NYSBA

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ONEONONE

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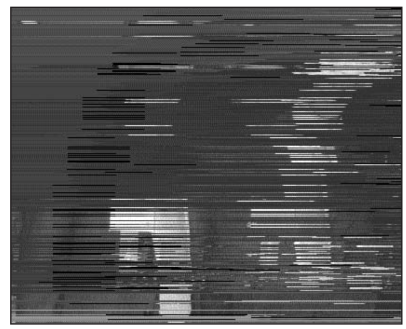
of the New York State Bar Association

A Message from the Chair

> *"One more success like that, and I'll sell my body to a medical institute."*
>
> **Groucho Marx doing what he does best in Joseph Santley and Robert Florey's** *The Cocoanuts* (Paramount, 1929).

> *"You're my kind of man, laddie. In this world, there is only one payoff window: Number One. The winner. Success. Now, that can be you. For the man who's going places, he needs a place where he can go climb, bust high—place like New York. Now, this here is a ticket that'll get you there. Train leaves at 9:40 tonight, this night. I'm betting this $100 on you, laddie, that you come back to St. Cloud Number One, riding high on the hog."*
>
> **Ed Begley pep-talking his daughter's boyfriend, Paul Newman, out of town in Richard Brooks'** *Sweet Bird of Youth* (MGM, 1962).

As I radiate in New York from the glow of ***General Practice Day 2000*** and its aftermath (I hope it's not the Indian Point reactor leak), I realize how special our Section is. In what can only be described as a resounding success, in the middle of what we downstate describe as a blizzard, i.e., a couple of inches of snow with a little wind action thrown in for good measure, ***General Practice Day 2000*** was a hit! The NYSBA allowed a few walk-ins to register, but we were sold out for the day. And with good reason. Our lead-off speaker was the remarkable Jonathan G. Blattmachr, a foremost expert in the area of tax and trusts and estates. Jonathan spoke on what he knows best, Estate Planning Techniques for the Moderate Estate. And speak he did. His presentation was electrifying, filled with so much material that tax section members would have learned something were they not attending their own program a few doors away. My mother's description of Jonathan Blattmachr as a "star" was an understatement. His article, "Estate Planning for Persons with Less than $3 Million," is reprinted in this issue.



Next was our "Hot Tips" program, moderated by Bill DaSilva. The program, which gets rave reviews every year, outdid itself this year, meriting coverage on the front page of the January 31, 2000 issue of the *New York Law Journal*, five days after the publication of my article, "Integrating Technology to Improve Legal Services Tops

Inside

NYSBA

Our Agenda," in the special Annual Meeting supplement of the *Law Journal*. Who said General Practice is not hot? Topics featured in the presentations ranged in diversity from Alternate Dispute Resolution to Elder Law to Federal Criminal Procedure.

Following a productive lunch meeting of your Section's Executive Committee, the CLE programs resumed with a marvelous panel discussion on Ethics in the Practice of Law. Our keynote speaker was a man who, despite his years as an Associate Judge of the Court of Appeals, is still "one of us" as a former Editor of *One on One*. The Honorable Joseph W. Bellacosa added wit and humor in preparing the attendees for what was an introspective and often difficult set of questions for the panelists, including himself, the Honorable Joseph P. Sullivan, Presiding Justice of the Appellate Division, First Department, Richard M. Maltz, Deputy Counsel of the Departmental Disciplinary Committee of the First Department, and Frank R. Rosiny, a former Chair of the General Practice Section and the immediate past Chair of the Association's Committee on Professional Responsibility. For me, the most enjoyable part of the discussion was that, as moderator, I asked the judges questions, rather than the usual—and reverse—scenario.

At 4 p.m., we hosted the "GP CyberCafé," which included demonstrations and hands-on workshops regarding the use of the Internet in the law office, and presentations on legal research on the web and tips on getting the most from technology in the practice of law. Vendors offered special discounts on software, publications and other items useful to General Practitioners, available ***exclusively*** to General Practice Section members. Next year, we hope to have a larger room, and more t-shirts with our new, three-color logo for our attendees as a token of our appreciation.

Following our day of programs, we held our Annual Dinner at the Marriott. Chief Judge Judith S. Kaye was our Keynote Speaker. Judge Kaye graced our intimate gathering of some 60 members, and spoke about technology in the courts, a presentation of such value that we have reprinted it in this issue of *One on One*. The Section presented Judge Kaye with a gorgeous pashmina scarf—red, of course—which adorned her black outfit and never left her shoulders the remainder of the evening.

During this, the celebration of the Section's 20th anniversary, we unveiled our new Section logo and acknowledged the presence of 11 of our 19 Section Chairs, including Bernice Friedman, the widow of our beloved Lew Friedman, who we lost so suddenly last year. I presented a plaque to our immediate past Chair, Bill Helmer, whose writings and meanderings are found in this issue. Bill is a wonderful person and a true friend. It was a privilege being his Chair-elect and it is an honor to have him currently co-editing *One on One*.

Speaking of past Chairs, we wish Irving Garson and his beautiful wife Adrienne the best of luck in their new home in Colorado. Break a leg, Irv, and send us a postcard once in a while.

Two pieces of "business" were conducted during General Practice Day. Dwayne Weissman of Commack, Long Island, was elected as the Section's Treasurer-elect, the next person to climb the rungs to chair the Section in 2004. A solo practitioner concentrating in the areas of real estate, elder law and trusts and estates, Dwayne will indeed be an asset to this Section and will continue his service as a true leader in the years ahead.

In addition, the Section voted unanimously to amend the Section bylaws to change the term of its officers to that of a calendar year, ending December 31 instead of May 31. That means that I will remain your Chair for an additional seven months, leading our Section until December 31, 2000. I hope to continue to serve this Section with honor and commitment as I have attempted to do in the past.

The following programs have been scheduled for the Spring/Summer 2000. I hope you will all be able to attend at least one.

Computers and the Practice of Law
May 6, 2000 — Erie County

Legal Tech Show
May 17-18, 2000 — Suffolk County

Annual Executive Committee Retreat
May 23-24, 2000 — Catskills

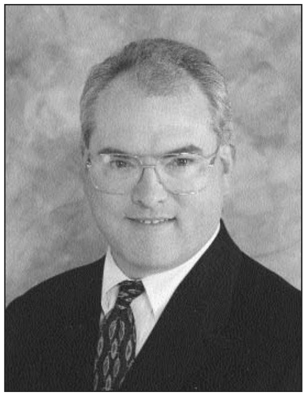
Annual Summer Meeting
July 20-23, 2000 — Alexandria Bay

Our Section is also co-sponsoring the program of the General Practice, Solo and Small Firm Section of the American Bar Association at the ABA's Annual Meeting in New York City from July 5-10, 2000. More specific information on any of the programs is available from Stephen P. Gallagher or Susan Fitzpatrick at the State Bar.

General Practice Day 2000 was an exceptional day for all of us. Thank you for making it so. I look forward to greeting each of you during the year and hope you will join us at our Summer Meeting on July 20-23, 2000 in Alexandria Bay, in the heart of the glorious Thousand Islands region of the state. Last summer, we had a record turnout in Hershey for which each attendee earned 15 MCLE credits, including a full complement of ethics credits for the year. We had a marvelous time meeting, networking and just plain shmoozing with fellow members of the bench and bar. We expect no less this year as Jeff Fetter, our Program Chair, is arranging substantive CLE programs for Thursday afternoon, Friday morning and Saturday morning. Linda Castilla, our meetings coordinator extraordinaire at the NYSBA, has arranged a remarkable package deal at the Riveredge, a beautiful resort in Alexandria Bay. This is a summer meeting you will not want to miss. I look forward to seeing you there.

Steven L. Kessler

From the Quarterback's Armchair



I am writing this column a few days after the verdict was announced in the trial of the four New York City police officers who encountered Amadou Diallo as he returned home for the final time in the Bronx just over one year ago. By the time that you read this, the U.S. Department of Justice will have determined whether to proceed with a civil rights case against the defendants.

Even if the feds decline to act, I believe that we will be living with this incident for a long time. One would have to return to the 1920s to find a series of law enforcement catastrophes equal to those that have burdened the nation's soul since the pogrom at Waco. We need to come to grips with this distressing trend now in order to find some way of avoiding similar catastrophes in the future.

In one sense only would I associate the word "tragedy" with the Diallo story; Sophocles and Shakespeare both would have understood how the events of the drama inevitably followed one another. Four young Irish-American officers are sent out together in one unmarked car, each armed with automatic weapons and encased in bulletproof vests. Their special mission is to confront street crime where it happens—this time, in a darkened Bronx neighborhood. They know that they are going into battle.

They see a furtive black man who retreats into a vestibule. When cornered, Diallo's demeanor is perceived as insufficiently submissive, and forty-one shots follow, each one the result of a separate pull of four triggers. The victim, who is innocent of any crime and unarmed, dies on the spot. At the trial, the senior member of the squad weeps on the witness stand and continually fingers his beads, which appear to be worry beads.

We should all have our worry beads out. Like the innocent women and children who died horribly at Waco, Diallo had nowhere to go when the authorities launched a fatal blitzkrieg directed toward the doorway of his very own home. I have no doubt that the officers fired, essentially, "by instinct." And the jury verdict was, in all probability, the correct one, at least on the law.

Yet I draw small comfort from this, because the verdict seems to continue and strengthen a cultural trend towards the embrace of "instinct" as the standard for acceptable public conduct. Some might blame President Clinton for this trend. He clearly has great trouble controlling his urge to demolish Big Macs and Sudanese aspirin factories. Some might blame the American character. Remember what the electorate did to the last reflective President? I believe his name was Carter.

The indulgence of instinct undermined the trial of the four officers long before the verdict came in. The instinct to retaliate must have played a part in the flawed decision of the Bronx District Attorney to charge the officers with a capital crime rather than a lesser offense. The instinct to beat the rap at any cost must have played a part in the apparent decision of the defense lawyers to fashion a unified and coherent mental state out of the split-second decisions of their four individual clients.

Reflection implies measurement of a course of action against a standard external to the self. If we have lost contact with (or faith in) any such standards, then we can only assess conduct by reference to the authenticity of the impulse that inclines one to the conduct. Virtue becomes an obsolete concept, and vehemence becomes praiseworthy, even when it translates into violence.

I recall a running gag from the 1960s comedy hit "Laugh-In." At random intervals, a raffish Dan Rowan would toss off the line: "if it feels good, do it!" That attitude must be resisted at every stop in the law enforcement process—from the precinct house to the jury box. The Rule of Law depends on it.

William S. Helmer

Technology and the Courts

By Judith S. Kaye

Following are remarks made by Chief Judge Kaye at the Annual Dinner of the General Practice Section at the Marriott Marquis in New York City on January 25, 2000.

I know you General Practice Section members have had a real busy day: Estate Planning Techniques at 9:15, Hot Tips from Experts mid-morning, Surrogates' Forms before lunch. Then post-prandial ethics with Judges Bellacosa, Sullivan and others, followed by a CyberCafé. When I saw your schedule, I was sure you'd want something light, frothy, funny from your dinner speaker. I thought that was why you picked me. Those are my best qualities.

So it came as somewhat of a shock when I received this suggestion from my friend, your Chair, Steve Kessler: "in light of the new technology in the new century, and the tremendous impact such advances will have on the general practitioner and solo and small firm practitioner specifically, I think it would be exciting for you to discuss electronic filing and technology in the courts." Exciting, Steve? Really? Electronic filing and technology in the courts. Well, if that's your idea of fun, who am I to disagree?

Actually, some might think modern technology is not a particularly good subject for me to be talking about in public. As many of you know firsthand, I still write letters by longhand. I do use a ballpoint pen, mind you. Months ago, I gave up the quill and inkwell. But I still haven't progressed to typewriting, let alone word processing or e-mail. I have had a computer in my office for a year or so, but I find that big label that's on the monitor makes it very hard to read messages.

But I want you to know, even though I'm not personally adept with the newest new thing, I am not a technophobe. To the contrary, I'm a great believer in the power of technology as a tool of justice. In ancient times, Justice may have managed to get her job done armed only with a blindfold and a scale—but then, she didn't have the three-million plus new filings every year to process that we do, and she didn't have the sort of pressures and schedules to manage that you do.

Clearly, technology can help us all do so many of the traditional tasks associated with litigation more accurately and more efficiently. Those are *quantitative* effects, and they're important. But there are also *qualitative* effects. Technology, I believe, can also help us deliver better justice and better communicate to the public the value of the work we do. In this age of cynicism about government in general and the courts in particular, those are no small achievements.

This evening, I want to address Steve Kessler's question by touching on some technology initiatives that have particular importance for the general practitioner. I know many of you, especially those who practice alone or in small offices, are interested in maximizing your efficiency so you can maintain the highest professional standards in an increasingly competitive environment. You, better than anyone, undoubtedly recognize the promise of technology in this regard.

Electronic Filing

I'll start with the hottest subject: electronic filing.

Last year, at the urging of the Judiciary, the New York State Legislature authorized the courts to undertake an experimental program testing electronic and facsimile filings of court papers in selected case types in selected courts. It's a toe-in-the-water—and rightly limited at the outset—for what may ultimately become a sea change in the way court papers are filed.

We had done our homework in preparing that legislation. Early on, we put together a planning committee that included judges, clerks and technical people. We got a lot of help from federal courts that had well-established pilot programs—especially the Eastern District and the Southern District's Bankruptcy Court. We also formed a Lawyer's Advisory Committee that gave us extremely useful feedback on our proposal.

Filing by fax has now actually been under way in the Court of Claims for about six months. In Suffolk County, fax filings have been accepted in guardianship, mental health and tax certiorari matters since the fall. Very soon we expect to have a similar program for commercial claims heard in the Monroe and New York County Commercial Parts.

If you think about it, filing by fax is a good first step away from the traditional method of hailing a cab, sitting in traffic and waiting in line at the clerk's office. But it's still a paper-based system. The next step is far more radical: paperless filings over the Internet. We will soon begin testing this approach in the Monroe and New York County Commercial Parts. And we plan to follow up with tax certiorari matters in Westchester County.

As you can imagine, with a Chief Judge who still communicates in longhand, the rules governing electronic filings provide a number of safeguards. Of course, all parties must consent to the use of electronic filing. They must also agree to comply with the User's Manual for the program and to exchange test e-mail messages. The presiding judge must approve the use of electronic filing, and may modify its use as justice requires. The legislation requires the Chief Administrative Judge to submit a report on the program to the Legislature by April 2002, and it has a sunset provision that becomes effective in July if the Legislature does not extend the law.

If you want more details, you can begin by reading the rules for the program issued by the Administrative Board last October. They're posted on the courts' website. I figure if you're high tech enough to be interested, you are high tech enough to find them. Our web address is a bit of a mouthful, but here it is: www.courts.state.ny.us. Once the system is up and running, we'll be co-sponsoring live training sessions on electronic filing with bar associations.

Telephone Conferencing

Which brings me to my second subject. We are currently exploring the possibilities of another frontier technology: the telephone. Specifically, I refer to telephone appearances for conferences and nonevidentiary pretrial proceedings.

