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ONEONONE

A publication of the General Practice, Solo & Small Firm Section of the New York State Bar Association

Message from the Chair

The General Practice, Solo & Small Firm Section continues to be a source of enrichment for our members.

The knowledge and experience of our members—more than 3,000 strong—are shared through publications and the sponsorship of continuing legal education programs. This enables us all to better serve our clients and, ultimately, to better serve the judicial system itself.

We joined with the Elder Law Section in Newport, Rhode Island, for the 2003 Summer Meeting. Over 600 NYSBA members belong to both the GP, S & SF and Elder Law Sections. The joint meeting was successful in that there were more than 250 registrants. In comparison, for the two separate Summer Meetings of 2002, the Sections attracted less than 200 registrants.

In Newport, substantive programs were sponsored by each Section. On behalf of the Elder Law Section, Chair Joan Robert and Program Chair Lawrence Davidow were responsible for several enlightening presentations. On behalf of the General Practice, Solo & Small Firm Section, Program Chair Frank D'Angelo offered Jeffrey M. Fetter, Stephen P. Gallagher and Robert L. Ostertag for a panel presentation of "Transferring the Law Practice: Planning for the Retirement, Disbarment or Death of the Solo Practitioner or Small Firm Member." Whereas we are always counseling our clients to plan ahead, these panelists emphasized the importance of planning for the future of our own practices. In addition, Leonard Sienko, of wEbrief fame, offered private Internet coaching sessions.

While in Rhode Island, none of the attendees expressed disappointment in missing the August 14th Blackout!

The Annual Meeting Program scheduled for January 27, 2004, promises more "bang for the buck." Be on the lookout for details.

Dwayne Weissman

P.S. Congratulations to Executive Committee member Irwin Kahn. In October 2003, Irwin, our First District Representative, was awarded the Lifetime Achievement Award by the New York City Trial Lawyers Association.

Congratulations are in order for P. Kevin Castel, as well. Mr. Castel was a panelist at our January 2003 Annual Meeting Program, "Ethics of Witness Preparation." P. Kevin Castel has been inducted as a United States District Judge for the Southern District of New York. Perhaps his contribution to our Program was a deciding factor!?

Inside

From the Co-Editors


Frank G. D'Angelo

The current issue of *One on One* continues its commitment to providing valuable substantive law, practice management and ethics information to our members. The practice management component of this issue focuses on the **sale of the law practice**. Former New York State Bar Association President Robert L. Ostertag provides valuable information on the transfer of the law practice in his timely article. Future issues will continue to deal with the complex problem of resolving the practice because of death, disability or disbarment.

In our ethics column, the obligation of the practitioner to disclose of the **existence of insurance coverage in settlement discussions** is explored in New York County Lawyers Ethics Opinion number 731. Future issues of *One on One* will provide expanded information, analysis and commentary on ethics.

Please take the time to read Martin Minkowitz' article entitled "Posters." This article focuses on the **workers' compensation notice requirements in the workplace.**


Martin Minkowitz

Also of interest is Thomas Hughes' article which explores **the present standard of absolute liability under Labor Law § 240(1)**. Multinational estate planning issues, particularly the state tax and inheritance laws under Israeli Law, are explored in Alon Kaplan and Jimmy Chotoveli's article, entitled "**Israel: Inheritance and Related Taxation.**"

Finally, in our technology column Steve Gallagher explores **ethical considerations in avoiding malpractice through the use of personal computers**.

As always the editorial staff invites questions, comments and certainly contributions to the publication. Enjoy!

Frank G. D'Angelo
Martin Minkowitz
Co-Editors of *One on One*

2004 New York State Bar Association

Annual Meeting

January 26-31, 2004

New York Marriott Marquis • New York City

General Practice, Solo & Small Firm Section Meeting

Tuesday, January 27, 2004

"Hot Tips for the General Practitioners; Winding Down the Practice; Planning for Disability, Death, Disbarment or Retirement; Ethics Update"

To register online: www.nysba.org/annualmeeting2004

Transfer of a Law Practice

By Robert L. Ostertag

For all time prior to the last decade, lawyers in America were perhaps the only corps of professional people who were prohibited from recognizing any financial value from their good names and the goodwill of their practices. We were told that clients were not chattels or vendible commodities, that lawyers were not tradesmen, and that the sale of law practices would necessarily involve the disclosure of client confidences and secrets, a serious violation of a core principle of our profession. Lawyers, therefore, had nothing to sell but their desks, their chairs, their typewriters and their libraries.

It was not until 1989 that those who control our professional lives, or at least some of them, caught up with reality. It was in that year that the Supreme Court of California promulgated a new rule of professional conduct that for the first time permitted the sale of the goodwill aspects of a deceased lawyer's practice by his or her surviving spouse or estate. In 1990, given that impetus, the American Bar Association adopted a new Rule 1.17 to its Model Rules of Professional Conduct that proposed, even more expansively, to permit the sale of law practices. Since the ABA has no authority to promulgate rules enforceable in any of our jurisdictions, each had to decide for itself whether it would follow California's and the ABA's lead. Indeed, it was not long before a substantial number of them did, and now no fewer than 38 jurisdictions permit such transfers, whether by rule or otherwise, New York included. New York's rule can be found at 22 N.Y.C.R.R. § 1200.15-a. It is more readily recognizable as Disciplinary Rule (or DR) 2-111.[1]

What the rule means, in general terms, is that lawyers, their personal representatives and their estates may transfer for value, under specifically stated limited conditions, not only the property comprising the physical plants in which they practice, but also the value of their own good names, their reputations and the cases and matters they have in their offices, and they can do so whether upon a lawyer's retirement, disability, or death. The rules in all the states and territories vary to a greater or lesser extent and may thus be said to be jurisdictionally specific. Attorneys licensed to practice in more than one jurisdiction, therefore, should take extreme care to identify the conditions under which they may transfer their respective practices for value. We shall treat here only the New York rule.

Who May Transfer a Law Practice for Value?

Lawyers retiring from the private practice of law, or law firms one or more of whose members are retiring from the private practice of law within the firm, or the personal representatives of deceased, disabled or "missing" lawyers may sell the lawyers' or firms' law practices, including their goodwill.

We deal here primarily with solo practitioners, however. For many years, law firm partners have found legitimate ways, though not authorized by rule, to transfer the value of their practices upon retirement, disability or death, usually by means of in-house contractual arrangements with their long-existing or even newly acquired partners or associates. Until now, solo practitioners have never had that opportunity, and that was the inequity of the former rule.

Now they may do so.

> *"For all time prior to the last decade, lawyers in America . . . had nothing to sell but their desks, their chairs, their typewriters and their libraries."*

But not only may solo practitioners or their personal representatives, by specific rule, and for value, transfer the goodwill and other proprietary aspects of their practices upon retirement, disability or death. So may non-solo law firms by specifically stated means. It would appear, therefore, that the inclusion in the new rules of a specific grant of right to members of non-solo law firms represents merely the drafters' acknowledgment of the existence of an already acceptable, longstanding end, but not necessarily its means.

Interestingly, the rule also applies to situations wherein lawyers are missing, but it does not define the term "missing." Perhaps the more sinister word "disappeared" would have been more appropriate.

To Whom May a Law Practice Be Transferred for Value?

A private practice may be sold to one or more other lawyers or law firms. That obviously includes any practitioner licensed and in good standing to practice law in the State of New York and any similarly situated New York law firm. Does it mean that a practice may be sold to a non-New York lawyer or law firm? The rule doesn't address the question, but since those unlicensed in New York are generally considered not to be lawyers for purposes of practicing here, presumably they would be excluded.

What about multijurisdictional firms, i.e., those with offices in more than one jurisdiction, where each such office is staffed by attorneys licensed to practice in the state wherein they are assigned by the firm as, for example, in New York? Presumably they would qualify for such purpose.

And what about firms whose professional staffs are not licensed to practice in New York and who do not have a presence here? Under newly proposed multijurisdictional practice rules, out-of-state attorneys would be authorized to represent clients in New York in specially restricted ad hoc situations. Would they qualify as purchasers? Obviously the rule does not address that unforeseen issue either, but again, since unlicensed out-of-state lawyers cannot maintain ongoing practices in New York, presumably the application of the rule would prohibit such transfers to them as well.

