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The Senior Lawyer

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

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Cover image:
Justin and Louise Vigdor

A Message from the Section Chair

In this, the sixth year of the Senior Lawyers Section's existence, we continue to build on our experience with Section members so as to achieve our stated purpose, the furtherance of the interests and quality of life of senior lawyer members of the New York State Bar Association. In this respect we are unique, since our primary focus is not a specific practice area but rather the needs of senior attorneys.

We are very proud to dedicate this issue of *The Senior Lawyer* to an extraordinary senior attorney, Justin L. Vigdor, who in 2006 chaired the newly created Special Committee on Senior Lawyers, and under whose leadership and guidance the Senior Lawyers Section was created. His outstanding 60-year career in law and community service has been chronicled by Rosemary Byrne, our Section's Vice-Chair, in her article aptly entitled "Justin Vigdor: A Life Dedicated to Making a Difference."

Consistent with our mission to provide articles relevant to the diverse interests of our Section members, this issue of *The Senior Lawyer* includes articles on a wide variety of topics, including technology, retirement planning, managed long term care, mortgage foreclosure settlements, identity theft, immigration law, and more. The editors are always interested in suggestions for articles and welcome the submission of original articles for their consideration.

As to our CLE programs, on November 17, 2014, we presented "Update 2014" at the DoubleTree by Hilton Hotel in Tarrytown. The topics which were covered in this all day program included updates on: wills, trusts and estates; elder law; CPLR; real property; retirement planning; systematizing a law practice; and social security. As with articles for *The Senior Lawyer*, we welcome suggestions for program topics and speakers, and these should be directed to Anthony J. Enea, Chair of our Program and CLE Committee.

Our efforts continue to increase the diversity of our Section with respect to both women and minority groups. This year we co-sponsored and participated in the Commercial and Federal Litigation Section's "Eighth Annual Smooth Moves: Career Strategies for Attorneys of Color." Also, we were a co-sponsor of "Women on the Move 2014," presented by the Committee on Women in the Law, and representatives of our Section attended the event, which included a networking reception after the CLE program.

In addition, as a part of our commitment to equal access to justice, we are undertaking a Mentors Pilot Project with CUNY School of Law. Members of our Section will be linked with graduates of CUNY who are in, or are planning to create, a solo or small firm community-based law practice. The focus of the mentoring relationship will be on law practice management, and the goal is to utilize the expertise of the Section membership for the benefit of attorneys with 0-5 years of experience who need support in creating a sustainable practice. We welcome your interest in this project and your comments.

We also welcome your participation in our Section's Committees. A list of our Committees, with a description of their focus and the names of the Chairs, can be found on our website, www.nysba.org/sls. By joining a Committee you will have an opportunity to voice your perspectives and influence issues of critical concern to senior lawyers.

I hope that you enjoy this issue of *The Senior Lawyer*, and I look forward to seeing you at our January 27, 2015, Annual Meeting Program.

Carole A. Burns

Senior Lawyers Section

Visit us on the Web at WWW.NYSBA.ORG/SLS

A Tribute from the Co-Editors

This issue of *The Senior Lawyer* is dedicated to a remarkable person, Justin Vigdor, who has touched and enriched the lives of all those who have any contact with him, however involved or slight.

I have known of Justin for many years, primarily because of our activities in the New York State Bar Association. But it was not until the founding of this Section of the Association that I really learned of the "magic" that he could perform—in making things happen for the benefit of all who knew him and all who did not.

Justin was the first Chair of this Section when it was created in 2008. As one of the charter members of the Section, I learned first-hand how Justin performed his magic—to encourage people to work toward a common goal and to "make things happen."

As in any well-built structure, an indispensable requirement is a solid, firm foundation. Through the efforts, insight and experience of Justin, our Senior Lawyers Section stands on a sound and indestructible foundation.

Justin created committees whose members worked diligently with enthusiasm to carry out the vision that Justin had for the Section and with dedication to the goals that Justin set. As a result, our Section now has grown in numbers to more than 2,000, among the largest Sections in our Association.