I don't know how many of you saw the *Law Journal* letter from Nassau County Supreme Court Justice Leonard Austen. We all can relate to the distress he writes about—those "Hello-how-are-you" conferences that take hours and hours of valuable time away from the office, with lawyers milling around in court while the judge works through the calendar. Well, he's done something about it, and so have many other judges in Nassau and throughout the state.

In Manhattan, after a year-long pilot program in Supreme Civil, Judge Crane has actually developed a detailed protocol for telephone appearances. I know that other courts use a more ad hoc approach.

My bottom line on this is that telephone appearances are here to stay. If you practice in a county where this option is not available, you might want to contact your Administrative Judge to start a discussion of the issue. This can definitely be done!

Better Case Processing

The court system is committed to exploring the use of technology to make *your* lives easier and your practice more efficient, more productive. Not surprisingly, we also want to make *our* lives easier—by making the courts more efficient, more productive. Since so much of what we do is really information management, the possibilities are mind-boggling. And for a system that, just a few years ago, still had rotary telephones in some of its courthouses, I think you'd have to agree that we are making good progress.

After an enormous effort to cable courthouses throughout the state, we now have 9,000 users on the court system's internal e-mail system. With that many court users—including judges—proficient in the technology, you can be certain that there will be rapidly expanding new frontiers, new applications to make litigation more efficient and effective.

We're using document-imaging to help us manage the tremendous case volume in the New York City Criminal Court, and experimenting with video arraignments in Kings County Supreme Court. We've developed scannable juror badges that will eliminate the need for that annoying courthouse tradition of juror roll call and also speed the payment of juror fees. We're in the process of developing a Universal Case Management System to integrate the separate systems used by many of our trial courts so that court personnel can access case data from any court in a format that is uniform and familiar.

Better Decisionmaking

These initiatives I've mentioned for the most part impact our clerical functions and improve our case processing abilities. But we also have other projects that impact our judicial function, and help improve our decisionmaking abilities.

Take, for example, the electronic registry of domestic violence protective orders that the court system first established five years ago. By gathering data from protective orders issued by any judge in any court in the state system, the registry serves as a powerful source of information for judges who must quickly make what may turn into life-or-death decisions. Does this defendant before me in Criminal Court have a prior history of domestic violence in the Family Court across the street? In the Town Court in the next county? Before the registry was set up, we had no capacity for answering such questions, short of calling every courthouse in the state.

In many of our innovative, "problem solving" courts—the Midtown Community Court, the Brooklyn

Felony Drug Treatment Court, the Brooklyn Domestic Violence Court—we've made a special effort to use the power of technology to leverage judicial resources.

In the Community Court, for example, everything is online: court papers, rap sheets, case histories, social service evaluations, treatment records. All are instantly accessible by the judge, the prosecutor and defense attorney through terminals located on the bench and at counsel's table. Often we think of computers as agents of dehumanization, but in this setting, they are a humanizing force. Indeed, right in the middle of midtown Manhattan, they help simulate the type of individualized information about a defendant that you might expect to find in a small town.

Technology can also help improve the decisionmaking process when the decisionmaker is a jury. I don't know how many of you have had a chance to visit Courtroom 2000 at 60 Centre Street. That, of course, is the courtroom of the late Judge Lewis Friedman—a former Chair of this Section—where he presided so magnificently. This is a courtroom chock full of the latest wonders in trial technology: real time transcription, an electronic "white board" for display of writings and diagrams in large format, flat screen computer monitors in the jury box, animation software for video reconstructions, the works.

Judges and lawyers who have appeared in Courtroom 2000 report two very noticeable changes: all the hardware shortens the amount of time it takes to try a case, and it also seems to keep the jury more involved in the proceedings. As one litigator put it, "the technology helped us communicate a complicated and document-laden case more effectively. . . . We talked to six or seven jury members after the trial. They told us that they were enthusiastic about the technology and found it exciting." A jury actually enthusiastic about a complicated, document-laden case. Does it get any better than that?

Public Outreach

The final point I want to mention is the power of technology to help us educate the public about our justice system, to demystify and in some cases undemonize courts and lawyers. This is without question a new role for the judiciary. I doubt that Benjamin Cardozo lost much sleep over the issue of public trust and confidence, but it's definitely part of today's legal landscape.

Throughout most of Y1K, judges and lawyers paid little attention to this issue. We pretty much left it up to the press and the schools to say or teach what they wanted about us and trusted that our trappings and authority would carry us through. Fast forward to Y2K. We know that today, gavels and robes—let alone pinstripes and wingtips—are no guarantee of public respect. Today, if our legal system is to continue to be strong and effective, we have to reach out to the public, explain to them what we do, why we do it and what difference it makes. We have to convince the public of the intrinsic worth of the rule of law.

And technology can help us do that. I took one small step into cyberspace myself earlier this month with an Internet broadcast of the State of the Judiciary Address, followed the next day by participation in a live "chat room" where I fielded questions from lawyers, students and court employees about the future of the State courts. If you're interested, you can read the transcript on the courts' website.

And speaking of the courts' website, that's another high tech tool for conveying positive and useful information about the courts to the public. Need a telephone number for your local courthouse? For an attorney registered in New York State? Want to find out about employment opportunities with the court system? Read about the structure of the courts? Review the judiciary's budget request? You can do all that and more through the website.

This year, the court system will be designing a second web site specifically for students. We've been working with state educators so the content will be age-appropriate and compatible with current curricula. We know we need to do a better job of educating future generations on law and citizenship issues. We hope this website will be one resource that teachers can turn to to start getting the message across.

Conclusion

And that, in short, is my start on the answer to Steve Kessler's question about the new technology in the new century. I've ribbed Steve a bit about his choice of subject matter for tonight's dinner speech. But the truth is I am grateful to him for inspiring me to investigate this subject—and I hope you are too. It's clear that the new technology can help all of us immensely in our common objective of delivering justice in the years ahead.

Judith S. Kaye is the Chief Judge of the State of New York.

Estate Planning for Persons with Less than $3 Million

By Jonathan G. Blattmachr, Georgiana J. Slade and Bridget J. Crawford

Introduction

Individuals in the "modest" wealth category face special hurdles in estate planning. This article will assume that the "modest" wealth category includes individuals whose net worth exceeds the amount which may be protected by unified credit (for 1999, the equivalent of $650,000[1] and herein referred to as the "estate tax exemption," the "gift tax exemption" or the "applicable exemption amount"), but does not exceed approximately $3 million.

In general, people of modest wealth cannot easily afford to give up significant amounts of wealth during lifetime to achieve estate planning goals. However, the lifetime transfer of wealth is one of the most useful techniques available for reducing estate taxes. Unlike individuals whose wealth is small enough that it will most likely be protected from tax by reason of credits or exemptions, or those whose wealth is so large that an achieved lifestyle almost certainly will continue regardless of how much is transferred during lifetime, modest wealth individuals face a real tension between opportunities to reduce taxes and protect assets from other claims which may arise, on the one hand, and the need to preserve an adequate base of wealth to ensure the maintenance of a current standard of living on the other. The advisor to these individuals must carefully consider which planning steps are most appropriate to consider and what level of transfers the individual reasonably can afford to make. Certainly, different problems and potential solutions will arise for each individual and the plan must be tailored to each person's unique circumstances and goals. Nonetheless, such individuals need estate and financial planning as much as anyone else does, perhaps even more so. These individuals, in a real sense, cannot afford to "lose" as much of their wealth to taxes, professional fees, claims and costs of administration as much wealthier people can. This article will focus on estate planning techniques which may be particularly useful to individuals in the modest wealth category.

Assign Life Insurance and Other Non-Income Producing Assets

As noted above, a person of more modest wealth faces a tension between making lifetime transfers of wealth which will reduce the taxes which will be imposed upon death and his or her desire to maintain a chosen lifestyle. Nevertheless, many individuals even of somewhat modest net worth consume their income, but not their capital. This presents a planning opportunity. However, giving away property while retaining the right to income usually does not achieve any tax reduction or protection of assets from claims of creditors.[2] On the other hand, many persons own assets which are likely never to produce income for themselves. A common example is life insurance. Although life insurance in certain circumstances can be made to be an excellent income producing asset (where it has a cash or investment component), most individuals do not "cash in" on that feature of the policy. Rather they allow the investment component to be maintained within the policy because most policies are structured so that the investment component is constantly being substituted for an ever-decreasing term insurance component.[3] In such a case, an insurance policy may be an ideal subject of a gift by the insured.[4]

The purposes for which the insurance is being maintained (such as to replace earnings lost upon the death of the insured, to pay a debt which will become due upon the death of the insured, or to fund estate taxes) usually can be as readily achieved if someone other than the insured owns the policy. If the insured holds no "incident of ownership" in the policy at or within three years of death, the proceeds should not be includible in the insured's estate for federal estate tax purposes except to the extent they are payable to the estate of the insured.[5] However, if the insured does hold any incident of ownership at or within three years of death, the proceeds—even if paid to someone other than the insured's estate—may be subject to estate tax at rates of 50% or more, even if the total estate does not exceed $3 million.

The most effective way to avoid having insurance proceeds included in the estate of the insured is to have them acquired initially by someone other than the insured. Alternately, if the insured already holds an incident of ownership (e.g., because he or she currently owns the policy), it is generally most effective for the insured to assign all incidents of ownership to someone else at least three years prior to death. Usually, the simplest route is to have the policy initially acquired by or assigned to the individuals whom the insured wishes to benefit from the proceeds, such as children or grandchildren.

However, having policies owned by one or more individuals may substantially complicate matters in the long run. That may occur, for example, when a child dies before the insured and the child's interest in the policy passes to someone whom the insured does not wish to own the policy, such as a former spouse of the predeceased child. The solution to this problem is to have the policy owned by a trust. If the trust is properly structured, the policy proceeds will be used for the purposes intended by the insured and will not be included in his or her estate. Although there will be more expense involved, having the policy owned by a trust may be the most effective and, in the long run, most efficient method to avoid estate taxes on the proceeds and guarantee that the proceeds pass as the insured wishes them to pass. For example, ownership of the policy by a trust will permit the use of a so-called "back-up" marital deduction provision. This provision will allow the proceeds to qualify for the estate tax marital deduction if the insured is married and the proceeds are includible in insured's estate (because, for example, the insured dies within three years of assigning them).[6]

Arranging for another person (or a trust) to own insurance almost by necessity will result in the making of a taxable gift. The assignment of the ownership of a policy of insurance to another and the payment of premiums on a policy owned by another constitute gifts for gift tax purposes. As a general rule, these gifts can be made to qualify for the gift tax annual exclusion if the policy is assigned to individuals or to a trust.[7] Many individuals of modest wealth do not make significant annual exclusion gifts because they feel they cannot afford to give up income producing assets. However, a life insurance trust, as a general matter, is an excellent way of using annual exclusions if they will not otherwise be used.

It is appropriate to recognize that life insurance, unless it is a cash value policy and has been specifically acquired to fund estate taxes, often lapses prior to the death of the insured. If that occurs, one can view the creation of the trust and the use of gift tax annual exclusions with respect to the transfer of the policy to the trust and payments of subsequent premiums as "wasteful." However, that probably is not a reasonable way to view the planning because many individuals of more modest wealth who have gone through the trouble and expense of establishing such a trust probably will be vigilant in insuring that the policy does not lapse.

Another category of assets which may be appropriate to give away under the protection of the annual exclusion are items of tangible personal property which have significant intrinsic value and which the owner is willing to transfer before death. This may include, by way of example, jewelry, works of art, antiques and collections. However, in order to remove the items from the donor's taxable estate, gifts need to be "complete." For example, the items should no longer be stored in the donor's home or otherwise be under the control of their former owner (such as a safe deposit box). Also, the new owner should pay for the insurance on those items. If a donor wants to continue to use certain objects (such as jewelry), giving those items away will not improve the donor's estate tax situation.

Recreational real estate is an excellent example of the type of property which could be the subject of a lifetime gift. Although the property may be too valuable to give away at one time under the protection of the annual exclusion under I.R.C. § 2503, gifts of undivided interests in property can be made and, in fact, may be valued at a discount (i.e., the value of the fractional interest is worth less than an aliquot share of the value of the whole).[8] However, continued use of the property should be consistent with the relative ownership of the property. For example, if the original owner gives away an undivided 25% interest in the property, the recipients of the 25% interest should pay for a quarter of the cost of maintaining the property and should exercise ownership rights and use over a quarter of the property. In the case of recreational property which constitutes a residence, use of a qualified personal residence trust should also be considered.

Qualified Personal Residence Trusts

As a general matter, under I.R.C. § 2702, for purposes of determining the value of a gift of a remainder in property to family members, the value of an income or use interest retained in that property is treated as zero, causing the entire value of the property to be treated as the gift. In other words, no reduction in value of the gift is made on account of the interest retained because the entire value is attributed to the remainder. However, an exception is provided where the remainder transferred is in a personal residence the use of which is retained.[9] This exception permits, by way of example, the owner of a personal residence to give a remainder interest to take effect after a term of years expires and to value the remainder based upon the normal "actuarial" principles under I.R.C. § 7520. Usually, the gift of the remainder is made by transferring the home to an irrevocable trust from which the grantor retains the right to the exclusive occupancy and use of the home as a personal residence for a period of years. Such a trust is known as a personal residence trust or a qualified personal residence trust depending on its terms.[10]

For instance, if a 65 year old makes a gift to her child of a remainder interest in her $500,000 home through a qualified personal residence trust to take effect in 10 years (i.e., the current owner retains the right to use the property as a personal residence for 10 years) and the property will revert to the estate of the donor if the donor dies during the retained ten-year term, the gift the property owner would be making upon the creation of the qualified personal residence trust would be $213,590, if the IRS interest rate used to determine the value of the interest of such a trust (determined under I.R.C. § 7520) were 5.6%, as it was for February, 1999. If the term holder lives for 10 years, the property will then be transferred to or held in trust for others without any additional gift tax and without any estate tax, provided the trust is properly structured.

One “problem” with an effective qualified personal residence trust is that the entitlement to use the property must end before the grantor of the trust dies. If death occurs during the retained term, the trust is includible in the grantor’s estate under I.R.C. § 2036(a). That means that the property will no longer be available to the remainderman, at least without cost. Finally, the client must be aware that once the retained term ends he or she no longer has any right to occupy the property. The client must then be in a position where he or she can afford to vacate the property or rent it from the remainderman at a fair market rent.[11]

Effective Use of the (Balance of) Annual Exclusions

The annual exclusion may not have an enormous impact on reducing taxes with respect to a person of extraordinary wealth. In fact, for such an individual, other gifts to family members (such as automobiles, payment for vacations and similar transfers) often absorb the entire sum of annual exclusions available for them. Even if part of the annual exclusion is being used for other transfers by a person of more modest means, such as the payment of premiums on a life insurance contract owned by others, an unused portion of the annual exclusion may remain. For instance, a married person with two married children and four grandchildren may give up to $160,000 to them each calendar year under the protection of annual exclusions coupled with “gift splitting” under I.R.C. § 2513 by the spouse (that is to say $20,000[12] to each of these eight individuals). Over a five-year term, that would remove $800,000, plus the subsequent income and growth on the gift property, from the client’s estate. For instance, if the property grew at 8% a year compounded annually, a total of about $930,000 would be removed from the client’s taxable estate in just five years. That could represent a large percentage of the client’s wealth. Hence, the use of annual exclusions can produce exceptionally effective estate planning results for persons of modest wealth.