Clients' Confidences and Secrets; Conflicts

Most sensitive is the issue of clients' confidences and secrets. Rule 2-111(B) states the conditions under which confidences and secrets may be disclosed in the course of negotiations involving the transfer of law practices. It is a critical section of the Code that cannot be ignored. Initially, Rule 2-111(B)(1) provides that the seller of a law practice may provide prospective buyers with any information not protected as a confidence or secret under DR 4-101. DR 4-101 is the key disciplinary rule in New York's Code of Professional Responsibility that governs the preservation of clients' confidences and secrets. It defines "confidence" as information protected by the attorney-client privilege under applicable law. It defines "secret" as other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or likely to be detrimental to a client. DR 4-101 then recites when and when not confidences and secrets may be revealed by a lawyer. Reference to it is virtually mandatory in the practice transfer process.

DR 2-111(B)(2) then provides that, notwithstanding the provisions of DR 4-101, the seller may provide the prospective buyer with information as to the identity of his or her individual clients (the word "individual" not meant to exclude corporate, partnership or other similar entities) except where the seller has reason to believe that such information or the fact of such representation is itself a confidence or secret (which usually it is not). In that instance, if the client, has first been advised of the identity of the prospective purchaser and has granted consent to the proposed disclosure, such information may be provided.

DR 2-111(B)(2) also states, again notwithstanding the provisions of DR 4-101, that the selling attorney may provide information concerning the status and general nature of an individual client's matter, together with information that is available in public court files and information concerning the financial terms of his or her attorney-client relationship and the payment status of the individual client's account. But there are rather complex qualifications. DR 2-111(B)(3) provides in substance that prior to disclosing any disclosable confidences or secrets, a selling attorney must provide the prospective purchaser with information regarding matters involved in the proposed sale that [hopefully] will be sufficient to enable the prospective purchaser to determine whether any conflicts of interest exist. Where sufficient information cannot be disclosed without revealing client confidences or secrets, however, the seller may make such disclosures as are necessary for the prospective purchaser to determine whether any conflicts of interest exist, subject, however, to the provisions of DR 2-111. If the prospective purchaser determines the existence of conflicts of interest prior to reviewing such information, or determines during the course of review that a conflict of interest exists, the prospective purchaser cannot review or continue to review the information unless the seller has obtained the consent of the client in accordance with the provisions of DR 4-101(C)(1). All that language easily lends itself to confusion in any given situation, and we clearly lack sufficient guidance to make it all meaningful.

Since the identity of clients is normally not deemed to be a confidence or secret, it would appear that the revelation of the identity of a seller's clients (presumably from a client list) would normally be among the first items of information to provide a prospective purchaser so that he or she might exclude conflicted clients from the transaction or at least render further consideration as to whether their representation would indeed present an impermissible conflict. Not necessarily so, however, under the Rule. It is particularly when the identity of a client is itself a confidence or secret that the complexity is at its greatest. No one said such transactions would always be simple.

What other identifications might be necessary? Certainly the identities of opposing parties. Some observers believe that the identity of all lawyers representing the parties, as well as of judges and hearing officers, should be disclosed.[2]

The protection of confidences and secrets has always been the core of our professional obligation to our clients, unlike in the accounting profession. That is primarily what our profession's eventual resistance to multidisciplinary practice with accountants was about.

The point to be made about DR 2-111(B)(3), particularly its second sentence, is that this segment of the negotiation process can be very delicate and the seller should give extreme care in disclosing the very kind of revelations that the prospective purchaser may require not only to determine whether a conflict exists, but whether he or she even wishes to pursue the business aspects of the proposed transaction. It clearly would not be difficult to fall into a violative trap that subsequently could result in disciplinary proceedings commenced by a discontented client.

It also is important to note that where confidences and secrets are disclosed to a prospective purchaser, he or she must maintain the same confidentiality of such information as if he or she represents the client. That appears clear enough from the rule and it should not be difficult to adhere to unless, of course, such information will somehow impact upon a prospective purchaser's representation of another client in another unrelated matter. Temptation frequently leads to misconduct.

"Reasonable Restrictions" and Geographic Considerations

DR 2-111(A) provides that a seller and buyer may agree upon reasonable restrictions on the seller's private practice of law notwithstanding any other provision of the Code of Professional Responsibility. Obviously this speaks to the seller's subsequent practice of law and thus to the issue of non-compete agreements. DR 2-111(A) also provides that "[r]etirement" shall include the cessation of the private practice of law in the geographic area, meaning the county and city, and any other county and city contiguous thereto, wherein the practice to be sold has been conducted.

DR 2-108(A) prohibits attorneys from participating in a partnership or being party to an employment agreement with other attorneys that restricts the right of any of them to practice law after the termination of a relationship created by the agreement except as a condition to payment of retirement benefits. DR 2-111(A) overrides that rule with respect to the sale of law practices. The right of clients to select their own lawyers has always been considered paramount to the right of lawyers to participate in non-compete agreements of their own. What is "reasonable" within the context of the sale of a law practice, of course, has never been tested in New York, at least not in published opinions up to this writing.

But DR 2-111(A) does define as reasonable a geographic area that includes the county and city wherein a lawyer practices, together with a county and city contiguous thereto. Thus, for example, a retiring New York City attorney would "reasonably" be restricted from practicing law in all five counties within the city, as well as in the City of Yonkers, and in Westchester and Nassau counties as well. Note in the rule the use of the mandatory third person "shall" as to the stated geographic areas. Whether a contractual restriction beyond the mandated geographic limits would be "reasonable" has not been decided but probably would be fact-intensive.

Note also N.Y. State Bar Op. 707 (1998) which opines that a lawyer may not retire from one part of a law practice and continue to practice in another part within the same geographic area. DR 2-111(A) thus is said not to contemplate retirement from one or more areas of practice without retirement from all others within the same geographic area.

What does ". . . in which the practice to be sold has been conducted" mean? Does it mean the city or county of one's primary office? Does it mean, more likely, any office locale from which one practices? Does it mean any city or county wherein a lawyer regularly or even occasionally has appeared during the course of his or her private practice even though it is not the city or county wherein this office is located? If a Queens County litigator appears regularly throughout Long Island but maintains his or her only office in Queens, can he or she be foreclosed by agreement from practicing in Suffolk County? Would that be a "reasonable" restriction? We do not yet know. If a lawyer maintains offices in several counties throughout New York State, as some do, are the geographic areas wherein those offices are located included within the rule? May a lawyer retire from the practice of law in Westchester County where he or she maintains an office, but not in Albany County where he or she also maintains an office? Such issues have not yet been determined by precedent.

Notification to Clients

When financial evaluations finally have been completed along with other details of the transaction and a basic agreement has been reached for it to be consummated, it is necessary for both participants, jointly and in writing, to notify each of the seller's clients of the proposed sale.[3] Such notice must include a statement as to the client's right to retain other counsel or to take possession of his, her or its file, and also as to the fact that the client's consent to such a file transfer will be presumed if the client, upon such notice, neglects to take action or fails otherwise to object to it within ninety days from the sending of such notice, subject, however, to any court rule or statute mandating express approval by a client or a court. That imposes upon each client the obligation to take an affirmative step to prevent the transfer of his or her file to the purchasing attorney if that is desired. The rule obviously is intended to avoid prevention of the transaction merely by reason of a client's neglect, inaction or lack of concern in the approval process. And, of course, despite their own neglect, inaction or lack of concern resulting in the transfer of their files to the purchasing attorney, clients may thereafter always terminate the services of the purchasing attorney.

With regard to fees, clients must also be notified in writing, jointly by both the seller and the buyer, that the existing fee arrangement with the selling attorney will be honored, or that proposed fee increases will be imposed. Obviously that is of particular concern to clients in the grant or withholding of consent. It is important to note that the fee charged to a client by the purchaser cannot be increased by reason of the sale unless permitted in the original retainer agreement with the client or otherwise specifically agreed to by the client.[4]

The joint written notice to each of the seller's clients must also include the identity and background of the purchasing attorney, the location of his or her principal office address, his or her bar admission(s), his or her number of years in practice within the jurisdiction, whether the prospective purchaser has ever been disciplined for professional misconduct or convicted of a crime, and whether the prospective purchaser intends to re-sell the practice.