From my personal experience and observation, Justin has that rare quality of making you feel that you are special and that what you do (or do not do) really makes a difference.

Some years ago I had a little sign in my office. It read: "I am a part of all whom I have met." I can say without hesitation and am grateful that I have had the opportunity not only to meet Justin but to "have a part of him" in me. My experience simply mimics the experience of all others whose lives Justin has touched.

Part of understanding Justin, where he came from and where he has been and is now, has been chronicled in the outstanding feature article written by Rosemary Byrne entitled: "Justin Vigdor—A Life Dedicated to Making a Difference."

To help honor such a dedicated, outstanding and rare individual, I felt that this issue should be dedicated to him and that his picture should be on the cover of this magazine.

However, when I learned that Justin Vigdor had been married to his wife Louise for more than 62 years—a significant part of his life has been inexplicably intertwined with that of his wife. I realized that Justin's many accomplishments were with the support, encouragement and devotion of Louise. Thus, for an accurate picture of a rare person who has made a difference to so many lives, his wife Louise has been a significant part of those accomplishments and that, together, they should be recognized and honored by this publication. Hence, the photograph on the cover of this magazine.

Willard H. DaSilva on behalf of
myself and my co-editor Stephen Brooks

Request for Articles

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

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

www.nysba.org/TheSeniorLawyer

Justin Vigdor
A Life Dedicated to Making a Difference

By Rosemary C. Byrne

As described by his colleagues and friends in the New York bar and the Rochester community, Justin L. Vigdor is, among other things, "a Renaissance man," "an innovator," "a volunteer extraordinaire," "an indefatigable leader," "a model of integrity," "an extraordinary mediator and negotiator," "a visionary," "tenacious," indeed, "the role model for attorneys everywhere."

Recipient of the New York Bar Foundation's Lifetime Achievement Award in January 2014, Justin has been showered throughout his 60-year career with honors, awards and accolades for his inspiring service to his home town of Rochester and his contributions to the legal profession in New York and nationally. I recently had the honor and pleasure of spending time with Justin at his office in Rochester to discuss the *life* which gave rise to that award and just a few of the many *contributions and achievements* which earned those accolades.[1]

Taking on Challenges at an Early Age

Born in the Bronx, the older son of a lawyer, who had studied law by night and worked in real estate and insurance sales by day, and a stay-at-home mom, Justin's path to the bar was forged by a set of unexpected circumstances and serendipitous events. As a high school student he showed an aptitude for writing and analytic skills and thought being a lawyer was an "exciting and rewarding thing to do." During Justin's second year of undergraduate study at New York University his solo-practitioner father became ill and Justin began going to his office in an effort to keep the practice alive. Fortuitously, the LSAT's were introduced that year and St. John's Law School initiated a program which permitted those with high LSAT scores to begin legal study after just two years of college. Justin seized the opportunity.

As one of a small minority of Jewish students at St. John's in the late 1940s, he recollects feeling a bit "like a square peg in a round hole." Nonetheless, he became President of the Student Body and a law review editor. The latter honor was afforded notwithstanding a "difference of opinion" with the then Dean over his law review case comment criticizing the activities of a Catholic priest and the result in *Terminiello v. City of Chicago,* 337 U.S. 1 (1949). In *Terminiello* the Supreme Court reversed the priest's conviction on charges of inciting a riot (which had been affirmed by both the District and Circuit Courts) and held that the "breach of peace" ordinance of the City of Chicago (which banned certain types of speech) was unconstitutional. Justin took the opportunity to say and do what he thought was right, a pattern he would repeat throughout his career. He respectfully declined to change the thrust of his comment. He recalls fondly that "an agreeable compromise" was reached when the Dean judiciously called upon Hon. Milton Mollen (Ret.), then a third year student, to assist.