On the other hand, that effectiveness highlights the tension which may arise when the client considers making such maximum use of his or her annual exclusions and where the client would have to make the gifts with income producing assets because the individual does not own sufficient non-income producing property with which to make the transfers. Neither the assets given away under the annual exclusions nor the income they produced usually may be made available to the donor. The individual simply may not be able to afford such a loss of income. However, the individual might be able to continue to benefit indirectly from the income of the gifted property without causing estate tax inclusion by transferring assets under the protection of the annual exclusion to a trust, the income of which the trustee is permitted to distribute to the grantor’s spouse who could use it, in the spouse’s discretion, for the grantor. In fact, it appears the grantor could define his or her spouse in such a trust as the person to whom the grantor is married at any given time.[13]

Although a spouse may not “gift split” with respect to gifts made to himself, herself or a trust of which he or she is a beneficiary, the non-donor spouse can gift split transfers to a *Crummey* trust[14] for the benefit of others and in which the gift-splitting spouse is a beneficiary (but not a holder of a *Crummey* power) to the extent of the transfers to the holders of the *Crummey* powers.[15] Hence, the grantor could continue to enjoy the trust property to the extent it is made available to his or her spouse. Of course, when that spouse dies, the property may no longer be available for the grantor.

Each spouse could also create a trust for the other spouse, although the trusts should be structured to avoid application of the so-called “reciprocal trust” doctrine. Under that doctrine, the trusts may be “uncrossed” with the effect that each spouse is treated as though he or she created the trust for his or her own benefit. This will cause estate tax inclusion to the extent that inclusion would have occurred if the spouse who is the trust beneficiary had created that trust.[16] It might be possible to structure the trusts so that the benefits and controls granted to the spouses are sufficiently different so that the doctrine will not apply.[17] Nevertheless, it does mean that only one-half of the assets will remain in trust for the benefit of the surviving spouse when the first one dies unless the trust continues for the benefit of the spouse who created that trust. However, that continuing benefit, as a general rule, will cause that trust to be includible in the estate of the grantor on account of the “creditors’ rights” doctrine. As a general rule, the creditors of the grantor can attach trust assets to the extent the trustee must or, in the exercise of discretion, may distribute them to the grantor.[18] Also, to that extent, the trust assets will be includible in the grantor’s estate.[19]

The New Alaska Option

A new law in Alaska provides another option.[20] This law, Alaska Stat. § 13.36.310 (1998), provides that an Alaska trust is not subject to claims of creditors of the grantor even if the grantor is eligible, in the exercise of the discretion of another person acting as trustee, to receive distributions from the trust, provided, among other conditions, that the transfer to the trust was not made to defraud creditors. Because the trust assets are not subject to the claims of the grantor’s creditors, the Alaska trust should not be includible in the grantor’s estate unless the grantor retains some other power over the trust causing it to be includible in his or her estate.[21]

This Alaska law permits an individual to transfer property under the protection of the annual exclusion to an Alaska discretionary trust, not just for the benefit of his or her family members but for himself or herself, and keep the assets out of his or her estate. However, if the grantor receives all the income, or perhaps, regular distributions that are nearly equal to the trust's income, there may be a finding that there was a sufficient understanding that the grantor was to receive the income and the trust will be includible in the grantor's estate.[22]

Potential Use of the Gift Tax Exemption and the GST Exemption

As indicated, many individuals of more modest wealth cannot afford to make large gifts, such as those equal to their entire gift tax exemption or their GST exemption, because they cannot afford to give up the income from the assets which would be given away. (Under I.R.C. § 2036(a)(1), retaining the right to income will cause the gifted property to be included in the donor's estate.) The possibility of being able indirectly to benefit from the income through one's spouse or to remain at least eligible to receive distributions from gifted property while nonetheless excluding it from the donor's estate raises the possibility of making gifts in excess of the amount covered by the annual exclusion, such as the amount of any remaining gift tax exemption (which generally can be as large as $650,000[23]) or the remaining GST exemption (which can be as large as $1,010,000 in 1999), increased annually thereafter by a cost of living adjustment.[24] Certain potentially attractive options may be available.

First, the final generation-skipping transfer tax regulations allow the immediate allocation of GST exemption to a lifetime QTIP trust described in I.R.C. § 2523(e), even though by making the QTIP election for gift tax purposes no gift tax will be paid upon the transfer.[25] The final QTIP regulations provide that a QTIP trust which one spouse creates for the other will not be includible in the estate of the spouse creating the trust, even if that spouse retains a secondary income interest in it, unless the estate of the beneficiary spouse elects for any continuing trust to qualify for QTIP treatment in his or her own estate (or unless the spouse creating the trust otherwise held a general power of appointment described in I.R.C. § 2041).[26] Although the creation of such a lifetime QTIP trust will permit the effective use of the grantor's GST exemption, it will not permit the effective use of the grantor's gift tax exemption (unified credit): Because the trust property will qualify for the gift tax marital deduction, no use will be made of the grantor's unified credit. In planning, use of the unified credit may be more important than the use of the GST exemption.[27]

Of course, the property owner could create a trust for his or her spouse which does not qualify for the marital deduction but which will not generate gift tax on account of the use of the unified credit (a gift tax exemption equivalent). However, the grantor will not be able to retain a secondary income interest following the death of his or her spouse because the retention of such an interest will cause the trust to be includible in the grantor's estate under I.R.C. § 2036(a)(1), effectively nullifying the grantor's use of his or her unified credit at the time the trust was created. In fact, in virtually all American jurisdictions, the mere eligibility (as opposed to entitlement) to receive distributions from the trust will cause estate tax inclusion on account of the creditors rights doctrine discussed earlier. That, in turn, again raises the Alaska trust option: the property owner could transfer an amount equal to his or her unused gift tax exemption equivalent to an Alaska trust, remain eligible in the discretion of the trustee to receive distributions, and still make the transfer complete for estate and gift tax purposes.[28]

Estate Building and Income Tax Sheltering with Life Insurance

Certain types of life insurance policies provide greater opportunities to build wealth while sheltering income from taxation. Specifically, so-called "variable" insurance contracts allow the policy owner to direct how the cash or investment value of the policy is to be invested among a variety of mutual funds. The fund alternatives usually include a blue chip stock fund, a government bond fund, an international stock fund and so forth. In some cases, these funds may provide significantly better yields when compared to the yields in traditional cash value policies. In any case, as long as a policy is a life insurance contract under I.R.C. § 7702, the earnings will accumulate income tax free. In addition, as long as a policy does not constitute a "modified endowment contract" under I.R.C. § 7702A (essentially, a single premium or limited premium payment policy), cash may be withdrawn free of income tax[29] up to the extent of basis,[30] before income is considered to be withdrawn, and even the income earned "inside" such a policy may be borrowed without income tax effect. In essence, this allows the insured to access the income without paying any income tax. That can have the effect of increasing yield and thereby providing additional flexibility for estate and other financial planning.

In addition, by contributing an adequate amount of premium which is allocated to the cash or investment component, it is possible to have future term premiums paid with income earned under the policy. The effect of that is to pay for the term premiums with pre-tax income which will never be subject to income tax, even if the policy is canceled prior to death.[31]

If the insured has access to the cash or investment component of the policy, however, all of the proceeds paid upon death may be includible in the insured's estate at death, even if the insured only has an interest in the cash or investment component and someone else (such as an irrevocable life insurance trust) holds all incidents of ownership with respect to the term component of the policy.[32] However, it is possible to structure the ownership of a policy through a split-dollar arrangement so that the insured may be able to benefit (at least indirectly) from the policy's cash value without causing the term insurance component to be includible in the insured's tax estate.[33] For example, under a split-dollar contract, an irrevocable life insurance trust "owns" the term component and the insured's spouse or an investment company (such as a corporation) "owns" the cash (or investment) component. Upon the insured's death, the proceeds attributable to the term insurance component should not be includible in the tax estate of the insured. The investment company might be a corporation which would "own" the cash value component and of which the insured would own no more than 50% of the voting stock (even if the insured holds more than 50% of the total equity). In such a case, the incidents of ownership held by the corporation should not be attributed to the insured shareholder.[34] The investment company, alternatively, might be a limited partnership which would "own" the cash value component, with the insured as a limited partner. In such a case, the incidents of ownership held by the partnership should not be attributed to the insured limited partner.[35] Although the corporation or the partnership could make tax-free withdrawals or borrowings from the cash value component of the policy (provided it was not a modified endowment contract), the distributions to the insured as a shareholder or partner may be subject to income tax.

Another option, and one which should avoid the taxation of the tax-free withdrawal would be to have the policy, including the cash value component, owned by an Alaska trust which is structured so that no incidents of ownership held by the trust will be attributed to the insured even if the insured grantor is eligible to receive distributions (which may include cash withdrawn by the trustee from the policy) from the trust.[36]

Qualified Family-Owned Business Interests

The Taxpayer Relief Act of 1997 enacted new I.R.C. § 2033A, which permits the exclusion from the gross estate of all of part of the value of certain family-owned businesses. The provision is exceptionally complicated and difficult to meet and will become less valuable over time. However, it may be very important for clients of more modest wealth whose estates are comprised in significant part of closely-held business interests.

This new exclusion is available only for estates that met many of the requirements of I.R.C. § 6166 (relating to the extension of payment of estate tax attributable to certain closely held business interests) and § 2032A (relating to special valuation of real property used in a farm or other closely held business). Indeed, § 2033A contains more than a dozen cross references to I.R.C. § 6166 (for example, relating to the acceleration of payment of the tax) and I.R.C. § 2032A (such as to community property, statute of limitations, and active management by a qualified heir), although I.R.C. § 2033A is not limited to real estate as I.R.C. § 2032A is.

The benefits of I.R.C. § 2033A are limited, although they no doubt will be extremely important to certain families. Basically, one can exclude the excess of $1.3 million of the value of the qualified family-owned business interest over the applicable exclusion amount (a/k/a estate tax exemption). I.R.C. § 2033A applies to estates of individuals dying after 1997. Hence, for an individual dying in 1999, the maximum amount excludable by reason of the application of I.R.C. § 2033A will be $650,000 ($1.3 million minus the applicable exclusion amount for 1998 of $650,000). By 2006, the maximum exclusion under I.R.C. § 2033A will be only $300,000 because the applicable exclusion amount will then be $1 million.

A recital of all of the requirements and special rules that can apply under I.R.C. § 2033A is beyond the scope of this article but the more important ones may be summarized as follows:

- The decedent must at death be a U.S. citizen or resident.
- The executor must elect § 2033A treatment and all persons "in being" who have an interest in the property must submit an agreement with the IRS for the treatment provided for under the section.
- The value of the property plus certain gifts made by the decedent must exceed 50% of the adjusted gross estate as that estate is increased by certain gifts.
- The business must be an active trade or business.
- The trade or business must be a proprietorship, or, if in another form, (1) 50% or more must be owned by the decedent or members of the decedent's family or (2) at least 30% must be owned by the decedent and members of the decedent's family and either 70% or more must be owned by members of two families or 90% or more must be owned by three families.
- The trade or business must have its principal place of business in the U.S.
- No stock or debt of the company (or a controlled group of which the company is a member) can have been publicly traded within three years of the decedent's death.
- Subject to certain limitations, not more than 35% of the adjusted ordinary gross income of the trade or business may be personal holding company income.
- The business must have been operated for five of the past eight years by the decedent or members of the decedent's family and there must have been "material participation" within the meaning of

I.R.C. § 2032A by the decedent or family members.

- The business interest must pass to a qualified heir (or heirs) within the meaning of I.R.C. § 2032A.
- The qualified heir who receives the property must be a citizen of the U.S., or the property can qualify only if it is held in a "qualified trust" that is in some ways similar to a qualified domestic trust (QDOT) described in I.R.C. § 2056A.

The gifts that are added to the decedent's gross estate for purposes of the more-than-50% test are intended to percent certain pre-death transfers from allowing qualification. In some cases, the reach for predeath gifts is very long. For example, the adjusted gross estate for purpose of I.R.C. § 2033A is increased by the amount of gifts (if more than *de minimis*) from the decedent to his or her spouse within ten years of the decedent's death. (However, a sale to a spouse does not appear to be covered by this "look back" rule.)

The value of the QFOBI itself is reduced, for purposes of determining its "adjusted value," by the claims and mortgages allowable under I.R.C. § 2053(a)(3) and 2053(a)(4). An exception is created for (1) $10,000 of indebtedness, (2) indebtedness that the taxpayer used to pay educational and medical expenses for the decedent, the spouse, and dependents, and (3) qualified residence indebtedness (i.e., the type of home mortgage interest that is deductible for income tax purposes). Apparently, the purpose of this debt-exclusion rule is to prevent an individual from borrowing money in anticipation of death and buying a qualifying closely held business.

In addition, the new rules disregard that portion of the trade or business that is attributable to cash or marketable securities in excess of reasonably expected day-to-day capital needs and other assets that would produce special treatment income under I.R.C. § 954(c)(1) (relating to certain controlled foreign corporations).

Special-Use Valuation

Under I.R.C. § 2032A, up to $750,000 may be excluded from a decedent's gross estate by specially valuing certain real estate used in a farm or other closely held businesses. The $750,000 limitation on the reduction in value of farm or closely held business real estate, with respect to the estates of individuals dying after 1998, is indexed for inflation. This adjustment is rounded to the next lowest multiple of $10,000 (if the inflation adjusted amount is not a multiple of $10,000). This provision also can be of significant importance for a client of more modest means and who owns real estate which may be specially valued.

Conservation Easement Exclusion

Generally, an income and gift tax deduction is allowed under I.R.C. § 170(h) for a qualified conservation contribution in real estate, including the grant of an easement to preserve open space for the scenic enjoyment of the general public, if it produces a significant public benefit. An estate tax deduction is allowed for a qualified conservation contribution made at death (or prior to death on property otherwise included in the estate).

I.R.C. § 2031(c) provides that a decedent's gross estate may elect to exclude part of the value of certain property with respect to which a qualified conservation easement is granted. As with many provisions of the estate tax law, however, the requirements for obtaining the estate tax exclusion are very complicated and the benefits are relatively limited. The exclusion generally requires that:

- The land be located within 25 miles of a metropolitan area or a national park or wilderness area, or within ten miles of an Urban National Forest.
- The land must have been owned by the decedent or a member of the decedent's family at all times during the three years ending on the date of death.
- The decedent or a family member must have granted a qualified conservation contribution, as defined for income tax purposes, except that the preservation of a historically important land area or certified historic structure will not, for this purpose, qualify as a conservation purpose.