Finally, attorneys should be aware that the rules that for decades proscribed the sale of a law practice revolved primarily upon issues attendant upon improper disclosure of confidences and secrets. The current rule that permits the transfer of law practices is clearly in derogation of the prior philosophy. Accordingly, the current rule should ideally be construed strictly and should be expected to result in disciplinary action should it be violated. All doubts as to the propriety of a proposed transfer, or of any ingredient of it, should reasonably be resolved against the transfer.

Valuation

A fundamental consideration in the entire negotiation process involves the question as to what value may be ascribed to a selling practice. That is an issue requiring outside expertise in most instances. It is not the purpose of this article to describe the various means by which a practice may be appraised. Suffice it to say that the determination may become very complex. The reader is referred to various references listed at the end of this article.

Conclusion

The rules relating to the transfer of law practices in New York are relatively new and, at this writing, are not yet the subject of judicial interpretation. Nor does the writer yet have any authoritative statistics as to the extent to which DR 2-111 has been utilized. The rule was intended primarily to place solo practitioners on a equal footing with non-solo practitioners in terms of their ability to obtain monetary value from their years of private practice. It probably is fair to state that most solo practitioners are general practitioners, and that most of them have relatively few institutional clients. Assuming that to be true, one cannot help but wonder what monetary value most solo practices may have where they consist of an ever-changing clientele, and where (unlike non-solo firms wherein a continuing firm name and its continuing professional staff may provide value) the goodwill aspect of the practice to be sold consists exclusively of the character and professional reputation of the selling attorney who, upon sale, will no longer be an element of the practice. That factor, it would seem, tends to place the solo practitioner on something other than the equal footing that the rule was intended to provide. But for those who can somehow find value to sell, the rule exists to be used. While nothing may be gained from it in many situations, nothing can be lost, and all solo practitioners should at least consider the marketable value of their practices before simply shutting down.

Endnotes

1. *See also* Ethical Considerations (or ECs) 2-34 to 2-36.
2. *See* Simon's New York Code of Professional Responsibility Annotated (West Group), at 338.
3. DR 2-111(C).
4. DR 2-111(E).

References

New York's Lawyer's Code of Professional Responsibility DR 2-111 and DRs cited therein, and ECs 2-34, 2-35 and 2-36.

N.Y. State Bar Op. 707 (1998).

N.Y. State Bar Op. 699 (1998).

N.Y. City Bar Op. 1999-04 (1999).

ABA Model Rules of Professional Conduct, Rule 1.17.

Edward Poll, The Business of Buying, Selling, Merging or Closing a Law Practice, soon to be published by the American Bar Association.

Robert L. Ostertag, *$ale of A Law Practice*, GPSOLO (ABA) vol. 17, no. 1 (Feb. 2000), at 22.

Robert L. Ostertag is a partner at the firm of Ostertag O'Leary & Barrett in Poughkeepsie and a past President of the New York State Bar Association.

Posters

By Martin Minkowitz

We have all seen the poster in business establishments, which gives notice to the world that employees on the premises are covered by workers' compensation benefits. The employees are not only notified that their employer is in compliance with the Workers' Compensation Law, but also advises what should be done if a compensable injury is sustained by the employee, and that there is a right to counsel in making a claim for benefits. There is also a poster for disability benefits as required by the Disability Benefit Law.[1] They usually hang side-by-side and are generally provided by the insurance company issuing the coverage. It even exists in several languages and is required by statute.[2] The reason we often noticed it is that the law requires that the sign be posted and maintained in a conspicuous place at the place of business and in the prescribed form of the Chair of the Workers' Compensation Board. Even an employer who operated a horse-drawn carriage or an automobile for hire who had no minimum staff or regular employees, who are not required to report for work at an established place of business, would have to maintain such a poster in each such vehicle which was owned or operated by him.

The notice really says that the employer on these premises has complied with all the rules and regulations of the Workers' Compensation Board and maintains an insurance policy to cover the employees who may sustain accidents in the employment.

The failure to post that notice carried little or no repercussions for the owner of the premises. If the Workers' Compensation Board investigated and did not see the poster, they could presume that there was no coverage and require the employer to prove or rebut that presumption, but other than the annoyance that might result from being subpoenaed to appear at the Workers' Compensation Board offices to demonstrate that coverage was in place, there was no penalty to the employer. The exclusive remedy doctrine which is mandated by the statute, protecting the employer from suit by its employees, remains in effect whether or not the notice is posted, so long as there was proper coverage as required by the statute.[3]

However, in this legislative session a major change has occurred. The employer who fails to comply with the law requiring the posting of the notice is now subject to a fine of up to $250 for each violation it is found guilty of. This is in addition to any other penalties, which might be imposed by law. The fine is for the benefit of and payable to the Uninsured Employers Fund.[4]

Interestingly, the law required and still requires that if the Chair requests an employer to furnish a written statement identifying the insurance company that the employer is insured with, or proving that the employer has self-insured, the employer must comply within 10 days of the request. The failure to furnish a written statement replying to the Chair constitutes presumptive evidence that the employer has neglected or failed to provide coverage for its employees.

Since the fine is for each violation of the law, a failure to respond within 10 days may result in a fine of $250 since it is a failure to comply with the provisions of section 51. If this becomes the interpretation of the Board, then the penalty of $250 will be payable to the Uninsured Employers Fund if the employer fails to respond within 10 days, even if the employer had insurance in place and covered all of its employees in accordance with the statute. It is, therefore, possible that an employer could be fined first for failure to post the sign, or if posted, not keeping it in a conspicuous place as required by the statute, and also liable for another $250 for failing to respond to the Chair of the Board.

The fine provision took effect on September 22, 2003, the date of the enactment of the law. It will be interesting to see to what extent this new provision is enforced and what the level of fining will be, since there is discretion in the Board to fine up to $250 for each violation. The fine is the same amount, which the Chair can impose for each 10 days that an employer has failed to provide for the payment of compensation.[5]

Endnotes

1. Workers' Compensation Law art. 9 (hereinafter "WCL").
2. WCL § 51.
3. WCL §§ 10, 50.
4. WCL § 26-a.
5. WCL § 52.

Martin Minkowitz is a partner with Stroock & Stroock & Lavan in New York City. A former Deputy Superintendent and General Counsel of the New York State Insurance Department and former General Counsel with the New York State Workers' Compensation Board, Mr. Minkowitz is an Adjunct Professor at New York Law School and is the author of the commentaries to McKinney's Worker's Compensation Law.

Is the Present Standard of Absolute Liability Under Labor Law § 240(1) Necessary or Desirable?

By Thomas Donald Hughes

Imagine the following scenario: You lease a store in a multi-story building in New York City. Your lease permits you to make improvements to the outside of your premises, and you decide you want to paint them. A painter with whom you are negotiating mistakenly believes that you have retained him and shows up at your store on a Sunday morning, paint in hand, while your store is closed. While painting the outside of your store he falls 12 feet to the ground from a defective scaffold borrowed from his employer, breaking his back. The painter, an independent contractor, sues you under New York State Labor Law § 240(1).

Plaintiff moves for summary judgment on liability and you oppose the motion, arguing that you cannot be liable for the painter's injuries because you did not agree to the work, you did not supply his materials or equipment, and you did not control or supervise his work. Indeed, you did not know that he was painting your premises. The court, however, grants plaintiff summary judgment under Labor Law § 240 because you, as the "owner" of the premises, are absolutely liable even though you did nothing wrong. Having no defenses to this New York Labor Law § 240(1) claim, you settle the case for a large sum of money.[1]

New York Labor Law § 240(1) provides:

> All contractors and owners and their agents, except owners of one and two family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law § 240(1) seeks to protect construction workers from elevation-related injuries[2] by placing ultimate responsibility for safety practices at commercial construction sites on building owners, general contractors, and their respective agents.[3] The duty to provide proper safety devices to construction workers is non-delegable and absolute,[4] making owners and general contractors vicariously and absolutely liable even if they do not supervise or control the construction work.[5] Absolute liability even attaches to fee owners who have leased the land to another and did not own the building itself,[6] and to lessees who hire the contractor.[7]

To prevail under Labor Law § 240, an injured worker must show that he was injured by "gravity related" construction hazard contemplated in section 240(1)—i.e., an injury from the worker falling or from an object falling on the worker; that the owner or general contractor violated the statute by not providing required safety devices or by providing inadequate safety devices; and that the statutory violation was "a" proximate cause of his injuries.[8] Defendants may avoid liability if the worker was the "sole proximate cause" of the accident,[9] or if the worker was "recalcitrant," that is, he refused to use safety devices provided to him.[10] Comparative negligence is not a defense once the plaintiff shows that the violation of the statute was a proximate cause of his injury.[11]

Since Illinois repealed its scaffolding law two years ago, New York is the only state in the nation with such an absolute-liability statute. If State Senator Dale M. Volker and State Assemblyman Joseph D. Morelle get their way, however, that will change. They have introduced a bill in the legislature that would retain the vicarious-liability component of Labor Law § 240(1) but dispose of the statute's absolute-liability component.[12] Under their proposal, the owner and general contractor would be liable only upon proof that plaintiff's injuries were caused by the owner's or the general contractor's *negligent* violation of the statute. Under this proposal, defendants could rebut plaintiff's negligence-based statutory claim of liability by *prima-facie* proof of compliance with the federal Occupational Safety and Health Act (OSHA) and with Part 23 of the N.Y. Comp. R. & Regs. (N.Y.C.R.R.) In addition, the proposed amendments would permit evidence of plaintiff's comparative negligence.