After receiving a fellowship and an LLM from NYU Law School following graduation from St. John's, Justin joined the Army and became a member of the Judge Advocate General Corps just after the 1951 enactment of the Uniform Code of Military Justice. He was one of the team of trailblazing JAG attorneys who argued appeals in the newly created Court of Military Appeals. Justin points proudly to the fact that the team "established precedent with virtually every case…[and] really helped to create a jurisprudence" for military criminal trials. Through their efforts, he noted, the Court of Military Appeals adopted a "Miranda" type rule and other procedures governing the admission of confessions years before the U.S. Supreme Court decisions affording such protections.

Justin became something of a trail blazer again when as "a young lawyer from the Bronx" with experience practicing in Washington, D.C., he opted to begin his career in Rochester, NY. Having decided he did not want to practice in New York City and, even though "he had probably never been north of Yonkers," he researched other alternatives in New York (where he was admitted to practice) and narrowed his choices to Syracuse and Rochester. Still in the service, he was able to "catch a ride on a military transport," briefly visit both cities for interviews and decided that he and his wife would move to the city of the firm which sent him the first offer. MacFarlane & Harris was first to respond and so began a 60-year "love affair" with the city of Rochester.

A Lifetime of Service to the Bar and the Community

As we began, I shared with Justin some of the previously mentioned descriptions gleaned from his colleagues and asked how *he* would describe Justin Vigdor. From his reply it quickly became clear we should add "self-effacing" to the list:

> I am so flattered [by those comments]. I don't know to whom you've been talking, but obviously to people whose judgment is overly generous. I am a person who has had a very rewarding career over a number of decades. I love the bar. I love the law. I enjoy working with people. From the time I was a young person, even in early high school, I was involved in activities of all kinds, and I always felt I could and should make some sort of contribution. And I just continued that throughout my legal career. I don't want to be banal

> or trite, but I do believe you get as much as you give…. Life goes by so very quickly. If you have the opportunity to make a difference…it's an opportunity not to be wasted. I've always felt I would take such opportunities.

The following small sampling of the programs that Justin has helped to initiate and shepherd to success during his career demonstrates that he has, indeed, seized those opportunities and capitalized upon them. In so doing, he has made a difference in the lives of scores of members of the legal profession and residents of his Rochester community.

Establishing the Al Sigl Community of Agencies

At the suggestion of a partner at his firm, as a young lawyer, new to Rochester, Justin joined the board of the Day Care Training Center for Handicapped Children (subsequently named the Mary Cariola Children's Center) and soon became its president. At that point its mission was to ensure that education would be available to children with developmental disabilities who were not then admitted to public schools.

Highlights of a Lifetime of Service and Achievement

Recipient—New York State Bar Foundation Lifetime Achievement Award (2014)

President—New York State Bar Association (1985)

President—New York State Bar Foundation

President - Monroe County Bar Association (1977)

President—Monroe County Bar Foundation

Spearheaded creation of NYSBA Senior Lawyers Section & First Section Chair (2009 – 2011)

Chairman of the Board—Rochester Fringe Arts Festival

Member—New York State Bar House of Delegates

Member—American Bar Association House of Delegates (1984-1996)

Life Fellow—New York State Bar Foundation & American Bar Foundation

Founder & First Chair of the IOLA Fund

Official Referee of the New York State Commission on Judicial Conduct

New York State Uniform Law Commissioner (1 of 5)

Life Member—National Conference of Commissioners on Uniform Laws

Past President & Director of AAA of New York State

Past President—Al Sigl Community of Agencies

Past Chair—Partners Foundation of Al Sigl Community of Agencies

Numerous Community Service Awards, including Rodenbeck Award for Service to the Community and Legal Profession, Nathaniel Award for Community Service and Professional Accomplishments

First recipient of "Justin L. Vigdor Senior Lawyer Award" created by Monroe County Bar Association

In 1962, working with representatives of six other agencies that provided human services to various categories of disabled adults and children, Justin expanded that mission and spearheaded the effort to co-locate the agencies and thereby coordinate and facilitate the delivery of services to special needs populations. The concept was met with strong resistance from existing, well-established Rochester charities which instead urged the various providers to merge and sought to use the "power of the purse" and principles of "*noblesse oblige*" to control the extent, nature and delivery of services to those in need in the Rochester community. Resisting the efforts to force a merger, and with Justin's guidance and leadership, the coalition developed a plan not to merge but to bring the agencies together under one roof (the site of an abandoned psychiatric center purchased for $1 from the State) with shared services. Justin was one of the leaders in the effort to raise the capital to make the plan a reality, despite efforts of some in the Rochester charitable community to discourage or derail the project. The result was the Al Sigl Center, which as "the Al Sigl Community of Agencies" now includes six member agencies and several affiliated human service organizations that provide services on six campuses to over 55,000 Rochester adults and children with special needs and disabilities.