If the contribution meets these (and several other) tests, the decedent's gross estate may elect to exclude the lesser of (1) a dollar exclusion limitation or (2) a certain percentage of the value of the land that is subject to the qualified conservation easement. The maximum dollar exclusion for 1999 is $200,000 and increased by $100,000 each calendar year until 2002, when it reaches $500,000 (which is not thereafter adjusted for inflation).

If lower than this dollar amount, the gross estate excludes only the "applicable percentage" of the value of the land subject to the qualified conservation easement, reduced by the amount of the charitable deduction allowed for the grant of the contribution. The applicable percentage is a maximum of 40%, reduced by 2% for each 1% by which the value of the qualified conservation easement is less than 30% of the value of the land. Thus, if the value of the qualified conservation easement is 26% of the value of the land, the applicable percentage is reduced to 32% (i.e., two times 4%, the amount by which 26% is less than 30%). In effect, the full 40% exclusion from the gross estate for the value of the land is available only if the value of the qualified conservation easement represents at least 30% of the value of the land.

It may be worth noting that an individual's estate of over $2.5 million could be sheltered from estate tax, through a combination of estate tax exemption, QFOBI qualification under I.R.C. § 2033A, special use valuation under I.R.C. § 2032A and conservation easement exclusion. That would be over $5 million for a married couple.

Accessing Income Tax Free States

Only seven states have no income tax: Alaska, Florida, Nevada, South Dakota, Texas, Washington (State), and Wyoming.[37] Of course, an individual can move to one of those states and avoid income taxation, but in many cases that may not be practicable or desirable. Moreover, if the individual's children or other chosen objects of bounty live in states (or locations) with income taxes, income generated on inherited property also will be subject to the state (and local) income tax once they have received the assets. However, by creating trusts under the laws of one of the listed seven states, it may be possible to avoid income tax on income of the trust which is not currently distributed to such beneficiaries even if the beneficiaries live in a state (or locality) with an income tax.

In fact, it is not necessary that the trust be created, in all instances, in a state with no income tax. For example, New York is, in effect, a state income tax haven for trusts created by individuals who reside out of that state. Except for New York source income (essentially income derived by the operation of a business in New York), New York imposes an income tax on income retained in a trust only if the grantor was domiciled in the state at the time the trust became irrevocable.[38] New Jersey has a similar rule.[39] Moreover, Delaware does not impose an income tax on income retained in a trust sited there unless the beneficiary is a Delaware resident.[40] Some states, however, try to extend their reach of taxation so greatly that even creating the trust in another jurisdiction will not avoid state taxation. Certain states, for example, impose their income tax on a trust created by a non-resident if a trustee is a resident of that state.[41] In fact, California attempts to impose its income tax on income retained by a trust created by a non-resident of California if any beneficiary is a resident of that state, even if none of the trustees is a California resident.[42]

Using a Charitable Remainder Trust to Build Wealth and Generate Income

Charitable remainder trusts described in I.R.C. § 664 may provide two tax planning benefits. First, an income, gift, or estate tax deduction may be allowed for the actuarial value of the remainder interest committed to charity. The remainder interest must equal at least 10% of the initial fair market value of all property placed in the trust.[43] The second and often more significant benefit is that the trust is exempt from income tax for any year in which it does not have unrelated business taxable income.[44] This may, for example, allow for the contribution of appreciated assets to the trust and their sale by the trustee without imposition of income tax, provided that: (i) no unrelated business taxable income is received in the year of sale by the trust and (ii) the gain is not attributed back to the grantor.[45] Being able to sell assets without paying tax on the gain preserves an enhanced base of wealth for the taxpayer. The size of the annual payment to the recipient from a charitable remainder unitrust will be directly proportionate to the value of the trust. Hence, by avoiding the imposition of tax on gain recognized and retained by the trust, a larger base of wealth is available to generate payments to the individual beneficiaries.

One common perception about charitable remainder trusts is that they are only used for the grantor and, perhaps, the grantor's spouse. The reason is that all (or a significant part) of the trust will be includible in the estate of the grantor upon his or her death by reason of the retention of the annuity or unitrust payments.[46] If the trust is only for the benefit of the grantor alone, the grantor's spouse alone or the grantor and the grantor's spouse jointly, no gift or estate tax will be paid with respect to assets placed into the trust or includible in the grantor's estate at death.[47]

In addition to continuing a charitable remainder trust for the benefit of the grantor's spouse, the trust may also be continued for the benefit of the grantor's descendants. Because of the new rules brought about by the Taxpayer Relief Act of 1997, whether or not the trust continues for the benefit of the grantor's descendants, it will be important to structure the trust so that the remainder interest for charity is at least equal to 10% of the initial net fair market value of the property placed in the trust. In any case, by retaining the power to terminate the interests of all or any of the grantor's descendants by the grantor's Will, no gift tax will be payable upon the creation of the trust.[48] The trust, however, will be includible, in the grantor's estate. Where the grantor's spouse and descendants or the grantor's descendants are beneficiaries of the trust, estate tax is paid on the present value of the interest in the trust that is committed to such successor individual beneficiaries. (If the surviving spouse is the only beneficiary of the trust after the grantor's death, no estate tax would be payable.[49]

Whether it will be appropriate to continue the trust for the benefit of the grantor's descendants will depend upon a variety of factors. For example, if the interest of the grantor's spouse in the trust is anticipated on an actuarial basis to be minimal (e.g., the grantor's spouse is older or the grantor will make the grantor's spouse a discretionary beneficiary), continuing the trust for the benefit of the grantor's descendants may be advantageous from an economic perspective. Although estate tax will be payable upon the death of the grantor (because the successor interest for the grantor's spouse *and* descendants will be fully subject to estate tax and no marital deduction will be available), the interest for the benefit of the grantor's descendants in the trust is likely to be substantial and on a future value basis is likely to exceed the value of the property if it had been bequeathed directly to the descendants and presently subject to estate tax and future earnings subject to income tax. However, if the grantor's spouse's interest in the trust is likely to be substantial (e.g., the grantor has given the spouse a fixed interest in the trust and the spouse is young), it may not make sense from an economic perspective to give the property directly to the grantor's descendants. The present value of the interest of the successor beneficiaries (including the grantor's spouse) in the property contributed to the trust will be subject to estate tax, and all the property received from the trust by the surviving spouse (to the extent not expended by him or her) will be included in his or her estate and may be subject to estate tax. Thus, the grantor's descendants are unlikely to receive a substantial benefit out of the trust, especially, in light of the enactment of the 10% minimum charitable remainder value requirement now contained in I.R.C. § 664.

A net income (with or without makeup) charitable remainder unitrust, which pays the lesser of the unitrust amount or trust income,[50] can provide an opportunity for taxable income to accumulate, in effect, tax free until such time as the trustee decides to invest the assets so as to generate current trust income which then can be distributed to the grantor or other beneficiaries of the trust. (If a charitable remainder trust with a make up provision is chosen, then deficiencies are made up in subsequent years in which trust accounting income exceeds the unitrust amount.) The tax free build-up may provide an enhanced base of wealth for the grantor (and, if appropriate, the grantor's spouse and other family members). This enhanced base of wealth from which the grantor (or other family members) may benefit could provide a sufficiently enhanced degree of financial comfort for the grantor so that he or she will feel more financially secure in making gifts of other assets which thereby can be removed from his or her estate. Nevertheless, because a charitable remainder trust does involve the transfer of assets to charity at the termination of the trust term, this technique will likely only appeal to the taxpayer who is charitably inclined.

Medical Care and Tuition Payments

Direct payments to a health care provider for the medical care of another person and direct payments of tuition to an educational institution for another person are not transfers for gift tax purposes.[51] Hence, by way of example, a grandparent may pay for all of the tuition for a child, a grandchild or any other individual from nursery school to post-graduate education free of gift tax. This is in addition to any annual exclusion gifts that such grandparent may make to such persons. Over time, these transfers for tuition and medical care can remove significant amounts from the donor's gift and estate tax base, which may be especially important for estate planning for those donors of more modest wealth who feel they can afford to make these payments. Furthermore, even though the payments for medical care and tuition must be made directly to the health care provider or educational institution to fall under the exclusion, there are practical ways to effect such payments which most taxpayers will welcome. For example, a property owner might open a joint checking account with each of his or her adult children, which is not considered a gift to the child even though the account is in joint name.[52] Only to the extent that the child draws on the account will the gift be complete. If the child draws on the account only by direct payment for medical care or tuition, the transfer, while complete, should be excludable as a gift under I.R.C. § 2503(e). Any amounts reimbursed, such as by medical insurance, would be contributed to that account and could be withdrawn by the person who opened the account.

Limited Liability Entities for Asset Protection and Tax Planning

A family holding company, whether in the form of a limited partnership, limited liability company, business trust or other entity may provide asset protection and tax benefits for the property owner and his or her family. By contributing assets to such an entity, the nature of what is owned changes. For example, the contribution of real estate to a limited partnership in exchange for limited partnership units changes what is owned from real estate to limited partnership units. As a general rule, such limited partnership units are less marketable than the underlying real estate is.[53] Hence, the partnership assets may be worth less, and, therefore, are less attractive to a creditor of the owner. In addition, it appears as a general rule that the partnership agreement may provide that anyone who attaches a partnership interest does not become substituted as a limited partner for purposes of voting and management decisions (to the extent they are granted to the limited partners under the terms of the partnership agreement or local law) but only becomes a naked assignee of the economic interests which the units represent. Yet it also appears that such an assignee probably will be taxed on a pro rata portion of the partnership's income as though he or she were a partner.[54] In a circumstance where regular distributions are not made, the units may actually become a liability for the assignee (because income taxes will be due on income attributed to the assignee without a corresponding receipt of property from the partnership to pay those taxes).

In addition, as mentioned above, the transmutation of the nature of what is owned into something which is less marketable almost certainly results in a reduction in valuation. Lower valuation, as a general rule, means lower gift, estate or generation-skipping transfer taxation but it usually also means a lower income tax-free step-up in basis under I.R.C. § 1014(a) upon the transfer at death because the basis of most inherited assets is equal to their estate tax values.

Special Care in Handling Interests in Qualified Plans, IRAs and Other IRD

Despite the fact that the income tax basis of most property passing at death is equal to estate tax value, a number of exceptions exist. The most common is for "income in respect of a decedent," typically referred to by its initials "IRD."[55] IRD consists of income to which the decedent was entitled at death but which is not properly includible in the decedent's pre-death income tax return. Accrued interest on a bond, certain declared but unpaid dividends, the inherent profit in certain installment sale notes and deferred compensation are common types of IRD. In fact, interests in qualified plans and IRAs often represent a very significant portion of the worth of a person of modest wealth and those interests almost always represent IRD. As a consequence, they could be exposed to estate tax and income tax as well as other taxes.[56] As indicated by that article, often 75% to over 100% of the value in such qualified plans and IRAs can be eroded by taxes. As discussed in more detail in that article, one of the more effective methods of reducing the overall tax burden on such an interest is to make it payable to a charitable remainder trust upon the death of the "owner" of such interest. That may effectively avoid the income tax on those interests but it will not avoid or probably only marginally reduce the estate tax due on the interest. Hence, a source of paying those estate taxes, such as through life insurance proceeds, must be available to implement the effective payment of the qualified plan and IRA proceeds to the charitable remainder trust. However, the payment of the proceeds to a charitable remainder trust could be highly effective and often can result in a substantial increase in the net value of the economic benefit in such proceeds to which the decedent's beneficiaries will succeed.[57]

Conclusion

Estate planning for individuals of more modest wealth is challenging because they face significant death taxes but do not have such a large base of wealth that they can easily afford to make significant lifetime gifts or other transfers to reduce the taxes which will arise when they die. However, careful planning using any number of the techniques described herein often may help to reduce these taxes.

Endnotes

1. This "exemption" will continue (although not evenly) to be increased to $1 million for 2006 and later years.
2. *See, e.g.*, I.R.C. § 2036(a)(1); Restatement (2d) of Trusts, § 156 (1959).
3. *See* "Some Advanced Considerations and Uses of Life Insurance in Estate Planning," especially Chart 3, *The Chase Review* (Winter 1997).
4. For a wealthier individual, a gift of an asset other than an insurance policy may be more appropriate for several reasons. First, often the policy lapses (e.g., is terminated by failure to pay premiums) before the death of the insured. In such a case, there will be no reduction of estate tax because the subject of the gift (i.e., the life insurance policy) will have lapsed prior to the death of the insured donor. Second, as a general matter, it is preferable to give those assets which have the greatest potential for growth. Many insurance policies are designed to emphasize preservation of value rather than high growth. There are additional reasons why an asset other than a life insurance policy may be a preferred subject of a gift by an individual of more substantial wealth.
5. I.R.C. §§ 2042, 2035(d)(2).
6. Usually, it will be best for the estate tax includible insurance proceeds to pass under the irrevocable life insurance trust agreement into a trust which can qualify for the marital deduction, by election under I.R.C. § 2056(b)(7), as qualified terminable interest property (QTIP). That way, the insured's executor can determine, by the election, how much should be made to qualify for the marital deduction. *See, generally*, "Building an Effective Life Insurance Trust," 129 *Trusts & Estates* 29 (May 1990). In addition, special considerations will arise if the surviving spouse is not a citizen of the United States. I.R.C. § 2056(d).
7. *See* "Building an Effective Life Insurance Trust," *supra* note 6.
8. *Cf. Lefrak v. Commissioner*, T.C.M. 1993-526.
9. I.R.C. § 2702(a)(3)(A). The Clinton Administration has proposed the repeal of the personal residence exception under I.R.C. § 2702(a)(3)(A)(ii), thereby requiring the trust to pay out the required annuity or unitrust amount. This would result in the diminished effectiveness of personal residence trusts as effective estate planning tools. At press time, the impact of this proposal is uncertain.
10. *See* Treas. Reg. § 25.2702-5.
11. The IRS has held in private letter rulings (which may not be used as precedent pursuant to I.R.C. § 6110(j)) that renting the home to the grantor after the retained use period ends will not cause the home to be includible in the grantor's estate if the grantor pays full and adequate rent. PLR 9626041 (Apr. 2, 1996); PLR 9425028 (Mar. 28, 1994). The Internal Revenue Service appears to be attempting to foreclose the possibility of the grantor buying the house back. Treas. Reg. § 25.2702-5(b)(1) provides, in effect, that the trust must prohibit the sale of the home to the grantor, the grantor's spouse, and certain other entities affiliated with them. 61 Fed. Reg. 16623 (1996).
12. The annual exclusion amount of $10,000 ($20,000 if the sponsors "split gifts" under I.R.C. § 2503) is now indexed to inflation but rounded down to the nearest $1,000 if the inflation adjustment is not an exact multiple of $1,000.
13. *See* Rev. Rul. 80-255, 1980-2 C.B. 272; *Estate of Tully v. United States*, 78-1 U.S. Tax Cas. (CCH) &13,228 (Ct. Cl. 1978).
14. A trust, transfers to which qualify for the annual exclusion by reason of the power of the beneficiaries immediately to withdraw the property transferred, is often called a "*Crummey* trust" after the well-known case of *Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968).