Historical and Public Policy Reasons for a Change in Labor Law § 240(1)

The Labor Law was enacted in 1885, when construction work was completely unregulated and much more dangerous than it is today. In addition, in 1885, unlike today, the only way an injured worker could be compensated was to sue to recover from his employer. Such a suit, however, stood little chance of success, because a plaintiff's contributory negligence (of which there was invariably some) mandated dismissal of any personal-injury lawsuit. The legislature leveled the playing field by eliminating the requirement of negligence in 1897.[13] The

Court of Appeals, concluding that common law defenses could not co-exist with absolute liability, eliminated the contributory-negligence defense in 1948.[14]

In the 1960s, the legislature amended the statute to its present form, which the courts have held imposes absolute liability on the owner. It is by now well established that the duty imposed by Labor Law § 240(1) is non-delegable, and that an owner or contractor who breaches that duty may be held absolutely liable regardless of whether it is at fault or has supervised or controlled the work.[15]

The situation today is dramatically different from the situation that existed when the Labor Law was first enacted. Today there are many forms of legislative and non-legislative safeguards protecting workers on the job, including OSHA, N.Y.C.R.R., industry safety standards, and union representation on job sites. Importantly, workers today are protected by workers' compensation, a program that guarantees payments for their accident-related medical expenses and continuing wage support during periods of temporary or permanent disability. These benefits are guaranteed regardless of fault, eliminating the prejudicial consequences created by the contributory negligence rule (which itself has been replaced by the more equitable comparative-negligence rule).

Labor Law § 240(1) undermines the rationale for making workers' compensation the sole remedy for an injured employee because actions based on this statute frequently spawn third-party indemnification claims against employers.[16] Such third-party claims, however, have the perverse effect of making employers incur defense costs in employee-injury cases and, if liable, indemnity costs—the precise result sought to be avoided by the Workers' Compensation Law.

Messrs. Volker's and Morelle's amendment of Labor Law § 240(1) would return workers' compensation to its rightful "exclusive-remedy" function in New York's legal compensation scheme. As against owners, fewer Labor Law § 240(1) lawsuits would be successful because of the need to prove that either the owner or the general contractor violated the various fault-based regulations. As to both owners and general contractors, it makes much more sense, in today's highly regulated work environment, to require an injured worker to prove a violation of the regulations, and to diminish any award by the plaintiff's comparative negligence. Indeed, that is precisely the standard applied to a "non-worker" who happens to be injured while on the job site.[17]

Recent Cases Narrowing the Applicability of Labor Law § 240(1) Suggest Support for Legislative Efforts to Amend the Law

The courts have long grappled with the task of establishing "overarching rules" for applying Labor Law § 240(1) in the legislatively-intended manner, to the point that they may be hoping for clarification from the legislature. "Although the statute seems deceptively simple on its face, few legislative enactments have taxed the courts more, probably because of the infinite factual variables that are continually presented to them. Well-intentioned efforts by courts to fashion overarching rules have often failed, and calls for a legislative overhaul of the statute are becoming more strident."[18] Attempting to deal with the "infinite factual variables" under Labor Law § 240(1), recent decisions have strictly construed the legislative intent behind the statute by limiting absolute liability to defined categories of construction-worker accidents. If these decisions are a guide they suggest a retreat from absolute liability under the statute—a position short of, but consistent with, efforts to amend absolute liability out of the statute altogether.

The trend toward limiting the reach of the statute began with *Rocovich v. Consolidated Edison Co*.[19] There the Court restricted liability to workers engaged in "those occupational hazards which the Legislature intended should warrant the absolute protection that the statute affords"; specifically, difference in level of elevation, or gravity-related accidents, in which the proper "'erection,'" "'construction,'" "'placement,'" or "'operation'" of one or more devices of the sort listed in section 240(1) would allegedly have prevented the injury.[20]

Going further, *Narducci v. Manhasset Bay Associates*,[21] divided covered hazards under section 240(1) into two categories—"falling worker" and "falling object"—and defined different liability rules for each category based on different subsets of statutorily-required safety devices. Most importantly, the court prohibited a "'hazard from one type of activity [being] 'transferred' to create liability for a different type of activity."[22] A "falling worker," for instance, cannot base liability on the defendant's statutory failure to provide adequate "ropes," "pulleys," "irons," and similar devices—i.e., on the relevant subset of statutorily-required safety devices for "falling object" cases. Likewise, a "falling object" plaintiff cannot base liability on the defendant's statutory failure to provide an adequate "scaffold," "ladder," or similar device—i.e., on the relevant subset of statutorily-required safety devices for "falling worker" cases.

The Second Department, in *Bernal v. City of New York*,[23] not only limits the reach of Labor Law § 240(1) but loosens the absolute-liability standard itself by integrating the tort-based requirement of "foreseeability" into the section 240(1) standard of care. In *Bernal* a Hi-Lo being operated by one of plaintiff's coworkers bumped into the scaffold, causing plaintiff, who was standing on the Hi-Lo awaiting transfer to the scaffold, to fall. Affirming the denial of summary judgment to the plaintiff, the Second Department held that "a reasonable fact-finder might conclude that the coworker's conduct was the sole proximate cause of the plaintiff's injuries *or that the coworker's conduct constituted an unforeseeable superseding, intervening act*" (emphasis added).

Justice Siracuse views *Bernal* as "suggest[ing] that the protection of section 240(1) does not extend to accidents caused by co-workers" and as "incorporat[ing] foreseeability, a negligence concept, into what had been a form of absolute liability based on the type of danger involved."[24] But if the scope of defendant's duty is determined by the "foreseeability" of plaintiff's accident, then the standard of care under section 240(1) is not one of absolute liability but one of negligence, which would presumably include comparative negligence.[25] Indeed, as the Court of Appeals suggested in abolishing contributory negligence,[26] it is conceptually impossible to adjudicate absolute liability by applying negligence rules.[27] The only way to permit negligence rules is to abolish absolute liability.

In narrowing liability, first, to gravity-related accidents; second, to distinct categories of gravity-related accidents; and third, to "foreseeable" consequences of causal acts, these decisions narrow the application of Labor Law § 240(1) and, perhaps, the standard of liability itself. By limiting the reach of the statute, the courts have effectively converted some cases of absolute-liability into negligence cases.

Twist and turn the law as they might, the courts will not unilaterally dismantle absolute liability under Labor Law § 240(1). The legislature must do that. Now that workers' compensation is available to all workers, and negligence law is more hospitable to personal-injury plaintiffs than it once was, the reasons for imposing absolute liability on owners and general contractors are no longer compelling. The Volker-Morelle amendments recognize this and, in abolishing absolute liability under the statute, pick up where the courts leave off.

