TV and radio advertising) as well as ruthless competition among them through munificent financial rewards to recruit the best law students, plus the introduction of advanced electronic devices such as computer typing machines and computer assisted legal research (CALR).

At the same time, however, nothing in my experience compares with the integration of law students (male, female, minorities, et al.) into the matrix of the practice.

The change has come from an era when no would-be lawyer was hired at a Wall Street firm until he or she had successfully completed three years of law school, to today when every summer at least 10 Wall Street firms are each hiring as many as 90 law school students with just two years of exposure to law training, and on the other side of the coin, to where 75% of second-year students at some law schools[1] have direct participation in law firm practice before graduating from law school.

Turning for a moment to conditions as they are today: instead of law firms resisting employment of not-yet-graduated law students, it is recognized that the "overriding purpose of the summer program is to provide summer associates with interesting work and a memorable 'New York' experience," and to that end, to provide them "with the type of work that is roughly equivalent to what they might experience as a junior associate," and to "encourage summer associates to enjoy New York City."[2] What a change!

And certainly for the better. Obviously the end product, the law school graduate, is today far more experienced and useful than his or her counterpart of 70 years ago, and not only are the law schools relieved of providing practical courses in what a student will be facing when permanent employment begins;[3] the law firms are today getting graduate personnel far better equipped to provide the service that a law firm's ever-expanding industrial and financial clients are needing and calling for.

And "Wall Street Law Firms" are meeting the responsibility for continuing law student education by aggressively instructing their incoming classes in what "lawyering" in today's "Internet" world will expect of them. In addition to covering antitrust law, securities law and the like, the lessons include personnel matters, ethics, *pro bono* work and attorney-client privilege. The subjects demonstrate the importance that Wall Street practitioners today place on these subjects in training young professionals. In other words, practicing law is much more than an intellectual exercise for personal gain. It demands integrity ("Ethics"), concern and care for the poor ("*Pro Bono*") as well as protection and care of those who seek legal service ("Attorney-Client Privilege"). Truly, law practice today is a way of life.

Memorable Experience

Before leaving the subject of introducing law students (summer and graduate) to Wall Street Practice, it might be well to visit briefly just what one was called upon to do 70 years ago.

An incident that stands out in my mind occurred on a very hot summer afternoon in 1934 (and remember, there was no air conditioning in those days) when Davis Polk's "Mr. Bruder," (office manager and managing clerk without peer), summoned me to his desk. It was from this point (also directly adjacent to the front door) that William Bruder alone presided over all aspects of the office's administration (bookkeeping, the law library, the file department, and stenographic services) in addition to the firm's contacts with the courts, the clerks of the courts, the county clerk's offices, and other law firms. To me, this figure was awesome. When I came under his supervision, he had been with the firm since 1887, almost 50 years, and told stories of watching people walk on the ice across the

East River during the blizzard of 1888. A real taskmaster, if ever there was one, he was nevertheless always ready to teach and to guide kindly in the intricate matters of court practice.

Said Mr. Bruder, "Mr. Gillespie, I have an order to show cause which I want you to take to the Bronx County Supreme Court and get signed by Judge Hammer, who is sitting this month in the Motion Part." He handed me a set of papers, showed me where the judge's signature should be placed and told me how to find the Bronx County Courthouse near the northern end of the Eastside IRT Subway.

Off I went, wearing a suit jacket over my shirt and tie (there was no such thing as "dressing down" in those days), and finally found the courthouse north of the Harlem River.

Judge Hammer's chambers were on the fourth floor of this formidable granite building. A handsome heavy wooden door reassuringly bore the name, "Honorable Ernest E.L. Hammer."

I pounded on the door, and there was no response. I tried again in five minutes, still to no avail. And with difficulty I found a telephone booth. I reached Mr. Bruder. He was most unsympathetic; "I told you to get Judge Hammer's signature. Wait until he returns or responds; don't come back without it!"

About every 15 minutes I renewed pounding my fist on the oaken door. Still no response. I was getting very discouraged, thinking that this summer work was not doing very much to further my legal career, when finally, about two hours after I had taken up my post, the door swung open and there stood a giant pink cherub, stripped to the waist except for a sleeveless undershirt, a glow of light sunburn on his forehead and shoulders. Obviously a true forerunner of "dressing down," he held out his hands in a welcoming gesture. "Come in." Before I could tell him the purpose of my visit, he ushered me onto the roof of the courthouse through a window in his large office and pointed down to the old Polo Grounds where the New York Giants were in the 10th inning of a tied-up ball game. Needless to say, we had to wait for the outcome, which fortunately was favorable to the judge. Thereafter he resumed his judicial duties and signed my order to show cause, but not until he asked my name; and with true interest, how I came to be working as a messenger-clerk for a Wall Street law firm. He very obviously had never heard of law school students working even as messengers. I returned after dark to Wall Street in triumph and next day earned the sincere approval of Mr. Bruder.

About 10 years after this impromptu visit with Judge Hammer, I had occasion to assist the late John W. Davis of Davis Polk, a leader of the American bar, in the preparation of a complex motion for summary judgment to dismiss a stockholders' derivative suit brought by minority stockholders of the U.S. Rubber Company against its directors challenging the legality of the company's executive compensation plans and other corporate action. The motion was made under old Rule 113 of the New York Rules of Civil Practice. The motion papers were largely documentary consisting of minutes of corporate proceedings, proxy statements, and formal filings with governmental authorities. They created a bound volume at least six inches thick.

When the time came to present this motion in the State Supreme Court (New York County), Mr. Davis suggested to my astonishment that I should argue the motion, an opportunity which I, still an associate, was keen to accept. The motion came on for oral argument and equally to my astonishment who should ascend the bench but the Honorable Ernest E.L. Hammer. In his black robe, he did not appear at all as he had when I had last seen him on the roof of the courthouse, but even more to my amazement when I got up to present the motion, he smiled warmly, "Good morning, Mr. Gillespie. It is nice to see you again."

The argument progressed satisfactorily. The briefs were filed and a few months later a favorable decision resulted. Appeals to the Appellate Division and to the New York Court of Appeals followed, with affirmances in both courts.[4]

The meeting with Judge Hammer in his undershirt on the roof of the courthouse has been with me ever since, and the fact that he very obviously had not forgotten the incident has given me confidence in dealing with the judiciary throughout my professional life. It taught me that, first and foremost, judges are human beings, they like what people like, such as ball games; and second that, when not called upon to personify justice, (*i.e.*, the rule of law), when not on the bench, (where they properly wear a distinguishing black robe), they like to dress down just like anyone else.

Working With Clients

Not all Wall Street litigation practice back in the mid-20th century was working in the library followed by an occasional court appearance to present, or hear the presentation of, a position that had been so laboriously produced. Occasionally Wall Street litigation practice actually meant going into the field and developing a client's factual case just as investigators and detectives would have done in an earlier era.

One such case was presented in June 1956 by the collision over the Grand Canyon of a TWA Constellation and a United Air Lines DC-7 in which all 128 persons aboard the planes lost their lives. At the time, it was the worst disaster in aviation history. Both planes fell deep into the Grand Canyon's Inner Gorge about a mile apart very close to the Colorado River. After preliminary efforts to remove remains had been completed, the problem of

fixing liability for this devastating occurrence came to the fore, and an on-site investigation was called for.

Personnel for TWA's insurance carrier, Associated Aviation Underwriters Inc. (AAU), originally recommended descent of the Colorado River by rafts or boats with experienced National Park Rangers to lead the search. But the area to be covered (at least 100 square miles), and the wickedly steep terrain (gorge after gorge after gorge) with constant temperatures night and day in excess of 125° F made random hunting of the area on foot from river boats quite impossible.

The chief pilot of TWA informed AAU's attorneys that he had flown at low altitude in a small aircraft over the flight paths of the two planes (both of which had taken off from Los Angeles) and had seen what he believed to be a big piece of the tip of the main wing of the United DC-7 about five miles short of the TWA crash site. This information moved the balance in favor of a lawyer-led helicopter expedition into the Canyon. After the decision had been made, AAU's chief investigative engineer, Everett Chapman, on August 8, 1956 wrote AAU:

> I phoned Pat Reilly this afternoon and called off arrangements for the boat trip to the crash site as per instructions from Gillespie. Reilly's comment on Chief Ranger Coffin's statement was "Certainly, it's dangerous." He and I have never underestimated the expedition by boat.
>
> I regard the helicopter operation as the more dangerous of the two methods because of the fatigue history of copter blades, hubs and power transmissions.
>
> In boats, one's danger can be seen; faced and coped with. If the oncoming rapids look tough, you walk around and line the boats through: there is time to evaluate and make a decision.
>
> I weigh this situation against hidden, insidious hot spots in the copter mechanism whose existence is announced by failure of the part.
>
> The copter pilot must have specialized skills comparable to Reilly's. Canyon flying is at an altitude of 7000 feet and in hot air most of the day. The landing sites are small and will be plagued by thermal updrafts. Many trips will be necessary. I cannot take the copter for granted.

Notwithstanding, these premonitions, the Wall Street practitioners pressed forward with the on-site helicopter investigation that was needed because preliminary views based on an authorized change in altitude from the flight plan filed by TWA pointed to it being responsible with consequent liability to its insurer in "runaway" amounts beyond estimation.

AAU's lawyers authorized chartering of two helicopters from Denver, Colo., each manned by a single pilot in a glass bulb with a bench next to him for two persons plus accompanying ground crew consisting of a specialized mechanic and fuel truck drivers.

The planes involved in the disaster had taken off in the morning of June 30, 1956, three minutes apart, from Los Angeles International Airport. The TWA Constellation departed first at 10:01 a.m. followed by the United DC-7 at 10:04 a.m. Both headed in a westerly direction to begin with, out over the Pacific and then turned east, TWA for Kansas City and United for Chicago. The new DC-7 was 45 miles per hour faster than the Constellation. They met just east of the California-Arizona border at 21,000 feet, close to an aviation checkpoint known as Painted Desert.

Both aircrafts were flying under Visual Flight Rules (no ground control), requiring the crews of each aircraft to maintain a lookout "to see and be seen," and for the overtaking aircraft to keep clear of the one in front. (It was the "burdened aircraft" in air navigation parlance.)

Although a ground controller was aware that both aircraft were at 21,000 feet and that the courses of their compass headings one for Kansas City and the other for Chicago at some point would cross, under then-existing U.S. Flight Regulations the controller was not called upon to advise them of the very remote chance that the two aircraft might reach the crossing point at exactly the same instant and at exactly the same height (21,000 feet above sea level), and he did not do so.

However, in terms of which aircraft had responsibility to avoid a collision, the position of each aircraft versus the other just before the impact (which was "the burdened aircraft") was crucial.

In September 1956, about two months following the disaster, the TWA-AAU investigation team assembled in the desert approximately 30 miles east of Grand Canyon Village, Ariz. Two Bell helicopters with their pilots plus a mechanic, a National Park Service Ranger, a representative of the Civil Aeronautics Board's Bureau of Safety Investigation, the chief flight engineer for TWA, a construction engineer from the Lockheed Aircraft Company (manufacturers of the Constellation), a consulting investigation engineer representing AAU, Everett Chapman, an attorney, Paul G. Pennoyer Jr. of Chadbourne & Parke ("Wall Street practitioner") representing TWA, and S. Hazard Gillespie of Davis Polk & Wardwell, representing AAU, made up the AAU party.

The helicopter pilots, mechanic and fuel drivers had established a base camp at the assembly point on the edge of the South Rim of the Canyon about 3,000 vertical feet above the site of the TWA wreckage (near Cape Solitude and the confluence of the Little Colorado and Colorado

Rivers). This transportation crew trucked from Flagstaff, Ariz., about 50 miles distant, a week's supply of flying fuel and food and camping equipment for the 10 persons involved in the expedition.

In addition, the pilots of the helicopters and their mechanic had flown into the Canyon floor 3,000 feet below, and created a landing pad on top of a tiny butte, about 50 feet by 50 feet, less than 100 feet from the three rudder stabilizer, which was all that was left of the Constellation.

Two by two, our team, strapped into a helicopter, each person with a bedroll and backpack, descended to this scene of devastation—and it was that. The plan was to spend five to seven nights at the site with daily helicopter expeditions searching for evidence.

The temperature was brutal, never below 125° F night or day and frequently over 130° F.

Before descending to this spot, a small fixed-wing, single-engine, sightseeing aircraft and local pilot were chartered to explore for wreckage that might have fallen up the flight paths of the stricken aircraft. This effort, which took many hours, proved fruitful. It required not only flying up and down the deep gorges of the Canyon in many directions, it also meant that, when two very key pieces were finally observed, they had to be located on a geodetic survey map so that they could later be found first from a lower-flying helicopter and finally by a team on foot, and thus retrieved for helicopter airlift up to the rim of the Canyon.

(Parenthetically it was very evident from the outset that United Air Lines and its insurer, United States Aviation Group (USAIG), though not initiating this investigation, were interested in its outcome to the extent that they established a duplicate operation, camping on a butte adjacent to that occupied by the TWA-AAU investigating team).

After two days of helicopter exploration at altitudes varying from the river bed of the Colorado River at 2,000 feet above sea level up to levels south and north of the river of about 7,000 feet above sea level, we were satisfied that we had spotted the only significant piece of material evidence, the wing tip of the DC-7.

The problem was getting to this piece and then getting it out of the steep-sided gorge where it had fallen. The site was too precarious to land even a helicopter. It was located about five miles "as the crow flies" from the in-Canyon landing pad from which the helicopter had launched its exploratory flights.

The TWA-AAU team camped on this site sleeping on top of their bedding rolls in stifling heat and climbing down occasionally to refresh themselves by a dip in the treacherous eddies of the Colorado River, only to be overheated by climbing back to the launching pad. On more than one occasion members of the party woke in the morning to find rattlesnake skins left during the night only inches from their sleeping bags.

At first light on the third morning in the Canyon, Pennoyer, attorney for TWA (a Navy Reserve Pilot), and Gillespie for AAU led a team consisting of a National Park Ranger, a Lockheed Aircraft Construction Engineer, a CAB Safety Investigator and Al Brick, the Chief of TWA's Flight Engineers, on a down-river Canyon hike in an effort to locate and inspect close-up the DC-7 wing tip.

The trek of about five miles took more than five hours. It meant climbing the steep side (vertically 250 feet) and descending the other side of about 20 ridges in a mile, five times (five miles) or a total of about 100 such ascents and 100 descents, when finally one of the leaders spotted the piece resting where it had fallen in a gulch of bruising boulders.

Next in excitement to finally standing beside this piece of vital evidence was the immediate identification by the Lockheed construction engineer and the chief TWA flight engineer of a small piece of cream-colored vinyl cloth, jammed in the leading edge of this wing tip, which the engineers identified as a piece of the headliner of the Constellation's bathroom located at the rear of the aircraft. In other words, the United Airlines DC-7 had come from the rear and the front-edge of its main wing had driven into the tail of the Constellation, tearing from it a piece of the cabin lining from that very spot, clearly establishing that the DC-7 was the overtaking aircraft.

There still remained the task of getting this evidence back to civilization. Pennoyer and Gillespie remained with the wing tip. The Park Ranger led the others back to the base camp and prepared the helicopter pilot and a helper to return with the "bird" and a stout rope of approximately 150 feet.

When the helicopter arrived at the wing site, Pennoyer stood off several hundred feet from the site and directed the pilot as the helicopter dragged a long drop line into position to be tied to the rope sling that Pennoyer and Gillespie had previously fastened to that bulky piece.

Slowly but skillfully, the pilot elevated the bulky mutilated piece from its place amid the rocks; then as the bird swung out toward the depth of the Inner Canyon the wing tip hanging a hundred feet below quickly gained more and more clearance space as it was flown down the five miles back to the landing pad.

The next morning, before dawn when the air was less heated and could provide more lifting support than at any other time in 24 hours, the helicopter with the wing strapped between its landing skids took off. After three tries, it lifted its precious load over the edge of the South Rim of the Canyon to the main base camp where a truck was waiting to take it to Flagstaff and by a Civil Aeronautics Board DC-6 to airlift it to Washington.

While which aircraft was responsible never had to be decided because existing litigation and the issue of liability as between the parties were ultimately disposed of by an agreed settlement, the sense of achievement in this experience and of service to a client are rarely to be found and never to be forgotten. Yet this was a real part of Wall Street litigation practice and perhaps explains why those seeking the ultimate in professional service turn in that direction.

Women in the Practice

One final Wall Street Practice experience that illustrates the great progress made during the past 70 years in incorporating women into the practice of law.

In 1975 the Federal Food and Drug Administration began an investigation into the manufacturing and distribution of certain antibacterial dressing pads; gauze pads that were impregnated with Furacin (trade name for nitrofurazone ointment) used in hospital operating rooms and emergency rooms for sterilizing wounds resulting from operations and accidents.

The principal manufacturer and the suspect in this investigation was Morton-Norwich Products Inc. and its vice-president of operations, the late James J. Mahoney, who were subsequently indicted for interstate shipment of adulterated drugs in contravention of 21 U.S.C. §§ 331(a) and 333. The substance of the charges was that goods that had been labeled, sold and distributed as "sterile" were in fact contaminated, and that they had been manufactured under conditions that did not conform to current good manufacturing practice (CGMP).

The FDA's agents had picked up samples of the labeled product in hospital supply rooms in northern New York State that the FDA's testing laboratories subsequently concluded were adulterated with mold (*paecilomyces varioti*). Subsequent official visits of FDA investigators to the suspect's manufacturing facilities near Norwich, N.Y., uncovered evidence of mold and flies in the packaging area.

The defense strategy required education of six attorneys in the chemistry of the product and the methods of manufacturing and packaging it to assure sterility. Last, but most important of all, the methods of testing the product had to be reviewed to be sure that the reported contaminates had not been introduced in the process of the testing itself.

One of the most important members of the legal forensic team, Virginia Worden, a graduate of New York University Law School in 1975, led the defense groups' study of testing methods, pharmacopoeia standards and treatises dealing with this subject. Her responsibilities included not only locating but briefing and preparing expert witnesses and officials of the manufacturing company (Morton-Norwich) to demonstrate the frailty in the FDA's testing process; it also involved the preparation of witness sheets for her attorney-colleagues to conduct cross-examination of the government's agents and experts.

In September 1976, after a year's tedious preparation and about the time when the court fixed January 1977 for the commencement of trial (in the U.S. District Court for the Northern District of New York in Syracuse), Ms. Worden let it be known that she was expecting the birth of her first child almost simultaneously with the commencement of the trial. Knowing the importance of her participation in the defense of this serious criminal matter, Ms. Worden valiantly volunteered to work until her child arrived and thereafter to come with the defense team to Syracuse accompanied by her newborn infant and her mother so that Ms. Worden could fulfill her courtroom responsibilities and at the same time provide whatever attention was necessary to the infant.

A daughter was born on January 6, 1977, and Ms. Worden, her baby and Ms. Worden's mother settled in at the Syracuse Hotel in time for the opening on January 13 of what turned out to be a nine-week trial in most severe winter conditions.

The skillful devotion of this lawyer to all the professional responsibilities that she faced in the course of this arduous legal struggle did much to produce an almost completely favorable outcome of the litigation. But more than that, coming as it did as early as 1975 just as women were making their way into the forefront of Wall Street Practice, it proved to all who dealt with her that women were to be relied upon professionally to the full extent of their male counterparts.

Endnotes

1. Columbia University Law School and New York University Law School.
2. Memo to all lawyers at Davis Polk & Wardwell "2000 Summer Associates Program," May 1, 2000.
3. In 1935-36 the late Honorable Bruce Bromley (later Judge of the New York Court of Appeals) gave a weekly seminar at the Yale Law School on Wall Street Practice.
4. *Diamond v. Davis*, 38 N.Y.S.2d 103 (Sup. Ct., N.Y. Co.), *aff'd*, 265 A.D.2d 919, 39 N.Y.S.2d 412 (1st Dep't 1942), *aff'd*, 292 N.Y. 552, 54 N.E.2d 683 (1944).

S. Hazard Gillespie is senior counsel at Davis Polk & Wardwell in New York City. He was president of the New York State Bar Association in 1958-1959 and served as U.S. attorney for the Southern District of New York in 1959-1960. Most of his career has been spent in trial and appellate practice. He now serves as chairman of the America Skin Association and president of the Tappan Zee Preservation Coalition. He is a graduate of Yale University and received an LL.B. from its law school.

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Not Done Yet

By Barbara Rose

Philadelphia attorney Robert Heim quickly scanned the list of partners eligible for election to his law firm's policy committee, hunting for his name. He enjoyed this familiar ritual. Like so many other validations, the list confirmed his leadership at a firm where he made partner three decades ago. He took pride in having won election every year in which he was eligible. But this year would be different. There it was in black and white: ineligible.

At age 64, he could no longer complete a two-year term because committee members had to be younger than 65. He had supported the age cutoff every time the issue had come up. Now that it applied to him, the policy stung.

"More than one-quarter million lawyers are 55 years or older, according to American Bar Foundation statistics. And, ready or not, they are approaching one of the biggest transitions of their lives."

"It was the first time in my life that I was ever too old for something," he recalls. "It made me start to think, 'I'm in the traditional retirement zone without having spent even one day thinking about it.' "

That unsettling moment nearly three years ago set the silver-haired litigator on a path familiar to hundreds of thousands of baby boomers nearing retirement. For him and others, the notion of being too old is unexplored territory. Who was he if he was no longer a litigator at the peak of his game? He didn't feel old. Yet he began to wonder whether it was high time he considered moving on, if there were other things he wanted to do with his life than practice law.

"Should I be thinking of this?" he asked his wife, Eileen Kennedy, when he got home that evening. "Should we be thinking of this?"

The answer is an emphatic yes. More than one-quarter million lawyers are 55 years or older, according to American Bar Foundation statistics. And, ready or not, they are approaching one of the biggest transitions of their lives.

Common wisdom held that after marching through their formative decades to a different drummer, boomers would approach retirement differently. Rather than slowing down or settling into a life of leisure, they would step with renewed energy into new pursuits. Many would launch sequel careers.

Then along came the worst recession of their lifetimes and, with it, increased financial insecurity. Reinvention is no longer merely desirable. For many, "it's an imperative," says Mark Miller, author of the nationally syndicated column "Retire Smart" and an upcoming book, *The Hard Times Guide to Retirement Security*.

After focusing, heads down, on building careers and raising families, they are looking up, startled to find there is no road map for what lies ahead. They are facing limits, tempering ambition, reaching back to youthful ideals and values while moving toward a new stage.

"Many don't have a clue how to pull this off," Miller says. "This is a very profound life change, every bit as important as a first job, marriage, kids. It's a pivotal change, and whatever the pivot is will likely be the trajectory they're on for 20 years or more."

Retired Chicago litigator David Melton, 58, sums it up: "I do have a sense that I'm at a dividing line in my life, heading off in a new direction. [But] I haven't figured out what that is yet."

Encore, Encore

Polls show that a majority of baby boomers intend to keep working and earning in retirement, and lawyers are no exception. Sixty-one percent of attorneys surveyed by legal consultants Altman Weil in late 2007 said they would continue to work in some capacity. Forty-eight percent of those who would keep working planned to continue practicing law.

Many desire work that combines income with meaning and social impact. Civic Ventures, a San Francisco-based nonprofit that promotes personal and social renewal in the second half of life, coined the term "encore career" to describe this increasingly popular choice.

But there is no well-marked path to active retirement. Rather, many lawyers find their way gradually, in a series of epiphanies starting late in their career.

When John Sherman of Brookline, Mass., took the Myers-Briggs personality test 20 years ago, the test typed him as well-suited for his corporate legal work. "It showed I had a certain edge that was typical of somebody who was a litigator and hard-driving," he recalls.

Now 63, a father of two grown daughters and retired from a deputy general counsel position at National Grid, a global utility where he worked for 30 years, he took the test again and discovered that he has mellowed. "Some of that edge had worn off."

He had never been comfortable with personal injury cases, and one case a few years before his retirement affected him deeply. It was a mediation that led to a settlement with the family of an employee who was killed in a workplace accident. He recalls looking across the table at the deceased man's two young daughters, who were crying, and realizing it didn't matter that National Grid had a terrific legal defense.

"I thought, 'I've been around doing this stuff for 30 years, and what have I done to make the world a better place, to prevent accidents and stop suffering?" he says.

He had no idea what he would do next when he took a buyout in 2008, but he had already laid the groundwork. Several years earlier, National Grid participated in a project sponsored by the United Nations and 13 multinational corporations to find practical ways to respect and protect human rights in business operations. The project resonated.

"My boss told me, 'I want you involved in this. We need an adult in the room to make sure we don't make promises we can't deliver,' " he recalls. "I got involved and became a convert. I found I had unique knowledge. I knew litigation, I was familiar with business ethics and it was all about risk management. I could speak the language of law and business, and learn human rights."

These days, he bikes the 1½ miles to Harvard University's Kennedy School of Government, where he works pro bono as a senior fellow on the same project, helping to develop tools such as a computer-based application to help companies recognize human rights risks in various parts of their business.

He also mentors Kennedy School students, travels to world capitals to speak at legal forums, participates in peer reviews of human rights cases and collaborates on a project to define the cost of social conflicts. "It's kind of a rich potpourri," he says. "I'm never quite sure what I'm going to be doing from week to week."

His family's cat, too old to follow him up the stairs to his study, naps in the living room while he becomes so immersed in his work, his wife has to remind him to come down for dinner. One of the few vestiges of his corporate career is a bright-yellow hard hat in the trunk of his car, required whenever he visited company plants. Like his law books, some of which are hopelessly out of date, he's not ready to get rid of it.

Sherman's fear that retirement would leave him isolated proved unfounded. "I have a huge network of people, and I've got more than I can do interacting with them daily," he says.

Retirement also has allowed him to come full circle to the intellectually and socially engaged man that his wife met in college, says his wife, Barbara, an interior designer for an architectural firm. "The human rights work absolutely caught his heart. He's utterly engaged, his mind is always going. In many ways he's not retired."

Stepping Aside

A majority of workers 65 and older say the main reason they continue to work is to feel useful, and stay active and connected with others, according to a Pew Research Center study in late 2009. Yet income plays a role for nearly half, as 27 percent report they want to work but also need income, and 17 percent say they work mainly because they need the money.

Diversity consultant Carl Cooper never thought he would live long enough to see retirement or become rich enough to enjoy it. Growing up in an African-American neighborhood in Philadelphia, the son of working-class parents and the only one of five children to go to college, he watched many of his elders die before reaching 65.

"A majority of workers 65 and older say the main reason they continue to work is to feel useful, and stay active and connected with others…Yet income plays a role for nearly half, as 27 percent report they want to work but also need income, and 17 percent say they work mainly because they need the money."

"People I knew who lived longer were poor," says the 65-year-old. "You would work until you couldn't work anymore, and then they put you in a nursing home."

Cooper held many jobs over the years—including positions in government, academia and private practice—before being named chief diversity officer at K&L Gates in 2003.

He founded a diversity consulting practice in 2007 to advise bar associations and law firms on developing pipelines of minority talent. Business slowed when the recession hit, but he's confident it will come back when the economy rebounds.

Even if Cooper could afford to quit working and maintain his comfortable lifestyle in Pittsburgh's Highland Park neighborhood, with a getaway villa in Jamaica and a time-share in the Bahamas, he can't imagine not working. "I would really feel guilty," he says, quoting Shirley Chisholm: "Service is the rent you pay for room on this earth."

He takes his computer, books and notes for articles he intends to write when he goes to Jamaica, but inevitably his 10-mile morning run flows smoothly into breakfast, then lunch without his having so much as thought about life beyond the moment. "Then literally after two weeks I'm ready to come back," he says.

His hardest lesson after a lifetime of striving is learning how to stop aspiring to a higher status. "When you go into retirement you're not stepping up, you're not really stepping down; it's like you step aside. Nobody talks about what you do when you step aside.

"People still seek you because you have expertise, and if you're in good health you can still do things. [But] I'm not going to run for president. I'm sure I want to achieve things, but it's not the kind of achievement aspirations I had five years ago."

When he looks to the future, he envisions finding ways to link mentoring and teaching to his diversity consulting. Meantime, he seems to be getting the hang of "stepping aside."

When a friend called recently to ask whether he'd be interested in joining a coaching venture on coping with stress, he thought for a moment before answering, "I don't have a lot of stress in my life now."

Like Cooper, Deborah Saxe broke societal barriers to get where she is, and she's not ready to quit striving even though there's not a lot left for her to achieve. She's among the first generation of women to become partner at a major law firm and combine her demanding practice with raising children. The 60-year-old employment lawyer at Jones Day in Los Angeles routinely makes the top-lawyer lists such as the annual Super Lawyer designation for her region.

Saxe was 41 when she took maternity leave for the birth of her first child, and she couldn't wait to get back to work. "I cleaned my garage, I put 40 years of photos into albums—I really was bored," she recalls. "With the second I pretty much worked straight through the maternity leave from home."

Her consultant husband worked from home. She didn't always agree with his child-rearing choices—she recalls arriving home from the office at midnight to find him dancing in the living room with their 1-year-old—but she knew her two daughters were well-cared for, and their family thrived. "We made it work," she says.

As a newer lawyer she worked seven days a week, and only in the last decade has she cut back to six. She usually takes Saturdays off to spend with family and goes into the office on Sundays. The work, while no longer new, remains satisfying. "I feel fortunate to be working where I can be proud of what I'm doing every day," she says.

A Time for Reflection, Relaxation

Sitting on the patio of her family's home in the foothills north of Los Angeles, near a pot of orange-red geraniums that belonged to her late grandmother, she can see beyond her large garden to the San Gabriel Mountains. She wonders why her avocado tree looks sickly and how one harvests and pickles capers. "I like the idea of growing them. And if I had more time, I'd figure out how to actually eat those things rather than just look at them," she says.

Unlike her husband, who retired at age 60, full-time retirement is years off for Saxe. But her idea of how she will get there is becoming more concrete. As a litigator, Saxe prides herself on winning. She's lost only two cases of the dozen or so that have gone to jury trial, and one loss was reversed on appeal. But she's discovered another side to her personality as a volunteer arbitrator and mediator.

"I like the opportunity to think about who's right and who's wrong from a fairly neutral position," she says. "I do see both sides of most things. The role of neutral is more me, I think."

Saxe envisions a phased retirement where she'll work as an arbitrator and mediator, giving her more flexibility and time with family. "It's not work as I know it," she says. "It's being independent and self-employed. I will do that as long as I can, maybe until I'm 70.

"It's certainly where I'm going next," she adds. "I look forward to it very much but I'm not quite ready to throw in the towel."

David Melton, by contrast, had vastly different feelings about his legal career. He was a partner at several large firms in Chicago before retiring in 2008. Over his 32 years in practice, Melton often thought about doing something else, but the law provided a good living and, he says, the intellectual and political issues tied to his work held his interest enough to keep him going.

But the demands of his intellectual property litigation practice took their toll on Melton. As he neared retirement, the 12-hour-plus days demanded more than he could give, physically and mentally. One particularly complex case required so many late nights of preparation that he struggled to stay awake during the trial. "I tended to rationalize it, but it was embarrassing," he says.

Melton felt too young to retire but too old to continue at the pace demanded of workhorse lawyers like him. "I recognized there was less and less room for me in big firms as I got older," he says. "They're looking for business generators. I'd used up my usefulness in a lot of ways."

Now, several years into retirement, Melton has no regrets about his decision to retire while in his mid-50s without any other plans. "My mental image was that I'd practice until 60. I almost made it," Melton says rather matter-of-factly, while sitting in the sunny living room of his 140-year-old house in a historic district of Evanston, just north of Chicago.