Justin's description of why he undertook the challenge provides a window into the measure of the man:

> RB: You were a young lawyer, starting in a practice, relatively new to Rochester, with a wife and small children to support. You might have opted to focus on yourself and your business. Why would you choose to challenge the Rochester establishment?
>
> JV: Well, at that time…it became clear to me that it was important…and that [the establishment charities] were really being

> obstructionist and that they were not acting in the interests of the people who needed [help], that they were acting in their own established ways of thinking that whatever we say is right and whatever we do is right….
>
> I was interested in this. When I get interested in something and I believe in it, I'm not going to walk away if people become obstructionist. I will see if I can find a way around it…. [T]here are some people who can think of a thousand reasons why something cannot be done. And other people who can think of one reason of how you can do something…. It's so easy to say you can't do it, it shouldn't be done, it can't be done. If it's worth doing you try to find ways of doing it.

Developing the Telesca Center for Justice

As President of the Monroe County Bar Association in the late 1970s, Justin began an effort to apply the concepts developed for the Sigl Center to the delivery of civil legal services in Rochester. As it emerged over time, the idea was to co-locate the four major service providers—the Empire Justice Center, the Legal Aid Society, Monroe County Legal Assistance Center and the Volunteer Legal Services Project—in a single building, also housing the Monroe County Bar Association and the Foundation of the Monroe County Bar, in the heart of downtown Rochester. The service providers would benefit from economies of scale and staff. Their clients would have easy access to the services they needed in a single location close to the courthouse rather than seeking help from "agencies that were scattered all over town" and often difficult to reach. The mission of the project—enhancing the delivery of civil legal services to Rochester residents—was enthusiastically received. Converting the idea to a reality, confronting the problems of lease expirations, geography, funding, as well as finding affordable space and convincing Boards comprised mostly of lawyers of the benefits of the project would require nothing short of logistical and legal wizardry.

It took almost two decades for the stars to align and for Justin (with the help of many others) to do his magic. The Monroe County Bar Association, the Foundation of the Monroe County Bar and the four service providers agreed to co-locate and to renegotiate their leases to a common expiration date. With Justin's leadership and skills of persuasion and negotiation, they came to an agreement all parties could accept.

With the "legal" structure in place, there remained the challenge of paying for the build out, moving costs and other expenses and assurances required for long term below market rate leases at the new location. Justin went from negotiator to fundraiser as Chair of the Partnership for Equal Justice. The result—a campaign that had an original goal of $1.2 million has raised almost $2.4 million. The Telesca Center has now become a national model, recipient of the ABA Harrison Tweed Award in 2008 and other awards for innovations in fundraising and the delivery of legal services.

The project took several years of Justin's time and energy. Once again the inquiry was "why did you do it?" and the response was yet another reason to engage in a life of community service:

> Well, I did it because I honestly believed it was worthwhile. It was something we had been talking about for years and years. And to me it was manifestly clear that such a center would be a great value to the legal community and to the nonlegal community and to the needy, the public in need of legal services. And it was very clear that it was just worth doing and we had some momentum and we just kept pushing with it.

Founding the NYSBA Senior Lawyers Section

Justin may well be considered the "founding father" of the NYSBA Senior Lawyers Section. In June of 2006, then NYSBA president Mark Alcott tapped Justin to chair a newly created Special Committee on Senior Lawyers. President Alcott charged the Committee with providing "opportunities to utilize the expertise of senior lawyers," developing programs and services to enhance their professional growth (including career transitions, pro bono activities and networking), as well as their quality of life and professional, financial and retirement planning and "acting as a voice of senior lawyers within the Association and the Community." The Committee was also asked to examine whether it should recommend the creation of a Senior Lawyers Section.