Endnotes

1. These facts are based on an actual case identified by the New York State Insurance Association. The matter settled after summary judgment for $900,000.
2. *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 618 N.E.2d 82, 601 N.Y.S.2d 49 (1993).
3. *Smith v. Hooker Chemicals*, 70 N.Y.2d 994, 521 N.E.2d 431, 526 N.Y.S.2d 696 (1986).
4. *Zimmer v. Chemung County Performing Arts*, 65 N.Y.2d 513, 482 N.E.2d 898, 493 N.Y.S.2d 102 (1985).
5. *See John v. Baharestani*, 281 A.D.2d 114, 721 N.Y.S.2d 625 (1st Dep't 2001) (owner and general contractor absolutely liable for injuries to unsupervised and uncontrolled independent contractor).
6. *Majia v. Moriello*, 286 A.D.2d 667, 730 A.D.2d 131 (2d Dep't 2001).
7. *Glielemi v. Toys 'R' Us, Inc.*, 94 A.D.2d 683, 462 N.Y.S. 2d 225 (2d Dep't 1983), *aff'd*, 62 N.Y.2d 664, 476 N.Y.S.2d 283. Though owners and general contractors may not delegate the duty to provide a safe place to work, they may delegate the work that gives rise to the duty. A third party that is delegated the work, a subcontractor for example, becomes an agent of the owner or general contractor, and, upon supervising and controlling the work, assumes the same statutory responsibility as the owner or general contractor. *Cf. Russin v. Louis N. Picciano and Sons*, 54 N.Y.2d 311, 445 N.Y.S.2d 127 (1981); *Passananti v. City of New York*, 268 A.D.2d 512, 701 N.Y.S.2d 652 (2d Dep't 2000), *aff'd*, 54 N.Y.2d 311, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981).
8. *Narducci v. Manhasset Bay Assocs.*, 96 N.Y.2d 259, 750 N.E.2d 1085, 727 N.Y.S.2d 37 (2001); *Smith*, 70 N.Y.2d 994.
9. *Styler v. Walter Vita Constr., Inc.*, 174 A.D.2d 662, 571 N.Y.S.2d 524, (2nd Dep't 1991).
10. *Stolt v. General Food Corp.*, 81 N.Y.2d 918, 613 N.E.2d 556, 597 N.Y.S.2d 650 (1993).
11. *Id*.
12. New York Senate Bill 1937 (S.1937).
13. 1897 N.Y. Laws, ch. 415.
14. *Koenig v. Patrick Constr. Corp.*, 298 N.Y. 313, 83 N.E.2d 133 (1948). *See* Justice Andrew V. Siracuse, *Proposals for Tearing Down the Scaffold Law*, N.Y.L.J., Apr. 9, 2002.
15. *Haimes v. New York Tel. Co.*, 46 N.Y.2d 132, 136–137, 385 N.E.2d 601, 412 N.Y.S.2d 863.
16. An owner or general contractor may prevail against the employer in negligence or under Labor Law § 240(1) if the employer proximately causes its employee a "grave injury" as defined by the Workers' Compensation Law or if it contracts to indemnify the owner or general contractor for liability arising out of the employer's negligent performance of the work. Workers' Compensation Law §§ 11, 29.
17. *See, e.g.*, *Gibson v. Worthington Div. of McGraw-Edison Co.*, 78 N.Y.2d 1108, 585 N.E.2d 376, 578 N.Y.S.2d 127 (1991) (person inspecting the work-site-to-be to bid on the job is not protected by Labor Law 240(1)).
18. *Hargobin v. KAFI Corp.*, 282 A.D.2d 31, 724 N.Y.S.2d 155 (1st Dep't 2001).
19. 78 N.Y. 2d 509, 572 N.E.2d 51, 577 N.Y.S. 2d 219 (1991).
20. *Id*. at 513–14.
21. 96 N.Y.2d 259, 267, 750 N.E.2d 1085, 727 N.Y.S.2d 37 (2001).
22. *Id*. at 268.
23. 217 A.D.2d 568–69, 628 N.Y.S.2d 823 (2d Dep't 1995).
24. *Secord v. Willow Ridge Stables*, 179 Misc. 2d 366, 373, 684 N.Y.S.2d 867 (Sup. Ct., Monroe Co. 1999).
25. *See Meta v. I. Chera and Sons*, 2001 WL 1328596, 2001 N.Y.S. Slip Op. 40171(U) (Sup. Ct., Bronx Co. 2001), *aff'd*, 304 A.D.2d 420, 757 N.Y.2d 433 (1st Dep't 2003) ("Some of these decisions, especially those in the Second and Third Departments, appear to engage in a fusion of what should be two discrete concepts, i.e., comparative negligence (which is not relevant in an absolute liability case) . . . and intentional culpable conduct . . . which may be used to defeat [a section 240(1)] claim").
26. *Koenig*, *supra*.
27. *See Secord* at 372 ("Since the scope of duty of the Scaffold Law defendant is measured by a statutory standard, though, without regard for foreseeability, it cannot be 'cut off' by an unforeseeable act").

Thomas Donald Hughes is Senior Vice President & General Counsel, Assistant Secretary, at Greater New York Insurance Group. Mr. Hughes is also an Adjunct Professor of Law at New York Law School.

How to Avoid Committing Malpractice with Your Computer

By Stephen P. Gallagher

> *In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation that the lawyer may encounter can be foreseen, but fundamental ethical principles are always present for guidance. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.*
>
> **The Lawyer's Code of Professional Responsibility**

The Information Age is dramatically changing our society. There can be no doubt whatsoever that the most successful lawyers in the future will be the ones who learn to master the tools of the Information Age. Canon 6 of The Lawyer's Code of Professional Responsibility states that, "A lawyer should represent a client competently." In this Information Age, does this mean that a lawyer has to have a computer on his or her desktop in order to competently practice law? Increasingly, I am beginning to believe that the answer is yes. There are just too many things that a lawyer can now do with a computer to enhance the quality of legal services, and there are too many things he or she cannot do without access to a computer.

Does that mean that a lawyer who cannot type should start trying to type all of his or her own documents? Of course not! But, where lawyers have traditionally invested in extensive law libraries, the Internet now functions as the greatest library-type resource that can be imagined. How long can you afford to ignore this resource? Whether you love computers, hate them or just tolerate them, computers will continue to have a dramatic impact on the delivery of future legal services.

Keep in mind that as a lawyer you fulfill many roles. A lawyer can serve as a trusted business advisor, a zealous advocate in court, a negotiator, a mediator, a tax planner, a shoulder to cry on, a guardian or a counselor, just to name a few. What is the common thread that ties all of these different activities? I would argue they all involve the processing, communicating and managing of information. So, like it or not, lawyers are information providers and processors. You depend on acquiring knowledge and your ability to analyze the facts and do research. You need to be able to communicate complicated concepts to clients in language that the client can understand. One of the hallmarks of the Information Age is the rapid change in methods of information processing, and computers are important tools in accessing this electronic highway.

That is why many lawyers have determined that using the Internet and becoming computer literate is no longer an option. It is a necessity. Clients expect to see computers in a law office, particularly sophisticated clients. If your client has learned to use a computer in his business and knows how much more efficiently he can operate, he may begin to question why his attorney does not use one.

"There can be no doubt whatsoever that the most successful lawyers in the future will be the ones who learn to master the tools of the Information Age."

One of the most challenging things about integrating emerging technologies into your practice is that there always seems to be something new and different. Whether it is a new upgrade, a new product or just a new way to use an application, the changes just keep coming at an even-faster rate. It is important to keep in mind that The Lawyer's Code of Professional Responsibility continues to provide the *"fundamental ethical principles"* for members of the profession.

Avoiding Malpractice on the Electronic Highway

Oklahoma Practice Management Advisor Jim Calloway writes extensively about how there should be universal minimum standards of tech competency for lawyers. He acknowledges that these standards would be ever-changing, but there are certain basic skills that every lawyer needs to master to remain competent to avoid malpractice. So, our focus here is to design a basic Road Map to help every practicing lawyer avoid committing malpractice with your computer.

1. **Use technology to keep current—**Learn to use the World Wide Web. Business activity is increasing on the Internet. Even net veterans are surprised at how quickly consumers are going

online. Since the mid-1990s the Internet has dramatically multiplied communications and information access, removing it from the domain of centralized broadcasters and placing it in the hands of a worldwide network of individuals. According to a Jupiter Communications survey, in 1996 only about 10 percent of U.S. households were online. The percentage climbed to 50 percent by 2000 and was expected to reach about 63 percent by the end of this year.[1] Understanding the resources available through the World Wide Web will allow you to access the resources when you need them.

Work with several of your favorite Internet search engines to see how quickly you can locate things like: a ZIP code; a certain bill pending before the state legislature; an attorney general's opinion issued last week; a downloadable federal tax form; a telephone area code for a city; a municipal ordinance; or the names of individuals who signed the Declaration of Independence. Using the Web, you should be able to find many of the above in less than a few minutes each.