15. Treas. Reg. § 25.2513-1. (The reason is that the gift to the *Crummey* trust is treated for gift tax purposes as made to the individuals who hold the power to withdraw the property transferred to the trust rather than treated as a gift to the spouse even though the spouse is a beneficiary of the trust.).

16. *U.S. v. Grace*, 395 U.S. 316 (1969).

17. *Cf. U.S. v. Green, KTC*, 68 F.3d 151 (6th Cir. 1995).

18. *See* Restatement (2d) of Trusts, § 156 (1959).

19. Rev. Rul. 77-384, 1977-2 C.B. 198.

20. Delaware passed somewhat similar legislation effective July 1, 1997. Unfortunately, the Delaware statute does not appear effective for creditor protection or estate planning purposes but probably will be amended to be effective for these purposes in 1999.

21. Rev. Rul. 76-103, 1976-1 CB 293. ("If and when the grantor's dominion and control of the trust assets ceases, such as by the trustee's decision to move the situs of the trust to a state where the grantor's creditors cannot reach the trust assets, then the gift is complete for Federal gift tax purposes. . . ."). *See also* PLR 9837007 (June 10, 1998) (not precedent) (ruling that transfer of property to an irrevocable trust that benefits donor and donor's living descendants is completed gift for federal gift tax purposes).

22. *See, e.g., Estate of Skinner v. U.S.*, 197 F. Supp. 726 (E.D. Pa. 1961).

23. *See* note 1.

24. The $1,010,000 GST exemption has been adjusted for inflation but rounded down to the nearest $10,000 if the inflation adjustment amount is not an exact multiple of $10,000.

25. Treas. Reg. § 26.2652-2. However, if the donor's spouse is not a U.S. citizen, the transfer cannot qualify for the gift tax marital deduction. I.R.C. § 2523(i)(1).

26. In February, 1999 the Clinton Administration proposed an amendment to I.R.C. § 2044 which would provide that if the grantor spouse is allowed a marital deduction with respect to the QTIP property, such trust must be includible in the estate of the beneficiary spouse.

27. The early use of the unified credit is important because it otherwise can be "lost" once total transfers exceed $10 million. *See* I.R.C. § 2001(c)(2). Although that seems unlikely to occur for individuals of more modest wealth, "inflation" or "appreciation" could cause that to occur. For example, $3 million will grow to more than $10 million in under 20 years at eight percent growth. Also, because the generation-skipping transfer tax usually can be postponed for a much longer period of time than can gift and estate tax, use of the GST exemption may be viewed as having less immediate benefit than use of the unified credit.

28. Rev. Rul. 76-103, *supra*. (Making the trust an Alaska trust also will permit avoidance of the rule against perpetuities because Alaska has effectively repealed it. In addition, the trust will only be subject to state income tax to the extent the income is allocable to a grantor who is subject to state income tax such as under the grantor trust rules under I.R.C. §§ 671 *et seq.* or to a beneficiary who is subject to state income tax. Otherwise, the trust will not be subject to the state income tax.)

29. Although not all variable policies permit withdrawals, universal type policies usually do. In any case, some insurance companies impose charges (called "surrender charges") on amounts withdrawn.

30. Basis generally will equal the sum of premiums paid, including that portion used to pay for the term insurance protection, reduced by amounts previously withdrawn.

31. This technique is described in detail in the Winter 1997 issue of *The Chase Review*.

32. Rev. Rul. 82-165, 1982-1 C.B. 117.

33. *See*, *e.g.*, PLR 9636033 (Mar. 12, 1996) (not precedent).

34. Treas. Reg. § 20.2042-(c)(6).

35. Rev. Rul. 83-147, 1983-2 C.B. 158.

36. *Cf.* PLR 9434028 (May 31, 1994) (not precedent) (incidents of ownership held by trust not attributed to beneficiary who was not a trustee but whose life was insured under policy owned by the trust).

37. Florida imposes an intangible tax on wealth each year which is somewhat akin to an income tax and some other states impose income tax only on certain types of income.

38. N.Y. Tax Law §§ 601, 605(b)(3).

39. N.J. Stat. Ann. § 54A:2-1.

40. Del. Code Ann. 30 §§ 1131 *et. seq.*

41. *See*, *e.g.*, Cal. Rev. & Tax. Code § 17742.

42. Cal. Rev. & Tax. Code § 17742.

43. I.R.C. § 664(d)(1) and (2).

44. I.R.C. § 664(c).

45. *See*, *e.g.*, PLR 9452026 (Sept. 29, 1994) (not precedent) (gain recognized by the trust on appreciated assets contributed to the trust will be attributed to the grantor only if the trustee is legally obligated to sell the transferred assets).

46. *See*, *e.g.*, Rev. Rul. 82-105, 1982-1 C.B. 133.

47. Special rules apply if the spouse is not a citizen of the United States. *See* I.R.C. § 2056A.

48. Treas. Reg. §§ 1.664-2(a)(3), 25.2511-2(c).

49. I.R.C. §§ 2056(b)(8) and 2055(a).

50. Such trusts are described in more detail in the July 1993 issue of *The Chase Review*.

51. I.R.C. § 2503(e).

52. Treas. Reg. § 25.2511-1(h)(4). In those states where the opening of a joint account may be a completed gift, it might be appropriate to have the joint tenants enter into an agreement that the non-contributing tenant may draw on the account only as an attorney-in-fact for the contributing tenant and only for purposes of paying medical care and tuition payments under I.R.C. § 2503(e). Accordingly, there should be no completed gift from the contributing tenant to the non-contributing tenant on the opening of the account since withdrawals will only be for the benefit of the contributing tenant or should qualify for the exclusion under I.R.C. § 2503(e).

53. In February 1999, the Clinton administration proposed the elimination of valuation discounts except for active business, thereby requiring interests in entities to be valued for gift and estate tax purposes to be valued proportionately to their holdings in cash, securities, real property and other "non-business" assets.

54. *Evans v. Commissioner,* 447 F.2d 547 (7th Cir. 1971); Rev. Rul. 77-137, 1977-1 C.B. 178*, but see* GCM 36960 (Dec. 20, 1976) (distinguishing *Evans* and suggesting that a transferee is treated as a tax partner only if the transferee has "dominion and control" over the transferred partnership interest).

55. *See* I.R.C. §§ 691(a), 1014(c).

56. *See, generally*, "Selected Estate Planning Guidelines for Qualified Plans and IRA's," *The Chase Review* (Winter 1996).

57. *See, e.g.*, Chart 7-A, *The Chase Review* (Winter 1996).

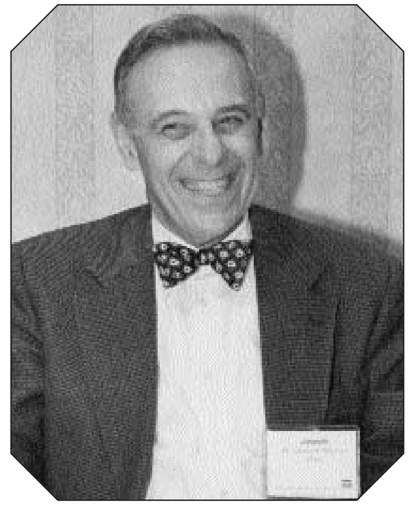
Jonathan G. Blattmachr is a member of Milbank, Tweed in Manhattan and a foremost expert in the areas of tax and trusts and estates.

Chief Judge Judith S. Kaye accepts a gorgeous red pashmina scarf from GP Section Chair Steven L. Kessler.

Scenes from

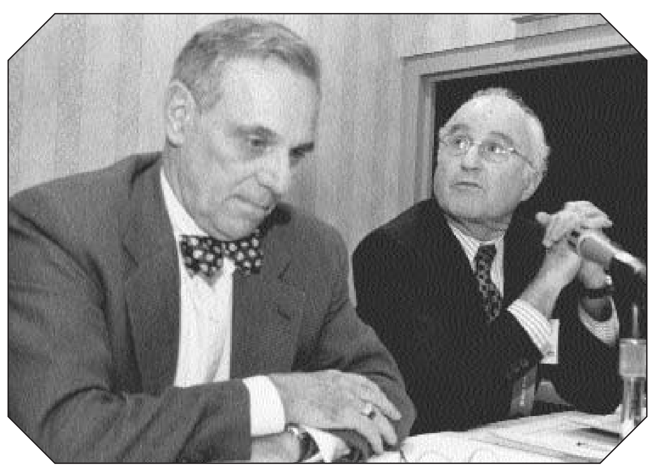
General Practice Day 2000

Tuesday, January 25, 2000



Ethics à la Judge Joseph W. Bellacosa.

Chief Judge Judith S. Kaye "charming the crowd" at the General Practice Section dinner.



Who do they think they are, judges or something? Ethics panelists Frank R. Rosiny and Richard M. Maltz and moderator Steven L. Kessler listen and learn from Court of Appeals Judge Joseph W. Bellacosa and Joseph P. Sullivan, Presiding Justice of the Appellate Division, First Department.

Counseling the Managed Care Patient—A Primer

By Stephen Hicks and Kelly Mercure Lamendola

In the ever-evolving field of health care, the general practitioner may be asked to provide advice and counsel on managed care issues. This article will describe some typical problems encountered by New York health care consumers and provide recommended solutions and responses.

Background

A Health Maintenance Organization (HMO) is defined as

> Any person, natural or corporate, or a group of such persons who enter into an arrangement, agreement or plan or any combination of arrangements or plans which propose to provide or offer or which do provide or offer a comprehensive health services plan.[1]

A Managed Care product requires all health care services be provided by or referred from the insured's chosen health care provider, also known as a "gatekeeper."[2]

These companies can be for profit or not for profit and can take many forms including the following:

- *Staff or Group Model HMO*—employs or contracts with doctors and medical specialists directly and maintains its own health center. The health care professionals are salaried and serve only plan members.
- *Independent Practice Association HMO* (IPA)—provides medical services through private practice doctors who contract independently to provide medical care in their own offices according to guidelines set by the HMO.
- *Point of Service Plan MCO*—(POS) provides medical services within a "network" that may include its own physicians and health center as well as the ability to use outside participating physicians, specialty centers and medical groups, but requires higher premiums and out of pocket payments.
- *Preferred Provider Organization MCO*—(PPO) offer a network of "preferred" health care providers who provide care according to set fee schedules. Enrollees can see plan doctors or obtain treatment outside the network for higher fees.

This article addresses HMOs and Managed Care Products regulated and licensed by the State of New York. Self-insured employee benefit plans as defined in the Employee Retirement Income Security Act (ERISA) are generally not subject to the provisions of state law discussed herein. For Medicaid and Medicare enrollees be aware that federal law affords these individuals additional benefits not described below. For assistance with Medicare or Medicaid contact the Health Care Financing Administration (www.hcfa.gov), the federal agency which administers these insurance programs.

First Scenario

Your client, who just closed on her new house, is on the phone. She does not need any closing documents and the home is fine. Rather she has a problem with her HMO and is feeling helpless. She was advised by her HMO of the following: (i) pre-authorization for the surgery recommended by her pediatrician to correct her infant daughter's severe breathing problem has been denied as not medically necessary; (ii) a recent trip to the emergency room with her daughter when the child could not breathe properly is not covered because it was neither pre-authorized nor a true emergency; and (iii) the last visit to the pediatrician's office will not be covered.

The emotional and financial toll is beginning to overwhelm your client. Now what?

Medical Necessity

While there is an obvious need to control health care costs, medical care should not be compromised. When a doctor recommends a course of treatment an HMO's determination that it is not medically necessary should be challenged. The process used by an HMO to determine whether or not a benefit is "medically necessary" is known as "utilization review." New York's utilization review requirements are spelled out in Article 29 of the Public Health Law. Your client has the right to question the HMOs decision through the utilization review process, which should be described in her member handbook. New York State does not define "medical necessity" by statute. The plan's definition of "medical necessity" must be disclosed to enrollees.[3] In addition, the plan's utilization review plan must contain a description of practice guidelines and the standards used by utilization review agents in carrying out determinations of medical necessity.[4]

As with most companies, HMOs often become defensive and uncooperative if a lawyer is involved. The preferred course of action may be to allow the client to contact the insurer directly.

Your client, with your help, should start building her case. She should immediately demand from the HMO a copy of the clinical review criteria on which the HMO's decision was based, as required by New York law.[5] Work with the client's doctor and the doctor's staff to understand the HMO's rationale and to document why, in this child's case, the surgery *is* needed. A second opinion may be necessary. As usual, advise your client to document all communication, save copies of all bills and letters, and keep detailed notes.

New York law requires clinical reviewers, not financial reviewers, to perform the utilization review, and that expedited appeals be provided when the treatment and medical condition warrant.[6] Keep in mind that company employees, not independent reviewers, are handling this appeal process.

According to the New York State Department of Insurance, HMO utilization review decisions were appealed nearly 4,800 times in 1997. Some companies such as Empire Blue Cross and Aetna have adopted an *external* appeals procedure whereby an independent third party review is made of the HMOs decision in some limited circumstances. Effective July 1, 1999 an external appeal mechanism, signed into law by Gov. George Pataki, is in place for the review of the denial of coverage by all HMOs and MCOs based upon medical necessity or based on the fact that the proposed treatment is experimental.[7]

Emergency Room

Pursuant to New York law, managed care companies subject to state regulation are required to pay for emergency room visits if the "prudent layperson" would have sought emergency room treatment.[8] An emergency condition is defined in part as:

> A medical . . . condition . . . the onset of which is sudden, that manifests itself by symptoms of sufficient severity, including severe pain, that a prudent layperson, possessing an average knowledge of medicine and health, could reasonably expect the absence of immediate medical attention to result in (a) placing the health of the person afflicted with such condition in serious jeopardy. . . .[9]

Again work with the client's doctor to obtain medical records and to determine if the medical condition at the time of the visit qualifies under the statute. If you elect to challenge the HMO's denial of coverage for her daughter's emergency room visit, do so by filing a grievance. The Managed Care Act allows for some grievances to be filed by telephone, and provides the time limits within which the plan must respond.[10]

Furthermore, these same companies are prohibited from demanding pre-authorization for emergency care or for reviewing the claim retrospectively provided that such services are necessary in order to stabilize or treat an emergency condition.[11]

Claim Reimbursement

The determination not to reimburse a medical bill may result from a clerical error or a clerk's misreading or confusion concerning the policy's coverage. Read the policy carefully to determine if the treatment provided is a covered one. Your client's employee benefits administrator may be helpful in obtaining information, and in understanding the policy's coverage. Alternatively, a misunderstanding between the HMO and a provider and/or supplier, such as an improperly completed referral or authorization form, could also be the cause. Unless additional legitimate information is needed, all claims must be paid within 45 days of the HMO's receipt of the claim.[12]

Second Scenario

Another client, with an existing degenerative illness, starts his new job and has a choice of health care coverage. He has decided to join an HMO and has narrowed his choices down to three companies. He asks for advice in the final choice. Continuing to see his current physician, and locating the appropriate specialist for his wife's rare disease are critical in the selection process.