Melton's wife, Nancy Segal, retired at age 50 in 2004 from an administrative career in the federal government

and started a management training and consulting firm for federal agencies that also does outplacement coaching for employees. Her business has thrived, giving Melton time to breathe.

He plans on going back to school to explore certification to teach math and history in a public high school. "It would give me an excuse to take some courses I'm curious about," he says.

Meanwhile, Melton says stepping off the treadmill has given him time to reflect, to read, and to be a better husband and father (he has two daughters). "I always had the excuse before: 'I don't have time or energy because I have to pour it into this job in order to succeed.' "

Where He Wants To Be

At 67, Heim still believes the law is his perfect calling. He continues to practice at Dechert, where he started his career. "Law is so much a part of me, I don't think I'll ever be able to let loose of it," he says.

As a boy, the stories of early American lawyers such as Henry Clay and Daniel Webster excited him. "The idea of law as something that bound society together—maybe part of it was living in Philadelphia—all those things came alive for me," he says.

Sitting recently with 10 lawyers on an advisory committee to the 3rd U.S. Circuit Court of Appeals, listening to the discussion and savoring the moment, he felt he absolutely is where he belongs.

Still, there are aspects of work he doesn't like, like staying up past midnight to prepare for a hearing. "I wish there were a way to put all that into my head without having to read it all," he says. "But then when I stand up in court it's still like the first day. When it comes time to say, 'May it please the court'—that excitement has never gone away."

He's considered starting a mediation practice, but unlike Saxe, who looks forward unreservedly to her transition, he wonders whether he would miss the competitive aspects of being an advocate.

Heim's wife, a former tax lawyer turned professional photographer, is exploring his stage of life in a series of photographs titled "Beyond Success." She captures his dilemma with a quote by Tennessee Williams: "There is a time for departure even when there is no certain place to go."

To be sure, Heim has destinations in mind: spending more time with his grandchildren, boating at his vacation home in Maine, championing judicial reform and working on behalf of the Free Library of Philadelphia. But he's not convinced any of that would be sufficient to replace what he would give up if he were to leave Dechert.

His collaboration on the photo project, which will become a book, helped Kennedy understand "just how big a thing it would be if he gave it up," she says. Her photographs attempt to capture what it's like to be poised between "loss and possibility," she says. "You're so into it, the mastery that it's taken so long to achieve, it's still hard to see what could be there."

For now, Heim lingers between the familiar and everything that lies beyond. "Every time I set a timetable for a decision," he says, "I move it."

Barbara Rose (www.barbaraerose.com) is a Chicago-based journalist who writes about how we live and work. Her background includes more than 15 years as a business reporter and columnist for newspapers, most recently the *Chicago Tribune*. Her stories appear in the *ABA Journal* and other magazines.

Announcement

The Senior Lawyers Section is pleased to announce that it will host a table at the New York State Bar Association Eighth Annual "Celebrating Diversity in the Bar" reception at the 2011 Annual Meeting on Monday, January 24, 2011, from 6-8 p.m., at the New York Hilton Hotel. Senior Lawyers Section members interested in participating in this event are invited to contact Membership Committee Co-Chair John S. Marwell (jmarwell@smdhlaw.com) or Co-Chair Charles A. Goldberger (cgoldberger@mgslawyers.com).

New York State Power of Attorney Law and Proposed Amendments

By David Goldfarb

Assemblywoman Helene Weinstein has revised her "clean-up" bill for the power of attorney law to incorporate many of the recommendations of the New York State Bar Association, its Task Force on the Power of Attorney, and the Elder Law Section's Ad Hoc Committee on the Power of Attorney. The bill is A8392-C (S7288-A in the State Senate) and at the time of this writing it has passed the Assembly and the Senate, but has not been signed by the Governor. This may well have changed by the time you are reading this. The bill would amend various sections of Article 5, Title 15 of the New York General Obligations Law. References in this article are to sections of the N.Y. General Obligations Law as it is proposed to be amended.

First, the bill would exclude from the law a number of powers of attorney in a new section, 5-1501C. The exclusions pertain primarily to commercial and governmental transactions that were probably never intended to come under the new law. The powers of attorney excluded are:

(1) those given primarily for a business or commercial purpose including (a) a power to the extent it is coupled with an interest in the subject of the power; (b) a power given to or for the benefit of a creditor in connection with a loan or other credit transaction; or (c) a power given to facilitate transfer or disposition of one or more specific stocks, bonds or other assets;

(2) a proxy or other delegation to exercise voting rights or management rights with respect to an entity;

(3) a power created on a form prescribed by a government or governmental agency for a governmental purpose;

(4) a power authorizing a third party to prepare, execute, deliver, submit and / or file a document or instrument with a government or government agency or other third party;

(5) a power authorizing a financial institution or its employee to take action relating to an account holding cash, securities, commodities or other financial assets on behalf of the person giving the power;

(6) a power given by an individual who is or is seeking to become a director, officer, shareholder, employee, partner, limited partner, member, unit owner or manager of a corporation, partnership, limited liability company, condominium or other legal or commercial entity;

(7) a power contained in a partnership agreement, limited liability company operating agreement, declaration of trust, or certain condominium documents or other agreement governing the internal affairs of an entity which authorize someone to take lawful action relating to such entity;

(8) a power given to a condominium managing agent to take action in connection with the use, management and operation of a condominium unit;

(9) a power given to a licensed real estate broker to take action in connection with a listing of real property, mortgage loan, lease or management agreement;

(10) a power authorizing acceptance of service of process on behalf of the principal; and

(11) a power created pursuant to authorization provided by a federal or state statute, other than G.O.L. Article 5, Title 15, that specifically contemplates creation of the power, including a power to make health care decisions or decisions involving the disposition of remains.

To be valid a statutory short form or a non-statutory form a power of attorney must meet the execution requirements and contain the warnings in the statute. 5-1501B. The amendments continue to only make it unlawful for a third party to unreasonably refuse to honor a *statutory short form* power of attorney and continue to make a proceeding under 5-1510 the *exclusive* remedy for enforcement. 5-1504.2. However, powers of attorney executed in another state or jurisdictions in compliance with the law of that state or jurisdiction or the law of New York or that comply with section 5-1501B are valid and a power of attorney executed in New York by a domiciliary of another state or jurisdiction in compliance with the law of that state or jurisdiction or the law of New York is valid in this state. 5-1512.

The prior law had made it unclear whether an individual acting on his or her own behalf could validly execute a non-statutory form which met the other requirements of 5-1501B, specifically the type size, cautions and warnings, and signing and acknowledgement require-

ments. The amendment offers some help here. The amendment would redefine a "principal" as an individual who executes a power of attorney "acting for him or herself and not as a fiduciary or as an official of any legal, governmental or commercial entity." 5-1501.2(k). Then, 5-1501B would state that nothing in the law would bar the use or validity of any other or different form of power of attorney desired by a person "other than a principal." 5-1501B.4. This means, in a roundabout way, that a "principal" acting on his or her own behalf cannot execute a valid power of attorney unless it at least conforms to the requirements of 5-1501B. But, see the discussion above about which powers of attorney are enforceable.

Since a 5-1510 proceeding is the exclusive remedy to enforce honoring the *statutory short form*, the question remains whether a *non-statutory* form that is valid because it conforms to the requirements of 5-1501B or 5-1512 is enforceable by some other action or proceeding.

Although the NYSBA had recommended eliminating the statutory major gifts rider (SMGR), the bill leaves it and redefines it as a statutory gifts rider (SGR). Although the bill would clarify that the SGR is necessary for "gifts," and not "other transactions," [5-1514] the statutory form still recites in the modification section, "However, you cannot use this Modifications section to grant your agent authority to make gifts or *changes to interests in your property*." 5-1513.1(h) [emphasis added]. This still leaves some ambiguity.

The proposed amendment clarifies that SGR gifting authority must be exercised according to any instructions either in the SGR "or in any other writing provided by the principal regarding the exercise of any authority." 5-1514.5. It continues to allow gifting "for purposes which the agent reasonably deems to be in the best interest of the principal, specifically including financial, estate, or tax planning, including minimization of income, estate, inheritance, generation-skipping transfer or gift taxes." It also continues to leave out of the best interest definition planning for public benefits eligibility.

The bill does have a provision that would require the New York State Law Revision Commission to study and report to the Governor and Legislature on the SGR.

A statutory form (either the POA or SGR) continues to require the "exact" wording in the statute, it will not, however, be prevented from being a "statutory form" by reason of a mistake in wording, such as in spelling, punctuation or formatting, or the use of bold or italic type. 5-1501.2(n) and (o).

The ability to create, modify or revoke a trust is restored to most of the sections of the statute which describe and explain the specifically enumerated powers in the statutory short form, unless such creation, modification or revocation of a trust is a gift transaction. 5-1502A, 5-1502B, 5-1502C, and 5-1502L.

Under the amendments, revocation of prior powers of attorney is no longer the default and the modification section can include a provision revoking prior powers of attorney. 5-1503.3 and 5-1513.1(d).

Third parties which must honor the statutory short form include those doing business in New York. 5-1504. The reasons for refusing to honor a power of attorney still include the refusal by a title insurance company to underwrite title; however, it is now limited to a refusal for a gift of real property made pursuant to a SGR or non-statutory power of attorney that does not contain express instructions or purposes of the principal. 5-1504.1(a)(9).

A power of attorney (statutory ort not) that meets the requirements of 5-1501B shall be accepted for recording if it has been signed (and acknowledged) by one agent or if two or more agents must act together, then signed (and acknowledged) by all of them. When a successor or co-agent authorized to act separately from any other agents presents a certified copy of a recorded power of attorney with the agent's signature acknowledged, the instrument shall be accepted for recording. 5-1504.7.

The special proceeding under 5-1510 is no longer the "exclusive remedy" for the production of records. 5-1505.2(a). Thus a record production could be compelled in a guardianship proceeding or by subpoena in a criminal or civil proceeding.

Under the amendment, it would no longer be required that every agent be unable to act before a successor can act. The power of attorney could provide for specific agent succession rules. Those rules would go in the form in the section on successor agents. 5-1508.2 and 5-1513.1(c). Signing and acknowledgement by the successor agent is now in a separate section on the form. 5-1513.1(p). Any person, other than an estate or a trust, may act as an agent, co-agent or successor agent. 5-1508.4.

Under the amendments it would no longer cause a conundrum if a principal wanted to revoke a power of attorney but could not locate the agent to give him or her notice. The power of attorney can be revoked by delivering the revocation to the agent in person or by sending a signed and dated revocation by mail, courier, electronic transmission or facsimile to the agent's last known address. 5-1511.3(b). An agent is deemed to have received a revocation when it has been delivered to him or within a reasonable time after it has been sent to his last known address. 5-1511.5(b). Where a power of attorney has been recorded the principal shall also record the revocation in the office in which the power of attorney is recorded. 5-1511.4.

Under the amendment it would be clear that without additional gifting powers, the $500 gift limit is not per person per year. The authority for "personal and family maintenance" granted in 5-1513.1(f)(I) would allow

the agent to make gifts totaling $500 in a calendar year. 5-1502I.14 and 5-1513.1(h).

The amendment makes it clear that the notary who takes the acknowledgement on the SGR can be one of the witnesses. 5-1514.9(b).

The current provision in the bill for effective dates states, "This act shall take effect on the thirtieth day after it shall have become a law and shall be deemed to have been in full force and effect on and after September 1, 2009. Provided, that any statutory short form power of attorney and any statutory gifts rider executed after August 31, 2009 shall remain valid as will any revocation of a prior power of attorney that was delivered to the agent before the effective date of this act." The NYSBA has urged that the bill also apply to powers of attorney that were executed prior to August 31, 2009, in anticipation of the new law.

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He is co-author of a *New York Elder Law*, formerly *New York Guide to Tax Estate and Financial Planning for the Elderly* (Lexis-Matthew Bender 1999–2009). He has written numerous articles including articles for the *New York Times*, NYSBA *Journal*, the National Academy of Elder Law Attorneys' *NAELA News* and the *New York Law Journal*.

Mr. Goldfarb formerly worked for the Civil Division of The Legal Aid Society (New York City). He is a delegate member of the executive committee of the Elder Law Section of the New York State Bar Association. He was Chair of the Association of the Bar of the City of New York's Committee on Legal Problems of the Aging from 1996 to 1999. He lectures on various topics in the field of Elder Law, trusts, Medicaid and estate planning. His e-mail address is goldfarb@seniorlaw.com and his home page is http//www.seniorlaw.com.

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Tipping the Scales of Justice: The Rise of ADR

By John M. Barkett

To anyone who has been doing trial work for more than thirty years, the ascent of alternative dispute resolution (ADR) processes—especially mediation—is unsurprising; litigation is costly. Combine high cost and high risk, and reasonable litigants are finding alternatives to trial, tipping the scales of justice in favor of mediation, arbitration, and hybrid forms of ADR processes.

Mediation Works

Mediation is a major contributing factor to the vanishing trial phenomenon because it works. If there is an outcome-determinative legal issue, a good mediator can work with the parties before discovery dollars are incurred to assist the parties in evaluating the likelihood of success and the associated settlement value of the case. If there are material factual disputes during mediation, a good mediator can assist the parties in outlining possible outcomes and determining the settlement value of a case. The "silver bullet" in mediation is to get the parties to the courthouse steps without spending the money to get there. Every trial lawyer knows that by the time of trial, a matter will funnel down to a few key issues, often just one or two. In a well-conducted mediation, the funneling process will be expedited. Key issues will be identified quickly and confronted fairly so that parties can meaningfully decide whether there is a mutually acceptable way to resolve differences.

Mediation is not always successful, but to give it the best chance of success, parties have to overcome certain obstacles. First is lack of preparation. When the mediator knows the case better than the advocates, there is a problem. A second obstacle is confusion over the amount in controversy. Parties demanding relief have to be able to articulate the relief being sought. A third obstacle is failure to have decision makers in the room. Often a mediator's first task is to address complaints by one party that another party will not be represented by a person with "full settlement authority." Mediation works best when no one in the room has to make a telephone call or reconvene with management to authorize a settlement on behalf of a party.

Creative ADR Processes

What I call "mediation plus" works for intrepid parties. In this process, the mediator first facilitates the exchange of information. The mediator then interviews witnesses who can be directed by a party or persuaded by the neutral to appear for the interview. Under the supervision of the mediator, expert presentations are then made to the mediator, counsel, and decision makers for all parties. Sometime thereafter, the mediation is held. A thoughtful process agreement that gives the mediator authority to police the process and to adjust deadlines as reasonably necessary is an important step to ensuring a resolution.

"Combine high cost and high risk, and reasonable litigants are finding alternatives to trial, tipping the scales of justice in favor of mediation, arbitration, and hybrid forms of ADR processes."

Nonbinding arbitrations, or what some call "early neutral evaluations," can also be effective ways to assist parties in resolving environmental or other disputes. If there are sufficient amounts in controversy or if there is a pressing need for development of a testimonial record because there are no documents available, an ADR process approved under a case management order (CMO) might make sense.

In a Superfund allocation context, the CMO might, for example, contain the following features: (1) appointment of a third-party neutral to gather evidence, write a report, and mediate the dispute; (2) questionnaires and a process to follow up with individual parties to ensure that questionnaire responses feature equivalent levels of due diligence; (3) creation of a document repository; (4) depositions taken by a neutral with some mechanism to provide for cross-examination of witnesses; (5) preparation of "position papers" and rebuttal or reply papers; (6) an "opt in" or "opt out" provision depending on a court's determination of how best to manage the process; (7) a schedule with a mechanism to extend deadlines; (8) hearing processes where oral argument is heard by the neutral; (9) preparation of a preliminary allocation report that will typically address shares of "orphans" or non-ADR participants; (10) a comment period followed by preparation of a final report; (11) a facilitation session with the neutral to attempt to effect a final resolution of the matter; (12) equal contributions to a trust fund by each participant to pay the costs of the process; (13) if appropriate, expert report exchanges and expert presentations; and (14) flexibility in permitting the neutral to issue a nonbinding ruling on liability issues.

Alternatively, similar to litigants who use mock juries to prepare for trial, one side, both sides, or all sides to a dispute may elect to present their cases to a neutral for a written evaluation within limits prescribed by the parties.

Arbitration

Historically, arbitration is the most common ADR process. Arbitration is increasingly used to ensure the involvement of neutrals with experience in the areas to be arbitrated with the expectation that knowledgeable neutrals will give parties the best justice.

A just, speedy, and relatively inexpensive arbitration begins with a good arbitration clause. There are a number of topics contracting parties should think about in drafting an arbitration clause. First is the number of arbitrators, their qualifications, and the selection process. Generally, the arbitrator or the arbitration panel represents the most important component of a successful arbitration process. Scheduling is another checklist item for an arbitration clause. One issue here is whether a failure of a party to abide by the schedule should have consequences. Choice of law issues could become material in the outcome of an arbitration and merit attention.

"A just, speedy, and relatively inexpensive arbitration begins with a good arbitration clause."

Another question is whether the arbitrators will have the authority to issue sanctions for any reason. Although arbitral processes are confidential, confidentiality may still need to be addressed. If an arbitral institution's rules govern the proceeding, the parties should determine whether the award will be confidential under those rules. The type of award is another topic that needs to be considered. The choices include an award without reasons, an award stating the reasons without discussion, or an award with a detailed analysis of the reasons underlying the award. The question of deposition discovery is another potential contracting topic. Most arbitral institutions limit discovery, except as allowed by the tribunal. If arbitration parties want to ensure broad discovery rights, they should provide for them in the underlying contract.

The conduct of the arbitration hearing will differ from that of a trial. For example, Rule 12.2 of the Center for Public Resources' Rules for Non-Administered Arbitration provides that the tribunal "is not required to apply the rules of evidence used in judicial proceedings" but will apply "the lawyer-client privilege and the work product immunity." A major difference between a trial and an arbitration relates to appellate review. The Federal Arbitration Act provides that an arbitration award may be vacated only where the award was "procured by corruption, fraud, or undue means"; there was "evident partiality or corruption in the arbitrators, or either of them"; the arbitrators were "guilty of misconduct" in refusing to postpone the hearing "upon sufficient cause shown," or in refusing to hear evidence "pertinent and material" to the controversy, or of "any other misbehavior by which the rights of any party have been prejudiced"; or "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Win or lose, those who have had arbitration experience almost universally endorse the process if the sole arbitrator or the panel is thoughtful, timely, efficient, respectful, fair minded, hard working, and renders a well-reasoned award. Finding these qualities is the challenge.

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Senior Lawyers/Mid-Career Lawyers Program

The Senior Lawyers Section announces its support for the Senior Lawyers/Mid-Career Lawyers Program recently proposed by Fordham University School of Law alumni. Senior Lawyers Section members interested in this program are invited to contact Executive Committee member Robert D. Taisey (rtaisey@hklaw.com) for additional information.

Creative Mediated Solutions

By Irene C. Warshauer

Mediation enables the parties to resolve disputes with the assistance of a mediator. Frequently, the dispute is resolved by the parties agreeing upon a sum of money which one side pays to the other. In those instances the parties reach an agreement that both sides can accept, saving time and money in the process. There are some disputes where a monetary exchange does not provide a resolution which works for one side, but is the only type of resolution that can be achieved in a judicial proceeding. Mediation presents a forum where nonmonetary solutions can be achieved. These solutions may include a payment as well. This article will discuss several creative solutions achieved through mediation. The mediator who mediated the dispute is identified in an endnote.

Death of a Baby in a Stroller

A baby fell asleep in his stroller. He was left by himself in a room while his parents worked in another room in the house. He somehow slipped and was strangled by the stroller straps. His parents sued the stroller manufacturer in court. The case was referred to mediation. The parents not only lost their child but had enormous guilt because had they not left the child alone in the stroller he probably would not have strangled. The stroller manufacturer was sympathetic, of course, but had warning labels on the stroller saying do not leave the child alone in the stroller. In American jurisprudence, the value of a life is measured, in significant part, by the earning capability of the decedent, based on his or her prior earnings. A baby's earning capacity is not great.

In mediation after opening statements and joint discussions, the stroller manufacturer offered less than $100,000, which was probably the amount of an adverse court verdict at the time. The parents were unwilling to accept that amount. In caucus the mediator asked the stroller manufacturer's attorney if the company would be willing to name a future stroller model after the child. After calling the company, counsel said yes. This was conveyed to the parents in caucus. It provided recognition of their child and their loss and enabled them to work out a resolution which included working together to contact the Consumer Product Safety Commission with ideas on how to prevent future accidents, and payment of a sum of money, which alone could not resolve the dispute.[1]

Transfer of a Government Employee

An over-40-year-old government supervisory employee was being transferred from an office near her home to an office further away, which she could reach by public bus, but would have entailed an extra hour of travel time each day. She filed a discrimination claim alleging age discrimination based upon an alleged violation of statute.

In mediation, it was agreed that she would be paid for the extra hour she was spending on the bus and that she would review files during the trip. The payment for the extra hour would continue until her retirement in less than a year.[2]

Distributor: You're Fired, Overseas

A company had an exclusive distributorship with an overseas manufacturer. The distributor had built up a successful business distributing the product and had leased many locations to sell the product. The manufacturer decided it wanted to distribute the product itself and cut off the distributor. Efforts to resolve the dispute took time, with the distributor losing money based on its inability to obtain product and its need to pay for the leases. In a mediation it was agreed that the manufacturer would immediately take over the distribution and the distributor's locations (for an agreed upon price) and that counsel would negotiate a formal agreement, terminating the distributorship, over the several months needed to cover all issues. It was further agreed that if any disputes arose out of the subsequent agreement (or during the negotiations), the mediator was designated to be the arbitrator to decide the dispute(s).[3]

Distributor: You're Fired, Domestic

A distributor had entered into a series of five-year distributorship contracts with a manufacturer. The contracts had been renewed four times so that the manufacturer and distributor had been doing business for 20 years. During that time the distributor had set up shops in malls throughout the country. At the end of the fourth contract, the manufacturer decided it wanted to cut out the middleman and sell its products directly to the consumer. It advised its distributor that it would renew the contract for another five years but the price would double. In effect, the manufacturer was only willing to ship its product to the distributor at a price the distributor could not afford to pay and still make a profit in its business, so the renewal offer, in effect, would put the distributor out of business.

The distributor sued, alleging an oral understanding with the manufacturer that it would continue to renew the same contract with a modest increase, and breach of the duty of good faith and fair dealing. The matter went to mediation and the mediator suggested that the manu-

facturer purchase distributor's business, saving itself start-up costs and giving the distributor the purchase price money. Without the purchase, the distributor would have had to close its business immediately, would have no money or merchandise, and the manufacturer would have to start from scratch and pay money to obtain leases and sales people.[4]

"Creative mediated solutions often involve something extra…"

A Shifty Middleman

Two parties were doing business with a middleman. The defendant had paid the middleman 50% of what was due but the middleman did not pay the plaintiff. The plaintiff commenced a lawsuit and then went to mediation. The parties and counsel got together an hour early to see if they could resolve the dispute. When the mediator arrived counsel said, "We just spent an hour and it can't be resolved." The mediator said, "I have travelled all the way here, let me try to mediate." They agreed. After hearing opening statements from both sides, she asked if the defendant was willing to pay the 50% it agreed was due to the plaintiff, and the two sides would pursue the middleman for the 50% he had been paid but not delivered to the plaintiff. They quickly agreed. The matter settled in less than an hour of mediation.[5]

Real Estate Plus

Two mediators with a lot of real estate experience co-mediated several disputes between two very affluent Orthodox Jewish families heavily involved in real estate in New York City. The monetary disputes were settled after both sides agreed to a sweetener proposed by the mediators. The mediators recommended and each family agreed to voluntarily donate several thousand dollars to their respective synagogues.[6]

Hotel Employee Begone

In a buyout of a hotel, an employee who was still on the job but to be terminated was offered a semester at an off-campus training certificate program run by a university that would give terminated employee a leg up on future jobs in the hotel industry. The mediation resulted in additional sweeteners to satisfy the unhappy employee. The semester would occur while he was on "leave" from the hotel. The leave included continuing to get his salary and insurance, even though he was to submit his resignation immediately. During the leave time, he would be allowed to return to host a large family wedding to be held at the hotel, at the employee rate, since he wanted to show off to his family how important he was at the hotel![7]

One-Time-Only Deals

In an age discrimination case, as part of the settlement, one of the perks a former employee was given was a "retiree's ID card" (invented solely for him), permitting him to enter the premises so that occasionally he could go back onto the secure workplace and kid around with his old buddies.[8]

Conclusion

Creative mediated solutions often involve something extra, often in addition to money, for the plaintiff, which has advantages for the defendant as well. Those that involve a charitable gift in addition to, or in part of payment to the plaintiff, have the advantage of the defendant not having to pay the plaintiff so much money, or any money at all, obtaining a tax deduction and doing good, all while resolving a dispute. Helping an employee deal with a transfer not only aids that person but also lifts the morale of the other employees who appreciate kindness or recognition of the employee's humanity. Other resolutions provide recognition of the plaintiff or commemorate the plaintiff's loss, such as the stroller case, or the sponsoring of a race or other event for a plaintiff with a disease or other particular type of problem.

The examples discussed in this article demonstrate the range of resolutions available through mediation. It further shows that the process can satisfy the needs of one or more parties enabling some disputes to settle or lessen hostilities between the parties when an exchange of money and a release will not be sufficient.

Endnotes

1. Irene C. Warshauer, mediator.
2. Gene Ginsburg, mediator.
3. Steve Hochman, mediator.
4. Vivian Berger, mediator.
5. Irene C. Warshauer, mediator.
6. Richard Weinberger, mediator.
7. Vivian Berger, mediator.
8. *Id.*

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The Modernized, Streamlined Contract: Electronic Contracts and Signatures—*Redux*

By Bran Noonan

As with everything else in the digital age, the hallowed handwritten and signed document is being reduced to relic status. Today, transacting electronically has become the norm rather than the exception. Nearly any type of contract can be drafted and executed electronically. Scores of legal documents, such as tax forms and trademark applications, are completed, signed, and submitted electronically. Checks are gradually becoming a thing of the past as more and more institutions accept automatic account withdrawal programs. Even parking tickets, once known for their illegibility, are no longer handwritten.

The electronic medium, at a minimum, expedites and modernizes commercial and business transactions, allowing parties to enter into them instantly and effortlessly. Consider a magazine publishing company that, for example, must enter into work-for-hire agreements with freelance writers on a monthly basis. The electronic medium allows each party to negotiate terms and execute the agreement from the comfort of their own offices. Neither side has to expend time or money meeting in person or waiting for documents to arrive by mail. And by simplifying and streamlining the editing and review process, the electronic medium improves the quality of a document and by extension the transaction itself.

Since the emergence of the Internet, the New York State Bar Association *Journal* has published two noteworthy articles on the subject of electronic transactions.[1] In June 1996, the *Journal* published "Information Age in Law: New Frontiers in Property and Contract."[2] The author warned that the rapidly expanding digital world would present new legal challenges as electronic transactions began to replace those executed on paper. As a result, the author urged legislatures and courts to reexamine and adapt the law to the broadening electronic form. Consumers and businesses would need laws to instill confidence in the integrity and validity of the electronic medium. Four years later, in 2000, the *Journal* published "Wide Use of Electronic Signatures Awaits Market Decisions About Their Risks and Benefits," which explored the potential effects of the then newly passed federal electronic signatures legislation on transactions.[3] This article addresses how the law has responded and progressed since those articles, focusing specifically on the validity and construction of e-contracts.

For all intents and purposes, electronic contracts are equal to their handwritten paper brethren. Current federal and New York State statutes and common law purportedly permit parties to execute a wide range of contracts and transactions electronically and to utilize electronic signatures to indicate mutual and valid consent. At the end of the day, courts primarily concentrate on whether or not an e-contract is properly constructed, rather than on the validity of the medium itself. The design of an e-contract raises unique issues, such as the effect of hyperlinks in contracts, which are absent from paper contracts. Interestingly, courts look to traditional contract law principles, such as sufficient notice of terms, to resolve design and construction concerns.

The Federal E-Sign Law

Congress adopted the Electronic Signatures in Global and National Commerce Act, commonly referred to as "E-Sign," on June 30, 2000. Section 7001, title 15 of the U.S. Code states in pertinent part that

> with respect to any transaction in or affecting interstate or foreign commerce: 1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and 2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.[4]

A transaction under E-Sign consists of "an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons."[5] Section 7003 does, however, exclude certain transactions from its coverage, namely, those traditionally governed by state law, such as insurance polices, rental agreements, and Uniform Commercial Code (UCC) transactions.

Federal courts have never addressed the constitutionality of E-Sign. While the act covers "any transaction in or affecting interstate or foreign commerce,"[6] it does not explicitly indicate which types of intrastate transactions are "in" or will "affect" interstate commerce and come under the purview of the act. Since its adoption, one state court has raised doubts about the legitimacy of the act. In *People v. McFarlan*,[7] a New York state trial court questioned whether or not Congress, in its attempt to give E-Sign the broadest scope constitutionally possible, would find the statute under judicial scrutiny in light of the U.S. Supreme Court's decisions in *United States v. Lopez*[8] and *United States v. Morrision*,[9] where the Court sought to limit, if not

roll back, Congress's power under the Commerce Clause. In *Lopez*, the Court held that the Gun-Free School Zones Act exceeded the scope of Congress's authority under the Commerce Clause because the subject matter of the act did not have a substantial economic effect on interstate commerce even when viewed in the aggregate. In *Morrison*, the Court invalidated the Violence Against Women Act for similar reasons. Declining to resolve the constitutional question, the *McFarlan* court, instead, merely contemplated how far Congress could actually step beyond the limits of the Commerce Clause in an effort to provide a better, uniform nationwide rule. At any rate, the U.S. Supreme Court's 2005 decision in *Gonzales v. Raich*[10] may have rendered this issue moot. There, appearing to distance itself from *Lopez* and *Morrison*, the Court upheld the validity of the Controlled Substance Act under the Commerce Clause insofar as it prohibited the intrastate manufacture and possession of marijuana.

The trial court in *McFarlan* also suggested that the U.S. Supreme Court's decision in *Printz v. United States*[11] raised a second constitutional problem with E-Sign. In *Printz*, the Court held unconstitutional provisions in the Brady Handgun Violence Prevention Act that required states to conduct background checks before allowing gun purchases. According to the Court, the federal government is prohibited from commandeering state processes or bodies to achieve federal purposes. In *McFarlan*, the state court considered E-Sign's applicability to a second police printout of computer-generated photos of the defendant. According to the court, E-Sign "expressly preempts state law" with respect to all records kept by state or local agencies.[12] While E-Sign presumably would not cover the police record, however, because it did not arise out of a commercial transaction,[13] the court argued, somewhat cryptically, that a rule imposed upon a state that regulates only those records used in commerce "is in the real world a rule imposing the [statute] on such state's records for all purposes."[14] The court dismissed the idea that a state statute regulating non-transactional government records might coexist with E-Sign, concluding that a federal rule that regulates all state records "may well constitute a violation of the rule against commandeering the activities of a state to achieve a federal purpose."[15] Putting aside whether the analysis flows logically, this conclusion is a rather expansive interpretation of *Printz*. Accepting the validity of an e-record is unlikely the type of hijacked processes the U.S. Supreme Court envisioned in *Printz*. Nevertheless, no published case has ever cited *McFarlan* or questioned the constitutionality of E-Sign. The implication is, at the very least, that the act has been widely accepted. A constitutional challenge would in fact be surprising because the functional benefit of the statute presumably outweighs any constitutional violation.