2. **Learn to use your e-mail effectively—**Learn basic e-mail and how to handle file attachments. E-mail is the most popular and often-used function of the Internet. Market-research firms estimate that in 2000 there were nearly 10 billion e-mail messages sent daily from between 450 and 570 million e-mail accounts worldwide, about 55 percent of which were in North America. The number of accounts was expected to grow to over 1 billion by 2005.[2] This is an incredible number of prospective clients, and an easy way to increase your exposure to malpractice claims, if you have not put systems and safeguards in place to protect yourself.

   Certainly there are legitimate concerns about the remote possibility of a breach of client confidentiality with unencrypted e-mail, but the vast majority of communications are very routine. There is a special benefit for communications between several parties when you use e-mail. Transferring documents as e-mail attachments is something that every lawyer should be able to do easily. Assuming you understand how your computer's folders are organized, learning to attach a file to an e-mail and how to handle a file when you receive it should take no more than half an hour. Sharing documents with others across the country or the state by attaching them to e-mail is an incredible time and expense-saving practice. There will still be times when a true hard-copy delivery is required or a fax might be preferable, but for the most part, e-mail will serve a huge amount of your document transfer needs. This means you will need to become comfortable with file attachments and your virus protection measures so that you can open e-mail with confidence.

3. **Install high-speed Internet access at work—**You need to access the Web through cable modem, DSL, T-1 lines or whatever. Law firms need high-speed Internet access. Broadband access makes the Internet a true tool, ready to be used at any moment. Using broadband access is not exactly a skill to be practiced, but it will be a revolution in your net use when those of you who do not have it finally do get it installed. Many attorneys now view high speed Internet access at home to be a necessity as well.

4. **Understand your office naming conventions and digital file storage system—**You have probably all experienced a time when your best client calls you at home on the weekend and just has to have one sentence added to an important document you thought was finished. The client is leaving town Monday morning. Can you easily turn your computer on from home or go to the office, turn on the computer network, and locate the client's document on your system to add the one sentence?

   This is another aspect of law offices that used to be a lot easier. You either had an alphabetical or numeric filing system. The client file was either in the proper file drawer or not. There are many ways to organize client files on the computer. It is just too risky for any lawyer not to know how word processing files are organized in his or her own office. You will be particularly vulnerable if every attorney in the law office does it a different way. Some have their word processing stored in client folders, some have everything under "My Documents, " and some organize their saved work by month and year. If someone is sick or disabled, or you have never paid attention to where your secretary stores your documents, finding the proverbial "needle in the haystack" will certainly put your relationship with this key client at risk.

   Begin by having everyone in the office agree on how the word-processing files are organized, and use the same naming conventions for your documents. Most offices already have a system. The question is whether the attorneys understand it or not. Set a firm-wide office goal to establish a uniform system for storing word processing and other digital client files.

6. **Know enough word processing to edit documents—**Obviously, it does not do you much good to be able to find your digital files by location and name, if you cannot do anything with them. You do not have to be able to type 100 words a minute, but you should have a basic understanding of how word processing software works and what the naming conventions are for editing work product.

As the Information Age continues to evolve, we will see more providers and users of information dealing with each other directly. The way companies utilize their people, market their products, manage their information, and work with law firms will all change. Renowned thinker and business trailblazer Rosabeth Moss Kanter calls this new way of working "e-culture,"[3] because it derives from basic principles of community: shared identity, shared knowledge, and mutual contributions. It seemed clear to me that, having the ability to communicate directly with nearly anyone, anywhere, set this new e-culture apart from anything we have ever seen. Within the framework of these principles, lawyers must be able and ready to use emerging tools to shape the body of the law to the ever-changing needs and relationships of society.

Endnotes

1. "Consumer Goods: Online Projections," Jupiter Communications I, July 1999.
2. *E-Mail Outpaces the Web*, "Industry Standard, Dec. 4, 2000, p. 168.
3. *See* Rosabeth Moss Kanter, e-Volve: Succeeding in the Digital Culture of Tomorrow (Boston, Harvard Business School Press 2001).

Stephen P. Gallagher was Director of Law Practice Management at NYSBA for the past 13 years. As such, Steve served as liaison to the General Practice, Solo & Small Firm Section. Steve can be contacted through e-mail at: Sgallagher@LeadershipCoach.us.

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Israel: Inheritance and Related Taxation

By Alon Kaplan and Jimmy Chotoveli

Many estate practitioners in Israel and around the world often state: "The Israeli tax system is free of Inheritance Tax. A testator can therefore pass on his property to his heirs free of tax."

In order to assess the correctness of this statement, it is necessary to analyze the Israeli laws of succession and examine Israeli Inheritance Tax laws.

I. Israeli Law of Succession

Inheritance in Israel is governed by the Succession Law of 1965. The Law enables any legally competent person to bequeath his estate after his death in accordance with his last will and testament. The laws do not impose any limitations upon the right to bequeath and a testator is therefore at liberty to bequeath his estate to whomever he wishes. This liberty has no bounds since there are no forced heirship rules in Israel.

Nonetheless, the Law gives a surviving spouse, children and other dependents a degree of protection by granting them a right to receive maintenance payments from the estate of the deceased, subject to certain limitations.

The Succession Law applies to all persons who, at the time of their death, were domiciled in Israel or who left assets in Israel.

Upon the death of the deceased, his estate passes to his heirs either by law (intestate succession) or by will (testate succession).

A. Intestate Succession

If the deceased did not leave a valid will, or if there are assets which were not bequeathed under the provisions of the will left by the deceased, or if the provisions made by the will are invalid, then the distribution of the estate of the deceased is governed by the rules of intestate succession.

The persons who are eligible to be heirs by law are the following:

- The lawfully married spouse of the deceased at the time of his death;
- A common law spouse may be also be regarded as the deceased's married wife if the couple lived together in a common household and neither of them was married;
- The children of the deceased and their issue (including illegitimate and adopted children and their issue), the parents of the deceased and their issue, the grandparents of the deceased and their issue;
- The state of Israel; in the absence of any other heirs.

The state is obligated by law to dedicate the estate for the purpose of education, science, health or welfare. The Minister of Finance, however, is entitled to make certain payments out of the estate to any person who was dependent on the deceased, or to a person upon whom the deceased was dependent or a relative of the deceased who is not an heir by law.

The Succession Law provides that children of the deceased and their issue take precedence over the parents of the deceased, and the parents of the deceased and their issue take precedence over the grandparents of the deceased.

Heirs of the same class, namely children, parents or grandparents, are entitled to receive the share in the estate due to such class of heirs, in equal shares between themselves.

B. Testate Succession

An individual is entitled to make a will if he is over the age of 18 and has not been declared by a court to be a legally incompetent person. At the time of drafting the will, the testator must be capable of understanding the nature and the legal consequences which ensue from it.

A testator can make a will in any one of the following forms:

- in the testator's handwriting;
- in the presence of two witnesses;
- in the presence of an "authority" (e.g., court);
- orally (special procedures apply to verification of the will).

A testator is entitled to revoke a will made by him at any time. Revocation may be in any one of the forms required for the making of a valid will or by destruction of the will revoked. The revocation must be unambiguous and, therefore, a will is only revoked by a later will if the later will expressly revokes the former will, or to the extent that any provisions in the later will contradict provisions in the earlier will. Subsequent revocation of the later will does not revive any provisions in the former will which had been revoked by the later will.

The rights of the heirs or beneficiaries are declared by way of an inheritance order if the deceased did not leave a will, or by a probate order in the case of succession by will. Where the will does not include assets which the deceased possessed at the time of death, then the courts may grant an inheritance and a probate order in one document.

The order is not a constitutive order creating the rights of the heirs and/or beneficiaries, but is merely a declarative order stating what the succession rights are.

An inheritance order declares who are the heirs by law and what is the share of the estate to which each heir by law is entitled, whereas a probate order declares that the will of the deceased is valid and specifies any provisions of the will which were found to be invalid. If an executor is appointed, this will be stated in the inheritance or the probate order.

C. Jurisdiction of Israeli Authorities in International Cases

The competent authorities in Israel, namely the Registrar of Inheritance Affairs or the Family Courts, have jurisdiction to deal with the estate of every person who, at the time of his death, was domiciled in Israel or who left assets in Israel.