Right to Information

In choosing a health plan, first learn what issues your client deems most important. For example: are prescription benefits important; is use of a specialist required, is the ability to see a particular doctor(s) a high priority, or is there a preference for a particular hospital?

New York's Managed Care Reform Act, often referred to as the "Managed Care Bill of Rights," provides New Yorkers with the right to receive an array of disclosure materials from an HMO.[13] For example an enrollee or prospective enrollee has the right to know the following: what medical treatment will require pre-authorization; the procedure for obtaining a referral to a specialist; a list of the HMO's participating providers, co-pay arrangements as well as the charge for going outside the network; the manner in which decisions are made regarding experimental drugs and treatments, and how doctors are paid for their services. Your client should obtain information from several HMOs and compare coverage provided; coverage limits; and the providers that participate with the plan.

You can also obtain, for your client, a copy of the State Insurance Department's report of complaints filed against New York HMOs. This report is available on the department's website at www.ins.state.ny.us.

Right to Continuing Treatment

If a new enrollee to an HMO has a health care provider who is not a member of the provider network, the HMO must permit the enrollee to continue an ongoing course of treatment with the current health care provider for a transitional period of up to sixty (60) days from the date of enrollment, if: (i) the enrollee has a life-threatening disease or condition or a degenerative and disabling condition or (ii) the enrollee has entered the second trimester of pregnancy at the effective date of enrollment. The enrollee's provider must, however, agree to abide by the HMO's guidelines and accept reimbursement at its rates.[14]

If an enrollee's health care provider leaves the network, an HMO must permit the enrollee to continue an ongoing course of treatment with the provider for a transitional period of up to ninety (90) days from the date of notice to the enrollee of the providers disaffiliation.[15] If the enrollee has entered the second trimester of pregnancy at the time of disaffiliation, an extended transitional care period is required.[16]

Specialist Care

If the HMO does not have a network member with the training and experience required to treat the subscribers condition: the law provides that the HMO

> shall make a referral to an appropriate provider, pursuant to a treatment plan approved by the [HMO] in consultation with the primary provider, the non participating provider and the enrollee . . . at no additional cost to the enrollee beyond that the enrollee would otherwise pay for services received within the network.[17]

In addition, the HMO must have a procedure by which an enrollee who requires ongoing care from a specialist may obtain a standing referral to such specialist.[18]

Hospitals

If the HMO has contracted with a particular hospital(s) for its subscribers, use of other hospitals for non-emergencies will likely require out-of-pocket payment for such services.

Miscellaneous

Medical confidentiality

An issue of growing concern to many citizens is their right to privacy. There is often a greater urgency to maintaining the confidentiality of one's medical records. The Managed Care Bill of Rights requires that HMOs provide information regarding their procedures for protecting patient confidentiality.[19] This requirement does not describe the particular information that must be provided, nor does it establish clear requirements on what information may be released, to whom and under what circumstances. It simply allows an enrollee or prospective enrollee to learn the company's policy on this issue; a policy that may be legal but not acceptable to your client.

Other Resources

Outside pressure can be helpful when attempting to resolve a dispute with your client's HMO. Always write and call regulatory agencies such as the New York State Department of Health—Bureau of Managed Care, the New York State Insurance Department and the federal Health Care Financing Administration. Seek assistance from advocacy offices such as the Attorney General's Health Care Bureau, the Medicare Rights Center and others—who is called depends on the type of plan and managed care company involved. Contact local political representatives who are often useful in exerting pressure on company officials on behalf of their citizens. See below for some contact names and numbers.

Contacts:

New York State Insurance Department
1-800-342-3736

New York State Department of Health
1-800-206-8125

New York State Attorney General's Office
1-800-771-7755

Medicare Rights Center
1-212-869-3850

New York Statewide Senior Action Council
1-800-333-4374

Health Information and Insurance, Counseling and Assistance Program (HI-CAP)
1-800-333-4114

Conclusion:

The above description and recommendations represent a brief overview of certain managed care issues for the general practitioner.

Endnotes

1. Public Health Law 4401.
2. Insurance Law 4801(c).
3. Insurance Law 3217-a (a)(1); Public Health Law 4408(1)(a).
4. Public Health Law 4900(10).
5. Public Health Law 4408(2)(j).
6. Public Health Law 4902.
7. Public Health Law 4914.
8. Public Health Law 4900(3).
9. Public Health Law 4900(3); Insurance Law 4303(a)(2).
10. Public Health Law 4904(3); Insurance Law 4904(b).
11. Public Health Law 4902(1)(h).
12. Insurance Law 3224-a.
13. Public Health Law 4408.
14. Public Health Law 4403(6)(f).
15. Public Health Law 4403(e)(1).
16. *Id.*
17. Public Health Law 4403(6)(a).
18. Public Health Law 4403 (6)(b).
19. Public Health Law 4408(2)(e).

Stephen Hicks, former Assistant First Deputy Attorney General with the Office of New York Attorney General Dennis C. Vacco. Hicks assisted Vacco in creating and supervising the Health Care Bureau.

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Fanfare for the Common Law: A Reflection on the Decision of the Court of Appeals in the Case of *Adirondack League Club v. Sierra Club, et al.*

By William S. Helmer

Introduction

It is said that some places can get under your skin or into your blood. I know that feeling. For me, one such place is the Adirondack wilderness; another is the magnificent chamber of the New York Court of Appeals. Still another is the recently renovated Nott Memorial on the campus of Union College. What assembles these three internalized locations in a particular corner of my mind is the case of *Adirondack League Club v. Sierra Club, et al.*[1] which addressed, among other things, the "navigability" of the South Branch of the Moose River in Herkimer County.

The Adirondacks have fascinated me since boyhood, and, after a detour through law school and private practice, my interest in environmental matters eventually carried me in 1995 to the position of Chief of the State Attorney General's Environmental Protection Bureau, where the Moose River litigation had been simmering since the Appellate Division's decision of the preceding year.[2] When the Court of Appeals agreed to hear the case, the temptation to handle it personally was irresistible. Similarly, the temptation to comment on the case in the wake of the decision by the Court of Appeals has been irresistible. Hence, this article and my trip to Union College on a cold and snowy night last February.

That night, I found myself in the Rotunda of the Nott Memorial confronting an audience of about fifty faculty members, students, and other interested members of the public. The first hour of the presentation, which included taped excerpts of the argument in the Court of Appeals, went off without a hitch. Then the question period began. In preparing for the presentation, I had tried to anticipate the tough questions that might be posed, such as "Why wasn't this a 'takings' case?" I never got that question; instead, a perceptive student asked, "Why wasn't this an 'environmental' case?"

Here was a question I had not anticipated. Yet I soon understood what she meant. By the time the Moose River case reached the Court of Appeals, it had nothing to do with scientific studies of potential impacts or with public reaction to and discussion of such impacts. Nor did it involve a process administered by a governmental agency that would terminate in a decision establishing the ground rules for future use of a resource. Instead of looking forward, the case looked backward into the 19th century and beyond in an effort to find out what ground rules had been established *back then* by the common law and the transactions accomplished thereunder.

My undergraduate interlocutor realized that the Moose River litigation did not represent the sort of environmental decisionmaking she had learned about. Why, the Court of Appeals had not even reached a final decision on whether the South Branch of the Moose River was really navigable; instead, the Court had sent the case back down for trial after generally explaining how the legal inquiry into navigability ought to be performed. Why was all this ancient history "relevant?"

I answered by arguing that the more one learned of the history of American environmentalism, the more interesting and "relevant" the case became, and the first part of what follows is an expanded version of my analysis of the historical forces that were at work in the Moose River litigation. The second part of what follows contains my answers to the questions that I had anticipated and prepared for in advance of the Union lecture, as well as a few more recent thoughts. Many of these questions will be placed before the court as the case moves towards trial.

The Historical Context—A Look Backward

I believe that the *Adirondack League Club* case is one of the echoes of the "big bang" that divided the American environmental movement back in the 19th century. The Adirondack League Club, which owns the land over which about 12 miles of the South Branch of the Moose flows, can fairly be said to represent one venerable tradition and the Sierra Club, which was the organizational defendant named in the original complaint, can fairly be said to represent another. Both organizations trace their origins to the early 1890s, that amazing decade that gave birth to both clubs,[3] the Adirondack Park,[4] and the constitutional provision protecting the State Forest Preserve.[5]

The two clubs can be seen as champions of two radically different ideas of how people should approach and relate to the American landscape.[6] On the one hand are those who believe that nature's bounty should be and, indeed, must be acquired, managed, and continually *earned*. Lands falling outside this system are *waste* lands. If inaccessible, the lands are essentially irrelevant; if accessible to and left as a part of the commons, any natural bounty must soon be ruined or depleted. The motto of this group might be—if you want a better environment, buy one.

The representatives of this tradition have tended and still tend to be excellent stewards of the land. They pioneered the science of modern forestry and include within their ranks the likes of Teddy Roosevelt and Gifford Pinchot, who was the father of the U.S. Forest Service. They also realized that the government has the power and the responsibility to give the public access to America's great natural bounty. And so, while the sportsman bought his private preserve, the government, in classic Victorian fashion, hired Olmstead to design the Niagara Reserve and Central Park.

The other tradition denies that there is such a place as "wasteland." What old mapmakers called wasteland is actually wilderness, which in some sense is, or should be, society's common property. There is no need to exclude the masses, for you can trust the common man to behave nobly in the wilderness precisely because the experience of wilderness ennobles its votaries. This was the faith of John Burroughs and John Muir. Of course, a person's progress towards this elevated state may need to be guided by a few regulations and environmental conservation officers, but that is a minor inconvenience.

A century ago, the first tradition predominated in the public realm. The presumption was that the world, including the wasteland, was a pretty unkempt place. If you found something that was worthy of conservation, you ought to build a fence around it. A clear running stream near a settlement was an alien intruder that ought to be captured and placed at the service of society. That is just how most eastern cities first acted to protect their earliest drinking water supplies—they built brick fences along either side of the creek to keep the cows, pigs, chickens, and people out.

Today, the second tradition predominates. Now, it is the human impact on natural resources that is deemed to be an alien intruder, one that must be captured and subdued. Hundreds of federal and state permits measure and control emissions to the air and water. Local zoning laws prescribe and proscribe particular land uses. In effect, the Adirondack Park Agency has zoned millions of acres pursuant to its Land Use Master Plan. But do not be deceived; the first tradition is still alive and healthy. A subdivision is a collection of private preserves, each continually earned as the mortgage gets paid and the lawn stays mowed.[7]

At the Union College lecture, I likened the two competing traditions to the two ends of a seesaw, and I identified the fulcrum at the middle as the problem of access—access to the wasteland or the wilderness, depending on which end of the board you sit on. Access is often at the center of any combat between the two traditions, and it clearly lies at the heart of the Moose River litigation. Access to the Adirondacks has always been difficult, and, in the 19th century, there was just one obvious way to access the minerals and timber of the Adirondacks—it was the rivers. It seemed that these natural highways presented a way to put the wasteland to work at a very low cost.

But would the cost be low? What if the river crossed private property? That was essentially the question that confronted New York's highest court in *Morgan v. King*[8] which was decided in the year after the Civil War ended. The court in that case held that the state's rivers would present a free highway to the public when they were "navigable in fact," and, in its analysis, the Court associated that term with the practical necessities of 19th century commerce.

It is worth dwelling for a moment on how the access issue is different today, 134 years later. Now getting timber and minerals out of the Adirondacks is much less of a concern, a circumstance that is largely the result of market forces. To the extent access is needed, good roads are available. Indeed, modern logging operations can and do use helicopters to transport timber. Access is no longer a problem or, to be more precise, it is not the same problem.

Now that access can be more easily obtained, the heirs of Burroughs and Muir are jostling one another on the top of Mount Marcy. Recently, certain handicapped individuals have tried to use federal law to demolish state barriers to motorized access to the wilderness.[9] The rivers and streams of the Adirondacks are facing similar pressures, and the courts are being asked to referee disputes between the recreating public and private property owners.

While many legal questions in this area remain to be answered, the Court of Appeals in the *Adirondack League Club* case answered at least three fundamental questions with a definitive "yes." The three questions can be summarized as follows: Does the *Morgan v. King* test of "navigability in fact" retain validity? Under that test, should suitability of a watercourse for recreational use be deemed competent evidence supporting a finding of navigability? And may a member of the navigating public lawfully resort to a privately owned streambed or bank for the purpose of avoiding obstacles?

The Court really answered a fourth fundamental question, which could be stated as: Will navigability be determined on a case-by-case basis, each determination involving an inquiry into the natural and historical attributes of the particular watercourse under consideration? Apparently so. It should be remembered that, after explaining the controlling law, the Court of Appeals sent the case back down for a trial on the issue of navigability. Given the compelling nature of the proof of navigability offered in the Moose River case, it may well be doubted whether the navigability of any Adirondack watercourse will be established through a motion for summary judgment.[10]

Unresolved Questions and Tentative Answers—A Look Forward

On January 22, 1999, I resigned as Chief of the Attorney General's Environmental Protection Bureau to take a job with the New York Power Authority. This change of venue means that I will have to content myself with a spectator's role when the Moose River case finally goes to trial. Nevertheless, I have pondered many of the legal questions that will soon confront the litigants and the court, and I am happy to provide my *obiter dicta* in the second part of this article.

Who will litigate in the trial court and what burdens of proof will they encounter?

It appears that the Adirondack League Club, the Sierra Club, and the Adirondack Mountain Club (which intervened in the case simultaneously with the State) will be the primary litigants. As a result of various rulings and stipulations, it also would appear that the individual defendants—those who actually descended the South Branch of the Moose on June 15, 1991—no longer have a role. The Adirondack League Club still has requests for declaratory and injunctive relief pending against the Sierra Club, and the Adirondack Mountain Club still has a request for declaratory relief pending against the Adirondack League Club.

The declarations sought relate, of course, to the navigability of the South Branch of the Moose River, and, thus, it would appear that the court will have to determine which side will bear the burden of persuasion on this ultimate issue. The decision of the Court of Appeals did not address the question (although it identified the issue of navigability as a question of fact), so one may assume that the Adirondack League Club will urge the court to follow those cases that place the burden of persuasion on the proponent of navigability.[11]

The posture of the State of New York is not entirely clear. The State had sought an injunction ordering the Adirondack League Club to cease posting warning signs near the point at which the Moose River enters its property. The Appellate Division upheld the denial of this relief, terming the request "premature." Given the fact that the signs are reportedly down, the State's role at the trial may be characterized best as that of an *amicus curiae*. Of course, the State's claims could be revived if the Adirondack League Club were to repost the River in the wake of the decision of the Court of Appeals.

What motions may be directed at aspects of the proof on the issue of navigability?