Despite *McFarlan*'s red flags, federal courts have utilized E-Sign on a handful of occasions, limiting their discussion to stating that E-Sign had settled the question of whether or not electronic agreements and signatures were valid and enforceable. For example, in the 2003 action *Medical Self Care, Inc. v. National Broadcasting Co.*, the Southern District of New York addressed whether an e-mail should be considered a writing for the purpose of enforcing a "written consent" clause in a contract.[16] The court invoked E-Sign, holding that "the decision not to consider an e-mail a writing is arguably foreclosed by 15 U.S.C. section 7001."[17] The next year in *On Line Power Technologies, Inc. v. Square D Co.*,[18] the Southern District of New York examined whether e-mails created a valid purchase agreement. The plaintiff allegedly entered into agreements with the defendant over multiple e-mails, which stated only the price, order number, and name of the sender. The court held that since "federal statutes governing electronic signatures recognize the validity and enforceability of electronic signatures," the parties "did enter into valid new agreements."[19] Finally, a year later, *Campbell v. General Dynamics*[20] concerned an employer that sent its employees a mass e-mail requiring them to pursue arbitration of an American with Disabilities Act grievance. In determining the validity of the arbitration e-mail agreement under the Federal Arbitration Act, the First Circuit held that E-Sign "prohibits any interpretation of the FAA's 'written provision' requirement that would preclude giving legal effect to an agreement solely on the basis that it was in electronic form."[21] Notwithstanding the lack of commentary, the case law, including that from other circuits, summarily confirms that E-Sign furnishes electronic agreements with the same authority as their paper counterparts.[22]

Interestingly, a narrow area of contention focuses on whether or not one party is obligated to accept electronic agreements under E-Sign, especially where the other party insists on it. The issue arises out of two provisions in 15 U.S.C. § 7001. On the one hand, § 7001(a) mandates that an electronic record may not be denied legal effect. Yet, on the other hand, § 7001(b)(2) states that persons are not statutorily required "to agree to use or accept electronic records or electronic signatures," presumably overriding the foregoing section. The sections lead to contrary interpretations: an electronic record will be automatically either denied legal effect if one party refuses to accept it or given legal effect if one party decides to use it.

Only two courts have actually addressed this issue, both favoring subsection (b)(2) over the preceding subsection. In *Prudential Insurance Co. v. Prusky*,[23] a 2005 action arising out of the Eastern District of Pennsylvania, the defendant cross-claimed, alleging that the plaintiff violated E-Sign for refusing to accept his electronic requests to transfer monies to other investment funds. Shortly after, a New York state trial court addressed the issue in *DWP Pain Free Medical PC v. Progressive Northeastern Insurance*.[24] In that case, the defendant argued that the plaintiff's no-fault action was premature because the medical provider

submitted claim forms electronically without permission. The plaintiff replied that E-Sign required the defendant to accept the forms because E-Sign gave them the same validity and effect as the handwritten form. Without explanation, both courts held that subsection (b)(2) permitted the parties to reject the electronic transmissions. Under that approach, subsection (a) apparently would govern when parties explicitly agree to use electronic means but, absent an agreement, neither party would be obligated to transact electronically. The result potentially burdens parties who intend to use electronic means by requiring them to obtain the other party's consent. This could lead to inequitable outcomes for individuals unsophisticated in the law. For instance, a consumer accustomed to transacting electronically might not expect this statutory limitation and might be left empty-handed for failing to confirm whether a business accepts electronic transactions, which is what happened to the individual investor in *Prusky*.[25]

The New York State ESRA Law

In 1999, the New York State Legislature passed the Electronic Signatures and Records Act (ESRA).[26] Section 304 states in pertinent part: "An electronic signature may be used by a person in lieu of a signature affixed by hand," and it shall have "the same validity and effect as the use of a signature affixed by hand." Section 305 adds that an "electronic record shall have the same force and effect as those records not produced by electronic means." The Legislature enacted ESRA to ensure that "persons who voluntarily elect to use electronic signatures or electronic records can do so with confidence that they carry the same force and effect as nonelectronic signatures and records."[27] Similar to E-Sign, the statute does not, however, explicitly obligate "any entity or person to use an electronic record or an electronic signature."[28]

As with the constitutionality of E-Sign, *People v. McFarlan* is again the lone court to create a potential controversy—this time, the issue of preemption. E-Sign expressly preempts contrary state law except for a narrow field. Specifically, a state electronic record and signature statute survives if (1) the state enacts the Uniform Electronic Transactions Act (UETA) as approved and adopted for enactment by the National Conference of Commissioners on Uniform State Laws; or (2) if the state enacts a law that is (a) consistent with §§ 7001 and 7002 of E-Sign, (b) technologically neutral, and (c) if enacted after E-Sign, makes specific reference to E-Sign.

In deciding the defendant's motion to exclude the prosecution's second printout of computer-generated photos of the defendant, the *McFarlan* court affirmed that "ESRA is not the same as, a clone of, or even similar to UETA,"[29] failing the first preemption exception under E-Sign. Then, presumably with respect to E-Sign's second preemption exception, the court resolved that the scope of E-Sign "purports to preempt ESRA in accordance with [its] own terms." The basis for this conclusion is left unexplained. No glaring inconsistencies between the two statutes exist, and the state statute is technology neutral. Actually, ESRA preceded E-Sign, and, therefore, does not refer back to the federal law. Regardless, in the end, the trial court evaded the issue altogether and actually rendered it moot, concluding that under either ESRA or E-Sign the result would be the same. While no other court has ever addressed this issue, the chance that a court will invalidate ESRA on preemption grounds appears remote.

With respect to the substance of the statute, ESRA has received even less attention than E-Sign. While the statute authorizes the use of electronic signatures, records, and contracts,[30] New York state courts have limited their review to the validity of electronic records, as opposed to contracts. In April 2002, *McFarlan* became the first published case to raise ESRA, accepting the validity of computer-generated photos of the defendant under the state and federal technology statutes. Just weeks afterward, in *D'Arrigo v. Alitalia*,[31] a New York civil court decided whether or not an airline passenger's electronically filed lost luggage complaint constituted a "writing" under the Warsaw Convention, which required complaints to be in writing. The civil court cited a variety of legal and nonlegal sources, including ESRA, to hold that the computer-generated complaint constituted a "writing."

The only other cases to utilize ESRA have done so in connection with electronic traffic tickets. Decided in 2005, *People v. Rose* involved a defendant who moved to dismiss her DWI charge on the ground that the computer-generated ticket was invalid.[32] The Rochester city court acknowledged that ESRA was designed primarily for "commercial and public record applications rather than law enforcement use," but that "the decision to substitute e-tickets for the often illegible multiple copy Uniform Traffic Tickets was an appropriate and logical extension within the purview of ESRA."[33]

The city court, however, objected to the e-ticket system insofar as it functioned in a manner that violated the verification requirement under the Criminal Procedure Law. Officers would input information into the computer system and then print the e-ticket. Yet the software was designed so that the officer "signed" the e-ticket before actually entering any information on the ticket. That would be akin to parties signing a blank paper before filling in the terms of agreement. Verification, as with consent, needed to follow the input of information. The court, nevertheless, found that the officer's signed deposition revived his ill-timed electronic verification.

A few years later, a Rensselaer County justice court faced with the same verification issue took an alternative approach. In *People v. Patanian*, the justice court agreed with the defendant that the state could not cure a defective e-ticket with deposition testimony.[34] The court, in-

stead, held that the officer's actions verified the electronic document. Since the officer himself printed and served the ticket bearing his electronic signature, "the need for a prompt or additional button formally affirming the uniform traffic ticket seems redundant in nature."[35] The court pointed out that "[n]o language under [ESRA] exists specific to any timing of the signature."[36] The central caveat, therefore, became the design rather than the validity of the electronic form.

"The catch was that users could consent and proceed without ever linking to view the agreement, which is commonly referred to as a Browse-wrap agreement."

New York State and Federal Common Law

In the event that E-Sign or ESRA are declared unconstitutional, repealed, ignored, or inapplicable for any reason, New York state and federal courts will likely continue to permit the use of electronic contracts and signatures, as long as the contracts are properly constructed. Since the case law on electronic contracts is sparse, jurisdictions have yet to develop their own comprehensive precedent on the subject. Federal and state courts look, instead, to the small group of cases that have emerged in jurisdictions nationwide for guidance.[37]

Most of the litigation has focused on Web site agreements, where a few federal and state courts have expressly held that such agreements constitute a valid writing which parties may execute and accept electronically. See, for example, *Caspi v. Microsoft Network, L.L.C.*[38] Before joining the Microsoft Network, a prospective member was prompted to enter a subscriber agreement with click-boxes providing the options: "I Agree" and "I Don't Agree." Registration could only proceed after the subscriber had an opportunity to view the screen and click the "I Agree" box. The New Jersey state appellate court held that between an electronic and printed contract "there is no significant distinction."[39] Another example is *In re RealNetworks, Inc.*,[40] where the Northern District of Illinois examined whether the arbitration clause in a Web site license agreement constituted a writing as required under the federal and state arbitration acts. The district court applied a literal interpretation of the term "writing," concluding that the definition of "writing" did not exclude electronic agreements.

Other courts have, however, bypassed the question of the medium's validity altogether, focusing instead on the construction of the Web site agreement. For instance, in *Moore v. Microsoft Corp.*,[41] the plaintiff had to scroll through the terms of the license and then click the "I Agree" icon before he could download the software. Paying no attention to the validity of the electronic medium, the New York state appellate court focused on whether or not the plaintiff received adequate notice of the terms and sufficiently consented. Similarly, in *Barnett v. Network Solutions*,[42] the plaintiff entered into an electronic contract with the defendant to register domain names. The Texas state appellate court focused on whether the plaintiff had notice of the forum selection clause, upholding the contract because it clearly presented the clause and required the plaintiff to scroll past it prior to consenting.

A controversial e-contract design issue has been the effect of hyperlinks in Web site license agreements. In *Pollstar v. Gigmania*,[43] an Internet browser could download concert information from the plaintiff's Web site pursuant to the conditions of a license agreement that the user accessed by clicking a hyperlink. The catch was that users could consent and proceed without ever linking to view the agreement, which is commonly referred to as a Browse-wrap agreement. In deciding the defendant's motion to dismiss, the Eastern District of California held that while the license agreement was buried in the Web site, potentially impairing the parties' mutual consent, the agreement was not invalid as a matter of law. Two years after *Pollstar*, the Second Circuit explicitly rejected the browse-wrap design altogether in *Specht v. Netscape Communications Corp.* because it failed to provide adequate notice.[44] In all these actions, from *Moore* to *Specht*, the construction of the e-agreement was under attack, not the electronic medium itself, which is to say that the courts all tacitly approved of it.

Courts have not indicated any special reasons, such as the rise of e-commerce, to give Web site agreements an exclusive right to the electronic form, finding other electronic transactions governed by the statute of frauds equally valid. A 2004 New York state case of first impression was *Rosenfeld v. Zerneck*, where the trial court addressed whether parties may enter a real estate contract by e-mail. In deciding if the typed signature at the bottom of defendant's e-mail satisfied the writing requirement under New York State's statute of frauds, the court held that the defendant's "act of typing his name at the bottom of the e-mail manifested his intention to authenticate [the] transmission."[45] In 2008, the New York Appellate Division, First Department applied *Rosenfeld* to an e-mailed employment agreement. In *Stevens v. Publics*, the appellate court held that the "e-mails from plaintiff constituted a signed writing within the meaning of the statute of frauds."[46] In the federal forum, the Seventh Circuit considered whether the defendant's e-mailed purchase orders, which contained only the sender's name in the e-mails, satisfied the UCC statute of fraud's signature requirement. Judge Posner, writing for the court, claimed that "neither the common law nor the UCC requires a *hand-written* signature," concluding that the sender's

name on the e-mails met the signature requirement.[47] With these actions, the issue was not so much whether the electronic medium is a valid means for executing employment or real estate agreements, but whether a statute restricts the use of the medium.

Construction of an E-Contract

While E-Sign and ESRA allow electronic contracts to serve as legitimate substitutes for many paper contracts, they provide limited guidance for practitioners attempting to properly construct an electronic contract. Practitioners should, therefore, consult the small body of electronic common law to determine the safest way to design and build an e-contract.

The case law highlights a number of general architectural guideposts. At the very least, properly constructed e-contracts should contain sufficient notice of all terms, adequate methods of consent, the ability to save and print the agreement, and a readable format.[48] For instance, in *Feldman v. Google*, the federal district court held that an e-contract seven paragraphs in length was "not so long as to render scrolling down to view all the terms inconvenient or impossible." With that in mind, parties should likely refrain from using hyperlinks since they potentially obstruct a party's notice of the terms. Next, electronic consent may be accomplished by requiring a user to click an "I agree" icon, for example, before allowing software to be installed.[49] The print and save requirement does not necessarily mean an electronic agreement must provide a "print" or "save" icon; the ability to cut and paste the agreement into a word processing program will suffice.[50] Finally, with respect to readability, while no single standard exists, common sense should guide design decisions. In *Feldman*, for example, the court approved contractual terms in 12-point font and not all capitalized.[51]

The case law has identified two key methods to deliver an e-contract: (1) by e-mail or (2) by accessing a contract on a Web site, as in a Web site license agreement.[52] Today, other methods certainly exist. A number of software programs, such as Adobe Acrobat and Omniforms, allow individuals to convert word-processed and hard-copy documents to digital forms that parties can digitally fill in, save, and e-mail as attachments.

Finally, while not addressed in any of the e-contract cases, an offeror should also construct a non-UCC e-contract that adheres to the mirror-image rule.[53] In New York, the mirror-image rule states that an offeree's response operates as an acceptance only if it is to the exact terms of the offer.[54] An offeror should, therefore, create an electronic contract where the prospective offeree cannot delete or insert material language. Otherwise, if the offeree materially modifies and returns the contract, it would likely fail for lack of mutuality.

Conclusion

While the electronic medium is seemingly equal to the handwritten paper form, new transactional legal challenges will certainly arise as the digital age progresses. Already increasingly common methods of e-communication will likely pose significant legal tests. Before long, the law will have to assess the validity of transactions executed via text messaging, instant messaging, Twitter, and Facebook. Do these electronic avenues differ significantly from e-mail correspondence? Will their informal nature preclude them from being a valid and enforceable alternative? Will courts begin to individually examine the types of electronic communication thruways employed? The answers are all arguably no. Courts have never scrutinized handwritten paper contracts over the type of paper used, whether it was a napkin or personal check, but rather over whether the parties satisfied the formal formation requirements, such as providing fair notice of terms and evidencing mutual consent. As long as the electronic alternatives allow for valid formation, courts should uphold them too.

Endnotes

1. A third article, *Of Keystrokes and Ballpoints*, 80 N.Y. St. B.J. 46 (Jul./Aug. 2008), by William Maker, Jr., touched on the narrow issue of whether an electronic writing satisfies the statute of frauds writing requirement.
2. Raymond T. Nimmer, N.Y. St. B.J. (May/June 1996), p. 28.
3. Bill Zoellick, N.Y. St. B.J. (Nov./Dec. 2000), p. 10.
4. Under § 7006(4), an electronic record "means a contract or other record created, generated, sent, communicated, received, or stored by electronic means."
5. 15 U.S.C. § 7006(13).
6. 15 U.S.C. § 7001.
7. 191 Misc. 2d 531, 744 N.Y.S.2d 287 (N.Y. Sup. Ct. 2002).
8. 514 U.S. 549 (1995).
9. 529 U.S. 598 (2000).
10. 545 U.S. 1 (2005).
11. 521 U.S. 898 (1997).
12. *McFarlan*, 191 Misc. 2d at 538. The court's source for this proposition is unclear since it incorrectly cites to a federal criminal statute. No provision in E-Sign appears to preempt state law with respect to agency records.
13. 15 U.S.C. § 7006.
14. *McFarlan*, 191 Misc. 2d at 539.
15. *Id.*
16. No. 01CIV4191, 2003 WL 1622181 *1 (S.D.N.Y. 2003).
17. *Id.* at *3.
18. No. 03 CIV 4860 (CM), 2004 WL 1171405 *1 (S.D.N.Y. 2004).
19. *Id.*
20. 407 F.3d 546 (1st Cir. 2005).
21. *Id.* at 556. The court added that, pursuant to E-Sign, an e-mail agreement to arbitrate is also likely enforceable under the Americans with Disabilities Act.
22. *See also Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002) (E-Sign settled the issue that the arbitration provision of the online agreement was a writing); *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289

(7th Cir. 2002) (had E-Sign taken effect before the contract had been completed, it would uphold the legal effect of the e-mails under the UCC statute of frauds); *MacDermid v. Discover Fin. Servs.*, 488 F.3d 721 (6th Cir. 2007) (online credit card application deemed valid under E-Sign).

23. 413 F. Supp. 2d 489 (E.D. Pa. 2005).
24. 14 Misc. 3d 800, 831 N.Y.S.2d 849 (Dist. Ct., Suffolk Co. 2006).
25. 413 F. Supp. 2d 489.
26. *See* N.Y. State Technology Law § 301 ("State Tech. Law").
27. 9 N.Y.C.R.R. § 540.1(a).
28. State Tech. Law § 309.
29. *McFarlan*, 191 Misc. 2d at 538.
30. State Tech. Law § 302: An electronic record "shall mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human capabilities."
31. 192 Misc. 2d 188, 745 N.Y.S.2d 816 (N.Y. Civ. Ct. 2002).
32. 11 Misc. 3d 200, 805 N.Y.S.2d 506 (N.Y. City Ct. 2005).
33. *Id.*
34. 20 Misc. 3d 298, 857 N.Y.S.2d 482 (N.Y. Just. Ct. 2008).
35. *Id.*
36. *Id.*
37. While the cases discussed in this section were decided between the late 1990s and early 2000s, courts continue to cite them today as guiding precedent. *See, e.g.*, *Mortgage Plus, Inc. v. DocMagic, Inc.*, 2004 WL 23331918 (D. Kan. 2004); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa 2007); *Jesmer v. Retail Magic, Inc.*, 55 A.D.3d 171 (2d Dep't 2008).
38. 323 N.J. Super. 118, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999).
39. *Id.* at 119.
40. No. 00 C 1366, 2000 WL 631341 *1 (N.D. Ill. May 8, 2000).
41. 293 A.D.2d 587, 741 N.Y.S.2d 91 (2d Dep't 2002).
42. 38 S.W.3d 200 (Tex. App. 2001).
43. 170 F. Supp. 2d 974 (E.D. Cal. 2000).
44. *See Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002) (the court found that a browse-wrap license agreement was invalid for failure to provide sufficient notice of the terms).
45. 4 Misc. 3d 193, 776 N.Y.S.2d 458 (N.Y. Sup. Ct. 2004). *But see Vista Developers Corp. v. VFP Realty LLC*, 17 Misc. 3d 914, 847 N.Y.S2d 416 (Sup. Ct., Queens Co. 2007) (holding that signed e-mail does not satisfy statute of frauds in a real estate transaction).
46. 50 A.D.3d 253, 854 N.Y.S.2d 590 (1st Dep't 2008). *See also Al-Bawaba.Com, Inc. v. Nstein Technologies Corp.*, 19 Misc. 3d 1125(A), 862 N.Y.S.2d 812 (Sup. Ct., Kings Co. 2008) (applying *Rosenfeld* to e-mail license agreement).
47. *Hasbro*, 314 F.3d 289.
48. *See Caspi v. Microsoft Network, L.L.C.*, 323 N.J. Super. 118, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1999); *Barnett v. Network Solutions*, 38 S.W.3d 200 (Tex. App. 2001); *In re RealNetworks, Inc.*, No. 00 C 1366, 2000 WL 631341 *1 (N.D. Ill. May 8, 2000).
49. *Moore v. Microsoft Corp.*, 293 A.D.2d 587, 741 N.Y.S.2d 91 (2d Dep't 2002).
50. *In re RealNetworks, Inc.*, 2000 WL 631341 *1.
51. *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007, 1010 (D.D.C. 2002); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229 (E.D. Pa 2007).
52. *See Barnett*, 38 S.W.3d 200; *Specht*, 306 F.3d 17; *Caspi*, 732 A.2d 528; *Moore*, 293 A.D.2d 587; *Rosenfeld v. Zerneck*, 4 Misc. 3d 193, 776 N.Y.S.2d 458 (N.Y. Sup. Ct. 2004); *Cloud Corp.*, 314 F.3d 289.
53. The UCC abandoned the mirror-image rule for the rule of good faith which does not invalidate an offer if the offeree modifies the terms in good faith.
54. *See Sinram-Marnis Oil Co., Inc. v. City of N.Y.*, 139 A.D.2d 360, 532 N.Y.S.2d 94 (1st Dep't 1988).

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E-discovery "Worst Practices": Ten Sure-Fire Ways to Mismanage a Litigation Hold

By Jack E. Pace III and John D. Rue

Two years after the "new" e-discovery rules became effective, the cases show some trends.[1] Consequently, many litigators are developing best practices regarding the preservation of electronically stored information ("ESI") in connection with civil litigation in the United States. These may include the adoption of demonstrably reasonable document retention policies, implementation of a "litigation hold" intended to preserve relevant documents at the earliest practical time, measures to assess the likelihood that any given transaction or dispute will escalate to litigation, and so on.

When drafting this article, the authors considered creating a "best practices" guide, but the field is crowded with options for the practitioner seeking "best practices." In fact, a Google search for "e-discovery best practices" yields 27,400,000 hits.[2] Thus, rather than offering yet another in an already overcrowded field, we offer here what we believe to be a far more useful approach based on common practices—e-discovery "worst practices." Such a perspective may be more effective for practitioners because with e-discovery, as with many practice areas, "best practices" are better understood in their breach than in their observance.

Moreover, long before the Federal Rules of Civil Procedure were revised in 2006 to more directly address the discovery of ESI and, indeed, ever since the use of computers in business became commonplace, responsible and diligent litigators routinely have taken appropriate steps to preserve, review, and produce relevant ESI. But those are not the settings in which the best lessons (or, at least, the stories that get the attention of the practitioner trying to make sense out of this area of the law) emerge. Rather, it is the headlines shouting of exorbitant sanctions for infractions of the rules (intentional or accidental) that cause litigators everywhere to sit up and take notice (or lose sleep).

In that spirit, the authors set out to describe below a set of e-discovery "Worst Practices" or, with apologies to David Letterman, the Top Ten Ways to Mismanage a Litigation Hold.[3] For each "rule," we have selected one or two illustrative examples from case law, with additional citations in endnotes where the wealth of examples made it difficult to choose only one. We offer special thanks to those involved in the cases discussed herein, in the spirit of the admonition of Catherine the Great: "If you can't be a good example, then you'll just have to be a horrible warning."

1. Don't worry, be happy (Part I)—As long as you have a good retention policy in place, a litigation hold is icing on the cake.

If you already have a document retention policy, isn't that enough? Why go to the trouble of creating individual litigation holds for each matter which, for some clients, may number in the hundreds? Many parties and counsel already appear to follow this rule.

For example, in a breach of contract action, the plaintiff deposed an employee of the defendant, during which the witness testified that she had never received a litigation hold notice or any request to search for relevant documents. Instead, she decided on her own initiative to search for documents that would be useful to the defendant in the dispute, and she sent a batch of such documents to the company's CEO.[4] The federal district court in Kansas (apparently unaware of this rule) held that the failure to issue a litigation hold was a breach of defendant's preservation obligation and, although the defendant already had produced all of the documents found on the witness's computer, the judge ordered the defendant to certify that it had produced all relevant information within its possession, custody, or control.[5] In fact, the court likely would have gone further and issued an even harsher sanction if the defendant had not been able to produce a sufficient number of documents from the witness's files.

Despite the risk of sanctions, parties in other cases have obeyed this worst practice rule as well.[6] For example, in a suit by a student alleging sexual harassment by a professor, testimony from various employees of the defendant revealed that (i) the general retention policy was not followed with respect to former employees; (ii) the college registrar was unaware of the case until recently and had never been asked to search for records relevant to the case; and (iii) the college's head of human resources had never heard of a "litigation hold" and never received any preservation instructions regarding the case.[7] The judge entered an adverse inference instruction against the defendant and awarded costs to the plaintiff.[8]

For parties following this worst practice rule, individual litigation holds seem especially unimportant where a general document retention policy is in place—even one that allows for the regular, periodic destruction of documents without review for relevance to ongoing or anticipated litigation.[9] After all, if the documents have been destroyed, what problems can they cause?

2. Don't worry, be happy (Part II)—Until a complaint is filed, there is no need for a litigation hold.

Lawyers implementing these worst practices need not worry about taking any preservation action until after a complaint has been filed. Why jump the gun and do work that may not be necessary?

Consider a patent infringement case recently litigated in Delaware federal court.[10] There, the court found that the plaintiff had instituted a document retention policy under which the company would destroy many categories of documents after a period of three months. Well after devising a long-term litigation strategy to enforce numerous patents against several defendants, the company instructed its outside counsel to "clear out" electronic (and hard copy) files directly relevant to the patents it intended to enforce.[11] This spoliation (combined with post-litigation commencement shredding of 480 boxes of hard copy documents) led to a finding of inequitable conduct, which in turn operated to invalidate (and deem unenforceable) the 12 patents asserted as infringed. As this case illustrates, a worst practice counsel for a defendant will wait to be hit over the head by a complaint, while worst practice counsel advising potential plaintiffs will advise their clients to proactively pursue a "destroy, then litigate" strategy.[12]

Further, attorneys following this rule not only will studiously ignore the possibility that a preservation duty might arise before a complaint is filed, but also will disregard the possibility that the preservation duty may extend to related transactions that occur after a complaint has been filed. For example, in *Toussie v. County of Suffolk*, the court held that where a preservation duty had been implicated by a transaction executed in 2001, the obligation extended to subsequent related transactions which occurred in 2002, 2003, and 2004.[13] Similarly, worst practice devotees should assume that dismissal of a lawsuit always ends the preservation obligation despite the likelihood of further litigation.[14]

3. It's not my fault—If opposing counsel doesn't request documents, they don't have to be preserved.

Why should you have to do the hard work of figuring out which documents are relevant to the pending litigation? Why not wait to see the document requests before deciding what to preserve?

In *Ferron v. Search Cactus, LLC*, the plaintiff saved and preserved all of his e-mail since the beginning of the litigation. Defendants, however, wanted not only his e-mail, but also the records of what Web sites he had visited, which data had been destroyed through the "routine alteration and deletion of information that attends ordinary use of [a] computer."[15] The plaintiff argued, in apparent observance of this rule, that he was under no obligation to preserve other electronic data because "no Defendant in this case ha[d] ever requested that he place a litigation hold on any other type of electronically stored information…on his computers."[16] The court rejected this argument, citing *Zubulake* for the proposition that parties have a duty to preserve all evidence that "may be relevant to future litigation."[17] Therefore, the court held, inexplicably, and seeming to ignore the "rules" discussed herein, that plaintiff's preservation duty is "independent of whether Defendants requested a litigation hold."[18]

As another court held in describing the best practice rule, "[t]he duty to preserve documents does not need a formal discovery request to be triggered, the complaint itself can be sufficient when it alerts a party that certain information is relevant and likely to be sought in discovery."[19] So the worst practice in this regard is to avoid proactively considering which materials may be relevant to a litigation. In other words, why not just wait and see what ESI opposing counsel actually requests? Doing so may even allow you to avoid preserving material that will never be requested.

4. It depends on what the definition of "is" is (Part I)—Construe "document" extremely narrowly.

No matter how lengthy the definition of "document" concocted by opposing counsel,[20] lawyers who faithfully follow this rule will always be able to argue later that if something is not printed on 8.5 x 11 paper, it is not a "document" for purposes of preservation.[21]

Nursing Home Pension Fund v. Oracle Corp. was a securities class action lawsuit against Oracle and several of its corporate officers, including Larry Ellison, Oracle's co-founder and CEO.[22] In March and April 2001, Matthew Symonds, an editor for *The Economist*, conducted and digitally recorded 135 hours of interviews with Ellison in preparation for a book about Ellison and Oracle, storing the audio files on Symonds' computer.[23] The court found that Ellison controlled the files, and that Symonds (a third party) subsequently ordered his computer repair shop to "dispose" of the computer.[24] The court ordered an adverse inference sanction against the defendants because Ellison had an obligation to preserve the recordings but took no steps to do so.[25]

Other courts have also held that various forms of electronic material should have been subject to litigation holds, including metadata indicating whether certain Web sites had been visited,[26] usage logs for an electronic database,[27] computer source code,[28] and even a computer's random access memory (RAM).[29] Although lawyers who impose a narrow definition of the types of formats and materials to preserve run the risk of sanctions, such as those granted in *Arista Records*, *Ferron*, *Keithley*, and *Oracle Corp.*,[30] that will not dissuade the worst-practice lawyer—even controlling case law can always be distinguished.

5. It depends on what the definition of "is" is (Part II)—Construe relevance extremely narrowly.

Those attorneys aspiring to spectacularly mismanage a litigation hold will always define extremely narrowly

the parameters of the universe of documents relevant to the pending litigation. In *3M Innovative Properties Company v. Tomar Electronics*, 3M sued Tomar for patent infringement relating to traffic control systems. An employee of the defendant claimed that he was the sole inventor of defendant's relevant system. In response to various discovery requests, the employee claimed that he was the only person at the company with relevant documents. Defendant did not issue a retention policy or litigation hold, because the witness believed it would apply only to him. He neither inquired whether other employees had relevant documents nor implemented any preservation procedures.[31] However, the court pointed out that even if the witness was the sole inventor, additional data still would be relevant to the lawsuit, including sales data, research and development documents, and testing information.[32] The court found, therefore, that the defendant had "failed to conduct a reasonable inquiry or investigation for information or documents responsive to 3M's discovery requests."[33] Although the court imposed various sanctions, including negative evidentiary findings, adverse inference instructions, additional discovery for 3M, and an award of attorneys' fees, it was probably just being conservative.[34]

Besides narrowly construing which document custodians may have relevant materials for purposes of preservation, the same worst practice may be applied to topical categories of documents. In *Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International*, the defendant failed to preserve documents relating to its public and media campaign and argued that those categories of documents were irrelevant. The court responded, "[t]o suggest that these documents are irrelevant is, charitably, incorrect."[35] As shown here, careful observation of worst practices requires attorneys to rely on *ex post* semantic deconstruction of document requests rather than casting a wide net for preservation purposes.

6. Ignorance is bliss—Once the hold is drafted, a lawyer's work is done.

Judging by some of the cases discussed above, one might conclude that lawyers who go so far as to at least *impose* a litigation hold are less likely than average to become "horrible warnings." However, even those lawyers still may aspire to personally prove Catherine's admonition.

In the *Metropolitan Opera* case, the Met sued a labor union and two individual labor leaders, alleging tortious interference and a secondary boycott. Although the individuals each received discovery requests directed to them specifically, neither appears to have made much effort to comply. One of the union leaders received from his staff a list of documents that he should look for, but he delegated the task to other staff members. One of his offices was never searched at all for relevant documents. When asked about several categories of documents at his deposition, he testified that his lawyer had asked him for the first time the previous day to look for such documents.[36] The other individual defendant was also approached by staff regarding documents; he directed them to search a single file drawer in his office, which they did, but made no further efforts to locate relevant materials.[37] The court (unaware, like so many others, of the "Rules" discussed herein) sanctioned both individual defendants and their counsel for failure to conduct adequate searches for responsive materials and entered a judgment of liability against the defendants, writing "defendants and their counsel may not engage in parallel know-nothing, do-nothing, head-in-the-sand behavior in an effort consciously to avoid knowledge of or responsibility for their discovery obligations."[38]

Likewise, in *Treppel v. Biovail Corporation*, the defendant's general counsel orally instructed the CEO and the vice president of corporate affairs to preserve documents relevant to the litigation. However, the general counsel never issued any written instructions, nor did he follow up with either executive to see what measures they had implemented or whether they were continuing to preserve relevant materials.[39] The court wrote that "[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."[40] The court ordered a forensic investigation at the defendant's expense.[41] Despite such a sanction, and the fact that sanctions in other cases have sometimes been even more severe,[42] the worst practices lawyer will assume his or her work is over once the initial hold letter goes out.