In the context of inheritance, domicile is widely defined as "the place of the centre of life" of the deceased.

The proper law which will apply is the law of the place of the center of life of the deceased at the time of his death, subject to certain exceptions.

In cases of foreign wills, Israel does not recognize foreign courts' probate or inheritance orders and a petition for an inheritance or probate order, as the case may be, must be filed with the competent court in Israel. Such a probate or inheritance order may be dealt with according to the provisions of the foreign law in the framework of the rules of private international law.

In order to establish jurisdiction in Israel, evidence of the existence of assets of the estate in Israel must be provided with the petition for an inheritance or probate order; for example, there must be a Land Registry extract evidencing the ownership of real property, or a confirmation by a local bank as to the existence of a bank account in Israel, etc.

An expert opinion regarding the validity of the foreign will and its execution must be annexed to a petition relating to the estate of a deceased who was not domiciled in Israel at the time of death.

The inheritance or probate order will normally bear a comment restricting the application thereof to assets in Israel.

Israeli estate practitioners normally recommend separating Israeli assets from the foreign assets by making a specific will relating to the Israeli assets only. Provision is then made in the Israeli will for the testator to change his foreign will without affecting his Israeli will, unless specifically stated otherwise.

II. Related Taxes

There is no inheritance tax or death duty in Israel. In addition, there is no gift tax in respect of gifts made during the testator's lifetime or as a result of the testator's death. In this context the country of residence, domicile or nationality is not relevant; nor is the country where any assets of the estate may be situated of any relevance.

However, the fact that Israel does not levy inheritance tax on the estate may not be a conclusive fact that no tax will be paid by the heirs after the distribution of the estate. Subsequent transfers of the assets between heirs may give rise to various local taxes, such as capital gains tax or real estate registration tax. Another example is the case where an executor is appointed by the court who decides to sell the assets of the estate and distribute the proceeds to the heirs. This may also trigger capital gains or income tax. If the estate consists of, *inter alia*, a residential apartment, it may be advisable to first transfer the apartment to the heirs (tax-free) who may then sell it. This way the heirs may be able to enjoy the several tax exemptions available for residential properties.

III. Conclusion

Having analyzed the Israeli succession laws and inheritance tax issues, we can conclude that Israel provides a convenient succession environment: Freedom of testation (no "forced heirship") accompanied by no inheritance tax provides the testator with reasonable certainty that his estate will pass to his heirs according to his wishes and at full value.

However, we have also noted that certain taxes may become payable after the distribution of the estate and may thereby diminish the value of the estate.

Testators possessing assets in Israel and in other jurisdictions are advised to consult local estate practitioners in order to plan the proper execution of their estate and a tax-efficient distribution of their assets.

The authors of this article have used, *inter alia*, the following sources: Chapter entitled "Israel," by Alon Kaplan and Jeffrey Cohen, *Tolley's International Succession Laws*, Issue 2, October 2002; *Israeli Business Law—An Essential Guide*, Editor: Alon Kaplan, Kluwer 1996 and 1999; ISBN 9041103236.

Alon Kaplan, LLM, practices as an Advocate in Tel Aviv. Mr. Kaplan is also a member of the New York Bar and practices law in Germany as a Rechtsbeistand. Mr. Kaplan is Chairman of the Israeli Branch of the Society of Trusts and Estate Practitioners (STEP) and a Council member of STEP. He is Editor of *Trusts in Prime Jurisdiction*, Kluwer 2000, ISBN 9041198156, and *Israeli Business Law—An Essential Guide*, Kluwer 1996 and 1999, General Editor: Alon Kaplan, ISBN 9041103236, e-mail: alon@kaplex.com.

Jimmy Chotoveli, LLB, MSc, is currently doing his articles at Alon Kaplan Law Firm, Tel Aviv, Israel. E-mail: jimmy@kaplex.com.

NYCLA Ethics Opinion No. 731

TOPIC:

DISCLOSURE OF EXISTENCE OF INSURANCE COVERAGE IN SETTLEMENT DISCUSSIONS.

DIGEST:

A LAWYER WHO IS NOT OTHERWISE LEGALLY OBLIGATED TO DISCLOSE THE EXISTENCE OF INSURANCE COVERAGE NEED NOT REVEAL THE EXISTENCE OF INSURANCE COVERAGE PROVIDED THAT THE LAWYER MAY NOT KNOWINGLY MATERIALLY MISLEAD ADVERSE COUNSEL AS TO THE EXISTENCE OF APPLICABLE INSURANCE. IN ADDITION, A LAWYER SHOULD WITHDRAW AN INACCURATE PRIOR MATERIAL MISREPRESENTATION MADE DURING SETTLEMENT NEGOTIATIONS, WHETHER MADE BY THE LAWYER OR HIS OR HER CLIENT, ABOUT THE EXISTENCE OF INSURANCE.

CODE:

DR 7-102; DR 4-101; DR 1-102(A)(4).

QUESTIONS:

A: Where not otherwise required by law, does a lawyer have an ethical obligation to disclose the existence of insurance coverage when his client's ability to pay a judgment or settlement is at issue or reasonably could be considered to be an issue in settlement negotiations?[1]

B. (1) Should a lawyer disclose the existence of insurance prior to settling a claim under circumstances in which the lawyer has herself introduced into settlement negotiations the existence of a liability insurance policy? (2) Would the answer be different if the source of the misconception is not the lawyer but the lawyer's client? (3) What if the source is not the client but some other third person?

OPINION:

In the course of settlement negotiations, adversary counsel has come to learn from another source (e.g., a third party or a news story) that the inquiring attorney's client, a corporate defendant in a commercial arbitration, is on the verge of insolvency. Recognizing this fact, the claimant's counsel announces that she is prepared to accept a settlement of fifteen cents on the dollar, an amount far less than the plaintiff is likely to garner at the hearing. Defense counsel is aware that there is an undisclosed insurance policy that would be more than adequate to satisfy the claim in full. Assuming that the claim is not in suit, or that it is brought in a forum that does not require its disclosure, inquiring counsel asks whether there is an ethical duty to disclose the existence of the insurance.

At the outset it should be noted that we find no provision in The Lawyer's Code of Professional Responsibility (or, for that matter, in the ABA's Model Rules) which specifically addresses the settlement process. DRs 1-102(A)(4) and 7-102 are, however, certainly relevant. DR 1-102(A)(4) forbids engaging "in conduct involving . . . deceit or misrepresentation" and DR 7-102(A)(5) precludes knowingly making "a false statement of law or fact." Puffery and exaggeration, which have long been prevalent in settlement negotiations, is not prohibited conduct *per se*.

The situation of negotiation in a pre-suit or administrative context raises unique ethical issues. While lawyers generally aspire to high standards of decency and professionalism, by convention a good negotiator will not disclose such crucial information as her client's bottom line or willingness to bear the burdens and uncertainties of litigation or verdict. It is customary and appropriate for negotiators to conceal how far their clients are prepared to go to resolve disputes amicably, but the ethical line is drawn short of making material misrepresentations or knowingly offering false statements by others.

The ABA Section on Litigation has released, in August 2002, its "Ethical Guidelines for Settlement Negotiation" (see ABA Web site, www.abanet.org\litigation) "as a resource . . . to facilitate and promote ethical conduct in settlement negotiations." Section Four of the Guidelines is headed "Issues Relating to a Lawyer's Negotiations with Opposing Parties" and Guideline 4.1.1 alludes to the applicability of Model Rule 4.1 (the Model Rule counterpart of DR7-102(A)(5)) to settlement negotiations. The Model Rule differs from DR7-102(A)(5) by limiting its prohibition to false statements of "material" fact or law.

Comment [1] to Model Rule 4.1 notes that "generally" a lawyer "has no affirmative duty to inform an opposing party of relevant facts" but "[a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false." And that "can also occur by failure to act." These observations from the Model Rules are also instructive as a subtext to DR 7-102(A)(5). Thus, it does not matter whether the lawyer is responding to a counter party's inquiry or the lawyer volunteers information about the client's financial means.