The proof on the issue of navigability of the South Branch of the Moose falls into two categories: commercial logging and recreational use. As to the latter, no one can dispute that descent of the 12-mile stretch of the River owned by the Adirondack League Club brings one into contact with an astonishingly beautiful landscape or that numerous recreational excursions down this stretch have occurred in recent decades. The proof as to the commercial use is also strong. Soon after the end of the Civil War, log driving began on the River, and massive spring log drives took place over the 12-mile stretch owned by the Adirondack League Club for a period of over forty years, ending just after World War II.[12]

Up until the decision of the Court of Appeals, the Adirondack League Club had directed its evidentiary attack on the proof of recreational use of the River and its suitability for such use. Now that this attack has been beaten back, the Adirondack League Club may turn its fire on the history of commercial logging. At the oral argument, Judge Wesley suggested that, inasmuch as logging was no longer possible on the River (because of market forces and state ownership and constitutional protection of the upriver timber), perhaps the only relevant proof is that which relates to recreational potential.

With all due respect to Judge Wesley, such an approach would be hard to square with the adherence by the Court of Appeals to the *Morgan v. King* precedent, which *expanded* the types of uses that would be deemed relevant on the question of navigability. Furthermore, limiting the sort of evidence that may be considered to the uses that can be foreseen at a particular moment in time raises the specter of watercourses remaining unchanged but nevertheless slipping in and out of navigability depending on current economic, social, and legal conditions. This would create serious constitutional problems in terms of the takings clause of the Fifth Amendment.

What is the navigability standard in New York in the wake of this decision?

It is difficult to formulate an exact statement of the standard, and perhaps the Court of Appeals deliberately avoided doing so in this case. It would seem that one must resort to several recent cases[13] and the definitions of the Navigation Law,[14] as well as *Morgan v. King*, to assemble the materials necessary to develop the general rule. My formulation would be:

> In New York, if a watercourse, "in its ordinary state and natural capacity," (the phrase employed by *Morgan v. King*) would give rise in the mind of a reasonable person to an expectation that the natural buoyant force of the delimited waters could be used, regularly and at least seasonally, to move one's person or one's property from one point of departure or entry to another, then the watercourse is "navigable in fact," and, thus, open to the navigating public wherever and whenever the aforesaid condition presents itself. [15]

Note that the rule, as I have stated it, does not speak to the purpose or motive for which a member of the public resorts to watercourses deemed navigable thereunder. Thus, swimmers or sunbathers floating on rubber rafts or other craft need have no intention of actually moving themselves or their property from one point to another in order to invoke the public right, and their resort to the privately owned bed and banks of the watercourse in order to avoid obstacles does not expose them to a charge of trespass.

At the same time, the navigating public must be conscious of the fact that the riparian estate can involve rights less tangible than a rocky bottom but more easily trodden upon. In its decision, the Court of Appeals reaffirmed its holding in *Douglaston Manor, Inc. v. Bahrakis, et al.*, in which it held that "exclusive fishing rights" in streams and rivers that are "navigable in fact" can be made part of the riparian estate through the general demising clauses of a deed.[16] Therefore, a fisherman who never touches the bed or banks but nevertheless drops his line over the side of his boat apparently can be charged with trespass.[17]

Will § 9-103 of the General Business Law protect the riparian landowner?

The immunity conferred by § 9-103 of the General Business Law is not much comfort to owners of property over which a "navigable in fact" watercourse flows. In the first place, certain activities that the navigating public may engage in, such as swimming, are not among the enumerated recreations that trigger the statute.[18] Even more distressing is the absence of the *quid pro quo* that lies at the heart of the statute. As explained by the Court of Appeals in recent cases, the statute is designed to protect the landowner who *suffers* the presence of the recreating public on his property upon the understanding that his potential liability in tort is limited.[19]

But a person portaging around a boulder on a river that is navigable in fact is not present on the riverbank at the *sufferance* of the riparian owner; he is there by *right*. Thus there is no *quid pro quo*, and, it would appear, no statutory protection available to the landowner. The problem for the landowner is not simply the increased risk of liability. He may have an obligation to make the watercourse safe for the public, and the inevitable search and rescue effort certainly implicates the owner's right to quiet enjoyment of his property. In any event, the decision of the Court of Appeals in the Moose River litigation undoubtedly will spur efforts to amend § 9-103 of the General Business Law.

In the meantime, landowners may seek to control the risk by agreement with the owner of any upstream public access point. Such an agreement could provide for a limitation on the rate of boat launches, a prohibition preventing launches when the water is too high or too low, and other measures designed to minimize the risk of injury. If the stream is included in the state's Wild, Scenic, and Recreational Rivers System, the State agency responsible for management could also assist in developing a workable plan.[20]

Why wasn't this a takings case?

Before one can determine whether anything has been taken, one has to determine what one has. The Moose River litigation is about determining what the Adirondack League Club acquired when it bought the tract over which the South Branch of the Moose flows over a century ago. If it acquired property over which a "navigable in fact" river flowed, then it cannot complain about the exercise of the rights to use the River that have always inhered in the public. Indeed, the very same case that controlled the question a century ago, *Morgan v. King*, continues to control the question today.

This fact points up the wisdom of the Court of Appeals in both 1866 and 1998. In 1866, it announced a classic common law rule-one certain enough to ensure predictability of future results and yet flexible enough to function in a dramatically changed social and economic context. By recognizing as primary the reasonable expectations of the navigating public, the question of what the reasonable expectations of the riparian landowner may have been collapses into the primary inquiry. Writing for the majority of the Court of Appeals, Judge Ciparick made the point succinctly. "Having never owned the easement, riparian owners cannot complain that this rule works a taking for public use without compensation."[21]

Doesn't this decision mean that thousands of people who own land including rivers and streams in New York are the unwitting hosts of unrecorded easements?

Yes. It would seem that prospective purchasers of such property would do well to thoroughly investigate the characteristics of any watercourse located thereon. If doubt remains, title insurance covering the risk should be obtained by or in favor of the purchaser.

Conclusion

The Moose River litigation is a fascinating example of how the common law continues to function and evolve in New York State. Even more venerable than the two traditions of environmentalism that vied for supremacy in the case, the common law proved in the end to be the master of both. It is well for the legal profession and the public to remember, as we enter another century and another millennium, that the answers to the most pressing legal and social problems can sometimes be found in the wise judgments of the past.

Endnotes

1. 92 N.Y.2d 591 (1998).
2. *Adirondack League Club, Inc. v. Sierra Club, et al.*, 201 A.D.2d 225 (3d Dep't), *appeal dismissed*, 84 N.Y.2d 978 (1994).
3. The Adirondack League Club was founded in 1890, and the Sierra Club was founded by John Muir two years later.
4. The Adirondack Park was created in 1892 (L. 1892, c. 707).
5. New York State Constitution, Article XIV, § 1.
6. It should be noted that the Sierra Club and the Adirondack League Club have functioned as allies in some cases. During the campaign to stop the Panther Mountain dam from inundating the Moose River plains, the two clubs were in the vanguard of the fight, along with other organizations and individuals like Paul Schaeffer.
7. An excellent and eminently readable survey of America's fascination with the subdivision can be found in James Kunstler's *The Geography of Nowhere*, published by Simon & Schuster in 1993.
8. 35 N.Y. 454 (1866).
9. *Galusha v. New York State Dep't of Environmental Conservation*, 27 F. Supp. 2d 117 (N.D.N.Y. 1998).
10. It should be noted that only two cases were cited, in the briefs submitted to the Court of Appeals, in which the issue of navigability was disposed of post *Morgan v. King* on a motion for summary judgment—*Hanigan v. State*, 213 A.D.2d 80 (3d Dep't 1995) and *Rogers v. S. Slope Holding*, 172 Misc. 2d, 33, 37 (Sup. Ct., Yates County 1997).
11. *See*, *e.g.*, *White Cap Seafoods v. Panzer*, 2 Misc. 2d 421 (Sup Ct., Suffolk County 1955), modified on other grounds 1 A.D.2d 963 (2d Dep't 1956).
12. A fascinating video of Adirondack logging is preserved *Cabin County—Lumberjack Sky Pilot* which is an hour-long compendium of excerpts of the late Rev. Frank Reed's extensive 16 millimeter film library with his voiced over commentary. Copies may be obtained from WMHT Home Video Sales, P.O. Box 17, Schenectady, N.Y. 12301. The State of New York recognized the logging potential of the South Branch of the Moose River as early as 1851, when the river was "declared a public highway for the purpose of floating logs and timber" (L. 1851, c. 207).
13. Among the cases that need to be consulted in formulating the general rule would be *Hanigan v. State*, *supra*, and *Douglaston Manor, Inc. v. Bahrakis, et al.*, 89 N.Y.2d 472 (1997).
14. Navigation Law § 2(4) and (5).
15. If the "point of departure" is to be found on private land, the navigator might have to refrain from utilizing it in order to avoid a trespass. In essence, he would have to "back out" the way he came in.
16. *See*, *Douglaston Manor Inc. v. Bahrakis et al.*, *supra*.
17. In wake of the *Douglaston Manor* decision, the Department of Environmental Conservation prepared an enforcement policy guidance document that assumed that the question of whether public "angling" (not involving touching of the bed and banks) could coexist with a riparian's "exclusive fishing rights" was still open. Despite the reaffirmation of *Douglaston Manor* in *Adirondack League Club*, the issue is even now less than certain. See on this topic §§ 11-0101 (12) (b), 11-0105, and 11-0110 of the Environmental Conservation Law and the opinion in *Slingerland v. International Contracting Co.*, 43 App. Div. 215, 220 (3d Dep't 1899), *aff'd* 109 N.Y. 60 (1901) and the dissent of Chief Justice Carrico in *Kraft v. Burr*, 252 Va. 273, 281-284, 476 S.E.2d 715, 719-721 (Va 1996).
18. *Cramer v. Henderson*, 120 A.D.2d 925 (4th Dep't 1986).
19. *See*, *Ferres v. City of New Rochelle*, 68 N.Y.2d 446 (1986) and *see also*, *Bragg v. Genesee Co. Agric. Society*, 84 N.Y.2d 544 (1994).
20. The South Branch of the Moose River was added to the system as a scenic river in 1975 (Environmental Conservation Law, § 15-2714[2] [s]).
21. *Adirondack League Club v. Sierra Club, et al.*, 92 N.Y.2d 591, 604 (1998).

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Beware These Nine Costly Mistakes When Creating a Home Page for Your Law Firm

By Phillip M. Perry

You can't afford to have clients ignore *your* Web pages, so avoid these nine common mistakes.

Mistake No. 1: Hyping the Firm Instead of Serving the Client

This is the most common error and turns off clients the fastest.

"The biggest mistake is to use the Web page as an electronic form of a press release," says Howard P. Henson, account executive with The Internet Learning Center in New York. "Instead, consider the Web page as a way to meet the needs of your client. The whole essence of success is to get people to add your Web page to their electronic address books."

Once they do *that,* they will be back again and again to retrieve information from your site. And that word "information" is the key to success. What people are looking for is information that will help them make more money in their business, become smarter buyers of your services, or lead more productive or happier lives.

The secret is to think communications, not selling. Here's how to decide what to communicate:

- What are the most common questions asked by your clients? Put the answers on your site.
- What general advice can you give clients in your specialty area? Here's where it goes.
- What timely information can you share with your clients? Examples: deadlines for filing forms, pending changes in the law, new personnel at your office.

Mistake No. 2: Segregating the Web Page from Other Marketing Efforts

Your Web page will not be effective if it is seen as separate from your law firm's traditional marketing tools.

"Look at your page as a line extension of the marketing channels you are already using," says David M. Edwards, associate consultant at Redwood Partners in New York.

Create the same echo effect as you do, for example, when your radio spots echo a statement in your display advertising. On your Web site, echo the efforts you are making to reach out in other media.

Suppose you are giving a speech to the chamber of commerce. Invite browsers to sign up for a monthly electronic newsletter.

Tag your Web site address onto your business cards, letterheads, and all of your promotional materials. Tie everything together as much as possible.

Mistake No. 3: Creating a Stodgy Home Page

Make sure the opening page is a winner. You have perhaps five seconds to convince the browser to stay at your site.

"Your home page is like a storefront," says Eric J. Berrios, director of interactive services at Erin Edwards, a Web page consultancy in Glen Head, New York. "It is the first impression people get of you. It has to stop people in their tracks."

To turn browsers into legal clients who come back for more, consider how you can condense the points made in this article into one dynamic opening page.

- Emphasize client benefits by offering links to useful pages. Example: "Click here to see the most important legislation that relates to premises liability."
- Refer to offerings made in your other promotional efforts. Example: "You may have heard us speak at the recent seminar. Click here for a report with vital follow-up information."
- Keep a low profile by using a small graphic and modest-sized firm name. Get the browsers' eyes focused on words that relate to their needs, and promise really helpful materials on your attached pages. Do anything to keep that visitor from clicking past your site!

Mistake No. 4: Designing a Confusing Web Page Structure

If your site is difficult to maneuver, your client will become frustrated and click out.

Avoid creating Web pages that are more than two levels deep beyond the home page. That's confusing. The browser can get lost completely.

Design your opening page to include a clickable index of additional pages. The browser who wants to access one of these pages can always return to your home page easily if you include the words "return to home page" at the bottom of each of your pages, along with a link.

Mistake No. 5: Designing "Show" Pages

If you *really* want to irritate your clients, create pages that take up to a minute to download.

Take a tip from Alan W. Runfeldt, senior projects manager for the Internet Group at Net5.Net, a consulting firm in Rohnert Park, California: "If you make people wait more than 20 to 30 seconds to download a page, you will be trying their patience and losing visitors."

One way to speed download time, says Runfeldt, is to keep each page under 10 kilobytes, including graphics. "A very important warning to those not experienced with using the Web: *Avoid large graphics*," Runfeldt says. "Remember to allow an average of 10 seconds of download time for every 10K of data transferred. Be especially wary of graphics-only pages."

Mistake No. 6: Failure to Engage the Client

Create as much interaction as possible with visitors to your site. Start by personalizing your site. Include information about the individuals at your firm. Sites without this information seem cold and fail to excite clients.

Include a form that allows the client to send you messages. Ask for feedback on your site. How can it be improved? Made easier to use? What information would the client like to see added to your site? This can set up a dialogue and make the client feel much closer to your business. That alone can stimulate a return visit to your site.

Include an invitation to "Please send us a question." When the client clicks on this invitation, have a message form pop up. Be sure to check your e-mail at least once daily.

Edwards suggests going an extra mile to get clients really involved with your site. "Every site should include a survey. You want to find out as much information about your visitors as possible. What is their age? Income? Interest? How would they like to benefit from visiting your Web page?" Listen to what visitors say and improve your site constantly.

Mistake No. 7: Failure to Update the Site

When clients return to your Web site, they expect to see something new. If they are disappointed, they will remove your page from their electronic address book.

Update your page at least once a week. You don't have to do something elaborate. But include a newsy item, or something that will help your clients. Announce "What's New This Week." When the client clicks on that statement, a page pops up with the new material.