Thus, the rule is to forsake any responsibility for the effective implementation of legal holds and retention policies. In addition, when assisting with general retention policies, the worst practice lawyer will ignore any potential or threatened litigation, regardless of the risk that relying on only the standard retention policy would cause potentially relevant material to be destroyed.[43]

7. Keep the hold on a "need to know" basis only (and only the lawyers need to know).

This is also known as the "007 Rule," because it involves handling legal hold information as a secret agent might treat top-secret instructions. For example, in *Nursing Home Pension Fund v. Oracle Corporation*, defendants prepared a preservation notice, which they sent to 30 of the company's employees—out of 40,000. These thirty employees did not include some senior corporate officers who likely would have possessed relevant information, but must not have qualified as need-to-know.[44] The court entered an order for adverse inferences as a sanction against the defendant.[45]

So the electronic discovery worst practice here is to cast a very narrow net when it comes to the distribution of the litigation hold to employees.[46] In particular, counsel seeking to adhere to these "Rules" will ensure that support staff, such as secretaries and other assistants to relevant custodians, are unaware of the hold policy.[47] Keeping IT staff in the dark on retention obligations is of particular importance in this regard, as is scrupulously refraining from making any follow-up inquiries with document custodians after distributing a hold memo.[48]

8. Out of sight, out of mind—Don't worry about documents not on the network.

This rule is observed most commonly by inaction, when counsel fail to consider ESI that is stored only locally, rather than on clients' network servers. However, attorneys seeking to observe this "Rule" diligently also can be proactive. In one particularly admirable example, in *Southern New England Telephone Company v. Global NAPs, Inc.*, the defendants not only attempted to keep the electronic files stored on key computers "out of sight" of plaintiffs, they also took similar steps for documents stored in less common places, just in case such document sources might later be discovered. Besides arranging for one computer to "crash" (to the floor)[49] and employing "Window Washer" software (which had a "Shred (wash with bleach)" option)[50] on another, the defendants apparently made it more difficult to retrieve certain documents stored at the home of the deceased treasurer of the company. A company director orchestrated the removal of a filing cabinet from the dead man's home, after which the defendants claimed they could not produce the documents since the treasurer had died intestate.[51] Concluding enigmatically that "lesser sanctions would not deter the defendants," the court found that the "ultimate sanction" was warranted, and entered a default judgment.[52]

Relevant documents may be found in many locations other than network servers, but this rule exhorts worst practitioners to avoid looking. For example, e-mail that is downloaded to computers automatically may be deleted from servers, thus obviating the need to ever produce it.[53] Personal and home computers can be ignored,[54] and server back-up tapes always can be overlooked.[55] If any "outside" documents are identified, they can be destroyed.[56] If you are not willing to go the extra mile and take preemptive action, just remember to try as much as possible to avoid considering where *else* relevant documents may be located.

9. Computers don't make mistakes—Search terms are flawless and always enough.

Always assume that technology is flawless. One of the best applications of this rule is the exclusive reliance on search terms to identify relevant documents for preservation purposes. For example, in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, defendants requested that the court approve a "clawback agreement" to cover the inadvertent disclosure of privileged documents, because they said they did not have time to individually review all responsive documents.[57] However, after the judge extended the discovery deadline by four months, the defendants decided they might make it through all the documents after all and abandoned the proposed clawback agreement.[58] Their goal proved to be overly ambitious, and they ended up reviewing text-searchable documents only where selected search terms showed up in the document and non-searchable documents only by page titles.[59] After plaintiff's counsel discovered a number of privileged documents in the production, the court found that the keyword searches had not been reasonable and held that the defendants had waived any privilege for the documents that had been produced.[60]

The *Victor Stanley* court apparently was skeptical of modern technology (or at least of human ability to employ such technology). The court wrote:

> [W]hile it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI, all keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying exclusively on such searches for privilege review…. Use of search and information retrieval methodology…requires the utmost care in selecting methodology that is appropriate for the task….[61]

Of course, besides the inadvertent production of privileged material, adherence to the maxim that "computers don't make mistakes" can also lead to the failure to preserve relevant documents if keyword searches are relied upon to identify what needs to be produced, leading to yet another possibility of sanctions—a "worst practices" lawyer's badge of honor.

10. Hide out in the Safe Harbor—The benefits of frequent and indiscriminate automated deletion.

Any list of the most instructive worst practices (and most severe examples of sanctions for discovery misconduct) would certainly have to include a discussion of one of the most reliable worst practice tools: the auto-delete function. In *U.S. v. Philip Morris USA, Inc.*, the defendant's system deleted all e-mail older than 60 days old on a monthly basis.[62] The system-wide automated deletion continued for two years following the court's entry of the first case management order, which specifically required preservation of all relevant documents "and other records."[63] The automated deletion was apparently also in violation of the defendant's own internal policy and many of the employees identified as having failed to follow applicable policies came from the highest echelons of the company. Deleted documents included e-mail regarding demographics of cigarette purchasers (including age), yearly marketing plans, advertising events, research on individual smokers, and media relations.[64] But while such an automated system may seem efficient to readers and followers of the "Rules" discussed here, the court did not appear to agree. In addition to prohibiting the defendant from calling as a witness anyone who violated the internal document retention program, the court imposed a total monetary sanction of $2,750,000 on the corporate defendant, consisting of a $250,000 fine imposed on each of eleven individual corporate managers and/or officers.[65]

Although Federal Rule of Civil Procedure 37(e) creates a "safe harbor" for "failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system," Rule 37(e) does not benefit "a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation."[66] Therefore, while such a holding does not remove or clarify the ambiguity in the meaning of "good faith" in the Rule, taking advantage of frequent and indiscriminate automated[67] deletion of relevant material is nonetheless clearly grounds for sanctions, in spite of Rule 37(e) (and this "worst practice" rule).[68] In the *Napster* case, an investment firm which had invested in Napster and was, at various times, party to suits against Napster, had a formal policy to the effect that "we do not retain e-mails, it is your responsibility to delete your handled e-mails immediately."[69] The court stated that notwithstanding this policy, the firm "was required to cease deleting e-mails once the duty to preserve attached."[70] Unthinkingly permitting the continued auto-deletion of documents is not a "get out of jail free" card for spoliation. But it is an excellent road to a place in the worst practices hall of fame.

Best Practices

Although perhaps not nearly so interesting as worst practices, we cannot conclude this article without a few affirmative recommendations. As an initial matter, counsel interested in "best practices" in the area of litigation holds and document preservation generally should consult the Sedona Principles and the Sedona Proclamation, very useful sources of which every litigator confronting e-discovery issues should be aware.[71] The careful and diligent litigator also can review the Top Ten list discussed above, and simply do the opposite. Synthesized into best practices for litigation holds, our Top Ten list can be translated into the following three simple rules, When, What, and Who:

1. When: Impose a litigation hold at the earliest practical time after realistically anticipating litigation, and regularly monitor compliance thereafter.
2. What: Preserve documents broadly, in terms of document type, location, date of document, format, and content.
3. Who: Distribute the hold notice broadly, but do not rely solely on support staff, IT staff, junior lawyers, co-counsel, or automated systems for implementation.

Endnotes

1. *See, e.g.*, Jack E. Pace III & John D. Rue, *Early Reflections On e-Discovery in Antitrust Litigation: Ten Months into the New Regime*, 22 ANTITRUST 67 (Fall, 2007).
2. As discussed below, perhaps the best guide to "best practices" is published by the Sedona Conference. *See* http://www.thesedonaconference.org.
3. In a subsequent article in this publication, we will discuss the best ways to mismanage the review and production of electronic documents.
4. *School-Link Techs., Inc. v. Applied Res., Inc.*, No. 05-2088, 2007 WL 677647, at *1-2 (D. Kan. Feb. 28, 2007).
5. *Id.* at *3-5.
6. *See, e.g., Toussie v. County of Suffolk*, No. CV 01-6716, 2007 WL 4565160, at *7, 10 (E.D.N.Y. Dec. 21, 2007) (no formal litigation hold issued); *Keithley v. Home Store.com, Inc.*, No. C-03-04447, 2008 WL 3833384, at *12, 18-19 (N.D. Cal. Aug. 12, 2008) (no proper litigation hold).
7. *Doe v. Norwalk Cmty. College*, 248 F.R.D. 372, 378 (D. Conn. 2007).
8. *Id.* at 381-82.
9. *See, e.g., Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135, 150-51 (D. Del. 2009) (documents destroyed according to general retention policy included materials relevant to planned litigation).
10. *Id.*
11. *Id.* at 144.
12. *See KCH Servs., Inc. v. Vanaire, Inc.*, No. 05-777-C, 2009 WL 2216601 (W.D. Ky. July 22, 2009) (granting adverse inference based on finding that defendant had deleted relevant software immediately after a pre-litigation phone call from plaintiff about the dispute); *see also Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, No. 1:05-CV-64, 2009 WL 910801, at *12-13 (D. Utah Mar. 30, 2009) (preservation duty arose eight years prior to lawsuit because defendant should have been aware that relevant industry-wide issue could lead to litigation).
13. *Toussie*, 2007 WL 4565160, at *6 n.5.
14. *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006).
15. *Ferron v. Search Cactus*, LLC, No. 2:06-cv-327, 2008 U.S. Dist. LEXIS 34599, at *5 (S.D. Ohio Apr. 28, 2008).
16. *Id.* at *8-9.
17. *Id.* at *9 (*citing Zubulake*).
18. *Id.*
19. *Porche v. Oden*, No. 02-C-7707, 2009 WL 500622, at *6 (N.D. Ill. Feb. 27, 2009).
20. In *Mosaid Techs. Inc. v. Samsung Elecs. Co., Ltd.*, the court rejected arguments that emails were not subject to discovery since the term "e-mail" was not used in discovery requests, where the definitions included "letters," "correspondence," and "communications." 348 F. Supp. 2d 332, 336-37 (D. N.J. 2004).
21. C.f. *Clinton to contest Supreme Court suspension*, CNN, Oct. 2, 2001, *available at* http://archives.cnn.com/2001/LAW/10/01/scotus.clinton/.
22. *Nursing Home Pension Fund v. Oracle Corp.*, No. C-01-00988, 2008 U.S. Dist. LEXIS, at *6 (N.D. Cal. Sept. 2, 2008).
23. *Id.* at *9-10.
24. *Id.* at *24-25.
25. *Id.* at *26.
26. *Ferron*, 2008 U.S. Dist. LEXIS 34599, at *4-10 (merely preserving email does not fulfill preservation duty).
27. *Arista Records LLC v. Usenet.com, Inc.*, No. 07-Civ.-8822, 2009 U.S. Dist. LEXIS 5185, at *7-8, 93-95 (S.D.N.Y. Jan. 26, 2009). *See also Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, No. 07-Civ.-8822, 2009 WL 1873589 (S.D.N.Y. June 30, 2009) (imposing additional sanctions in the same case after additional spoliation and discovery abuses were discovered).
28. *Keithley*, 2008 WL 3833384, at *12.
29. *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007).
30. *Arista Records*, 2009 U.S. Dist. LEXIS 5185, at *93-95 (evidentiary sanctions); *Ferron*, 2008 U.S. Dist. LEXIS 34599, at *13-16 (forensic discovery); *Keithley*, 2008 WL 3833384, at *20 (magistrate awarded monetary sanctions and recommended the district court give adverse inference instruction); *Oracle Corp.*, 2008 U.S. Dist. LEXIS, at *28-32 (adverse inferences).

31. *3M Innovative Props. Co. v. Tomar Elecs.*, No. 05-756, 2006 WL 2670038, at *6-7 (D. Minn. Sept. 18, 2006). *Cf. Toussie*, 2007 WL 4565160, at *7 (only "key players" preserved relevant materials).
32. *3M*, 2006 WL 2670038, at *7.
33. *Id.* at *11.
34. *Id.* at *1-2.
35. *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees and Rest. Employees Int'l*, No. 00-Civ.-3613, 2004 WL 1943099, at *8 (S.D.N.Y. Aug. 27, 2004).
36. *Id.* at *22-23.
37. *Id.* at *23.
38. *Id.* at *25.
39. *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 115 (S.D.N.Y. 2008).
40. *Id.* at 118.
41. *Id.* at 124.
42. In *In re NTL, Inc. Sec. Litig.*, two of the relevant entities had put hold memos in place; however, the hold memos were later ignored by both entities. The court granted an adverse inference request and awarded attorneys' fees. 244 F.R.D. 179, 195, 201-02 (S.D.N.Y. 2007) ("Counsel must take affirmative steps to monitor compliance."). In *Porche v. Oden*, defendants failed to follow a retention policy already in place; as a sanction, the court forbade defendants from presenting any evidence from documents that should have been produced, but had not yet been, and granted an adverse inference jury instruction. 2009 WL 500622, at *7, 9. Finally, in *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, defendant and its lawyers were fined for "counsels' failure to properly monitor the discovery process," including permitting improper application of the retention policy. 244 F.R.D. 614, 636-37 (D. Colo. 2007) (collecting examples of monetary sanctions).
43. *Micron*, 255 F.R.D. at 150-51.
44. *Oracle Corp.*, 2008 U.S. Dist. LEXIS 66740, at *7-8. *Cf. Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 95 (D.N.J. 2006) (many high-level employees "entirely unaware of either…litigation or their obligation to preserve documents"); *Toussie*, 2007 WL 4565160, at *7 (only "key players" involved in preservation efforts, leaving "several…key departments unaccounted for"). *See also* discussion of *3M*, *supra* note 31.
45. *See also Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co.*, __ F.R.D. __, 2009 WL 2407754 (precluding plaintiff from presenting any evidence in support of its most significant claim as sanction for failure to produce relevant documents as a result of failing to request the appropriate personnel to search in certain locations).
46. *In re NTL, Inc.*, 244 F.R.D. at 198 (many employees never received hold memo and those who did receive it were never reminded of their obligation).
47. *Treppel*, 249 F.R.D. at 118-19 (in-house counsel did not make support staff to high-level executives aware of preservation obligation, although he had reason to believe they may have had discoverable information).
48. *Keithley*, 2008 WL 3833384, at *12 (technical personnel were not made aware of significance of computer code data nor the obligation to preserve it). Additional inquiries to document custodians were ordered by a magistrate judge in *Wachtel v. Health Net, Inc.*, after it became clear during depositions that many employees had relevant documents that had not been produced. 239 F.R.D. at 94-95. *See also Major Tours, Inc. v. Colorel*, No. 05-3091, 2009 WL 2413631 (D.N.J. Aug. 4, 2009) (holding that plaintiff had made a preliminary showing of spoliation where one of defendant's Rule 30(b)(6) witnesses testified that she did not even know what a litigation hold was).
49. *S. New England Tel. Co. v. Global NAPs, Inc.*, 251 F.R.D. 82, 87 (D. Conn. 2008). An alternate method is the corporate version of "the dog ate my homework": a thief stole my laptop from my unlocked car. *Gutman v. Klein*, No. 03-CV-1570, 2008 WL 4682208, at * 10 (E.D.N.Y. Oct. 15, 2008).
50. *S. New England Tel.*, 251 F.R.D. at 88-89.
51. *Id.* at 85, 89, 94.
52. *Id.* at 96; *see also Chevron v. M&M Petrol. Servs., Inc.*, No. SACV 07-0818, 2009 WL 2431926 (C.D. Cal. Aug. 6, 2009) (granting adverse inferences, monetary sanctions, and reasonable attorneys' fees against party that kept "secret books" on a separate computer system in order to avoid producing relevant documents).
53. *Treppel*, 249 F.R.D. at 119.
54. *Smith v. Slifer Smith & Frampton*, No. 06-cv-02206, 2009 WL 482603, at *12 (D. Colo. Feb. 25, 2009) (failure to retain evidence on home and office computers).
55. *Wachtel*, 239 F.R.D. at 95 (old emails removed to back-up disks not searched).
56. *Micron*, 255 F.R.D. at 150-51 (relevant files identified by outside counsel when litigation was reasonably foreseeable were "intentionally destroyed…in bad faith").
57. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 254-55 (D. Md. 2008).
58. *Victor Stanley, Inc.*, 250 F.R.D. at 255.
59. *Id.* at 255-56.
60. *Id.* at 267-68.
61. *Id.* at 256-57, 262.
62. *U.S. v. Philip Morris USA, Inc.*, 327 F. Supp. 2d 21, 23 (D. D.C. 2004).
63. *Id.* at 23-24.
64. *Id.* at 24.
65. *Id.* at 25-26 and n.1.
66. *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 146, 148 (D. D.C. 2007) (ordering that defendant pay for searches of back-up tapes, where emails were automatically deleted periodically).
67. Routine deletion that is not automatic is also not protected by Rule 37(e). *Cache La Poudre Feeds*, 244 F.R.D. at 624, 629, 636-37 (erasure of former employees' electronic records without determining relevancy grounds for monetary sanctions); *Micron*, 255 F.R.D. at 148 (routine purge of documents by outside counsel not appropriate where party knew that some material may be relevant to impending litigation).
68. *Peskoff v. Faber*, 244 F.R.D. 54, 60 (D. D.C. 2007) (referring to "amended Rule 37(f)").
69. *In re Napster*, 462 F. Supp. 2d at 1064.
70. *Id.* at 1070.
71. *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (The Sedona Conference Working Group Series, Sept. 2005 Version), *available at* http://www.thesedonaconference.org.

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Legal Implications of Twitter Social Networking Technology

By Steven C. Bennett

At a recent joint session of Congress, where President Obama spoke on plans for responses to the economic crisis, some members of Congress amazed (and perhaps shocked) the public by using some of the latest communication technology available: "Twitter."[1] This new social networking system aims to keep participants connected through the exchange of quick, frequent answers to one simple question: "What are you doing?"[2] Founded in 2006, the service became publicly available and rapidly gained popularity.[3] The service principally operates through cellular telephones, using messages of 140 characters or less (known as "Tweets").[4]

Many lawyers, when first encountering Twitter, "just don't get it." But this latest phenomenon, like email, IM, voicemail, blogging and other social networking technology, is clearly here to stay, in one form or another.[5] What should lawyers make of the new technology; what risks should lawyers recognize; and what advice should lawyers give to their clients? This Article briefly addresses some of the legal implications of Twitter.

Implications for Lawyers

The essential purpose of Twitter, for lawyers and other professionals, is to keep connected to friends, acquaintances, clients and prospects. Lawyers, for example, may wish to use Twitter to share information on developments in their practice area, or news regarding their activities (the progress of trials, presentations or business travels, for example). The benefits may include "increased visibility" within the lawyer's professional sphere.[6] Twitter is "about the conversation" within a network; users of the technology hope that small talk on Twitter "leads to real conversations and relationships."[7]

Twitter messages from lawyers, for all their informality, must be treated with the same caution as messages in any other form (including correspondence, memoranda or emails). Lawyers must pay particular attention to the risks of revealing privileged or confidential information in Twitter messages, which are often programmed to be sent to a group of friends and acquaintances. Further, despite the informality of the medium, messages that contain what may appear to be legal advice, that operate on the (unstated) premise of an attorney/client relationship, or that may be characterized as a solicitation of legal work—all may hold professional responsibility significance for the lawyer.[8] To avoid doubts about the meaning of Twitter communications, lawyers may need to establish some protocols: avoiding anything but general professional news in their Twitter communications, restricting the group of recipients of Twitter communications (or some subset of such communications) and/or providing periodic notice to recipients of the conditions under which the Twitter communications are made.[9]

Implications for Businesses

Business use of social networking tools has grown tremendously in recent years. No longer just a fad, social networking has particularly drawn the attention of advertisers and corporate communications specialists.[10] The internet has created hundreds of "communities" of interest for marketing, branding and introduction of new products and services.[11] In a down economy, recruiters and unemployed workers may use such technologies to help change career directions.[12] And some sources suggest that social networking can perform admirably in the event of emergencies.[13]

Twitter enthusiasts suggest that this technology may offer similar business (as well as social) benefits. Because of its novelty, however, Twitter applications typically are not offered directly by businesses for their employees. As a result, text messages generally do not run through an enterprise network, but rather through the telecommunication carrier's network. In effect, Twitter messaging, like many forms of mobile computing, may not (at least as yet) fall within the purview of any company IT regulators.[14]

Indeed, to the extent that businesses cannot capture and save such messages, they may have particular difficulty regulating Twitter communications. As a result, some businesses may choose to label Twitter messaging as not part of the company's record-keeping system. Some businesses may go further, and forbid the use of such messaging for business purposes.[15]

Yet, corporations clearly have a stake in preparing for the possibility that their employees may use Twitter (and other social networking technologies). Messages sent from corporate employees may convey proprietary information, may reveal other privileged or private information, and may expose the company to claims of defamation or harassment. Messages received by employees may contain spam, malware or illegal materials. And, to the extent that employee dedication to social networking becomes a distraction, it may decrease the efficiency of the organization.[16]

As a result of these kinds of concerns, companies may need to survey employee communication practices periodically, and may need to conduct training or information campaigns regarding what social networking practices

(including Twitter) will be supported, and which considered unacceptable.[17] System monitoring may be required, to confirm that employees use corporate communication systems in conformity with established policies. In certain circumstances, the company may consider specifying that misuse of corporate communications systems (or private communications systems while on company time, or in connection with corporate business) will be considered grounds for termination of employment.[18]

Implications for Litigation

The increasing speed of communication media (from correspondence, to the telegraph, to telephones, to facsimile transmissions, to email, to IM and now to texting and Twitter) may have decreased the attention span of the average user.[19] Whatever the cause, experience in litigation since the internet was invented, and email popularized, shows that abbreviated, casual messaging systems tend to breed abbreviated, casual messages.[20] Such messages can get individuals (and companies) in a lot of trouble, in the event of litigation.[21]

The limits of the term "electronically stored information" (ESI), as used in the 2006 amendments to the Federal Rules of Civil Procedure, have not been clearly established. One case regarding RAM information on a web-site suggests that the term could cover relatively ephemeral information, such as Twitter messages.[22] The case, however, has received some serious criticism.[23] Thus, there may be some question whether Twitter messages are "stored" within the meaning of the Rules.[24] At very least, the discoverability question may turn on the facts of how Twitter technology has been used in the particular case.[25]

Even if such information is not produced as part of the discovery process, however, Twitter messages may be findable, and usable, in the event of disputes, to the extent that such messages are posted on social networks.[26] Indeed, an *ad hoc* system for identifying and aggregating Twitter messages on common themes (such as news event) has developed.[27] And such messages may become potent evidence in the event of litigation, just as email has become.[28]

Formulating Best Practices for Twitter Use

Contrary to the instincts of some, there has been no "end of history" regarding communications technology.[29] The acceleration of new technologies, new computing capabilities, new communications media and new social customs continues.

For lawyers and their clients, the advance of technology may have significant legal implications. The only reliable means to cope with new technologies like Twitter is to embrace an understanding (if not a use) of such technologies, to participate actively in efforts to understand how such technologies may modify legal regimes, and to help clients formulate best practices to control and exploit such technologies.[30]

Lawyers cannot do this job alone. The effort must be inter-disciplinary, aimed at understanding both what is legally required and what is practical and economical. Ironically, new technologies like Twitter may drive lawyers to recognize their interdependence with other professional disciplines, even if they never choose to adopt the social networking technologies with which they must become familiar.[31]

Endnotes

1. *See* Dana Milbank, *A Tale Of 140 Characters, Plus The Ones In Congress*, Wash. Post, Feb. 25, 2009, at A3, available at www.washingtonpost.com ("Some members called it a new age of transparency, a bold new frontier in democracy.").
2. *See What Is Twitter?*, www.twitter.com.
3. Twitter.com does not release information on usage rates. One estimate of 2008 usage, however, put the number of Twitter users as high as 4-5 million. *See* Jeremiah Owyang, *Social Networks Site Usage: Visitors, Members, Pages Views And Engagements By The Numbers In 2008*, www.web-strategist.com (Nov. 19, 2008); *see also* Andy Kazenia, *Social Networks: Facebook Takes Over Top Spot, Twitter Climbs*, www.blog.compete.com (Feb. 9, 2009) (ranking Twitter highly among users of social networking sites).
4. Twitter notes that messages may be connected through "phone, IM, or web site, and you are only expected to pay as much or as little attention to them as you see fit." *Isn't Twitter Just Too Much* Information*?*, www.twitter.com.
5. One measure of the success of the technology is the fact that many imitators of the Twitter approach already exist. *See* Sean P. Aune, *7 Twitters Of The World*, www.mashable.com (Jan. 10, 2008) (Twitter is "easy to love; easy to clone;" listing similar sites).
6. *See* Kevin Hunt, *Twitter And Lawyers*, www.tnalcorpcomm.wordpress.com (Feb. 3, 2009).
7. *See* Matt Homann, *What Is Twitter And How Can I Use It?*, www.lawyerkm.wordpress.com (Feb. 4, 2009) (summarizing panel discussion at Legal Tech New York).
8. *See* Melissa H. Weresh, *A Bold New Frontier—To Blog Where No Lawyer Has Blogged Before*, Iowa Lawyer (Jan. 2009) (noting ethical concerns regarding unauthorized practice of law, unintended creation of attorney-client relationships, and violation of restrictions on attorney advertising), available at www.law.drake.edu; Jason Bouletee & Tanya DeMent, *Ethical Considerations For Blog-Related Discovery*, 5 Shidler J.L. Com. & Tech. 1 (Sept. 2008), available at www.lctjournal.washington.edu; Adrienne Carter, *Blogger Beware: Ethical Considerations For Legal Blogs*, 14 Richmond J. L. & Tech. [No. 5] (Fall 2007), available at www.law.richmond.edu.
9. Given the 140 character limitation, it may be difficult for lawyers to send automated coda for every message, confirming that the message is not intended as legal advice, or to solicit an attorney / client relationship. If that is the intent of the lawyer's Twittering, some alternative form of (at least periodic) notice may be required.
10. *See* Ollie Ross, *CIOs Getting Serious About Social Networking*, www.news@zdnet.com (Feb. 25, 2009) (noting use of social networking to "generate a buzz").
11. *See* Martha Young, *Social Networking—What Is The Business Value?*, www.itworld.com (Oct. 2, 2008).
12. *See* Melanie Rodier, *Wall Street Recruiters And Employees Increasingly Use Social Networking For Career Management*, www.wallstreetandtech.com (Dec. 19, 2008).

13. *See* Jason Palmer, *Emergency 2.0 Is Coming To A Website Near You*, New Scientist (May 2, 2008) (research at University of Colorado at Boulder suggests that "some of the social media were extremely well suited to disaster response, despite not being designed for that purpose"), available at www.newscientist.com.

14. *See* Steven C. Bennett & Cecilia Dickson, *E-Discovery: The Challenges In Mobile Computing*, N.Y.L.J., Sept. 30, 2008.

15. *See* Robert Mullins, *Web 2.0 Conflicts With E-Discovery*, www.office-software.suite101.com (Jan. 28, 2009) ("Businesses concerned about the content of IMs first forbade them in the office, but eventually allowed IM once messages could be archived.").

16. *See* Clint Boulton, Facebook, *Twitter Use In The Enterprise Sparks Hot Debate*, www.eweek.com (Aug. 20, 2008).

17. Some commentators suggest that "[p]romoting the use of a corporate tool that leverages Twitter's API [application programming interface]…is a less risky option than banning it and forcing staff onto a tool that has no auditing capability." Matthew Hodgson, *eDiscovery, Enterprise 2.0, And The Open Web*, www.theappgap.com (Nov. 6, 2008).

18. See Reed Irvin, Enterprise Social Networking And The New Governance Paradigm, www.blog.ca-ig.com (Jan. 15, 2009).

19. *See* Steve Rubel, *Twitter, Human Attention And Moore's Law*, www.micropersuasion.com (Mar. 12, 2007) (noting phenomenon of "continuous partial attention" to communications, as a result of overwhelming volume of messages).

20. *See* Tresa Baldas, *Beware: Your "Tweet" On Twitter Could Be Trouble*, Nat'l L.J., Dec. 22, 2008 (noting that short "tweets" can be "vulnerable to misinterpretation," and may "open[] the door to poor judgment," especially when sent in anger) (quotations omitted), available at www.law.com; Correy E. Stephenson, *E-Discovery Implications Of Twitter*, www.lawyersusaonlin.com (Dec. 16, 2008) ("Twitter is the haiku of internet communications," so that "this is a medium that has a great potential for de-contextualization—thoughts and words and phrases on Twitter can be more easily construed out of context than in a longer medium where they might be expressed more fully.") (quoting Douglas E. Winter of Bryan Cave law firm).

21. *See generally* Peter Wardle & Barnali Chouhury, *Ediscovery: Weapons Of Mass Discovery*, (2007), available at www.practicepro.ca (informal emails "can contain ill-considered and potentially damaging statements not found elsewhere" in corporate records).

22. *See Columbia Pictures Industries v. Bunnell*, 2007 WL 2080419 (C.D. Cal. May 29, 2007).

23. *See, e.g.*, Robert B. Mullen, *Ephemeral Data Meets Hard Law*, The Recorder (Feb. 10, 2009) (decision was "not in keeping with the way lawyers and judges have always done business"), available at www.law.com; Electronic Frontier Foundation, *Movie Studios v. TorrentSpy* (2007) (decision is "unprecedented" and "threatens to radically increase the burdens that companies face in federal lawsuits").

24. Several cases suggest a contrary view. *See, e.g., Phillips v. Netblue Inc.*, 2007 WL 174459 (N.D. Cal. Jan. 22, 2007) (rejecting as "absurd" argument that hyperlinks should have been preserved); *Healthcare Advocates, Inc. v. Harding, Earley, Follner & Frailey*, 497 F. Supp.2d 627 (E.D. Pa. 2007) (no sanctions for failure to preserve temporary cache files); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162 (S.D.N.Y. 2004) (no sanction for failure to preserve "ephemeral" data).

25. *See* Anthony P. Chan, *Data Talk: Cache And Transient*, www.ediscovery.quarles.com (Feb. 12, 2009) (suggesting that discoverability may turn on: whether the data serves a business purpose that warrants retention; whether the requested data is relevant to the case; whether the party is capable of preserving the data; whether data that might have served as evidence has been purposefully destroyed; the timeliness of the request for data, and whether a party has been given notice of the duty to preserve; whether the party acted in good faith to preserve the data; and whether the data is inaccessible because of undue burden or cost, within the meaning of Fed. R. Civ. P. 26(b)(2)(B)).

26. *See* Perry L. Segal, *E-Discovery 101: Twitter MySpace Away On Facebook*, www.ediscoverycalifornia.com (Feb. 4, 2009) ("You have to be your own filter. Before you post, ask yourself whether you're OK with the concept that anyone on earth might see it—forever. If the answer is yes, go ahead. Post it. Otherwise, keep it to yourself.").

27. *See* Amy Graham, *How To Start A Twitter Hashtag*, www.contentious.com (Nov. 20, 2008) (describing informal "convention" by which users label "tweets" to help put together "disparate coverage" of an event).