As part of its initial work, in the Fall of 2007 with Justin at the helm, the Committee conducted a massive survey of almost 16,000 attorneys, over the age of 50, regarding attitudes toward retirement, planning and preparation for retirement, viewpoints on community service and pro bono work, the efficacy of a Section dedicated to the needs of senior lawyers and what services these "seasoned lawyers" might want from such a Section. Almost 2,300 responses were received and tabulated.

The result was one of the most far-reaching and comprehensive studies and reports on the attitudes of senior lawyers toward their work, retirement and other personal and life planning issues done to date.[2]

Having received the analysis and recommendations set forth in the Special Committee Report, in November, 2008, the NYSBA House of Delegates approved the creation of a Section dedicated exclusively to the needs and interests of senior lawyers—one of the first of its kind in the country. Justin was named its first chair. Today, the Senior Lawyers Section is one of the fastest growing sections of the NYSBA

and over 2,000 members enjoy its meetings, CLE programs and this very magazine.

Justin underscored the need and value of the Section:

> I was aware of the demographics of the bar, the fact that people were getting older, that we had a whole generation now that are baby boomers….
>
> I think the need [for] the Section was twofold. One, it was a need on the part of the [NYSBA] itself to keep senior lawyers active, dues paying, involved members, who could contribute in one way or another to the profession, rather than drifting off because they were drifting off from their practices. So that's the association benefit.
>
> The lawyer benefit is that there are a number of issues and services that seniors could benefit from that the association could [address] or help provide. Things like discrimination against elders, mandatory retirement issues, travel and recreation, opportunities and knowledge about pro bono—many of the things that the Senior Lawyers Section does today—articles about [seniors'] personal investments, their own personal estate planning, their own personal retirement planning…and I thought that that was something that really didn't exist in a package. There was some here, maybe some there and some somewhere else. But to bring them together in one package for the senior lawyer, I thought, had value.

Launching the Rochester Fringe Festival

In 2010, at an age when most attorneys are rejecting anything "on the fringe" and are actually contemplating traditional retirement, Justin took on a new challenge. He agreed to spearhead an effort to develop the initial First Niagara Fringe Festival, an idea proposed by University of Rochester President Joel Seligman. A self-described "all-out, no holds-barred, multidisciplinary visual and performing arts festival," the Fringe was seen as a way to build on Rochester's rich cultural history and infrastructure and to revitalize the City.

Justin, who admits he's "a guy who can't sing, can't dance, can't act, can't play an instrument," was asked to head a group whose members do all those things. Once again, he helped turn an idea into a reality! Bringing together several of Rochester's cultural and educational institutions, as well as philanthropic organizations and government representatives, in 2012 under Justin's leadership as Chairman of the Board, the not-for-profit Fringe Festival had its debut. Over 32,000 people enjoyed a five-day festival featuring more than 120 productions. One year later, the Fringe doubled its length and offered the 50,000 attendees 360 performances in 28 Rochester venues. This year, over ten days the Fringe will present 380 shows, of which approximately 125 (plus a number of outdoor performances) are absolutely free.

Earlier this year the Fringe was one of five recipients of the Rochester Community Champions Award given to organizations and individuals that inspire others to make Rochester "a great place to live and work."

Although Justin clearly believes the Festival will benefit the community and "improve the vibrancy and viability of the downtown," his motivation for undertaking this project is also somewhat more personal. For Justin, working on the Fringe is "something new and challenging;" it's "rejuvenating." But it was the word "fun" which permeated Justin's discussion of his involvement in the Fringe. The years almost slipped away as Justin gleefully described the "food truck rodeo" at which Board members would evaluate the food trucks, decide which to invite and where to put them during the festival.

Yet, it is equally clear that "it's not all fun" and Justin's responsibilities are not purely ceremonial. In a city with scores of community groups and cultural activities competing for grants and philanthropy, Justin admits that the challenge of continuing to finance the Festival is one of his greatest concerns.