Include a statement such as "This is an interesting place to be. Bookmark it now and come back in six days when we update it."

Mistake No. 8: Omitting Links to Other Sites

Including links to other sites is considered good form and a courtesy to clients. Include links that will extend the information you have in your site. Consider especially any links to legal information from the state or federal governments. By all means, offer to include links to the Web pages of your clients.

Mistake No. 9: Keeping Your Site a Secret

Publicize your site! People won't check into your site until you send out invitations.

- Mail a press release about your site.
- Include your site's address on your business cards, stationery and advertising.
- Ask other Web page owners to include your site as a link; in exchange, offer to link their site to your page.
- Register with **http//www.submit-it.com**, a service for publicizing sites.
- Register with all services that offer awards for best sites.

Claims for Workplace Stress

By Martin Minkowitz

What to do with the client who can no longer work because of mental stress at the last employment? Disability caused by mental stress can be compensable under the New York State Workers' Compensation Law (WCL). In an appropriate case, a worker can receive payment for medical care and treatment in addition to the wage replacement benefit provided by the WCL (up to $400 per week, non-taxable). Mental stress claims have emerged as a significant percent of workers' compensation benefits in the past two decades.

Although the WCL in New York came into existence in 1914, awards for mental stress resulting in mental disabilities (sometimes referred to as mental-mental claims), did not appear as compensable until the early 1970s. While mental stress which resulted in a physical disability, such as a heart attack, was compensable (known as mental-physical), prior to 1970, the system rejected mental-mental claims. The acceptance of these disabilities as compensable required employees and their workers' compensation carriers to defend against a claim which characteristically could not be physically corroborated, either as to the stress or the disability. Cases reported around the country ranged from an undercover policeman who alleged total disability after the suicide of a fellow officer and an official investigation of drug use by an undercover narcotics agent,[1] to a woman in New York who saw her employer in his office after he had shot himself to death,[2] and became totally disabled.

A study completed about 15 years ago by the National Institute of Mental Health noted that about nineteen (19%) percent of all adults have at least one psychiatric disorder in any six-month period. A Canadian study indicated an even larger potential pool when workers evaluate their own reaction to stress in the workplace. In that study about 60% of the workers believed that there was negative stress in the workplace and 80% of that group responded that the stress affected either work performance or psychological or physical well-being.

Many state courts, tribunals and legislatures have recognized that with no physical corroboration for either the stress or the disability, there is an opportunity for fraudulent claims or claims by malingerers which must be guarded against.

The New York State Legislature passed an amendment to the law which became effective in July, 1990 which provides that injuries which are solely mental and based on work-related stress, and are caused by a lawful personnel action of the employer, will not be compensable under the State WCL if the evaluation, transfer, termination, demotion or other disciplinary action was done in good faith (§ 2 WCL). A determination by the Workers' Compensation Board that the employer's action constituted a lawful personnel decision which mistaken in good faith is a factual issue to be resolved by the Board.[3] An employer's poor handling of the matter does not necessarily rise to the level of bad faith.[4]

To be compensable the employee must prove that the stress is greater than that which usually occurs in the normal work environment.[5]

In a recent decision the Appellate Division affirmed the Workers' Compensation Board's finding of total mental disability because of "undue work related stress."[6] The court found that the testimony revealed "claimant's involvement in the expansion of the Center caused an extremely tense situation as financial difficulties mounted," and that the "claimant had an acrimonious relationship with his superiors regarding the Center's operations which caused him to be depressed and anxious. The court concluded that the Board on hearing the psychiatrist's testimony had substantial evidence upon which it could find that the disability arose out of and in the course of the employment and sustained the award. The finding of fact by the W.C.B. that a claimant has experienced more than the normal work-related stress and is entitled to mental-mental disability award will never be disturbed by the Appellate Division when it is supported by substantial evidence.

Endnotes

1. *City of Aurora v. Industrial Com. of Colorado*, 84-C0387.
2. *Wolf v. Sibly*, 36 N.Y.2d 505, 330 N.E.2d 603 (1975).
3. *Meyer v. Teachers College Columbia University*, 199 A.D.2d 623, 604 N.Y.S.2d 995 (App. Div. 3d Dep't 1993).
4. *Miles v. State Insurance Fund*, 1999 N.Y. Slip Op. 10231, 698 N.Y.S.2d 561 (App. Div. 3d Dep't 1999).
5. *See Troy v. Prudential Ins. Co.*, 233 A.D.2d 635, 649 N.Y.S.2d 746 (App. Div. 3d Dep't 1996), and *Leggio v. Suffolk Co. Police Dep't*, 245 A.D.2d 897, 666 N.Y.S.2d 815 (App. Div. 3d Dep't 1997).
6. *Marillo v. Cantalician Center for Learning, et al.*, 263 A.D.2d 719, 693 N.Y.S.2d 687 (App. Div. 3d Dep't 1999).

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Does the Color Really Matter?

By Charles Rosenstein

As real estate practitioners, we have to concern ourselves, on behalf of our clients, with the likes of contract negotiations, structural and infestation issues, contingency deadlines, mortgage commitments, title insurance problems, and closing dates—to name just a few. In pushing the closing across the finish line at the County Clerk's office, don't neglect the matter of color. "Color," you say? Yes, color, and not the color of title that we all remember hearing something about from our first year law school real estate classes. Our clients, of course, are concerned about the color of their new walls, the color of their new carpets, and the color of their new homes. Why is color an issue for us as well? Because considerable confusion exists regarding the color of the ink in the pen that our clients will use to execute the recordable documents. Blue or Black? Black or Blue? Here's some advice that may spare you bruising debates at the Clerk's desk.

In upstate real estate practices, it appears that black ink is the color preferred by title insurance companies in order to insure recordability. The thinking appears to be that the use of black ink makes for superior copies, and, thus, the clerk's offices damn well ought to REQUIRE that all documents to be offered for recording MUST be in black pen in order to be accepted. In rebuttal, the thoughtful practitioner might argue that blue ink ought to carry the day because it allows easy discrimination between the original document, signed in blue, and its photocopy, which will appear as black (color copiers are not standard issue in most clerk's offices). Need we succumb to the black ink advocates in order to make certain that our deeds and mortgages will be accepted for recording?

The answer lies in the informal opinion of the State Attorney General No. 89-77. In this opinion, the AG advises that there is no requirement that signatures on deeds and other related documents affecting real property filed in the County Clerk's office be executed using black ink. It also follows that blue ink may not be the mandatory color. The opinion states that the asserted reliance on § 2101 of the CPLR, which requires that all papers offered for filing be in "black ink" is misplaced. The statute is one of "limited application" and establishes procedures for civil litigation; it was not meant to govern the format of documents "affecting real property."

Now we are able to answer the questions raised as we began this inquiry. With regard to the execution of real estate documents to be filed with a County Clerk, color DOES NOT matter. County Clerks are not authorized to refuse to accept real estate documents for recording due ONLY to the fact that they are executed in a color other than black. Of course, the Clerk may reject the document for several reasons, but the color of the ink used to execute the document is not one of them. Take comfort, oh weary practitioner. Although there are a great many things to which you must closely attend in completing the real estate transaction, not a single erg of mental energy must be expended on worrying about the color of the ink in the pen at the closing table.

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Exotic Seasonings—a report on a successful experiment

Cy Dereal, Esq. (aka Bill Helmer)

Everybody knows that a year consists of twelve months and four seasons. This follows from the Gregorian Calendar we employ in the West, which is a revision to the Julian Calendar designed by Sosigines for the first Caesar. The big guy got the credit, of course. The same thing happened when Sosigines produced his other great invention, the really big salad.

A Roman dictator's calendar was a natural target for upstarts and radicals, and the French and Russian revolutionaries, when they were not experimenting with new salad dressings, ordered up weeks of ten and five days, respectively. Neither nation has yet fully recovered. I have also heard rumors that retailers add a "thirteenth month" to accomplish some occult purpose relating to "inventory control."

You may now count me among the tinkerers. A while back, I designed a system calling for eight seasons of about 46 days each in the hope that it would better organize the family life of two working attorneys with three kids and three jobs and two each of pets, cars, and mortgages. This article is my report on the results of the trial run lasting from December 1998 through December 1999.

It should come as no surprise that the ***Holiday*** Season remained the trickiest part of the year, notwithstanding my adjustments. Things started well. I have always dreaded the onset of the national consumer frenzy, which seems to arrive earlier and earlier each year, so I deferred the start of our holiday season until December 12, 1998. This clever arrangement also got us past my wife's birthday on the 8th. So far, so good.

The "back end" of the new season did get a little weird. Following the logic of my system with my usual rigor, I kept all of our decorations up until January 26th, getting them down around the time of the Super Bowl. Although the neighbors were mighty unhappy, we did solve one common solid waste disposal problem. All organic matter, such as the Christmas tree, simply dried up and crumbled to easily vacuumed dust.

The next season lasts from January 27th through March 13th. Quite a bit happens during the heart of winter, including Groundhog's Day, President's Day, St. Valentine's Day, and, of course, Mardi Gras. For some unknown reason, the kids get a vacation in here, so they needed entertaining for a few days. Watching Dad injure himself on the ski slopes was just the ticket. I named this season "Cold as a Brass John in the Yukon," or ***Cold*** for short.

Now we approach the high point of the year for all Irishmen. St. Patrick's Day arrives early in the season that lasts from March 14th to April 28th and is soon followed by the onset of spring. The name of the season is obvious—***Green and Beer it***. Thanks to the Poles, Easter Monday is "Dingus Day," upon which day the boys are directed to pluck pussy willows and chase the girls with them. Does it get any better than that?

Get ready for the ***M & M Season***—Mother's Day and Memorial Day fall due in the period lasting from April 29th through June 13th. And don't forget to honor our sister republic to the south on Cinco de Mayo. I pulled off a hat trick during this season, watching a Mexican bullfight on satellite TV with my Mom and Grandma on Memorial Day. Cervesa and nachos were served.

Okay, it's time for a season that I call ***Welcome Golf***. Between June 14th and July 28th, my pursuit of the little white ball was interrupted by Flag Day, Father's Day, my birthday, the Glorious Fourth, and Bastille Day. Since I lose a ball every other hole or so, these holidays provide a convenient means for replenishing the supply. Oh yes, free caddy service begins with the end of school. Life was good.

The free caddying continued almost until the end of the next season, which extends from July 28th until September 11th. Around Labor Day, the annual "State Fair" ordeal in Syracuse took place. Talk about your tropical heat! The two-story butter sculpture looked downright smug within its refrigerated chamber. Of course, we sampled the traditional State Fair breakfast of grilled sausage and peppers. I labeled this season Hot as All Get Out, or ***Hot*** for short.

We are down to the last two of the new seasons. I call the next one, lasting from September 12th to October 27th, ***Farewell Golf***. Over this period, the supply of balls and tees run low, and the fall weather can drive even the most ardent golfers inside to the pinochle table. This season is followed by the ***Snickers*** season, which is named not for the candy, but for the reaction that my Halloween costumes always seem to elicit.

This last of the eight new seasons runs from October 28th until December 11th, and is packed with important holidays. Halloween, Election Day, and Guy Fawkes Day follow one another in quick succession. Of course, this is also the season to give thanks—most notably for the fact that we are not Canadians, who are doomed to celebrate Thanksgiving early in October. They have funny rules for football, too.

There you have it—my eight-season year. Building on my success, I am now working on an eight-day week and a thirty-hour day, which I imagine will find favor with all practitioners who bill on an hourly basis.

Lawyers on the Tube, Screen and Page—A Multimedia Quiz

What follows is a baker's dozen of questions relating to the portrayal of lawyers on television, in movies, and by novelists.

Television:

Name the television series in which each of the following actors starred as a lawyer:

1. Eddie Albert
2. Carl Betz
3. Scott Bakula
4. Fyvush Finkle

Movies:

Name the actor who appeared as:

5. The defendant in *A Man for All Seasons*
6. Counsel for the defense in *The Devil and Daniel Webster*
7. The judge in *My Cousin Vinny*
8. Judge, jury, and executioner in *Judge Dredd*

Novels:

Identify the classic novel in which each of the following fictional lawyers plays a key role:

9. Tulkinghorn
10. Dowling
11. Finch
12. Utterson

Bonus question:

13. In the *Perry Mason* television series, only the shapely legs of Perry's secretary appeared on camera. Name the famous actress who supplied the stunning stems.

ANSWER KEY

1. *Green Acres*
2. *Judd for the Defense*
3. *Eisenhower & Lutz*
4. *Picket Fences*
5. Paul Scofield
6. Edward Arnold
7. Fred Gwynne
8. Sylvester Stallone
9. *Bleak House* by Charles Dickens
10. *Tom Jones* by Henry Fielding
11. *To Kill a Mockingbird* by Harper Lee
12. *The Strange Case of Dr. Jekyll and Mr. Hyde* by Robert Louis Stevenson
13. Mary Tyler Moore

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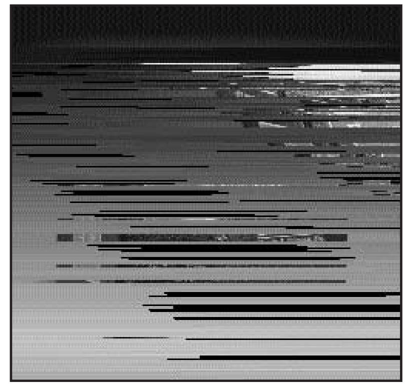

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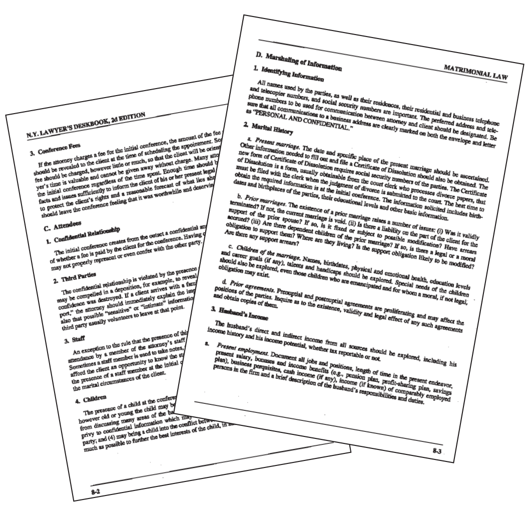

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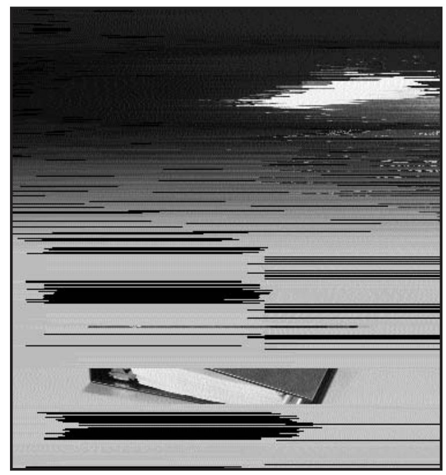

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