28. One commentator suggests that Twitter messages, as "present sense impressions," or "excited utterances," may be admissible as exceptions to ordinary hearsay rules. *See* Joshua L. Konkle, *Twitter And Federal Rules Of Evidence 803(1) And 803(2), Hearsay Exceptions*, www.dciginc.com (Feb. 20, 2008). Following such logic, Twitter messages that contain statements of "then existing mental, emotional, or physical conditions," might also be admissible under Rule 803(3) of the Federal Rules of Evidence. *See generally Lorraine v. Markel Am. Ins. Co.*, 2007 WL 1300739 (D. Md. May 4, 2007) (extensive discussion of evidentiary issues surrounding electronically stored information).

29. The rumor has long circulated that a U.S. Patent Office official once suggested that "everything that can be invented has been invented." The truth of the rumor is highly debatable. *See* Samuel Sass, *A Patently False Patent Myth*, 13 Skeptical Inquirer 310 (1989), available at www.myoutbox.net. Whatever the truth of the rumor, the notion that technology will stand still has been repeatedly disproved.

30. *See* Grace L. Mastalli & K. Krasnow Waterman, *Trust, Ethics And The Technology Factor* (June 20, 2008) ("Today legal competence requires increasing degrees of jurisdiction-specific knowledge, web savvy and technical expertise."), available at www.kkrasnowwaterman.com; Steven C. Bennett, *Teaching Technology Skills To Lawyers*, 28:19 N.L.J., Jan. 16, 2006, at 13.

31. Guidance in this area starts with the essential principle that a team approach (involving input from legal, business, IT, records, risk management and business professionals, wherever possible) is essential in developing effective document management and communications policies. *See, e.g.*, Steven C. Bennett, *Implications Of A "Keep It All" Data World*, 81:2 N.Y.S.B.A.J. 42 (2009): Steven C. Bennett, *Records Management: The Next Frontier In E-Discovery?*, 7/08 Practical Litigator 31 (2008); Steven C. Bennett, Sharon Alexander & Cecilia Dickson, *Getting Started: Procedures For Developing A Document Retention System*, 3:1 BNA Accounting Policy & Prac. Spec. Rep. 1 (2007); Steven C. Bennett, *E-Document Management*, Computerworld.com, June 1, 2004; Steven C. Bennett, *Building An E-Document Retention Policy*, 3:3 InfoPro 42-45 (2001).

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Ethics of Lawyer Social Networking

By Steven C. Bennett

Social networking via the internet (sometimes called "Web 2.0") can be a low-cost way to connect with friends, family and old acquaintances, and form new relationships.[1] For lawyers, social networking could make business development "faster, better and cheaper."[2] As a result, it has become a topic of interest for many in the legal profession.[3] In a 2009 survey conducted by the American Bar Association, 43% of lawyers surveyed said that they are members of at least one online social network (this compared to only 15% in 2008). Twelve percent of respondents reported that their firms are also members of at least one online social network.[4] Online social networking thus may play an increasing part in the legal community, and will continue to evolve as developers produce new innovations to increase the number and quality of services offered.[5]

"In a 2009 survey conducted by the American Bar Association, 43% of lawyers surveyed said that they are members of at least one online social network (this compared to only 15% in 2008)."

This technology and the frequency of its use has already outpaced established legal practices. Existing ethics guidelines generally do not focus on technology issues, and state bar associations have been slow to fill in the gaps with opinions and best practice guides.[6] Yet, lawyers require at least a basic understanding of how social networking works, and some awareness of the ethical implications of using such technologies.[7] This Article briefly addresses some of the ethics issues lawyers may face when they use social networking tools.[8]

What Is Social Networking?

Social networking web-sites allow registered users to upload profiles, post comments, join "networks" and add "friends."[9] They give registered users the opportunity to form "links" between each other, based on friendships, hobbies, personal interests, and business sector or academic affiliations.[10] Social networking sites can be used both personally, to contact friends and find old classmates, and professionally, to look for employment or find someone with whom to collaborate. Most social networking systems are available to all users. Some are available by invitation (or special qualification) only. Most began with a personal focus on linking "friends," but many now are used both for business and personal networking purposes. Some directly solicit participation by lawyers.[11]

These sites have received significant media attention.[12] Employers now search social networking sites before hiring employees;[13] consumers worry about protecting themselves from identity theft;[14] and parents seek to keep their children safe from online predators.[15] Advertisers, moreover, increasingly seek ways to exploit social networking systems to entice users into commercial relationships.[16] These kinds of concerns are multiplied when legal professionals use social networking tools.

Ethical Considerations: A Survey

As suggested below, the ABA *Model Rules of Professional Conduct* (the "Rules") do not directly address all of the ethics concerns associated with social networking.[17] The Rules, however, point to potential issues, in a number of areas. The following survey of some of the essential ethical considerations associated with lawyer use of social networking examines the terms of the Rules, and reviews some interpretations of the Rules provided by bar ethics opinions, cases and commentaries.[18]

Competence, Diligence And Supervision

Rule 1.1 requires that lawyers provide "competent representation to a client." Competent representation requires the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The more "technical or complex" the requirements of a matter, "the more difficult it may be for the lawyer to meet the 'competency' standard in providing such services." In accordance with these basic principles, lawyers who use social networking tools must at least have a working understanding of the technology.[19] As the technology is new, and ethics rules and opinions still developing, lawyers must also keep track of new professional responsibility pronouncements in the area.[20]

Lawyers cannot "pass the buck" regarding use of these tools. Rule 1.3 requires that lawyers "act with reasonable diligence and promptness in representing a client." Further, Rules 5.1-5.3 make clear that lawyers must take responsibility to supervise the paraprofessionals and administrative staff that work at their direction.[21] In short, lawyers and law firms must develop policies and procedures for the use (or ban) of social networking, and must take steps to enforce such rules.[22]

Confidentiality and Privilege

Rule 1.6(a) proscribes lawyers revealing information "relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted" under one of several enumerated exceptions.[23] Comment 16 to Rule 1.6 notes that lawyers "must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." The lawyer's duty requires choosing a means of communication for which the lawyer has a reasonable expectation of confidentiality.[24] Comment 17 lists factors for determining the reasonableness of a lawyer's expectation of confidentiality, which include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.[25]

An ABA ethics committee has opined that it is not reasonable to require that a mode of communication, such as email, be avoided simply because interception is technologically possible, especially when unauthorized interception of the information is a violation of law.[26] Nonetheless, lawyers "may be required to keep abreast of technological advances in security, as well as the technological advances being developed by hackers who are seeking to steal secrets from third parties."[27] Ultimately, a client may require that the lawyer implement special security measures, for certain confidential communications, in addition to what may be required by the Rules.[28]

Social networking presents many new ways for lawyers to (inadvertently) reveal client information. Lapses in confidentiality can occur on a firm's website, client intake forms, in emails, attachments, on lawyer blogs, bulletin boards, chatrooms, listservs, and many other communication forms.[29] Simply making a list of contacts public on a networking site, for example, could disclose a confidential relationship.[30] Additionally, lawyers may reveal information related to the representation of a client by linking to other websites.[31] Indeed, some social networking sites require that the user grant the site developer access to all information placed on the site. That arrangement could effectively destroy any claims of privilege or confidentiality regarding social networking communications.[32]

The lawyer's confidentiality protection duty extends to persons providing service to the client at the lawyer's direction. Thus, Commentary to the Model Rules states: "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."[33] Lawyers must ensure that paraprofessionals and administrative staff who may use social networking services are made aware of limits on confidentiality associated with such services.

Finally, lawyers may need to discuss means of communications with their clients. Where, for example, a client uses an employer's computer system to communicate with a lawyer, claims of privilege may be lost, because the employee may lack privacy rights in the system.[34] Lawyers may need to remind their clients of these and other threats to the confidentiality of their communications.[35]

"Social networking presents many new ways for lawyers to (inadvertently) reveal client information. Lapses in confidentiality can occur on a firm's website, client intake forms, in emails, attachments, on lawyer blogs, bulletin boards, chatrooms, listservs, and many other communication forms."

Creation of Unintended Attorney-Client Relationships

An attorney-client relationship arises when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person," and the lawyer either manifests "consent to do so," or "fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services."[36] Under this standard, even if a client never executes an engagement letter, an attorney-client relationship may be implied from the conduct of the parties.[37] Thus, a lawyer who provides casual advice, or solicits confidential information from an acquaintance, risks a claim that an attorney-client relationship has developed.[38]

Rule 1.18, moreover, specifies the duties of a lawyer to a "prospective client," that is, "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter[.]" Even when no attorney-client relationship ensues, "a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation," except in limited circumstances.[39] Rule 1.18, moreover, advises that a lawyer "shall not represent a client with interests materially adverse to those of a prospective client," in the same or a substantially related matter, if the lawyer received information from the prospective client that could be "significantly harmful" to the prospective client. If a lawyer is so disqualified, no other lawyer in the same firm may conduct the representation, except if both the affected client and the prospective client consent, or if the lawyer who received the information "took reasonable measures

to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client," and the disqualified lawyer is timely screened from the representation, and the prospective client receives prompt notice.

"[C]ommentators suggest that websites inviting potential clients to communicate with lawyers should disclaim the existence of an attorney-client relationship, except on express agreement from the lawyer, and caution prospective clients not to send a lawyer confidential information, without confirmation of an agreement to undertake representation."

Comment 2 to Rule 1.18 states that a person who communicates information "unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship" should not be considered a "prospective client" within the meaning of the Rule.[40] Further, Comment 4 to Rule 1.18 states that a lawyer "may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter." In accordance with these rules, commentators suggest that websites inviting potential clients to communicate with lawyers should disclaim the existence of an attorney-client relationship, except on express agreement from the lawyer, and caution prospective clients not to send a lawyer confidential information, without confirmation of an agreement to undertake representation.[41]

In the virtual world, the establishment of electronic means of communication with potential clients risks establishment of attorney-client relationships, if the lawyer does not "exercise caution and vigilance."[42] The key, in general, is the degree to which the potential client may interact with the lawyer, especially with regard to the exchange of confidential information. Thus, conventional law firm websites, which principally provide information about lawyers and their firms, may essentially operate as passive advertising.[43] Yet, where such sites invite email contacts with lawyers, the potential for interactions grows. As a result, many firms adopt restrictions on interactions, through their websites.[44]

The speed of social networking, moreover, may facilitate referrals, advice, and the formation of apparent attorney-client relationships, all with a few clicks of a mouse.[45] In social networking, casual interactions sometimes cannot be distinguished from more formal relationships. Thus, extreme caution may be required.

To avoid creating implied attorney-client relationships, lawyers must refrain from giving fact specific legal advice in social interactions.[46] Some jurisdictions have crafted ethics rules specifically governing advice provided over the internet.[47] Ethics opinions generally distinguish between general and specific legal advice. "Providing legal *advice*…involves offering recommendations tailored to the unique facts of a particular person's circumstances….Lawyers wishing to avoid formation of attorney-client relationships through chat room or similar Internet communications should limit themselves to providing legal information [.]"[48] A lawyer may write on general legal topics (including articles and blog postings) so long as there is no communication of individual advice.[49]

A clear and conspicuous disclaimer of attorney-client relationships can help prevent misunderstandings.[50] Another useful tool is a "click-wrap" disclaimer acknowledgement, which requires readers to manifest their understanding (of lack of an attorney-client relationship) by clicking "Accept" prior to gaining access to website contents.[51] Such a disclaimer (or click-wrap acknowledgement) may also clarify that the lawyer does not intend to solicit confidential information from a prospective client.[52] For shorter messages, a reference to a website with the complete disclaimer may be all that is possible.[53]

In addition to disclaimers and click-wrap acknowledgment forms, lawyers may need to take steps to ensure that they do not accept confidential information from their internet correspondents. Receipt of such information may be one marker of an attorney-client relationship. For example, the Ninth Circuit ruled that an online questionnaire gathering information for potential class members in a class action lawsuit created an attorney-client relationship even though users acknowledged that the questionnaire did "not constitute a request for legal advice and that the [user is] not forming an attorney client relationship by submitting this information."[54]

Conflicts

The inadvertent creation of attorney-client relationships (discussed above) could cause conflicts for an entire firm. Under Rule 1.7, a lawyer generally cannot represent a client if the representation involves a conflict of interest.[55] Conflicts rules are more complicated than this simple principle suggests. Under the Rules, for example, a lawyer may represent a client, despite a potential conflict, where the lawyer believes that competent representation is possible, the representation is not prohibited by law, the representation does not involve assertion of a claim by one client against another client, and each affected client gives informed consent.[56] The representation, however,

must not involve the "assertion of a claim by one client against another client[.]"[57] The conflicts of one lawyer in a law firm, moreover, may be attributed to other lawyers in the firm.[58] Due to these kinds of complexities, most U.S. law firms have rigorous systems for "conflict clearance" before any legal engagement is accepted.[59] Failure to follow these conflict clearance systems, in the context of social networking communications that may be characterized as forming relationships with clients, could cause considerable difficulty for a lawyer.

Under Rule 1.7, moreover, conflicts may arise where representation of a client may be "materially limited" by a "personal interest of the lawyer." Thus, in theory, if a lawyer were to take a definitive legal position (in a blog or other posting), such position could "materially limit" the lawyer's ability to represent clients for whom the opposite legal position is dominant.[60] Yet, the notion of positional inconsistency does not prevent a lawyer from taking different sides in different cases.[61] Indeed, some ethics opinions suggest that a lawyer may take "antagonistic positions on a legal question" that arises in different cases.[62] Further, even where an individual lawyer might be prohibited from taking such antagonistic positions, other lawyers in the firm may not be so precluded.[63]

At a minimum, however, public statements of a definitive legal position adverse to an existing client may cause embarrassment for a lawyer, or a law firm.[64] Even if lawyers do not entirely eschew social networking for fear of causing such problems, some form of restraint may be appropriate.[65] Some law firms, for example, require screening of all publications with a committee. Often, moreover, firms require that individual publications be labeled as representing the opinion of the individual author only, such that the opinion should not be attributed to the firm as a whole, or its clients.

Unauthorized Practice of Law

Generally, under Rule 5.5, a lawyer who is not admitted to practice in a jurisdiction must not "establish an office or other systematic and continuous presence" in the jurisdiction, for the practice of law; or "hold out to the public or otherwise represent that the lawyer is admitted to practice law" in that jurisdiction. A non-lawyer who falsely offers legal services under the guise of being a lawyer is guilty of the unauthorized practice of law. And, because licensing of the practice of law is a state matter, a lawyer authorized to practice law in one state cannot, without admission to the other state's bar, or *pro hac vice* admission for purposes of a specific matter, perform unlicensed legal services in a foreign jurisdiction.[66] The precise contours of these rules are somewhat ill-defined.[67] Increasingly, moreover, lawyers need to operate in more than one state (and perhaps more than one country) to be effective.[68] In 2002, the ABA modified its rules on multi-disciplinary practice, to permit limited forms of multi-jurisdictional practice.[69]

Rule 8.5 provides, however, that a lawyer not admitted in a particular jurisdiction is subject to disciplinary authority in that jurisdiction, "if the lawyer provides or offers to provide any legal services" in that jurisdiction. Comment 5 to Rule 8.5 states that a lawyer's conduct must conform to the rules of the jurisdiction "in which the lawyer reasonably believes the predominant effect" of the lawyer's conduct will occur.

A lawyer may use disclaimers to reduce problems involving unauthorized practice of law. The language of the disclaimer should indicate the state (or states) in which the attorney is admitted.[70] Attorneys may take the additional step of asking potential clients about their residence before answering any questions or sending any messages.

In general, a lawyer may not establish an office or "other systematic and continuous presence" in a jurisdiction in which the lawyer is not admitted.[71] Maintaining a blog or social networking profile may expose lawyers to unauthorized practice rules in many jurisdictions.[72] At least one commentator has noted that, where a law firm "maintains an interactive website and purposefully avails itself of a jurisdiction, it is reasonable to conclude that the law firm will be subject to the ethical rules applicable in such jurisdiction."[73]

Although courts have not found that a website alone constitutes the practice of law, at least two cases indicate that maintaining an online presence can contribute to liability.[74] In Maine, a lawyer who maintained an office and website holding himself out as able to provide legal services, although not licensed there, was held to have engaged in unauthorized practice of law.[75] In California, a court held that, although not physically present, an out-of-state lawyer's use of "telephone, fax, computer, or other modern technological means" could constitute unauthorized practice of law.[76] Although the court declined to rule that a lawyer's virtual presence in California automatically amounted to practicing law, the holding is a reminder that courts pay attention to an online presence.[77] A prudent lawyer should research jurisdictional restrictions on cross-border practice before creating websites or profiles on the Internet.[78]

Advertising

In *Bates v. State Bar of Arizona*,[79] the Supreme Court ruled that, to preserve the "free flow" of commercial information, states could not wholly ban lawyer advertising, but could regulate false, deceptive or misleading advertisements.[80] Consistent with that ruling, ABA Model Rule 7.2 permits a lawyer to advertise services through written, recorded or electronic communications, "including public media."[81] Comment 2 to the Rule permits public dissemination of information concerning: "a lawyer's name or firm name; address and telephone number; the

kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance." Various states, applying these general rules, have prepared more detailed guidelines for appropriate attorney advertising.[82] A host of ethics opinions, moreover, have attempted to apply these guidelines to specific aspects of lawyering in cyberspace.[83] The guidelines do not deal specifically with social networking as a means of advertisement.[84] Nevertheless, certain essential principles appear in the guidelines and related opinions.

"A lawyer who posts a profile on a social networking site, for example, identifying the individual as a lawyer, probably does not invoke the interactivity and immediacy of a solicitation (although such a posting may be considered an advertisement)."

Law firm websites may be labeled a form of advertising.[85] In general, lawyers may use websites and blogs to advertise their services.[86] They may also use profiles on social networking sites.[87] Such communications over the internet may be subject to state regulations on advertising.[88]

Some states require submission of all attorney advertisements to a state bar committee for approval.[89] Yet, because social networking profiles and posts can be (and often are) updated daily, materials submitted may not reflect current content.[90] At very least, lawyers should keep periodic records (such as hard copies of website "screen shots" (in case state regulators ask to review their advertising.[91]

Lawyers must also take care regarding the types of information they post on websites and social networking sites. Testimonials about a lawyer's accomplishments may be prohibited, absent an express disclaimer.[92] Excessive testimonials from "friends," moreover, could in some instances create unjustified expectations about the outcome a lawyer can obtain for other clients.[93]

Solicitation

Rule 7.3 provides that "a lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."[94] Under Rule 7.3, a lawyer may not solicit professional employment unless the person contacted is a lawyer, or has a familial, personal, or prior professional relationship with the lawyer.[95] Further, a lawyer may not solicit employment from a prospective client by electronic communication if the prospective client has made known to the lawyer a desire not to be solicited by the lawyer or the solicitation involves coercion, duress or harassment.[96] Comment 1 to the Rule notes the "potential for abuse" in such solicitations.[97]

The question becomes whether social networking communications constitute "real-time electronic contacts" or merely "general advertising," which is not prohibited as solicitation.[98] At one end of the spectrum, passive web-sites and non-interactive blogs (although perhaps advertising) generally do not constitute prohibited solicitation.[99] At the other end, "chat room" communications, wherein lawyers may importune potential clients to hire them, just as they might through a telephone call or in person, generally are considered to be solicitations.[100] Although a chat room discussion "provides less opportunity for an attorney to pressure or coerce a potential client" than telephone or in-person solicitations, "real-time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing."[101]

The degree of "interactivity and immediacy" of social networking tools can vary greatly.[102] A lawyer who posts a profile on a social networking site, for example, identifying the individual as a lawyer, probably does not invoke the interactivity and immediacy of a solicitation (although such a posting may be considered an advertisement).[103] The Twitter system (and its many clones), by contrast, essentially amounts to broadcast emails, to recipients who agree to "follow" a particular Twitter broadcaster.[104] The choice to follow a particular "friend" is the user's alone, although often threads of conversations with other "friends of friends" can produce new connections. The messages, moreover, are extremely short, and do not typically invite an immediate response.[105]

Other forms of social networking are designed to deepen relationships with family, friends and acquaintances, through shared interactions.[106] A profile (or "wall") on a social networking web-site, for example, typically offers participants the opportunity to post photographs and comments surrounding a shared interest. Users may connect to specific groups, already formed within the social network, and generally interact freely after admission to the group.[107] The immediacy of the interactions, however, depends on the individual users.[108]

The degree to which users may already have "personal" relationships (within the meaning of Rule 7.3), moreover, may vary greatly. A "friend of a friend," or a stranger encountered in a networking user group probably could not qualify as a "personal" relationship, sufficient to permit a solicitation. But many other social networking users connect precisely because they already have

long-standing relationships. With such relationships, solicitation (or referrals) may be entirely appropriate (and appreciated).[109] Thus, no flat prohibition or approval of any particular type of social networking solicitation may be possible.[110]

Rule 7.3 requires that any electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services shall include the words "Advertising Material" at the beginning and ending of any electronic communication, unless the recipient of the communication has already contacted the lawyer or has a prior relationship with the lawyer.[111] Solicitations on websites, blogs and social networking sites, if made, must be clearly marked in accordance with this requirement.[112]

Honesty In Communications

Rule 7.1 prohibits lawyers from making "a false or misleading communication about the lawyer or the lawyer's services." Under the Rule, a communication is false or misleading "if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." A lawyer's website, blog or social networking profile necessarily concerns the lawyer (and his / her services), and such information platforms must be true and not misleading.[113] A law firm cannot, for example, imply (by use of the word "bar" in its domain name) that it is associated with a bar organization; nor may it use "org" as a top level suffix, which might imply that it is a not-for-profit organization.[114]

Professional qualifications listed on social networking sites should correspond to official records and descriptions on firm websites.[115] Lawyers not yet admitted to a state bar should so note in their user profiles and other materials on social networking sites.

Rule 8.4, more generally, prohibits lawyers from engaging in any conduct that involves "any dishonesty, fraud, deceit or misrepresentation." Applying that Rule, a Philadelphia bar ethics committee held that a lawyer could not use a third party to "friend" an adverse witness, in an attempt to find possibly impeaching evidence concerning the witness, on a social networking site.[116] The committee concluded that such communication was "deceptive," because it omitted the material fact of connection between the third party and the lawyer, and the intent to gain information for purposes of litigation.[117]

Finally, under Rule 3.6(a), trial lawyers cannot make extrajudicial statements that will be "disseminated by means of public communication," where such communications may have a "substantial likelihood of materially prejudicing" a legal proceeding. Attorneys who blog about ongoing litigation might, therefore, be subject to professional discipline.[118]

Conclusion

- In 2003, the American Bar Association's Law Practice Management "eLawyering Task Force" created a set of "Best Practice Guidelines For Legal Information Web Site Providers."[119] The Guidelines, among other things, suggested that websites should:
- "[P]rovide full and accurate information on the identity and contact details of the provider of the site;"
- "[I]nclude information about the dates on which the substantive content on [the site] was prepared or last reviewed;"
- "[A]void misleading users about the jurisdiction to which the site's content relates;" and "[G]ive users conspicuous notice that legal information does not constitute legal advice."

Today, just a few years later, these general ABA Guidelines remain apt. But the addition of social networking tools to the array of communications methods that lawyers use every day has already made these Guidelines incomplete. With these new networking tools, the practice of law is changing, and rapidly.[120] Social networking requires concerted thinking about adaptation of legal ethics rules to a dynamic world, where interactions between attorneys, clients and communities of social network users can become quite complicated. In this dynamic environment, the best approach for the responsible lawyer is to become educated on new technologies and new methods of practice, to remain alert to potential ethical issues involved in the use of these technologies and methods of practice, and to encourage candid discussion, among lawyers, clients, IT specialists and law firm managers about the best means both to serve client interests, and to uphold the high standards of the profession.[121]

Endnotes

1. For an analysis of the strengths and limitations of various social networking tools, *see* G.G. Filisko, *Social Promotion—Social Network Sites Work For You, But Only If You Work At Them*, A.B.A.J. (Dec. 2008), ,available at *www.abajournal.com*; *see also* Robert Ambrogi, *Why Bother With Online Networking?*, *www.legaline.com* (Mar. 31, 2009) (summarizing potential value of social networking to lawyers); Larry Bodine, *Twitter Not Effective For Law Firm Marketing*, *www.lawmarketing.com* (May 23, 2009); Adrian Dayton, *Social Media For Lawyers: Twitter Edition* (2009) (summarizing use of social networking tools by lawyers).
2. Paul Lippe, *Would Henry V Have Used Web 2.0 At Agincourt? Pt. II*, *www.law.com* (Feb. 9, 2009); *see also* Paul Lippe, *The Role Of Social Networking In Law*, *www.law.com* (July 30, 2009) ("For my money, social networking will prove to be a powerful tool in law, because its structure reflects the distributed nature of the legal profession, so it has the potential to help improve quality and reduce costs at a time when these are more at the top of clients' priorities than ever before.").
3. At its recent annual meeting, the ABA featured a session on "Social Networks, Blawgs and Podcasts: Business Development Tools for

the Internet Age." *See* ABA News Release, July 20, 2009, *www.abanet.org*. For a summary of the discussion, *see* Leora Maccabee, *Legal Marketing Ethics In A Web 2.0 World*, *www.lawyerist.com* (July 17, 2009).

4. Reginald Davis, *Getting Personal: Social Networks Appeal, But Not To The Firm*, A.B.A.J., available at www.abajournal.com (Aug. 2009). Another recent survey reported that "nearly 50 percent of lawyers are members of online social networks and more than 40 percent of attorneys believe professional networking has the potential to change the business and practice of law over the next five years." Leader Networks, *Networks For Counsel: Online Networking In The Legal Community* (June 2008), available at *www.leadernetworks.com*. More generally, some surveys suggests that in excess of a billion users, world-wide, are connected to one or more social networking sites. *See* Christian Kreutz, *The Next Billion—The Rise Of Social Network Site In Developing Countries*, www.web24dev.net (June 19, 2009).

5. The development of Web 2.0 applications, coupled with the expansion of wi-fi / mobile communications, may mean that the benefits of "Moore's Law" (regarding expansion of computer power) will continue to yield new services for years to come. *See* Om Malik, *Moore's Law Reconsidered*, Business 2.0 Mag., Apr. 3, 2007, *www.cnn.com* ("while the PC itself might be disappearing, mobile devices such as the iPhone are the new beneficiaries of Moore's Law").

6. The American Bar Association recently announced formation of a "Commission on Ethics 20 / 20," with the recognition: "Technological advances and globalization have changed our profession in ways not yet reflected in our ethics codes and regulatory structures. Technologies such as e-mail, the Internet and smartphones are transforming the way we practice law and our relationships with clients, just as they have compressed our world and expanded international business opportunities for our clients." *See* ABA News Release, Aug. 4, 2009, *www.abanet.org*.

7. Micah U. Buchdahl, *Facing Facebook And Tweeting With Twitter: GC's Come Up Against Social Networking Sites, Like It Or Not*, GC Mid-Atlantic Magazine, available at *www.gcmidatlantic.com* (June 2009).

8. This Article does not address the separate questions of propriety that may arise from use of social networking tools by the judiciary. *See generally* Miriam Rozen, *Social Networks Help Judges Do Their Duty*, *www.law.com* (Aug. 25, 2009); Debra Cassens Weiss, *Dozens Of Judges Are Getting LinkedIn*, *www.abajournal.com* (Aug. 20, 2009); *Judges All Atwitter Over New Media*, *www.abanow.org* (Aug. 2009).

9. "The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests." *Doe v. MySpace, Inc.*, 474 F. Supp.2d 843, 845 (W.D. Tex. 2007).

10. *See generally* Penny Edwards & Lee Bryant, *Social Networking For the Legal Profession* 7 (2009).

11. *See* Doug Cornelius, *The State Of Legal Social Networking*, *www.lawmarketing.com* (July 20, 2009) (listing available social networking sites meant for use by lawyers).

12. The Journal of Computer-Mediated Communication recently dedicated an entire issue to the subject of social networks, their history and potential influence. *See* Dana N. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, And Scholarship*, 13 J. of Computer-Mediated Comm. 210 (Dec. 2007).

13. *See* Michael Jones, Adam Schuckman & Kelly Watson, *The Ethics Of Pre-Employment Screening Through The Use Of The Internet (2009)*, *www.ethicapublishing.com*.

14. *See* Leyla Bilge, Thorsten Strufe, Davide Balzarotti & Engin Kirda, *All Your Contacts Belong To Us: Automated Identity Theft Attacks On Social Networks*, *www.2009.org* (Apr. 2009).

15. *See* Janis Wolak, David Finkethor, Kimberly J. Mitchell & Michele L. Ybarra, *Online "Predators" And Their Victims: Myths, Realities, And Implications For Prevention And Treatment*, 63 Am. Psychologist 111 (Mar. 2008), available at *www.apa.org/journals*.

16. *See* Raghuram Iyengar, Sangman Han & Sunil Gupta, *Do Friends Influence Purchases In A Social Network?*, *www.hbs.edu/research* (Feb. 26, 2009); Jure Leskovec, Lada Adamic & Bernardo A. Huberman, *The Dynamics Of Viral Marketing*, ACM Transactions On The Web 1 (May 2007), available at *www.personal.umich.edu*.

17. See ABA Center for Professional Responsibility, History: The Development Of The ABA Model Rules Of Professional Conduct, 1982-2005 (2006); see also ABA Model Rules Of Professional Conduct (Pre-2002), History, www.law.cornell.edu / ethics (summarizing significant changes in individual rules).

18. States have not uniformly adopted the Model Rules. Instead, many states have implemented modifications of the Rules, to suit their particular needs. *See* ABA / BNA, *Lawyers Manual On Professional Conduct §* 81:551 (2007). Recently, for example, Kentucky, New York and Wisconsin adopted versions of the Rules, with modifications. *See* Hinshaw & Culbertson LLP, *Kentucky Overhauls Ethical Rules*, *www.martindale.com* (July 30, 2009) ("Although Kentucky has generally adopted the Model Rules, its rules still contain many unique provisions, some of which have yet to be interpreted."); Joel Stashenko, *New York Adopts New Conduct Rules Aligned With ABA Model*, *www.law.com* (Dec. 17, 2008) (New York version of Rules represents "fine tuning" of state's prior rules); Legal Ethics Forum, *Wisconsin Adopts Slightly Modified ABA Model Rules 3.8(g)-(h)*, *www.legalethicsforum.com* (July 8, 2009).

19. *See generally* Steven C. Bennett, *Has Information Technology Raised The Level Of Professional Competency?*, *E-Discovery Standard (2006)*, *available at www.lexisnexis.com/litigation-news*.

20. One excellent source of information on new technologies is the ABA Legal Technology Resource Center. *See www.abanet.org/tech/ltrc*.

21. This issue has arisen recently in the context of "outsourcing" of legal services to vendors and part-time professionals. In that context, recent ethics opinions stress that the principal counsel involved in a matter retain ultimate responsibility for supervision of all work. *See* Steven C. Bennett, *The Ethics Of Legal Outsourcing*, 36 N. Ky. L. Rev. 479 (2009).

22. *See* Doug Cornelius, *Online Social Networking: Is It A Productivity Bust Or Boon For Law Firms?*, 35 Law Practice Mgmt. 28 (Mar. 2009), available at *www.abanet.org/lpm/magazine* (misuses of social networking technology "is not a technology problem—it is a people problem").

23. Exceptions to the confidentiality requirement appear in Rule 1.6(b): "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or a court order."