In general, a lawyer may not "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal." DR 7-102(A)(3). For example, in a federal lawsuit, disclosure of insurance information is self-executing, and must be disclosed automatically, "without awaiting a discovery request." Fed. R. Civ. P. 26 (a) (D). Yet under New York law, disclosure of insurance information, while available, may await formal demand, and can be waived by an adversary's failure to request it. CPLR 3101(f); CPLR 3102. And some administrative and arbitration forums have no provision for such discovery. *See, e.g.*, NASD Code of Arbitration Procedure; NASD Discovery Guide; New York Stock Exchange Arbitration Rules, Section 619. And many negotiations take place in the context of pre-suit negotiations.

An outright lie about "law or fact" is proscribed by DR 7-102, and a lawyer who affirmatively misrepresents the existence or extent of insurance coverage may be held civilly liable. *See Slotkin v. Citizens Casualty Co.*, 614 F.2d 301 (2d Cir. 1979) (lawyer and insurance adjuster affirmatively denied, on the record, existence of excess insurance coverage, resulting in settlement of infant's medical malpractice case within primary policy limits). *See also In re McGrath,* 96 A.D.2d 267, 468 N.Y.S.2d 349 (1st Dep't 1983) (suspension of attorney who negligently misrepresented the absence of excess coverage in *Slotkin*).

There is a line of authority, not directly analogous to our concern here, holding that an attorney should disclose the death of his client before accepting a settlement offer. *Kentucky Bar Association v. Geisler,* 938 S.W.2d 578 (Kentucky 1997); *Virzi v. Grand Truck Warehouse,* 571 F. Supp. 507 (E.D. Mich. 1983). As the American Bar Association has stated: "When a lawyer's client dies in the midst of settlement negotiations of a pending lawsuit in which the client was the claimant, the lawyer has a duty to inform opposing counsel and the court in the lawyer's first communication with either after the lawyer has learned of that fact." ABA Formal Op. 95-397. Since the death of a client terminates or at least changes the attorney's authority to act on behalf of the client," a failure to disclose that occurrence is tantamount to making a false statement of material fact" within the meaning of the Model Rules. *Id.*

However, in the opinion of the Committee, there is a difference between the death of a client—which is a matter of public record and generally terminates an attorney's ability to act on behalf of a client—and the disclosure of insurance information, which, under some circumstances, could be considered a secret or confidence. A client may have a confidentiality concern about disclosing the details of its finances, and may similarly wish to conceal the existence of an insurance policy. As a matter of general policy, a corporate client may not wish to disclose to the general public, and to the plaintiff's bar in particular, the existence of insurance out of a desire not to encourage numerous frivolous suits. Disclosure of insurance information could affect a client's ability to settle other cases.

Under DR 4-101, the duty to maintain the confidentiality of "secrets" is broader than the scope of confidences, as the former can pertain to information derived from sources other than the client. If the client requests that such information be kept confidential, or if it is likely to embarrass or injure the client, it is protected from disclosure by DR 4-101. *See*, James Altman, *The Secret About Secrets,* 224 N.Y.L.J. 24 (7/14/2000), p. 24, col. 1.

Nonetheless, the Code provides that a lawyer *may* reveal a client's confidences and secrets to the extent required to correct a materially inaccurate representation "previously given by the lawyer and believed by the lawyer still to be relied upon by a third person. . . ." DR 4-101(C)(5). As this Committee has previously opined, a lawyer may withdraw an inaccurate representation which he previously made and was relied upon by his adversary in the course of negotiations. NYCLA Eth. Op. 686 (1991), 1991 WL 755942. As this Committee wrote: "Thus, the lawyer may inform the party to whom the statement was made that the statement is withdrawn, even if the client objects on the grounds that disclosure will be detrimental to the negotiations." 1991 WL 755942 *1.

It is the opinion of the Committee that it is not necessary to disclose the existence of insurance coverage in every situation in which there is an issue as to the available assets to satisfy a claim or pay a judgment. While an attorney has a duty not to mislead intentionally, either directly or indirectly, we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source. Under those circumstances, we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation.

CONCLUSION:

A lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by principle of substantive law or court rule. Nor is the lawyer obliged to correct an adversary's misunderstanding of the client's resources gleaned from independent, unrelated sources. However, while the lawyer has no affirmative obligation to make factual representations in settlement negotiations, once the topic is introduced the lawyer may not intentionally mislead.

If a lawyer believes that an adversary is relying on a materially misleading representation attributable to the lawyer or the lawyer's client, or a third person acting at the direction of either, regarding insurance coverage, the lawyer should take such steps as may be necessary to disabuse the adversary from continued reliance on the misimpression created by the prior material misrepresentation. This is not to say that the lawyer must provide detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a materially inaccurate representation presented by the lawyer, his or her client or another acting at their direction.

ENDNOTE

1. The question assumes the subject of insurance coverage has not been previously raised by either side.

Book Review

New York Workers' Compensation

(West's New York Practice Series)
by Martin Minkowitz

Reviewed by Donald T. DeCarlo

The author Martin Minkowitz is an acknowledged expert in workers' compensation law and insurance. He currently practices law as a partner with Stroock & Stroock & Lavan, and was formally General Counsel to the New York State Insurance Department, and New York State Workers' Compensation Board. He is widely published, a prolific lecturer, and Adjunct Professor at New York Law School.

Martin Minkowitz's new book on New York Workers' Compensation and related national workers' compensation law and insurance is a must-read for those involved in the workers' compensation system. The plain English review in the book of the basic concepts of workers' compensation law and related insurance appears to be the most current and concise annotated review of this subject. Mr. Minkowitz's book is entitled *New York Workers' Compensation* and the content of the book is on New York primarily; however, the coverage is in many areas national in scope.

Mr. Minkowitz's book interestingly enough starts off with a Preface that includes the current status of the leading case in New York State on employers' liability claims, the *Dole v. Dow Chemical Co.* case, and legislative reform to address problems created by this case which limits the expansion of employers' liability. The *Dole v. Dow Chemical* case is a major erosion of employers' workers' compensation exclusive remedy defense. Mr. Minkowitz then proceeds to cover the different areas of workers' compensation and employers liability law. He clearly summarizes, in a number of chapters, workers' compensation substantive as well as procedural law, including unique workers' compensation problem areas such as occupational disease, mental injuries, special funds, part-time domestics, discrimination, and filing claims within the system and related laws such as the New York Disability Benefits Law.

The book proceeds to cover workers' compensation history and basic concepts, and for those practicing law in New York State, essential workers' compensation rules and forms are included. Mr. Minkowitz treats in detail administrative practice issues, key workers' compensation statutes, and case law involving claims, hearings, and appeals. In addition, there is importantly a comprehensive review of the standard Workers' Compensation and Employers Liability Insurance Policy which is used in all but the five exclusive state funds, premium rate filings, benchmark claims data and more.

I found the chapter on federal workers' compensation laws ("Federal Laws") to be a excellent survey of this area of the law. Federal laws are unique and complex, and the treatment of this subject in the book provides the reader with a review of the scope of the laws and significant issues under the federal laws. This latter advice is important information for all involved in the system due to overlapping jurisdiction between state and federal laws.

The appendices at the end of each chapter are comprised of common workers' compensation practice forms and helpful charts; add to this cases cited throughout the book, and you have an excellent resource for underwriters, claims representatives, lawyers, risk managers and others involved in the system.

Whether you want to broaden your knowledge of workers' compensation law and insurance, seek selective legal or insurance information, or want assistance in workers' compensation practice, the Minkowitz book does it in a understandable and comprehensive way by one of the leading legal scholars in this field of law.

I will be encouraging members of AMCOMP, an organization that certifies workers' compensation professionals, to supplement their base of knowledge and expertise by reading Martin Minkowitz' new book.

Donald T. DeCarlo, Esq. is Chairman/President of The American Society of Workers' Compensation Professionals (AMCOMP).

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Lynne S. Hilowitz
120 North Main Street, 4th Floor
New City, NY 10956

Committee on Workers' Compensation
Martin Minkowitz
180 Maiden Lane
New York, NY 10038

Co-Editors

Frank G. D'Angelo
999 Franklin Avenue, Suite 100
Garden City, NY 11530

Martin Minkowitz
180 Maiden Lane
New York, NY 10038

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Section Officers

Chair
Dwayne Weissman
2171 Jericho Turnpike, Suite 212
Commack, NY 11725

Chair-Elect
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Garden City, NY 11530

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Vacant

Treasurer
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45-22 Little Neck Parkway
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General Practice, Solo & Small Firm Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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