24. *See* ABA Formal Opinion 99-413, available at *www.abanet.org*.

25. *See generally* Christopher J. Wesser, *Ethical Considerations And The Use Of E-Mail*, 49 DRI For The Defense 68 (Feb. 2007) (noting that counsel must observe "duty to prevent confidential

communications from being misdirected or otherwise revealed to third-parties").

26. *See* ABA Formal Op. 99-413; *see also* D.C. Op. 281 (1998); Ill. Op. 96-10 (1997); Mass. Op. 00-1 (2000); N.Y. Op. 709 (1998).

27. J.T. Westermeier, *Ethics And The Internet*, 17 Geo. J. Legal Ethics 267, 308 (2004).

28. Rule 1.6, Comment 17; *see* Frederick L. Whitmer & Benjamin D. Goldberg, *Ethical Issues Of The 21st Century*, 14 Law Firm Partnership & Benefits Rep. 1 (Oct. 2008) (practitioners should "assure themselves about the safeguards present" in their communication systems).

29. *See generally* Cydney Tune & Marley Degner, *Blogging And Social Networking: Current Legal Issues*, 962 PLI / PAT 113, 130 (Mar.-Apr. 2009) ("courts are generally unwilling to recognize a reasonable expectation of privacy in material that people both willingly post on the Internet and take no steps to limit access to or otherwise protect").

30. *See* Robert F. Chapski, *Embracing New Technologies And Avoiding Its Pitfalls*, 50 DRI For The Defense 60 (Oct. 2008) (contacts are "often easily discerned by navigating links to the profile pages of a collection of friends in a social network").

31. *See* Westermeier, *supra*.

32. *See* Thomas R. McLean, *EMR Metadata Uses And E-Discovery*, 18 Annals Health L. 75, 104 (2009) (after registration, any material that passes through networking website "may no longer be considered confidential because of the grant of information access that was given to the site owner").

33. *See* Rule 1.6, Comment 16.

34. *See Scott v. Beth Israel Medical Ctr.*, 2007 WL 3053351 (N.Y. Sup. Ct. Oct. 17, 2007) (emails to counsel not privileged, where communicated through computers owned by hospital); *Long v. Marubeni Am. Corp.*, 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006) (employee emails not privileged, due to employer's clear email use policy); *see also In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 256 (Bankr. S.D.N.Y. 2005) (attorney-client privilege in email communication depends on company's email policies regarding use and monitoring, company access to email system, and employee notification of policy); *but see Stengart v. Loving Care Agency*, A-16-09 (N.J. Sup. Ct.) (granting review of appellate decision holding that attorney-client privilege was preserved, despite fact that employee emailed counsel from employer's computer system).

35. *See* Catherine Sanders Reach, *Enjoy Email Responsibly*, 44 Ark. Lawyer 30 (Summer 2009) (lawyer should "consult the client" regarding confidentiality issues, especially where "highly sensitive" information is involved) (citing ABA Opinion).

36. Restatement (Third) of the Law Governing Lawyers § 14 (2000).

37. *See, e.g., Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980) (attorney-client relationship, sufficient to support malpractice claim, established where lawyer told prospective client she did not have a case, but would discuss matter with his partner, but never called); *Matter of Petrie*, 742 P.2d 796 (Ariz. 1987) (attorney-client relationship may be implied from conduct of the parties).

38. James McCauley, *Legal Ethics In Cyberspace*, Virginia Law Register (May 2000) at 3 ("Even where no fee is paid and no agreement to undertake representation is entered," a lawyer-client relationship may be "presumed" as a result of an interaction. "A lawyer who casually gives legal advice to or obtains confidential information from a friend or acquaintance in a casual, social setting such as a cocktail party may have inadvertently created an attorney-client relationship."); *but see Knigge v. Corvese*, 2001 U.S. Dist. Lexis 10254 (S.D.N.Y. 2001) (party's "unilateral" belief that he is represented by counsel "does not confer upon him the status of client unless there is a reasonable basis for his belief").

39. Rule 1.6(b) permits revelation of confidential information, for specific, limited purposes. Rule 1.9 applies the same rule to former clients.

40. *See* Melissa Blades, *Virtual Ethics For A New Age: The Internet And The Ethical Lawyer*, 17 Geo. J. Legal Ethics 637, 647 (2003-2004) ("Because the Model Rules contemplate a discussion between client and lawyer before the attorney-client relationship can attach, unsolicited emails with detailed information about the client most likely do not create such a relationship.").

41. David Hricik, To Whom it May Concern: Using Disclaimers To Avoid Disqualification By Receipt Of Unsolicited E-mail From Prospective Clients, 16 Prof. Lawyer 1 (2005).

42. Assoc. of the Bar of the City of New York, Formal Op. 1998-2, *www.abcny.org*; *see generally* Anthony E. Davis & David J. Elkanich, *A Lawyer's Guide To Managing E-Lawyering Risks*, at 5 (2006), *www.chubb.com* ("The greatest risk to lawyers and law firms with an Internet presence is that they may not always know who their clients are….[Web-site interactions] pose great risks in that attorney-client relationships may be created before any evaluation for appropriateness, such as checking for conflicts of interest, has been completed.").

43. *See* Vermont Bar Op. 97-05, *www.vtbar.org* (web-site not "directed to a specific recipient" is similar to a telephone book or yellow pages); Illinois State Bar Op. 96-10, *www.isba.org* (same).

44. *See* Micah Buchdahl, *Potential Ethical Issues And Ways To Avoid Pitfalls For The Law Firm Web Site*, Wisconsin B.J. (2003), available at *www.internetmarketingattorney.com*. One state ethics opinion, however, suggests that lawyers "cannot avoid" some risk associated with the availability of an email system that allows potential clients to contact a law firm. *See* Mo. Informal Advisory Op. 20000179, *www.mobar.org* (attorney "can reduce these risks with a disclaimer," but "cannot avoid them").

45. G.M. Filisko, Social Promotion: Social Network Sites Work For You, But Only If You Work At Them, 94 A.B.A.J. 48 (2008).

46. *See* Dean R. Dietrich, *Online Chat: Be Careful What You Say*, 82 Wisconsin Lawyer (May 2009), *www.wisbar.org* ("Lawyers should limit their discussion to explaining general principles or trends in the law or laying out the majority and minority viewpoints on particular issues. Lawyers . . . should advise individuals to obtain legal counsel to determine what law would be applicable to their unique circumstances and indicate that the discussion…should not substitute for specific legal advice.").

47. *See* Ariz. State Bar Ass'n Ethics Op. 97-04 (1997) ("lawyers should not answer specific legal questions from lay people through the Internet unless the question presented is of a general nature and the advice given is not fact-specific"); N.Y. City Ethics Op. 1998-2 (1998) ("A lawyer…should carefully refrain from…a general solution applicable to all apparently similar individual problems since slight changes in fact situations may require a material variance in the applicable advice[.]").

48. D.C. Bar Legal Ethics Comm., Op. 316, *www.dcbar.org* (emphasis added).

49. *See id.* (permissible communications include "the kind of information one might give in a speech or newspaper article").

50. The following is one example of a disclaimer: "None of the information or materials posted in this weblog are intended to constitute legal advice, nor can we guarantee the accuracy of posted information, especially as to each individual situation. The views or opinions expressed in this page are strictly those of the weblog's author." *See* Divorce Net, www.divorcenet.com.

51. The following is one example of a "click wrap" acknowledgement: "Email addresses of our attorneys are not provided as a means for prospective clients to contact our firm or to submit information to us. By clicking 'accept,' you acknowledge that we have no obligation to maintain the confidentiality of any information you submit to us unless we have already agreed to represent you or we

later agree to do so." *See* David Hricik, *Disclaimers Regarding Email On Law Firm Websites*, *www.hricik.com* (Nov. 2001).

52. *See* Nicole Lindquist, *Ethical Duties To Prospective Clients Who Send Unsolicited Emails*, 5 Shidler J. of Law, Commerce & Tech. 8 (2008) (noting that online disclaimers "present a unique challenge" because viewers can easily ignore, skip or misunderstand them, and suggesting desirability of manifestation of "some sort of assent").

53. *See* Steven C. Bennett, *Legal Implications Of Twitter Social Networking Technology*, N.Y.S.B.A.J., May 2009 (summarizing technology, which limits number of characters in a message).

54. *Barton v. U.S. District Court for the Central District of California*, 410 F.3d 1104, 1105 (9th Cir. 2005).

55. Where a conflict is apparent from the outset of an encounter with a prospective client, the lawyer must decline the representation. *See* Rule 1.7, Comment 3 ("A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client[.]").

56. *See* Rule 1.7(b)(1)-(4).

57. *See* Rule 1.7(b)(3).

58. *See* Rule 1.10(a) (no lawyer in a law firm may represent a client "when any one of them practicing alone would be prohibited from doing so"). The precise application of this Rule is a matter of some subtlety. Law firms may, for example, build "Chinese Walls," to avoid potential conflicts due to imputed knowledge of the affairs of two clients in potential conflict. *See* Robert E. Ware, *The Conflict Virus*, Cleveland Bar. J. 16 (Jan. 2005) (outlining requirements for an "ethical screen" or "Chinese wall").

59. Comment 3 to Rule 1.7 suggests: "To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved." The effectiveness of even sophisticated conflict clearance systems has been questioned by some commentators. *See generally* Susan P. Shapiro, *Tangled Loyalties: Conflict Of Interest In Legal Practice* 198 (2002) (suggesting that lawyers may develop conflicts in subtle ways, including social relationships).

60. *See* William Freivogel, *Legal Ethics And Technology* at 1 (July 2002), available at *www.abanet.org/buslaww/newsletter* ("Taking positions on legal issues online could undermine the position a lawyer is taking, or may have to take, on behalf of a client.").

61. *See* Noreen L. Slank, *Positional Conflicts: Is It Ethical To Simultaneously Represent Clients With Opposing Legal Positions?*, Mich. Bar. J. 15 (May 2002), www.michbar.org/journal (positional conflicts "have generally been tolerated, except under the most sensitive of ethical barometers;" lawyers can "speak with as many voices as there are clients with positions to advance").

62. *See* Professional Ethics Commission of the Board of Overseers of the [Maine] Bar, Op. 155 (1997), *www.mebaroverseers.org* (such an "issue conflict" is not a "conflict of interest") (but noting duty of lawyer to employ "best judgment" to ensure that advocacy in a different case will not "impair her effectiveness"); D.C. Bar Op. 265 (1996), *www.dcbar.org* ("A traditional notion in the law of legal ethics holds that there is nothing unseemly about a lawyer's taking directly opposing views in different cases so long as the lawyer does not do so simultaneously.") (prosecutor may become criminal defense lawyer after public service; lawyer for plaintiff may represent defendants in other cases).

63. In its Formal Opinion 2007-177, the Oregon Bar noted that there is "no way for everyone in a multilawyer firm to know ever current or potential issue that may arise in every case the firm is handling." Further, "there is no safeguard that a lawyer or firm can reasonably take to avoid issue conflicts in the same manner that a lawyer or firm can avoid traditional conflicts by keeping lists of the names of current and former clients." The Rules, moreover, "are intended to be construed in a practicable manner that does not create unavoidable traps[.]" In light of these concerns, the Opinion concluded, "it would be inappropriate to hold that, on pain of discipline, all lawyers at a firm are chargeable with the full 'issue conflict' knowledge of every other lawyer at the firm." Rather, "[a]ctual knowledge, or at least negligence in not knowing [about the positional conflict] must first be proved." Or. Formal Op. 2007-177, *www.osbarg.org*.

64. *See* David Luban, *Stimson's Attack On The Gitmo Lawyers*, *www.balkin.blogspot.com* (Jan. 14, 2007) (noting circumstances of "business conflicts," where law firm seeks to avoid "annoying a client" with its positions in another matter).

65. *See* Arthur D. Burger, *Spotting Firm Conflicts*, Legal Times, July 16, 2001 (suggesting that "a human eye and brain are clearly needed" to spot potential positional conflicts).

66. *See generally* Stephen Gillers, *Regulation Of Lawyers* (2001) (summarizing operation and history of unauthorized practice rules).

67. *See* Geoffrey C. Hazard & Angelo Dondi, *Legal Ethics: A Comparative Study* 273 (2004) (unauthorized practice rules have been "especially vexed" in the United States).

68. *See* Richard L. Marcus, *The Electronic Lawyer*, 58 DePaul L. Rev. 263, 291 (2009) ("Law firms increasingly provide service across multiple venues using lawyers from multiple places to provide those services.").

69. Under the new ABA Rule, a lawyer may practice law in jurisdictions where he or she is not admitted if: the lawyer associates with local counsel, if the work is related to a litigation or ADR proceeding in which the lawyer is appearing; if the client is the lawyer's employer; or if federal law permits the representation. *See* Rule 5.5(c)-(d).

70. *See, e.g.*, S.C. Bar Ethics Advisory Comm., Advisory Op. 94-27 (1996) (lawyer should "clearly identify geographic limitations of the lawyer's practice, so that it is clear that he may not practice law except in those states in which he is admitted to practice"); Cal. Bar Op. 2001-155 (recommending that attorneys explain where they are licensed to practice law, where they maintain offices, and the courts in which they regularly appear).

71. Rule 5.5(b)(1). Rule 5.5(c) permits a lawyer to practice law, on a temporary basis and in limited circumstances, in jurisdictions in which the lawyer is not formally admitted. Similarly, Rule 5.5(d) permits a lawyer licensed in one jurisdiction to practice, on either a temporary or continuous basis, in another jurisdiction if the lawyer is providing legal services solely for the lawyer's employer or its affiliates, or is engaging in activities authorized by federal or other law.

72. *See* Louise L. Hill, *Lawyer Communications On The Internet: Beginning The Millenium With Disparate Standards*, 75 Wash. L. Rev. 785 (2000) (suggesting need for "national standards," rather than individual state rules, due to technological changes that render state-by-state regulation of attorney communications "ineffective and obsolete"); Daniel Backer, *Choice Of Law In Online Legal Ethics: Changing A Vague Standard For Attorney Advertising On The Internet*, 70 Fordham L. Rev. 2409 (2002) (lawyers engaging clients via the internet may be subject to conflicting rules).

73. Westermeier, *supra*, at 288.

74. For a discussion of recent decisions, *see id.* at 284-288.

75. Maine Ethics Op. 198 (2005).

76. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998).

77. *See also Florida Bar v. Kaiser*, 397 So.2d 1132 (Fla. 1981) (New York lawyer engaged in unauthorized practice of law when firm advertised in Miami telephone books and on television, creating impression that lawyer was licensed to practice in Florida).

78. N.C. Ethics Op. 10 (2006).

79. 433 U.S. 350 (1977). The Court in *Bates* noted the possibility the lawyer advertising might not provide a consumer with all of the relevant information needed to make an informed decision about counsel. Nevertheless, the Court observed, "[t]he alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers." *Id.* at 374.

80. Beyond "commercial speech," lawyers also have rights to express their beliefs or participate in political discourse. Distinguishing between such forms of speech may be difficult, in the context of social networking. *See* Will Hornsby, *Lawyers Shouldn't Have To Guess On Ethics Of Online Marketing*, 2008 WLNR 25703029 (Aug. 18, 2008) (noting that regulation in this area amounts to "unchartered territory").

81. *See* Rule 7.2, Comment 3 ("electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule").

82. *See Differences Between State Advertising And Solicitation Rules And The ABA Model Rules Of Professional Conduct* (August 1, 2009), www.abanet.org (surveying state rules); *see also Five Tips For Lawyer Advertising: From Billboards To Blogs (2009), www.abanet.org* (listing principal limitations in state advertising rules).

83. *See, e.g.*, Ala. Ethics Op. RO-96-07 (1996); Ariz. Ethics Op. 97-04 (1997); Cal. Ethics Op. 2001-155 (n.d.); Cincinnati Ethics Op. 96-97-01 (n.d.); Haw. Ethics Op. 41 (2001); Ill. Ethics Op. 96-10 (1997); Iowa Ethics Op. 00-1 (2000); Md. Ethics Op. 97-26 (1997); Mich. Ethics Op. RI-276 (1996); Mo. Ethics Op. 970161 (1997); N.C. Ethics Op. RPC 239 (1996); N.J. Advertising Ethics Op. 36 (2005); N.Y. County Ethics Op. 721 (1997); Pa. Ethics Op. 96-17 (1996); S.C. Ethics Op. 97-08 (1997); Utah Ethics Op. 97-10 (1997); Vt. Ethics Op. 97-5 (1997).

84. Comment 3 to Rule 7.2, however, recognizes that "electronic media, such as the Internet, can be an important source of information about legal services[.]"

85. *See* Susan Corts Hill, *Living In A Virtual World: Ethical Considerations For Attorneys Recruiting New Clients In Online Virtual Communities*, 21 Geo. J. Legal Ethics 753, 764 n.21 (2008) (web-sites "widely considered" to be a form of advertising) (citing ethics opinions); J.T. Westermeir, *Ethical Issues For Lawyers On The Internet*, 6 Richmond J. of L. & Tech. Para. 5 (1999) ("Many jurisdictions have determined that the advertising rules adopted by local bar associations apply to websites.").

86. Frederick L. Whitmer & Benjamin D. Goldberg, *E-Mail, E-Discovery, Blogs And Social Networking*, 14 Law Firm Partnership & Benefits Rep. 3 (Nov. 2008); Lawyers also may advertise via the Internet, provided the advertisements comply with ethics rules. *See, e.g.*, Ala. Ethics Op. RO-96-07 (1996); Ariz. Ethics Op. 97-04 (1997); Cal. Ethics Op. 2001-155; Cincinnati Ethics Op. 96-97-01; Haw. Ethics Op. 41 (2001); Ill. Ethics Op. 96-10 (1997); Iowa Ethics Op. 00-1 (2000); Md. Ethics Op. 97-26 (1997); Mich. Ethics Op. RI-276 (1996); Mo. Ethics Op. 970161 (1997); N.C. Ethics Op. RPC 239 (1996); N.J. Advertising Ethics Op. 36 (2005); N.Y. County Ethics Op. 721 (1997); Pa. Ethics Op. 96-17 (1996); S.C. Ethics Op. 97-08 (1997); Utah Ethics Op. 97-10 (1997); Vt. Ethics Op. 97-5 (1997).

87. Whitmer & Goldberg, *supra* ("the prudent approach is to conclude that the [advertising] rule applies to social network sites and blogs because much of the same information [as on web-sites] is often included on both. Indeed, it would appear imprudent to conclude otherwise)."

88. Some commentators suggest that the advertising rules "presumptively" govern lawyer communications on blogs and social networking sites. *See* Sarah Hale, *Lawyers At The Keyboard: Is Blogging Advertising, And If So, How Should It Be Regulated?*, 20 Geo. J. Legal Ethics 669, 671 (2007) (Rule 7.2 was "intended to cover any new public-communication technology, including blogs").

89. *See* Charles F. Luce, *Ethics In Attorney Advertising And Solicitation*, *www.mgovg.com* (1997) (noting variety of advertising regulations, and suggesting: "The conservative approach is for those lawyers licensed in more than one state to follow the advertising rules of the most restrictive state in which they are licensed.")

90. *See* C.C. Holland, *Mind The Ethics Of Online Networking*, *www.law.com* (Nov. 6, 2007) (pre-approval of content may be "just about impossible" where social networking materials "can reflect daily or even real-time changes that are outside the user's control").

91. Arizona requires attorneys to retain copies of websites when they appeared in a retrievable format. Massachusetts requires attorneys to keep copies of the content of websites for two years. New York and Virginia require attorneys to keep a copy of the website for at least one year. North Carolina requires copies of the web pages to be retained for two years along with notations of when the pages were used. For a list of state requirements, see *www.abanet.org/tech/ltrc/research/ethics/adsstates.*

92. *See* Holland, *supra.*

93. *See* Will Hornsby, *When Testimonials Meet Tweets: Thoughts On The Ethics Of Web 2.0*, 35 ABA Law Prac. 37 (Jan./Feb. 2009).

94. *See* Ronald Rotunda & John Dzienkowski, *The Lawyer's Deskbook On Professional Responsibility* Sec. 7.3-1 at 1146 (2009) (background and purpose of solicitation ban).

95. Rule 7.3(a).

96. Rule 7.3(b).

97. *See* Rule 7.3, Comment 1 ("The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching."). In-person solicitations, moreover, are more difficult to record, in order to ensure that the communications made were not false or misleading. *See* Christopher Hurld, *Untangling The Wicked Web: The Marketing Of Legal Services On The Internet, And The Model Rules*, 17 Geo. J. Legal Ethics 827, 841 (2004).

98. *See* Rule 7.3, Comment 3 ("The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person or other real-time communications, will help to ensure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of direct in-person or other real-time communication between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.").

99. *See* Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Op. 1998-2 (addressing law firm internet web-sites), *www.abcny.org*; Joel Michael Schwarz, *Practicing Law Over The Internet*, 14 Harv. J. of Law & Tech. 657, 669 (2001) (suggesting "sliding scale" standard to determine whether web-site constitutes solicitation, and noting that "merely hosting a passive web-site" should not constitute solicitation).

100. *See* The State Bar Of California, Standing Committee On Professional Responsibility and Conduct, Formal Opinion No. 2004-166, *www.calbar.ca.gov* (attorney communication with potential client in mass-disaster victim chat room prohibited); Virginia State Bar A-0110, *www.vsb.org* (April 14, 1998) (communication in "real time" chat room falls under restrictions on solicitation); Darren Franklin, *Hanging A Shingle On The Information Superhighway*, 2001 Stanford Tech. L. Rev. 2, ¶ 10, *www.stlr.stanford.edu* ("potential for undue influence is probably greatest in legal chat rooms").

101. W. Va. Lawyer Disciplinary Bd., Legal Ethics Inquiry 98-03 (1998)

102. *See* ABA Center for Professional Responsibility, Model Rule 7.3, Reporter's Explanation Of Changes, *www.abanet.org/cpr* ("interactivity and immediacy of response in real-time electronic communications presents the same dangers as those involved in live telephone contact").

103. *See* C.C. Holland, *Mind the Ethics of Online Networking, Law.Com Legal Technology, available at www.law.com* (Nov. 6, 2007); Margaret Hensler Nicholls, *A Quagmire of Internet Ethics Law and the ABA Guidelines for Legal Website Providers*, 18 Geo. J. Legal Ethics 1021, 1028 (2005).

104. *See* Bennett, re: *Legal Implications Of Twitter, supra.*

105. *See* Educause, *7 Things You Should Know About Twitter*, *www.net.educause.edu* (July 2007) ("The experience of using Twitter has been described as walking into a room of conversations and looking for a 'hook' to decide if and when to jump in.").

106. *See* Dan Drath et al., *Never-Ending Friending* at 17 (Apr. 2007), available at *www.creative.myspace.com* ("most social networking users rely on the medium to deepen their existing relationships, whether with their favorite bands, brands, or people").

107. *See* Alison Kitchens, *Learn About The Basics Of Social Networking, www.themountaineer.com* (July 26, 2009) (social networking wall "is similar to a bulletin board where users can type a message on a friend's wall that anyone who looks at his or her page can read"); Monica S. Flores, *20 Tips For Social Networking, www.womensmedia.com* (Apr. 3, 2009) (a "group" on a social networking site is "just like a group in real life—a gathering of people interested in a particular idea, issue, or cause;" there are "thousands of different groups that have been set up for different interests").

108. One set of California commentators suggests that "[t]o the extent a lawyer makes contact with a prospective client on [a social networking] site, the advertising and solicitation rules would almost certainly apply." Paul W. Vapnek, Mark L. Tuft, Ellen R. Peck & Hon. Howard B. Wiener, *California Practice Guide: Professional Responsibility* 2:539 (2009). The question of "Internet communications and 'in person' solicitation," however, is under review in California. *See id.* at 2:541.

109. *See* Martin A. Cole, *Friends And Family*, Bench & Bar of Minn. (Feb. 2007), *www.mncourts.gov* ("Individuals who have such a relationship with the lawyer may well turn to the attorney naturally to handle their legal affairs. Thus, the need for time to reflect or seek independent advice does not seem as essential in this situation.").

110. Broadcasting of "spam" solicitations to multiple users may produce disciplinary sanctions, no matter the lack of immediacy and interactivity of the medium. *See* Tennessee Bar Association, *Actions From The Board Of Professional Responsibility*, 33 Tenn. B.J. (July / Aug. 1997), *www.tba.org/journal* (lawyer disbarred, among other things, for placing advertisement that appeared on more than 5,000 internet news groups and 10,000 e-mail lists; hearing panel held that posting was improper intrusion into the recipients' privacy); Utah State Bar Ethics Advisory Op. 02-02, *www.utahbar.org* (emails that encourage recipient to engage firm's services and extol firm's expertise are "solicitations" for purposes of ethics rules); *see generally* Matthew T. Rollins, *Examination Of The Model Rules Of Professional Conduct Pertaining To The Marketing Of Legal Services In Cyberspace*, 22 John Marshall J. of Computer & Info. Law 1 (2003) (discussing application of spam rules to lawyer advertising).

111. Rule 7.3(c).

112. For a list of state requirements, *see www.abanet.org/tech/ltrc/research/ethics/adsstates*.

113. Tune & Marley, *supra* (noting that private, personal communications need not meet standards of the Rule).

114. *See* Arizona Bar Op. 01-05, *www.myazbar.org/ethics*; *see also* Ohio Board of Commissioners on Grievances and Discipline, Ethics Op. 99-4 (June 4, 1999)), *www.sconet.state.ohio.us/BOC* ("preferable" for law firm to use its name as domain name on web-site, but other names may be used, so long as not deceptive); N.C. State Bar, 2005 Formal Ethics Op. 14, *www.ncbar.com/ethics* (domain name need not specifically identify law firm, so long as name is not otherwise misleading); Assoc. of the Bar of the City of New York, Formal Op. 2003-01, *www.abcny.org/ethics* (domain name may not imply expected results, such as "bigverdict.com" or include "puffery," such as "personalinjuryexpert.com").

115. A lawyer may also list areas of specialty. Rule 7.4(a) allows a lawyer to "communicate the fact that the lawyer does or does not practice in particular fields of law."

116. *See* Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02 (Mar. 2009), available at *www.philadelphiabar.org.*

117. Some commentators, however, suggest that such "deception" may be justified, in circumstances where essential evidence otherwise would not become available. *See* Monroe H. Freedman, *In Praise of Overzealous Representation - Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 Hofstra L. Rev. 771, 780-781 (2006); *see also* Elizabeth Stull, *Ethics Evolving With Technology*, 2009 WLNR 9278552 (May 14, 2009) (noting that some ethics opinions permit "dissemblance" when there is an "overarching public issue" being pursued, such as housing discrimination).

118. *See* Richard Raysman & Peter Brown, *How Blogging Affects Legal Proceedings*, 7 Internet L. & Strategy 1 (June 2009) (noting case where court reprimanded prosecutor for blogging about ongoing trial).

119. *www.abanet.org/elawyering/tool/practices*.

120. *See* Nicole L. Black, *The Legal Profession And Five Responses To Technology*, www.llrx.com (Aug. 22, 2009) (profession is "stuck in the middle of the process" of adjusting to technological developments); Steven C. Bennett, *Teaching Technology Skills To Lawyers*, Nat'l L.J., Jan. 16, 2006, at 13 (outlining need for technology training) .

121. This Article has not addressed the separate technical and legal questions that may surround privacy, data security, virus protection and other concerns associated with electronic communications used in the practice of law. *See generally* Justin Rebello, *Protecting Your Law Firm's Online Data*, Wisconsin L.J., Aug. 24, 2009, available at *www.wislawjournal.com*; Faith M. Heikkila, *Data Privacy In The Law Firm*, 0Mich. B.J. 33, July 2009, available at *www.michbar.org*. These kinds of concerns certainly should be accounted for in a law firm's policies and procedures. Further, certain common sense aspects of social networking, such as the avoidance of defamatory communications, may be vital elements in training lawyers and staff. *See, e.g.*, Adrianos Facchetti, *Ten Ways To Avoid Being Sued On Twitter*, *www.twitip.com* (Aug. 21, 2009) (advising, among other things, to "lay off the booze" when communicating on social networks). Finally, social networking information may be discoverable, in the event of litigation. *See Ledbetter v. Walmart Corp.*, 2009 WL 1067018 (D. Colo. Apr. 21, 2009) (ordering production of website information in response to subpoenas).

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What Do We Tell Seniors About the Tax Impact of a Surrender or Sale of a Life Insurance Contract?

By Dean S. Bress

While seniors are living longer, they are in the midst of a financial crisis that has wrought an unstable stock market and devastated home prices. Many are seeking ways to provide funds to help them insure a secure retirement. In response, some investors, seeing a profit opportunity, have banded together to meet that need by providing liquidity to those seniors willing to sell their life insurance policies. Offered the opportunity to sell their insurance policies, seniors are taking advantage of the offers with little or no concern for, or knowledge of, the income tax implications.

In response to these sales, and in order to advise accountants and others about the tax treatment to be afforded to the sale of a life insurance policy, the IRS issued Revenue Ruling 2009-13, I.R.B. 2009-21. The Ruling discussed three separate situations in an effort to provide income tax guidance to sellers of life insurance policies. At the same time, and outside of the scope of this article, was a companion release (Revenue Ruling 2009-14) which discussed how the buyer of those life insurance policies would be taxed when those policies matured or were sold to others.

Before approaching the specifics of the Ruling, a few basics are in order. Code § 61(a) defines gross income as income from all sources, including income from life insurance contracts.[1] Next, there are specific rules which deal with income received in connection an annuity, endowment or life insurance contract.[2] Generally speaking, if a policy is sold any income earned on the policy is subject to income tax before taking into consideration the basis in the contract (the net premiums or other net investments).[3] If a non-annuity amount is received on the complete surrender, redemption, or maturity of the contract, the amount received is all to be included in gross income but only to the extent that the amount received exceeds the net investment in the contract.[4]

In the first situation discussed in the Ruling, an insured cash basis taxpayer paid $64,000 in premiums for a form of permanent insurance, of which $10,000 was allocated to the insurance protection (as pure insurance), surrendered his policy to the insurance company and received $78,000 as the cash surrender value. Since the insured received $14,000 more than was paid in premiums, he had a gain of $14,000. Now, how is that gain treated—ordinary income or capital gain, or something in between? Because a life insurance contract is not treated as a capital asset under Code § 1221, any gain recognized on a surrender of the policy must be treated as ordinary income. This somewhat unexpected adverse tax result should be made known to the policy owner who is about to surrender the policy.

"Offered the opportunity to sell their insurance policies, seniors are taking advantage of the offers with little or no concern for, or knowledge of, the income tax implications."

In the next situation, the owner of the policy instead of surrendering the policy to the issuer sold the policy for $80,000 to an independent third party having no family or other connection to the policy owner. The Ruling states that in measuring a gain or loss on the sale of a life insurance contract, it is necessary to reduce the cost basis by that portion of the premiums allocated to the purchase of the insurance (as opposed to an investment). Thus the owner's adjusted basis in the insurance contract is $54,000 ($64,000 minus $10,000). Thus the owner will have a gain of $26,000 ($80,000 minus $54,000). Now, how will this gain be taxed? The Ruling goes to discuss the "substitution for ordinary income" doctrine. The doctrine may be stated in the vernacular as follows: "OK, when income is built into the value of the policy and would be recognized as ordinary income on a surrender of the policy, we are not going to allow a sale and avoid the ordinary income treatment that would come from a mere surrender of the policy. So therefore in this situation we are going to treat the gain as follows: $14,000 is ordinary income (as would be the case for a surrender) and $12,000 is long-term capital gain."

In the final situation, the owner held a level term life insurance contract. The owner had paid a monthly premium of $500 for almost 8 years having paid a total of $45,000 in premiums. In the middle of year 8, the owner sold the policy for $20,000. Since almost all of the premiums paid were for insurance, then the owner's basis in the contract for purposes of computing gain or loss was negligible. In the example given the cost of the insurance was $44,750 leaving an investment of $250. Thus on a sale of the insurance contract the owner had a gain of $19,750 ($20,000 minus $250). Because there was no cash surrender value, the substitution for ordinary income doctrine did not apply. And since the contract was a capital asset and was held for more than one year, the entire gain is treated as a long term capital gain.

It's important to impart to clients the tax ramifications since some of the results are surprising. And since most of those surprises are not favorable to the sellers of the policies, it's fair to say that one may not expect buyers of the policies to be falling all over themselves in an effort to make the tax implications known.

"[S]ince most of those surprises are not favorable to the sellers of the policies, it's fair to say that one may not expect buyers of the policies to be falling all over themselves in an effort to make the tax implications known."

Endnotes

1. Code § 61 (a).
2. Code § 72 (e).
3. Code § 72(e)(5).
4. Code § 72 (e)(5)(A).

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New York's Family Health Care Decisions Act

The Legal and Political Background, Key Provisions and Emerging Issues

By Robert N. Swidler

Introduction

New York's Family Health Care Decisions Act (FHCDA)[1] establishes the authority of a patient's family member or close friend to make health care decisions for the patient in cases where the patient lacks decisional capacity and did not leave prior instructions or appoint a health care agent. This "surrogate" decision maker would also be empowered to direct the withdrawal or withholding of life-sustaining treatment when standards set forth in the statute are satisfied.

On March 16, 2010, Governor Paterson signed the FHCDA into law at a ceremony at Albany Memorial Hospital. The key provisions became effective on June 1, 2010.[2]

1. The Legal Background

End-of-Life Decision Making

Prior to the FHCDA, the law in New York on end-of-life decision making had been relatively stable for about 25 years—stable, but in the view of many observers, also harsh and unrealistic in its approach to decision making for dying and incapable patients. The long-standing law could be summarized in three broad principles:

Principle 1. Patients who have decisional capacity have a broad right to consent to or decline treatment—even life-sustaining treatment. This principle, which has its roots in Justice Cardoza's seminal decision in *Schloendorff v. New York Hospital*,[3] was first explicitly stated by the New York State Court of Appeals decisions in *In re Storar*,[4] and reaffirmed by the Court repeatedly since then, notably in *Fosmire v. Nicoleau*.[5] While New York courts based the right on common law, in 1990 the U.S. Supreme Court, in *Cruzan v. Director, Missouri Department of Health*, found that the right of competent adults to refuse unwanted medical treatment is a liberty interest protected by the Fourteenth Amendment Due Process Clause.[6] Accordingly, in general capable patients can decline life-sustaining treatment, including artificial nutrition and hydration, without regard to their prognosis or the invasiveness of the treatment.

Principle 2. With respect to incapable patients, life-sustaining treatment can be withdrawn or withheld if there is clear and convincing evidence that the patient would want the treatment withdrawn or withheld. The Court of Appeals announced this standard in *In re Storar.*[7] In a later decision, *In re Westchester County Medical Center (O'Connor)*, the Court explained that "clear and convincing evidence" means proof that the patient made "a firm and settled commitment to the termination of life supports under the circumstances like those presented."[8] The *O'Connor* court also noted that the "ideal situation" is where the patient expressed his or her wishes in writing, such as in a living will.[9]

Principle 3. With respect to incapable patients, if there is not clear and convincing evidence that the patient would want treatment withdrawn or withheld, life-sustaining treatment is legally required to be continued or provided. This logical corollary to Principle 2 also arises from *In re Storar.* In that case, the Court refused to allow the mother of a mentally retarded man who was dying from bladder cancer to discontinue his regime of blood transfusions, because of the absence of proof of the patient's wishes.

In the years since *Storar* and *O'Connor*, the New York State Legislature approved three other principal circumstances in which life-sustaining treatment could be withdrawn or withheld:

DNR decisions. Decisions regarding the entry of a do-not-resuscitate (DNR) order can be made by a surrogate decision maker under circumstances defined in New York's DNR law.[10]

Health care agent. When a patient appoints a health care agent pursuant to New York's Health Care Proxy Law and later loses capacity, the agent can make any health care decision the patient could have made, including a decision to forgo treatment, based on a substituted judgment / best interests standard.[11]

Mentally retarded patients. Decisions to withdraw or withhold life-sustaining treatment from patients who have mental retardation or a developmental disability can be made by an Article 17-A guardian under a special state law enacted in 2002, known as the Health Care Decisions Act for Mentally Retarded Persons (HCDA).[12] Significantly, indeed remarkably, the Legislature amended the HCDA in 2007, with little controversy, to provide for the designation of a guardian without a court appointment for the purpose of making end-of-life decisions for a patient with mental retardation or a developmental disability who meets clinical criteria.

But in many end-of-life decisions involving incapable patients, the issue concerns a treatment other than resuscitation, there is no health care agent, and the patient is not mentally retarded. In such cases, the legal ability to withdraw or withhold treatment depends on whether there is "clear and convincing evidence" of the patient's wish to forgo such treatment.

Familiar Scenarios

With these legal principles as the backdrop, variations of this scenario have occurred daily in hospitals and nursing homes across New York: An elderly patient is left permanently unconscious after a stroke and is able to breathe only while on a ventilator. After a period of waiting for improvement, the physician tells the family that there is no hope of recovery, and that it would be acceptable from a medical standpoint to discontinue ventilation. The close and loving family members believe their husband and father would not want his death prolonged this way, and favor discontinuing ventilation after making him comfortable.

"Under New York law, the family had no control—life-sustaining treatment had to be continued indefinitely."

In most states, as a result of statute or caselaw, providers could honor the decision by this family. Under New York law they could not: in this instance there is no clear and convincing evidence and no health care proxy, the decision relates to ventilation, not CPR, and the patient is not mentally retarded. Accordingly, under New York law, the family had no control—life-sustaining treatment had to be continued indefinitely.

In another familiar scenario, an elderly woman who is a nursing home resident is in an advanced stage of Alzheimer's disease, and stops eating. As an interim measure, staff commences tube feeding by nasogastric (NG) tube, but recognizes that long-term tube feeding will require a surgical gastrostomy. The woman did not appoint a health care proxy or leave clear and convincing evidence of her wishes. The woman's daughters believe their mother would not want that operation, nor would she want continuous tube feeding for the short remainder of her life. They request that the NG tube be removed, and that she be given comfort care only. Again, in most states their decision could lawfully be honored. In New York, it would have been unlawful to honor their decision.

To be sure, even before the FHCDA, many hospitals and nursing homes in New York (or their medical staff) would have given effect to the decisions of these families, believing in each case that it was the humane, respectful and medically appropriate course. They might have tried to support their action by discerning "clear and convincing evidence" from the family's recollections of the patient's statements and values. Or they might have contended that the treatment was "medically futile" or "medically inappropriate," even though in each case it would likely have been effective in keeping the patient alive a while longer. But it was hard to reconcile those approaches with the harsh letter of the caselaw, particularly as articulated in *O'Connor*. For that reason, other more cautious providers would have declined the family's decision under these circumstances; they would have kept the patient on the ventilator, or insisted upon the gastrostomy, even though in each case those approaches are inconsistent with the family's wishes and the patient's likely wishes.

Decisions to Consent to Treatment

Prior to the FHCDA, New York law was also deficient in providing family members with authority to consent to beneficial treatment for incapable patients. A patchwork of laws and regulations provides such authority under certain circumstances, such as where the patient previously appointed a health care agent, or where a court had appointed a guardian.[13] But there was no statute or regulation that generally empowered family members to consent to treatment when the patient could not and scant caselaw support for such authority. To be sure, providers generally turned to family members for consent anyway, and an exception in the New York informed consent statute provided some protection from liability for doing so.[14] But this lacuna in decision-making authority was still problematic in many ways. For example, the absence of clear legal authority on the part of family members to consent to treatment also impaired the ability to secure other decisions relating to treatment, such as authorization for the disclosure of protected health information.[15]

2. The Political Background

When Others Must Choose

In March 1992, the New York State Task Force on Life and the Law addressed this issue in its influential report, *When Others Must Choose: Deciding for Patients Without Capacity*.[16] The Task Force is a multidisciplinary panel that was formed by New York Governor Mario Cuomo in 1985 and charged with studying and making policy recommendations for public policies on issues relating to medical ethics and bioethics. Its earlier reports led to, among other public policies, a New York State regulation recognizing brain death (1986); New York's do-not-resuscitate law (1987); New York's Health Care Proxy Law (1990); and a law restricting surrogate mother contracts (1993).

In *When Others Must Choose*, the Task Force examined the absence of authority of family members or friends to make decisions for patients who lack capacity in New York. It reviewed the clinical, ethical and legal aspects of the problem. It recognized that most New Yorkers have not appointed health care agents, and it found there was a need to give family members and others close to the patient some default authority to make health care decisions for those patients who lack capacity, and who did not previously make a decision themselves or appoint a health care agent. The Task Force concluded that the absence of such authority resulted in both undertreatment and overtreatment of patients.

The Task Force went beyond just calling for reform. It advanced a specific legislative proposal to address the problem. The proposal (not called the Family Health Care Decisions Act until later) was similar in many respects to the Task Force's earlier proposal that led to New York's DNR law. Specifically, it proposed a statute that would set forth requirements for determining incapacity; allow the selection of a surrogate decision maker from a priority list, empower such surrogates to make health care decisions for patients who lack capacity and who could not make the decision themselves or appoint a health care agent; require the surrogate to adhere to the substituted judgment/best interests standard; and limit the circumstances in which a surrogate may authorize the withholding or withdrawal of life-sustaining treatment.

The Task Force sent its proposal to Governor Cuomo and to the state Legislature. In 1993 the proposal was introduced in the Assembly by Richard Gottfried (D-Manhattan), Chair of the Assembly Health Committee and formerly the lead sponsor of the Health Care Proxy Act.[17] Assemblyman Gottfried would prove to be a tenacious champion for the FHCDA. The bill was first introduced in the Senate by John A. DeFrancisco (R-Onondaga) in 1995,[18] but in most years thereafter it was sponsored by Senate Health Chair Kemp Hannon (R-Garden City).

At the start, the bill's prospects were strong. The Task Force had a remarkably successful track record of securing enactment of its previous proposals, such as the DNR and Health Care Proxy laws. Those policies were generally regarded as successful, and the Task Force made the compelling case that the FHCDA was a necessary and logical extension of the policies and principles it had previously advanced. Soon a large, impressive and diverse list of organizations announced their support for the FHCDA.[19] An umbrella group called the Family Health Care Decisions Coalition emerged to coordinate activities in support of the FHCDA.[20]

But at the same time, other factors impeded the progress of the bill. The New York State Catholic Conference, which was especially influential in the Republican-controlled state Senate, issued a memo opposing the bill. The Conference was concerned that aspects of the bill devalued life and facilitated euthanasia. It emphasized its opposition to a provision that would allow ethics committees to make end-of-life decisions for patients who did not have surrogates and to the termination of life-sustaining treatment for pregnant women patients. The Conference also sought to limit the circumstances in which artificial nutrition and hydration could be stopped, and to protect the conscience rights of health care providers. Other organizations such as Agudath Israel and New York State Right to Life expressed similar concerns.

Over time, the bill was amended to meet some of the Conference's concerns. For example, in 2002 both versions deleted the hospital-based process for making end-of-life decisions for patients without surrogates. But the Conference's opposition generally continued.

It was also significant that those New Yorkers who cared most about end-of-life decisions already had adequate means to protect their interests under law: they could create a health care proxy or living will. In a sense, the FHCDA sought to protect the interests of those who were not concerned enough about the matter to look out for themselves—akin to an intestacy law. Unsurprisingly, legislators did not often hear demands from grass-roots constituents for the bill.

As a result of forces promoting and forces impeding the FHCDA, for many years each spring a ritual was played out in Albany: supporters would meet with legislators and secure an editorial or op-ed piece. Numerous organizations would go on record as supporting the bill, but none would put substantial resources into a lobbying effort. At the same time, the organizations opposed to the bill would make their influential opposition known, especially to the Senate. By the end of each session, the bill had died in committee in one or both houses.

Beginning in 2002, a few developments offered new hope of securing enactment of the FHCDA. For one thing, that year the Legislature enacted the HCDA.[21] FHCDA advocates argued that since the Legislature was willing to allow surrogate end-of-life decisions for mentally retarded patients, who are less likely to have formed wishes and values, and who are more at risk of being "devalued," it should be willing to allow surrogate end-of-life decisions for other patients as well.

Also in 2003 the Family Decisions Coalition retained an Albany lobbying firm, Malkin & Ross, which advocated for the FHCDA year after year, mostly on a pro bono basis. Moreover, in 2007, Assemblyman Gottfried managed—rather surprisingly—to secure the support of Right to Life for the FHCDA, largely by adding language to emphasize the duty of providers to respect surrogate decisions that favored the provision of life-sustaining treatment.[22]

Perhaps most important, the attitudes of New Yorkers, including legislators, had gradually changed since 1993. A consensus seemed to emerge that it was often quite reasonable and not eccentric for a patient to want to opt for palliative rather than aggressive care toward the end of life. It also seemed to most New Yorkers that families *should* be able to make these decisions for their dying, incapable loved ones.

All these developments boded well for the prospects of enacting the FHCDA.

The Dispute Over "Fetus" and "Domestic Partner"

Despite such developments, the bill was gridlocked for several years by two issues that related more to the battles over abortion and gay/lesbian rights than to end-of-life decisions. First, in 2003 the Senate, at the request of the Catholic Conference, inserted in its version of the FHCDA a requirement that a surrogate, when making a decision about life-sustaining treatment for a pregnant patient, must consider "the impact of the treatment decision on the fetus and on the course and outcome of the pregnancy." Although it was doubtful that the clause would have any practical effect on surrogate decision making, pro-choice members of the Assembly regarded the insertion of the word "fetus" objectionable for symbolic and political reasons. As a result, for years the Assembly refused to support the FHCDA if it included the fetus clause, while the Senate refused to support the FHCDA without the clause.

Meanwhile, also in 2003, the Assembly introduced a version of the bill that revised the surrogate priority list to make the highest priority relative the "spouse *or domestic partner*." It did so both as a result of its growing support for gay/lesbian rights generally, but also because of the strong case for allowing a partner in a same-sex couple to make the health care decisions. However, the Senate indicated that it would not make that change in its version. As a result, for years the Senate refused to support the FHCDA if it included the domestic partner phrase, while the Assembly refused to support the FHCDA without such clause.

FHCDA advocates were frustrated by this impasse and wanted to return the focus of attention to the need to allow humane decisions for dying patients. They repeatedly proposed ideas for compromising or bypassing these disputes, but without success—until 2009.

Enactment of the FHCDA

As a result of the November 2008 election—the election that brought Barack Obama into the White House—Democrats gained control of the state Senate for the first time in over 40 years. In early 2009 Senator Thomas Duane (D-Manhattan) became Chair of the Senate Health Committee, and shortly thereafter he introduced a version of the FHCDA that tracked the Assembly version: it excluded the "fetus clause" and included the domestic partner clause.[23] The gridlock had ended.

In the spring of 2009, staff from the Governor's office, the Senate and the Assembly began to meet in the Capitol to scrutinize the language of the bill, and to identify and address technical and policy issues. Among the issues that received particular three-way attention were the need to clarify the settings where the FHCDA would apply and the need to address how the FHCDA would apply to persons who are already subject to the HCDA, or subject to OMH or OMRDD surrogate decision-making regulations.

That three-way review process was nearly complete when the dramatic "coup" in the Senate in June 2009 brought a halt to progress on all legislation, including the FHCDA.[24] Although staff ultimately finished that work and identical bills were introduced in the final days of the 2009 session, both houses adjourned before acting on them.

The bills were re-introduced in both houses in January 2010 with only one change: a long-standing provision stating that a surrogate's decision was not required if the patient had made a prior decision personally was amended to attach witnessing requirements to prior oral decisions to forgo life-sustaining treatment.[25]

The Assembly passed the FHCDA on January 20 with a nearly unanimous bipartisan vote, and the Senate passed it February 24, unanimously. On March 16, 2010, 17 years after the FHCDA was first introduced, Governor Paterson signed the FHCDA into law. The Governor stated, "After nearly two decades of negotiations, New Yorkers now have the right to make health care decisions on behalf of family members who cannot direct their own care."[26]

3. Key Provisions of the FHCDA

Key provisions of the FHCDA are summarized below. The new law is detailed, however, and this summary does not cover all its provisions.

Applicability

The FHCDA applies to decisions for incapable patients in general hospitals and residential health care facilities (nursing homes).[27] The statute uses the term "hospital" to apply to both those settings.[28] The FHCDA does not apply to decisions for incapable patients who have a health care agent;[29] who have a court-appointed guardian under SCPA 1750-b;[30] for whom decisions about life-sustaining treatment may be made by a family member or close friend under SCPA 1750-b;[31] or for whom treatment decisions may be made pursuant to OMH or OMRDD surrogate decision-making regulations.[32]

Determining Incapacity

The FHCDA sets forth a hospital-based process to determine that a patient lacks decisional capacity, but only for purposes of the FHCDA.[33] The process requires special credentials for professionals for determining that a patient lacks capacity as a result of mental retardation or mental illness.[34] It also requires that the patient and prospective surrogate be informed of the determination of incapacity[35] and additional notifications for patients from mental hygiene facilities.[36] Notably, if the patient objects to the determination of incapacity, or the choice of surrogate, or the surrogate's decision, the patient's objection prevails unless a court finds that the patient lacks capacity or another legal basis exists for overriding the patient's decision.[37]

Decisions for Adult Patients by Surrogates

The statute sets forth, in order of priority, the persons who may act as a surrogate decision maker for the incapable patient, i.e.:[38]

- an MHL Article 81 court-appointed guardian (if there is one);
- the spouse or domestic partner (as defined in the FHCDA);
- an adult child;
- a parent;
- a brother or sister; or
- a close friend (as defined in the FHCDA).

The surrogate has the authority to make all health care decisions for the patient that the adult patient could make for himself or herself, subject to certain standards and limitations.[39]

A surrogate's consent is not required if the patient already made a decision about the proposed health care, expressed orally or in writing, or with respect to a decision to withdraw or withhold life-sustaining treatment expressed either orally during hospitalization in the presence of two witnesses or in writing.[40] But since a surrogate must base his or her decision on the patient's wishes if they are reasonably known, even if a patient's prior oral decision cannot be honored directly, a surrogate will have to give that statement appropriate weight in making a decision.

The FHCDA requires the surrogate to base his or her decisions on the patient's wishes, including the patient's religious and moral beliefs. If the patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, the surrogate must base decisions on the patient's best interests, a term explained in the statute.[41]

Surrogate Decisions to Withdraw or Withhold Life-Sustaining Treatment

The FHCDA authorizes surrogate decisions to withhold or withdraw life-sustaining treatment only if one of two standards is met.

First, life-sustaining treatment can be withdrawn or withheld if:

- the surrogate determines[42] that treatment would be an extraordinary burden to the patient, and
- the attending physician and another physician determine that the patient:
- is terminally ill (i.e., has an illness or injury that can be expected to cause death within six months, whether or not treatment is provided); or
- is permanently unconscious.

Second, life-sustaining treatment can be withdrawn or withheld if:

- the surrogate determines[43] that treatment would involve such pain, suffering or other burden that it would reasonably be deemed inhumane or excessively burdensome under the circumstances; and
- the attending physician and another physician determine that the patient has an irreversible or incurable condition.[44]

Significantly, inasmuch as the definition of life-sustaining treatment includes decisions about resuscitation, one of the two standards must be met for surrogate consent to a DNR order as well.[45] As a practical matter, in most of the cases where a DNR order could have been entered under the DNR law, the order can be entered under the FHCDA.

"FHCDA requires the surrogate to base his or her decisions on the patient's wishes."

The two standards also apply to decisions regarding artificial nutrition and hydration (e.g., the provision of nutrition or hydration by a tube inserted through the nose, stomach, or vein). Decisions regarding the provision of food and drink are not considered health care decisions and are outside the scope of the statute.[46]

Decisions for Minor Patients

The statute authorizes the parent or guardian of a minor patient to decide about life-sustaining treatment under the same two end-of-life standards that apply to surrogate decisions for adults.[47] However, the parent or guardian must make the decision in accordance with the minor's best interests, taking into account the minor's wishes as appropriate under the circumstances.[48]

If the attending physician determines that the minor has the capacity to decide about life-sustaining treatment, the minor's consent is required to withhold or stop treatment.[49] If there is another parent who is unaware of the decision, the law requires an attempt to inform such parent of the decision.[50]

The statute allows a physician to accept a life-sustaining treatment decision by an emancipated minor without parental consent, although a decision by the minor to forgo such treatment requires ethics review committee approval.[51]

Decisions for Adult Patients Without Surrogates

One of the most significant features of the FHCDA is that it establishes a procedure to secure a decision (it is probably not accurate to call it "consent") to provide needed treatment for incapable patients who have no family members or close friends who could act as the surrogate.[52] Prior to the FHCDA, in such cases the provider might either go to court for the appointment of a guardian or approval of the treatment, or fashion some legally dubious "administrative consent," or wait for the patient's need for the treatment to become so urgent that treatment could be provided under the emergency exception to the informed consent requirement.

The FHCDA addresses the problem first by requiring hospitals, after a patient is admitted, to determine if the patient has a health care agent, guardian, or person who can serve as the patient's surrogate. If the patient has no such person, and lacks capacity, the hospital must identify, to the extent practical, the patient's wishes and preferences about pending health care decisions.[53]

With respect to routine medical treatment, the statute simply authorizes the attending physician to decide about such treatment for patients without surrogates.[54] For decisions about major medical treatment, the attending physician must consult with other health care professionals directly involved with the patient's care, and a second physician selected by the hospital or nursing home must concur in the decision.[55] The treatment can then be provided.

In contrast, decisions to withdraw or withhold life-sustaining treatment from isolated incapable patients are strictly limited. Such decision can be made only (1) by a court, in accordance with the FHCDA surrogate decision-making standards; or (2) if the attending physician and a second physician determine that the treatment offers the patient no medical benefit because the patient will die imminently, even if the treatment is provided, and the provision of the treatment would violate accepted medical standards.[56]

Ethics Review Committees

The FHCDA requires hospitals and nursing homes to establish or participate in an ethics review committee (ERC) that has diverse membership, including community participation.[57] The ERC, which can operate through subcommittees, must be available to try to resolve disputes if less formal efforts fail. Its role is strictly advisory, however, except in two respects: ERC approval is required for certain decisions to withdraw or withhold life-sustaining treatment in nursing homes, and to affirm decisions to forgo treatment by emancipated minors.[58]

Other FHCDA Provisions

The FHCDA also

- sets forth the right of private hospitals and individual health care providers to refuse, on grounds of moral or religious conscience, to honor health care decisions made pursuant to the FHCDA, subject to limits and requirements (e.g., the facility must notify patients of its policy prior to admission and promptly transfer responsibility for the patient to another health care professional willing to honor the decision).[59]
- protects surrogates, health care providers and ethics committee members from civil and criminal liability for acts performed in good faith pursuant to the FHCDA.[60]
- provides that liability for the cost of health care provided to an adult patient under the FHCDA is the same as if the patient had consented to treatment.[61]
- establishes that the FHCDA does not:
- expand or diminish any authority an individual may have to express health care decisions for himself or herself;[62]
- affect existing law concerning implied consent to health care in an emergency;[63]
- permit or promote suicide, assisted suicide, or euthanasia;[64]
- diminish the duty of parents to consent to treatment for minors.[65]
- provides that a hospital or attending physician that refuses to honor a health care decision made by a surrogate in accord with the standards set forth in the FHCDA is not entitled to compensation for treatment provided without the surrogate's consent, except under specified circumstances.[66]

DNR-Related Provisions

The statute eliminates much of New York's DNR law as applied to hospitals and nursing homes, and provides for such decisions to be made in accordance with the standards and procedures in the FHCDA.[67] However, the statute then creates a new PHL Article 29-CCC as a place to retain (with some modifications) existing provisions on nonhospital DNR orders.[68] A helpful revision to the nonhospital provisions obligates home health care agency staff and hospice staff to honor nonhospital DNR orders (previously, nonhospital DNR orders were directed only to emergency medical services and hospital emergency personnel).[69]

The statute also renames the former DNR law, PHL Article 29-B, as "Orders Not to Resuscitate for Residents of Mental Hygiene Facilities," to preserve existing rules regarding DNR orders in those settings.[70]

Health Care Proxy Law Amendments

Chapter 8 amends the Health Care Proxy Law to require a provider, when an agent directs the provision of life-sustaining treatment, to provide the treatment, transfer the patient, or seek judicial review.[71] This mirrors a similar provision in the FHCDA. The statute also amends the proxy law to adopt the FHCDA provisions regarding institutional and health care provider conscience.[72]

Amendments to Guardianship Laws (MHL Article 81 and SCPA 1750-b)

The statute amends New York's guardianship law, MHL Article 81, to authorize a guardian of the person to act as a surrogate under the FHCDA for decisions in hospitals.[73] It also repeals provisions in MHL Article 81 that restricted the authority of a guardian to make life-sustaining treatment decisions.[74]

The statute amends the HCDA (SCPA 1750-b) to insert a definition of "life-sustaining treatment" (because previously it referred to a definition in MHL Article 81 that was repealed).[75]

Assignments for the Task Force on Life and Law

Chapter 8 directs the Task Force on Life and the Law to create a special committee to provide advice on standards and procedures for surrogate decision making for persons with mental retardation / developmental disability and persons in metal health facilities. The committee must include members appointed by OMRDD and OMH.[76]

Finally the new law also directs the Task Force to make recommendations on extending FHCDA decision-making standards and procedures to other settings, such as physician offices and home care.[77]

4. Emerging Issues

Enactment of the FHCDA will direct the attention of health lawyers, policymakers, patient advocates and health care providers toward several issues. Here are a few:

The Challenge of Implementation

The FHCDA is not short and simple, and it will take time and considerable effort for health care providers, health lawyers and others to familiarize themselves with its requirements and to implement it in practice. Unexpectedly, the lead time between enactment (March 16, 2010) and the effective date (June 1, 2010) was extremely brief. As a result, providers need to scramble to conduct training and implementation efforts; clearly those efforts will need to extend well beyond the effective date.

On the positive side, several factors should aid in the prompt implementation of the FHCDA. First, the FHCDA is similar in structure to the DNR law that it supersedes, so providers and others will find its key concepts and procedures familiar. Moreover, statewide hospital and nursing home associations promptly and collectively made available to their members model policies and forms to implement the FHCDA. The developers of MOLST (Medical Orders for Life-Sustaining Treatment) also quickly revised their forms to reflect FHCDA principles. Other educational programs and materials (including this article) are rapidly emerging.

With patience and persistence on the part of providers, and with patience and forbearance on the part of regulators, the FHCDA can be implemented soon and implemented well in facilities across the state.

The Adequacy of Safeguards

The most significant change made by the FHCDA is that it empowers family members to direct the withdrawal of life-sustaining treatment in the absence of clear and convincing evidence of a patient's wish to forgo treatment. In lieu of the unrealistic and harsh clear and convincing evidence standard, the statute institutes safeguards, including these: it requires the attending physician and another physician to make specific clinical findings; it requires the surrogate to make certain non-clinical findings about the burdens of the treatment; it obligates the surrogate to base his or her decision on the patient's wishes if known, or else the patient's best interests; it allows persons connected with the case to challenge a decision.

There is ample reason to have confidence in the adequacy of these safeguards, and confidence that the statute will in fact improve the quality of end-of-life decision making. But it is essential to empirically confirm that expectation. Policymakers, health care professionals, patient advocates, medical ethicists, academics and others need to study the experience under the FHCDA across the state and ensure that the safeguards and other provisions are working as intended.

The Performance of Ethics Review Committees

For the first time, all hospitals and nursing homes in New York will be required to create or participate in ethics review committees.[78] The clear objective of ERCs is to provide a relatively impartial mechanism to resolve disputes and to provide oversight of the most sensitive decisions. But there is no assurance that ERCs will perform these functions well. Moreover, it is unclear how facilities can or will reconcile the role of ERCs with other facility-based ethics initiatives, such as ethics consultation services.[79] Mechanisms must be devised to measure and continually improve the quality of ERCs, and research should be conducted on the merits and demerits of this part of the statute.

Extending the FHCDA to Other Settings

The FHCDA applies only in hospital and nursing home settings. Yet the need for surrogate decision making can arise in any setting where health care is provided, including a diagnostic and treatment center, physician's office, dentist's office, assisted living residence, or home care situation. Of particular urgency is the need to allow surrogate decisions to elect hospice for an incapable patient, irrespective of where the surrogate makes the decision. But many of the safeguards in the FHCDA are designed for the hospital or nursing home setting, such as concurring opinion requirements and reliance upon ERCs. As a result, extending the FHCDA to other settings is not a simple matter. A key emerging issue for the Task Force on Life and the Law is to devise a way to accomplish this extension in a responsible and practical manner.

Decision Making for Developmentally Disabled Persons

As noted previously, surrogate decisions are already being made for developmentally disabled persons pursuant to the HCDA. Some advocates believe that the HCDA offers a better approach to surrogate decision making than the FHCA; other advocates favor extending the FHCDA to that population, perhaps with amendments or special provisions. The Task Force was directed to form a subcommittee to address this issue.

Surrogate Consent to Human Subject Research

The FHCDA has indirectly impacted other laws and regulations that refer to the authorized health care decision maker. Perhaps most significant, federal human subject research regulations allow a "Legally Authorized Representative" to give consent for incapable patients to be enrolled in research protocols.[80] A "Legally Authorized Representative" includes a person "authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research."[81] Thus the FHCDA would appear to give the surrogate such authority in many cases. This is a positive development in important respects: it expands access by incapable patients to promising clinical trials and facilitates medical advances in the treatment of conditions that cause mental incapacity. But it also poses new ethical concerns. An emerging issue is determining the extent to which the FHCDA has opened the door to surrogate consent for human subject research, and the extent to which the state should seek to regulate such research. This is yet another issue the Task Force on Life and the Law is examining.

Conclusion

The FHCDA authorizes a family member or close friend to make health care decisions, including end-of-life decisions, for a patient who lacks decisional capacity, subject to substantive and procedural safeguards. Ultimately, the FHCDA is best viewed as an effort to align New York law with sound clinical practice and broadly accepted principles of medical ethics. To be sure, it will be challenging to implement the FHCDA well, and it will be necessary to identify and correct its flaws and gaps, and respond to the issues it raises. But from the outset the FHCDA will provide relief from the harsh aspects of prior law, and over time the law can be expected to enhance the quality of decision making for incapable patients.

Endnotes

1. 2010 N.Y. Laws ch. 8, A.7729-D (Gottfried et al.) and S.3164-B. (Duane et al.). Section 2 of Chapter 8 amends N.Y. Public Health Law (PHL) to create "Article 29-CC Family Health Care Decisions Act."
2. 2010 N.Y. Laws ch. 8, § 29.
3. 211 N.Y. 125 (1914).
4. 52 N.Y.2d 363, 438 N.Y.S.2d 266 *cert. denied*, 454 U.S. 858 (1981).
5. 75 N.Y.2d 218, 551 N.Y.S.2d 876 (1990).
6. 497 U.S. 261 (1990).
7. 52 N.Y.2d 363.
8. 72 N.Y.2d 517, 531, 534 N.Y.S.2d 886 (1988).
9. *Id.*
10. PHL art. 29-B.
11. PHL art. 29-C.
12. Surrogate's Court Procedure Act 1750-b (SCPA).
13. PHL art. 29-C; N.Y. Mental Hygiene Law art. 81 (MHL).
14. PHL § 2805-d(4)(c) .
15. *See* 45 C.F.R. § 164.502(g)(2) (A HIPAA-covered entity must honor decisions about protected health information made by an adult's "personal representative," i.e., a person who has "authority to act on behalf of [the adult] in making decisions related to health care.").
16. NYS Task Force on Life and the Law, *When Others Must Choose: Deciding for Patients Without Capacity* (March 1992) *available at* http://www.health.state.ny.us/nysdoh/taskfrce/inforpts.htm.
17. A.7166 (1993). The bill was not named the "Family Health Care Decisions Act" until 1995.
18. S.4685 (1995).
19. Among the supporting organizations were: AARP; American College of Physicians; Association of the Bar of the City of New York; Friends of the Institutional Elderly; Gay Men's Health Crisis; Greater New York Hospital Association; Medical Society of New York State; Healthcare Association of New York State; Nurses Association of New York State; NYS Association of Homes and Services for the Aging; NYS Health Care Facilities Association; NYS Bar Association; NY Civil Liberties Union; NYS Hospice and Palliative Care Association; SEIU Local 1199; StateWide Senior Action Council.
20. *See* Family Decisions Coalition, http://www.familydecisions.org.
21. 2002 N.Y. Laws ch. 500.
22. Enacted at PHL §§ 2984(5), 2994-f(3).
23. S.3164-B (Duane).
24. *Republicans Seize Control of State Senate*, http://cityroom.blogs.nytimes.com/2009/06/08/revolt-could-imperil-democratic-control-of-senate (June 8, 2009, 15:50 EST).

25. Enacted at PHL § 2994-d(3)(ii).
26. Press Release, Office of Governor Paterson, *Governor Paterson Signs Family Health Care Decisions Act into Law* (Mar. 16, 2010), *available at* http://www.state.ny.us/governor/press/031610FHCDA.html.
27. PHL § 2994-b(1).
28. PHL § 2994-a(18).
29. PHL § 2994-b(2).
30. PHL § 2994-b(3)(a).
31. PHL § 2994-b(3)(b).
32. PHL § 2994-b(3)(c).
33. PHL § 2994-c.
34. PHL § 2994-c(3)(c).
35. PHL § 2994-c(4)(a), (b).
36. PHL § 2994-c(4)(c).
37. PHL § 2994-c(6).
38. PHL § 2994-d(1).
39. PHL § 2994-d(3)(i).
40. PHL § 2994-d(3)(ii).
41. PHL § 2994-d(4).
42. The statute does not explictly give this responsibility to the surrogate, but it is implict in the structure of the clause.
43. *See* PHL § 2994-c(6).
44. PHL § 2994-d(5)
45. PHL § 2994-a(19).
46. PHL § 2994-a(12).
47. PHL § 2994-e(1).
48. PHL § 2994-e(2)(a).
49. PHL § 2994-e(2)(b).
50. PHL § 2994-e(2)(c).
51. PHL § 2994-e(3).
52. PHL § 2994-g.
53. PHL § 2994-g(1).
54. PHL § 2994-g(3).
55. PHL § 2994-g(4).
56. PHL § 2994-g(5).
57. PHL § 2994-m.
58. PHL § 2994-m(2).
59. PHL § 2994-n.
60. PHL § 2994-o.
61. PHL § 2994-p.
62. PHL § 2994-q(1).
63. PHL § 2994-q(2).
64. PHL § 2994-q(3).
65. PHL § 2994-q(4)
66. PHL § 2994-s.
67. See 2010 N.Y. Laws ch. 8, § 4, which amends PHL art. 29-B – the DNR law—to make it applicable only to mental hygiene facilites. *See also* new PHL § 2994-a(19) (defining "life-sustaining treatment" to include cardiopulmonary resuscitation).
68. 2010 N.Y. Laws ch. 8, § 2, adding PHL art. 29-CCC Nonhospital Orders Not to Resuscitate.
69. PHL § 2994-ee.
70. PHL art. 29-B.
71. 2010 N.Y. Laws ch. 8, § 23. amending PHL § 2984(3).
72. 2010 N.Y. Laws ch. 8, § 23, adding PHL § 2984(5).
73. 2010 N.Y. Laws ch. 8, § 25, amending MHL § 81.22.8.
74. 2010 N.Y. Laws ch. 8, § 25, repealing MHL § 81.22.9(e).
75. 2010 N.Y. Laws ch. 8, § 27, amending SCPA 1750-b.
76. 2010 N.Y. Laws ch. 8, § 28(1).
77. 2010 N.Y. Laws ch. 8, § 28(2).
78. PHL § 2994-m. Since 1992, the Joint Commission on the Accreditation of Healthcare Organizations has required hospitals to have a mechanism to address ethical issue, but it has never specifically mandated ethics committees. Similarly, since 1997, New York's DNR law has required facilities to have a dispute mediation system, but does not require ethics committees for that purpose. PHL § 2972.
79. The statute helpfully notes that the ERC requirement does not "bar [providers] from first striving to resolve disputes through less formal means, including the informal solicitation of ethical advice from any source." PHL § 2994-m. Accordingly, a hospital's ethics consultation service or chaplain's office could still serve as a first line of guidance or attempted resolution of a dispute.
80. 45 C.F.R. § 46.116.
81. 45 C.F.R. § 46.102.

Robert N. Swidler is General Counsel to Northeast Health, a not-for-profit health care system in the Capital Region that operates hospitals, nursing homes, home care and other facilities and services. Mr. Swidler is former Counsel to the NYS Office of Mental Health, former Assistant Counsel to Governor Mario M. Cuomo, and former Staff Counsel to the NYS Task Force on Life and the Law.

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The Story of a Shelter: Intervention and Prevention of Elder Abuse

By Deirdre M.W. Lok and Joy Solomon

The fastest growing segment of our population are persons 85 and older, increasing from 4 million in 2000 to an estimated 19 million by 2050.[1] Medical technology and advances in medicine and research have led to longer, happier lives, but growing older can also mean an increased risk of medical complications, diminished cognitive functioning and an increased risk of abuse. Each year, an estimated 2.1 million older Americans are victims of physical, psychological, or other forms of abuse and neglect.[2] Financial abuse, especially in our current economic climate, is growing at an alarming rate, with an annual monetary loss by victims of elder financial abuse estimated to be at least $2.6 billion.[3]

Elder abuse is often undetected and underreported. One out of every five cases is unreported.[4] New York is one of only six states without mandatory reporting of elder abuse.[5] Attorneys, and not just elder law attorneys,[6] are seeing the impact and prevalence of elder mistreatment in their respective practices and are wondering where to turn and what resources exist. In addition, public cases such as Brooke Astor, the recent change in the power of attorney law, and the unusually high attendance at the elder abuse presentation at the 2010 New York State Bar Association annual conference also point to the growing and pervasive effect and problem that elder abuse and exploitation presents to legal practitioners.

Throughout the nation, aging experts, domestic violence practitioners and others are using creative strategies to combat elder abuse in the community. In 2004, Joy Solomon, Esq., then the Director of Elder Abuse Services at the Pace Women's Justice Center, identified a gap in service for victims of elder abuse in need of emergency shelter. However, at such time, no such safe-haven existed. Joy sat on the Westchester Public Private Partnership with Daniel Reingold,. J.D., M.S.W., the President and CEO of the Hebrew Home at Riverdale. Together, they conceived the idea that the Home was the perfect place to create a shelter.

The Harry and Jeannette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale ("the Weinberg Center") is a comprehensive elder abuse center that provides an emergency residential shelter as well as psychosocial, health care and legal advocacy and community-based services for victims of elder abuse. The Weinberg Center also provides educational, training, research and community awareness programs on issues of elder abuse.

A. Seeds of An Elder Abuse Shelter: Intervention

The Hebrew Home at Riverdale, (hereinafter "the Home"), located on 19 acres overlooking the Hudson River, is aN 870-bed facility that provides a full spectrum of residential health care, adult day and night care, rehabilitation services, and home care on a non-profit, non-sectarian basis. Extensive services, including a full medical staff able to provide 24-hour care, an extensive rehabilitation department, a memory care unit, art, pet and aquatic therapies, alternative therapies, including yoga, a high school and extensive art collection and museum, give the Hebrew Home a unique ability to fully serve the needs of older adults, and provide the ideal blueprint for The Weinberg Center. Inspired by the successful collaboration with non-profit agencies and government and the need to focus multi-disciplinary attention on elder abuse, the Weinberg Center developed relationships with community agencies who refer victims of elder abuse, and the doctors, psychiatrists, social workers, attorneys, nurses and companions at the Hebrew Home. At its core, the Weinberg team consists of two attorneys and a social worker. However, the Weinberg Center clients utilize the entire Hebrew Home staff and resources for daily living and care.

Today, elder abuse cases are referred from the New York City Department for the Aging, the New York City Police Department, District Attorneys' Offices, Adult Protective Services, hospitals, and community-based agencies. Every referral is reviewed on a case-by-case basis, due to the complex and unique medical, social, mental, financial and housing needs of each victim. Before a victim is accepted for admission, a Patient Review Instrument (PRI) must be completed to assure that he or she can obtain appropriate and adequate care at the Home. Once completed and reviewed, the appropriateness of the admission is determined and transportation is arranged usually within 24 hours. The shelter space is virtual because the victims have varied medical and other needs; they are carefully placed in the Home among other resident peers where only the staff is aware of their "special" circumstances. Admission is not based on an ability to pay; in fact, Medicaid benefits can often be secured on their behalf.

Once admitted, the Weinberg Center client meets with a caring medical team, a social worker, and lawyers from the Weinberg Center. Medical, mental health and other assessments are completed. A legal assessment and review is done with the victim, to consider possible civil

remedies, including an Order of Protection, revocation of a power of attorney, and annulment of a marriage. When appropriate, Weinberg Center attorneys petition the court for the appointment of a guardian. Often, a multi-agency and disciplinary approach continues after admission, including work with the police department, district attorneys' offices, the referring agency and other community resources.

The goal of the Weinberg Center is to return the victim home, if possible. If not, appropriate long-term plans are arranged.

Security is vital to ensure the safety of Weinberg Center clients and to the other long-term care residents and staff. The Home has only one secured point of entry and a trained security team is kept apprised of relevant court orders, limits on visitation and other restrictions. Initially, a two-week "no visitation" policy is implemented for each new Weinberg resident to give the victim time to adjust to his or her new surroundings, and for the staff to complete an evaluation and investigation into the alleged abuser(s).

B. Elder Abuse Training, The Weinberg Screen and ElderServe's Overnight Day Care: Prevention

The Weinberg Center offers unique education programs on elder abuse. Partnerships with law enforcement, hospital doctors, social workers and discharge planners, community centers and senior centers, community organizations and groups, faith-based leaders and organizations, attorneys and local bar associations, judges and court personnel, and even 32 BJ (the doormen and superintendent's union in New York City), have led to trainings and programs for a full spectrum of community members and professionals who work with older adults.

In an effort to increase the identification of elder abuse victims who may otherwise go unnoticed, the Weinberg Center team, with help from Terry Fulmer, Dean of New York University's College of Nursing, developed a screening tool for elder abuse detection. The tool was designed to be easy to administer and to provide a way to gain insight into an older person's circumstances that may evidence abuse. The screening has grown from use in the short-term rehabilitation part of the Home to all of the Home's portals, including long-term residential care, and short- and long-term home health care. The screen is available for use in community centers, hospitals and other health care settings. The research division at the Home is tracking data collected from the screen. The Weinberg Center team has also adapted the screen to be used by attorneys in their initial client meetings to assess for possible signs of elder abuse, especially financial abuse.

ElderServe on the Palisades, another program at the Home, has developed the only overnight medical model day care program in the country. The night care program, ElderServe at Night, is based on the medical model day care program that provides medical services, social work services, dietary supervision, occupational and physical therapies as well as a wide variety of activities to promote cognitive functioning. This unique program is a means to care for a patient with dementia or Alzheimer's disease who suffers from sleep disturbances commonly associated with the disease. Perhaps most importantly, the program prevents caregiver stress. Often, the erratic sleep patterns typical of an Alzheimer's patient are overwhelming, if not impossible to manage when safety precautions and personal care of an individual are required during normal sleeping hours.

Throughout the night, these clients engage in activities, peer socialization, and exercise. This safe, medically monitored and engaging program can be a critical piece to abuse prevention, offering a reprieve for caregivers and clients alike.

C. Case in Point

Mrs. G is an 82-year-old woman with a dementia diagnosis. She spent the last twenty years of her life living in Midtown Manhattan. She was single and had only one known living relative, but had numerous friends from the fashion industry, where she worked for years. Mrs. G was also born in Austria. Mrs. G frequently went to the park, socialized with neighbors in her building, and went almost daily to a local senior center. Mrs. G was always beautiful, fashionably well-dressed, and independent, until a close friend of hers died. This traumatic event seemed to trigger the start of a decline in Mrs. G's cognitive functioning.

Through 2008-2009, the staff at the senior center observed a decrease in Mrs. G's ability to care for herself and a marked increase in her dependence and trust in people she did not know. It was evident that the dependency on others, in combination with decreased cognitive ability and judgment, put Mrs. G. at great risk of financial exploitation. In May 2009, Mrs. G suddenly became instantly attached to a man, "Mr. M", who frequented the senior center. The senior center staff was convinced that Mr. M was untrustworthy and did not have her best interests in mind. He had only become close to Mrs. G in the last few weeks and suddenly was involved in her daily care, decision making and acted with authority about her finances and health care. When attempts were made to help Mrs. G schedule doctor visits, Mr. M would cancel the appointment or argue with the senior center staff that she did not need to see the doctor. Mrs. G would allow him to advocate for her, without seeming to understand what was in her best interest. The senior center staff was particularly concerned that Mrs. G was providing access to her apartment, her finances and personal information to Mr. M.

On July 19, 2009, Mrs. G was admitted to the hospital for pain to her hip. She had an odor, her clothes were dirty and she was agitated. When she was diagnosed in the emergency room with a fractured hip, Mrs. G did not know how she was injured and did not recall what happened to cause the pain. She had been to the emergency room on nine occasions within the prior eight months. The hospital learned that she refused home assistance, did not have a doctor, did not know how to manage her pain and did not seek appropriate medical attention or take advice from medical professionals. In April 2009, New York State Adult Protective Services (hereinafter, "APS") was contacted by the same New York City hospital because Mrs. G had a femoral neck fracture, but disturbingly she walked out before being evaluated by an orthopedic doctor. APS was in the process of evaluating her when Mrs. G was admitted to the hospital again in July. By July 22, 2009, APS determined that Mrs. G could not be safely discharged back into the community without the appointment of a guardian for her person and property. She did not have any family to look after her medical needs or personal affairs.

Perhaps the most immediate threat was from Mr. M. The hospital staff was alarmed when Mrs. G suddenly agreed to appoint him and his friend (who appeared to be suffering from dementia) as her health care agents. Mr. M was not making decisions in her best interest and did not seem to be able to provide the level of care Mrs. G needed. He was domineering and controlling, and exerted a strange level influence on Mrs. G about her health care decisions. Mr. M's proposed plan of care for Mrs. G was to ask his friend with dementia to provide 24-hour care to Mrs. G. Further, he asked repeated questions about Mrs. G's finances, assets, bank accounts and costs of care. He inquired about whether or not she would be appointed a guardian and was adamantly opposed to the appointment of a guardian, notwithstanding Mrs. G's condition and needs.

The hospital did not want to release Mrs. G to Mr. M's care, but did not know what to do. Mrs. G could not take care of herself, but had no known family to care for her. Mrs. G's complex dementia diagnosis further complicated the situation. A domestic violence shelter could not provide the medical care that Mrs. G needed, yet somehow she had to be protected from Mr. M. The Weinberg Center was the perfect answer. The hospital social worker made the referral, and Mrs. G was admitted into the Weinberg Center.

Mrs. G arrived at the Home underweight, malnourished, unable to hear well, barely able to walk, and in a great deal of pain. Mrs. G was placed in the memory care unit of the Home, and taken into the care of a support team consisting of a nurse, nutritionist, therapist, social worker, and doctor. The staff immediately provided her with a hot meal and clean clothes. A doctor examined her and agreed that she needed hip replacement surgery, and in the meantime prescribed her medication to ease her pain. A psychiatrist met with her and determined that she suffered from considerable cognitive impairment, could not attend to her own personal care, or manage her finances, and was unable to understand the nature and consequences of her limitations. She was fit for a new hearing aid by the audiologist. Mrs. G was given a walker to help her ambulate independently.

The Weinberg Center continued to investigate the suspicions of financial abuse, and as the facts unfolded, the deception of Mr. M became more evident. He falsely identified himself as a doctor during various phone conversations with the Home staff and acquaintances of Mrs. G. He called several of her financial advisors, and pretended that he was "the doctor from the center." Mr. M asked everyone he could about her assets. It was revealing that Mrs. G had absolutely no idea who Mr. M was at this time.

The Weinberg Center reached out to every possible member in the community who might be in a position to help or provide information about Mrs. G. The landlord from Mrs. G's apartment agreed to hold her apartment and refrain from commencing an action or proceeding based on non-payment of rent in light of her circumstances. Her banks agreed to take extra measures to prevent any transfers of funds. The staff from the senior center was willing to provide information and even testify about Mrs. G's deterioration and the sudden and suspicious involvement of her "friend." The hospital provided the medical records that contained pertinent information about Mrs. G's mental and physical health when she was first seen in the emergency room. Even the Austrian consulate was involved in helping to locate and contact a friend, as well as certain assets she owned in Austria.

Mrs. G needed a guardian. Her assets were at risk, and she had no idea where her money was saved or how much she had. Her rent was due and she had no idea how to pay it. Mrs. G could not take care of herself or follow doctor's orders. The attorney from the Weinberg Center went to court and petitioned for a guardian to be appointed. The Judge designated a guardian to protect Mrs. G's finances and manage her personal care. The suspicious health care proxy was voided, her bank accounts frozen, and temporary restraining orders put in place to prevent any further damage to Mrs. G's property. Mrs. G was safe and receiving the care she needed, her assets fully and finally protected.

It is still unclear how much money was taken from Mrs. G. Because of evidentiary limitations, including the timeline of events, Mrs. G's lack of capacity, and how much money was taken, a criminal case was not commenced. But, Mrs. G. is safe, at her optimal health, is walking, can hear, is free of pain, and has a responsible

third party managing her finances. The Weinberg Center and the efforts and cooperation of the community made her case a success.

C. Conclusion

For more information on training provided by the Weinberg Center, the services at the Weinberg Center, or the Weinberg elder abuse screening tool, please contact dlok@hebrewhome.org. For any referrals to the Weinberg Center, please contact 1-800-56-SENIOR.

Endnotes

1. Teaster, P.B., Tyler, A.D., Mendiondo, M.S., Abner, E.L. Cecil, K.H., Otto, J.M, *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older*, The National Committee for Prevention of Elder Abuse and The National Adult Protective Services Association. Prepared for the National Center on Elder Abuse (2006).
2. *Id.*
3. MetLife Mature Market Institute, *Broken Trust: Elders, Family, and Finances,* March (2009) *at* http://www.metlife.com/assets/cao/mmi/publications/studies/mmi-study-broken-trust-elders-family-finances.pdf.
4. National Elder Abuse Incidence Study. 1998 Washington, D.C.: National Center on Elder Abuse at American Public Human Services Association.
5. Wei, G.S., Herbers, Jr, J.E., *Reporting Elder Abuse: A Medical, Legal and Ethical Overview*, 59 Journal of the American Medical Women's Association, No.4 (2004).
6. Real estate attorneys involved in disputes over property, prosecutors and defense attorneys involved in assault, forgery, larceny or murder cases, matrimonial attorneys whose clients live in multi-generational households, transactional attorneys who work with designated powers of attorneys or represent families and finance-based attorneys who work with institutions that are attempting to safeguard against privacy violations, or loss or mismanagement of assets by family members are all faced with issues of elder abuse and exploitation.

Deirdre M.W. Lok is counsel for The Harry and Jeanette Weinberg Center for Elder Abuse Prevention at the Hebrew Home at Riverdale, the nation's first elder abuse shelter in a long-term care facility, and a prevention, intervention and training resource on elder abuse for local agencies and government. Prior to joining The Weinberg Center, Deirdre was a Deputy Prosecuting Attorney in Oahu, Hawaii. Deirdre was the first prosecutor in Hawaii selected to manage the newly formed Mental Health courtroom and supervised and trained incoming deputy prosecutors on trial procedure in trial courtrooms. She spent three years as an Assistant District Attorney in the Queens County District Attorney's Office, investigating, prosecuting and trying a variety of cases, with a focus on domestic violence cases. Deirdre graduated magna cum laude from New York University and received her law degree from Brooklyn Law School, class of 2003. Deirdre is a frequent speaker on the issue of elder abuse and the law, and is a member of the New York City, Bronx, Brooklyn and Westchester County Elder Abuse Coalitions and co-chair of the New York City Elder Abuse Network.

Joy Solomon is currently the Director and Managing Attorney for the Harry and Jeanette Weinberg Center for Elder Abuse Prevention, the nation's first comprehensive elder abuse shelter, located at the Hebrew Home at Riverdale in New York City. Joy is also the Director of Elder Abuse Programs at the Pace Women's Justice Center, a non-profit legal advocacy and training center based at Pace University Law School in Westchester County, New York. Prior to joining the Women's Justice Center in 1999, Joy investigated and prosecuted a variety of crimes including child abuse, fraud, and elder abuse as an Assistant District Attorney in Manhattan, where she served for eight years. After obtaining her B.A. from Syracuse University in 1986, Joy received her law degree in 1989 from the National Law Center at George Washington University. Joy is a frequent speaker on the issue of elder abuse to a wide range of professionals including testimony in front of the United States Congress' Special Committee on Aging.

This article originally appeared in the Summer 2010 issue of the Elder Law Attorney, *published by the Elder Law Section of the New York State Bar Association.*

COMMITTEE REPORTS

Age Discrimination Committee

A meeting of the Age Discrimination Committee was held on September 27, 2010 with ten members attending either by telephone or in person at the offices of Duane Morris LLP in New York City or the offices of Whiteman Osterman & Hanna LLP in Albany.

Marguerite Stenson Wynne provided an update on the *Kelley Drye* case, noting that the EEOC had filed a motion to dismiss certain defenses raised by Kelley Drye in its answer, that the motion had been dismissed without prejudice to allow Kelley Drye to file an amended answer, which was done, and that the EEOC had renewed its motion to dismiss.

There was an extensive discussion of a proposal to send to the larger law firms in New York a new request to sign a pledge, similar to the one circulated in 2007, supporting the "best practices" and recommendations contained in the *Report and Recommendations on Mandatory Retirement Practices in the Profession* that was approved by the NYSBA in March 2007, and in particular agreeing to have a partnership retirement policy that does not require partners to retire automatically upon reaching a specific age. The proposal was approved, and the Committee will start work on this project.

During the discussion of the retirement policy pledge, other questions and issues were raised, including how physical disabilities may be linked to age discrimination policies or actions and the desirability of having the Committee devote more time and attention to the age discrimination subjects listed in the Mission Statement of the Special Committee on Age Discrimination in the Profession, which is set forth on our Committee's web page. One such subject is law firm hiring practices involving older lawyers who either entered law school long after graduating from college or have become unemployed because of a corporate or law firm downsizing. Jerome Lefkowitz, Dorothy Loeb and Ms. Wynne agreed to review this subject to determine whether, and if so how, the Committee might focus more attention on this subject.

The Committee also discussed a law firm ranking list produced by *The American Lawyer* called the "A-List," which includes among the criteria used to rank a law firm its diversity policies and practices. However, these criteria do not appear to include practices and policies related to age discrimination. Richard Rifkin reminded the Committee that the NYSBA does not favor law firm rankings.

Finally, mention was made of discussions with Edna Sussman, the Chair of the Dispute Resolution Section, with regard to possible joint programs or seminars. One such program was included in the joint meeting of the Elder Law Section and the Senior Lawyers Section in White Plains in late October. Another possibility is a program aimed specifically at senior lawyers to assist them in learning more about, and possibly developing, an arbitration and mediation practice utilizing their significant experience.

John R. Dunne
Gilson Gray

* * *

Program and CLE Committee

As you may recall, last October, 2009, the Senior Lawyers Section participated with the Elder Law Section in presenting a three-day Fall Meeting at The Sagamore. The CLE program was very well received, and the Meeting was a great opportunity to get to know Section members and to network. We again partnered with the Elder Law Section at a Fall Meeting held October 28-30, 2010, this year at the Renaissance Westchester Hotel in White Plains.

On the afternoon of Thursday, October 28, 2010, the Elder Law Section and the Senior Lawyers Section presented separate programs on subjects of particular interest to their respective Section members. The Senior Lawyers Section program, entitled "Mediation Comes of Age—A New Frontier for Elder Law Practitioners and Senior Lawyers," was presented by the Dispute Resolution Section. The program covered both substantive and procedural aspects of mediation, including the application of mediation to a wide variety of issues / disputes, and provided tips on effective representation in mediation and advice on developing a practice as a mediator. The joint Friday and Saturday programs will be replete with timely topics, including the new power of attorney form; Medicaid, Medicare, and health care issues; health care reform; supplemental / special needs trusts; and financial / retirement planning.

Our next event will be the 2011 Annual Meeting. The Senior Lawyer Section's program is scheduled for Friday afternoon, January 28, 2011. At last year's Annual Meeting one of the participants in our program on retirement planning was Michael J. Garibaldi, CPA, ABV, CFF, Israeloff Trattner & Co., P.C. At the 2011 Annual Meeting,

with Michael's help and that of his associates, we will present "Valuation of a Professional Practice and Succession Planning—The Next Generation." We believe this program will be of substantial interest to members of the Senior Lawyers Section as well as members of many diverse Sections. Details of the program will be coming soon. We hope you make plans to join us.

We welcome any suggestions you may have for program / CLE topics, speakers and / or sponsors, and offers to help with the development and implementation of future programs.

Carole A. Burns
Willard H. DaSilva

* * *

Pro Bono Committee

The Pro Bono Committee continues to work with Gloria Herron Arthur, Director of Pro Bono Affairs for the New York State Bar Association, to identify, coordinate and promote pro bono initiatives for senior lawyers.

In commemoration of National Pro Bono Week (October 24-30, 2010), the Department of Pro Bono Affairs published a special newsletter in early October. You will find a link to it on our website. The newsletter highlighted events that took place in various judicial districts throughout the state, and provided updates on different pro bono programs, including the court system's Emeritus Program.

The Attorney Emeritus Program is designed to promote and encourage pro bono service (at least 30 hours per year) by retired attorneys who are at least 55 years old and who have practiced for a minimum of 10 years. Remember, an Attorney Emeritus is not subject to either the $350 attorney registration fee or mandatory CLE requirements. It is a great opportunity for a senior lawyer who is interested in donating his or her time in pro bono service.

If you are currently providing pro bono service, or even if you are just starting to consider it, please don't forget about the Empire State Counsel Program. The Program is designed to honor and recognize New York State Bar Association members, who, over the course of the year, donate 50 hours or more of free legal services either to individuals or to certain organizations. The specific criteria for the Empire State Counsel designation, along with a Verification Form, can be found on the New York State Bar Association's website. Again, you can find a link to this information, along with other pro bono information, on this Committee's web page. Even if you will not reach the 50-hour mark this year, the Bar Association is interested in tracking the pro bono service hours of senior attorneys. Take time to fill out the Verification Form by the end of the year.

We welcome your participation on the Pro Bono Committee. Please contact the New York State Bar Association if you are interested in joining us.

Elizabeth McDonald

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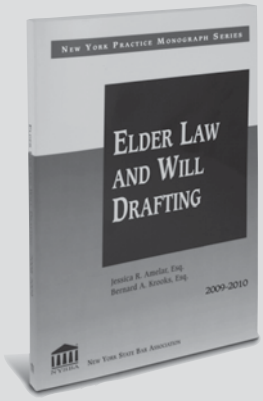

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Elder law cuts across many distinct fields including (1) benefits law, (2) trusts and estates, (3) personal injury, (4) family law, (5) real estate, (6) taxation, (7) guardianship law, (8) insurance law and (9) constitutional law. The first part of *Elder Law and Will Drafting* provides an introduction to the scope and practice of elder law in New York State.

The second part provides an overview of the will drafter's role in achieving these goals.

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NEW YORK STATE BAR ASSOCIATION

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Section membership is available to current NYSBA members who are age 55 or over.

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To be eligible for membership in the Senior Lawyers Section, you **must first** be a member of NYSBA. You must also be age 55 or over.

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The Senior Lawyers Section is currently looking for members of the Section to help build its substantive committees. The Section's leadership welcomes volunteers. To become involved, please contact: SeniorLawyers@nysba.org. Participation in Section committees is a benefit of membership.

Please return payment and application to:

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Table of Contents

Addressing Defective Verdicts While the Jury is Empaneled; Post-Trial Motion Practice – Challenging the Verdict after the Jury Has Been Discharged; An Introduction to Post-Verdict Setoffs: Collateral Source Reductions Under CPLR 4545; Setoffs Under General Obligations Law § 15-108; Reductions to a Lost Earnings Claim in Certain Malpractice Actions; Collateral Sources and No-Fault Insurance; Periodic Payments of Future Damages Awards: An Overview of CPLR Articles 50-A and 50-B; Interest on Damage Awards and Money Judgments; Preparing and Entering Judgments and Bills of Costs in New York; Appellate Considerations for Post-Trial Motions to Set Aside a Jury Verdict; Post-Trial Motions: A View from the Bench

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The Senior Lawyer

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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 any one of the Co-Editors, 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 Co-Editors 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 Co-Editors 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 Co-Editors, Board of Editors or the Section or substantive approval of the contents therein.

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Table of Contents

Introduction; Defamation; The Invasion of Privacy Torts; Right of Publicity; Other News-gathering Torts; Copyright Infringement; Trademark Infringement; Rights and Clearances; Errors and Omissions Insurance; Contracting with Minors; Television Standards and Practices; Reality Television Pranks and Sensitive Subject Matter; Miscellaneous Steps in Pre-Broadcast Review.

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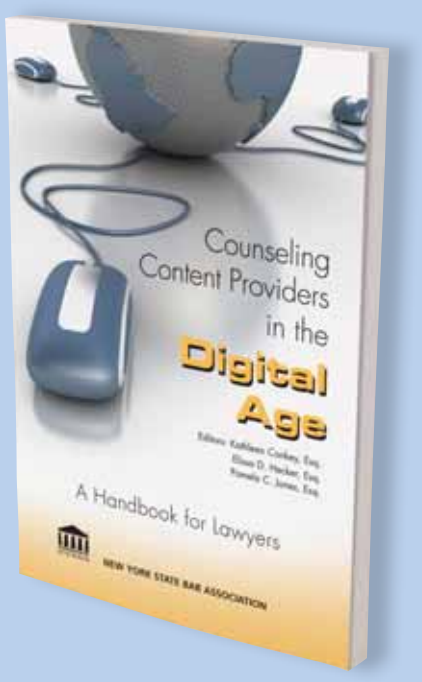

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