* * * *

For Justin, his work and success on these four projects, the earliest of which he began as a lawyer in his twenties and the latest of which he initiated almost six decades later, are among his greatest professional accomplishments. His wife of 62 years, Louise, and his closely knit family of four children and eight grandchildren (ranging in age from 8 to 32), and a first great-grandchild on the way, are his personal joy.

Our discussion returned to motivation. Noting that Justin's 60+ years of service to the Rochester community, as well as to the bar and the legal profession, made him "a model of community service," I asked if he could shed light on, or explain, the source of this dedication to voluntarism and giving back.

Chastising me for being too flattering because he was really "not that noteworthy," Justin explained:

> Although I don't see myself as particularly religious, or observant, and I'm certainly not a student of Torah or Talmud, one of my guiding principles comes from the ancient Jewish tradition of commitment—*Tikkun Olam.* Roughly translated "Repair the World."
>
> The thought is that human beings are living in an imperfect world and must do whatever they can to repair the world… and that human beings are obliged to do something, if they can do something,

> about all of the things that they see around them—the needs, the poverty, the illness, the disarray…. It certainly isn't going to do the job. We cannot fix all the problems. We cannot eliminate disease and poverty. But if *you are able* to do something to help, *you should* do something to help. And that something can be a variety of things. It can be contributing time, contributing money, contributing counsel, [or] educating others about the need to do that…
>
> I believe that as lawyers, as people, our job is to do whatever we can to make this world a better place. I guess you could say that I have carried this precept, this value, with me throughout my life.

Working to assist the developmentally disabled, facilitating access to civil legal services for Rochester residents, spearheading a program to provide options and opportunities for his colleagues in the NY bar as they mature in their careers and in their lives, and overseeing an arts festival helping to revitalize Rochester's downtown for the "fun" of it, might not be considered *pro bono* activities under New York rules. Perhaps they should, but that is a debate for another time and another forum. They are all, however, the essence of making a difference, making the world a better place—Tikkun Olam—the lifeblood of Justin Vigdor.

Justin is clearly a senior lawyer who has made a difference. As one of his former partners eloquently put it, "Justin's life is not measured in chronology, but in accomplishments." By that measure, Justin Vigdor is certainly more than an octogenarian. Indeed, he may well be ageless!

Endnotes

1. Although there is insufficient space in these pages to discuss in detail Justin's remarkable list of honors and contributions, a sampling of them is included in the accompanying side bar.
2. New York State Bar Association, 2008 Senior Attorney Survey, Perspectives on the Seasoned Attorney (the "Special Committee Report").

Rosemary C. Byrne (rcb@sbscoaching.com) of Step-by-Step Coaching LLC is a corporate attorney and former litigator, with an encore career as an NYU trained and certified Life Coach and certified Retirement Coach. A frequent speaker on transition and retirement life planning, she is Vice Chair of the NYSBA Senior Lawyers Section and co-chair of its Financial & Quality of Life Planning Committee. She is a graduate of the Benjamin N. Cardozo School of Law and a member of the law school's Board of Overseers. A co-author of No Winner Ever Got There Without A Coach, her article "Planning for Seniority: A Baby Boomer's Playbook" recently appeared in Experience magazine, published by the ABA.

E-Mail Netiquette for Lawyers

By Gerald Lebovits

Electronic mail, called "e-mail" and often spelled "email," has electrified the practice of law. E-mail is invaluable. It's "cheaper and faster than a letter, less intrusive than a phone call, [and] less hassle than a fax."[1] It eliminates location and time-zone obstacles.[2]

E-mail isn't perfect. Attorneys are besieged by the volume of e-mails. It's hard to sort through the mix of solicitations, SPAM, correspondence, and critical, time-sensitive information. One result: "people are either annoyed by the intrusion [of e-mail] or are overwhelmed by the sheer number of e-mails they receive each day."[3] E-mail also leads to misunderstandings.[4]

Despite its problems, e-mail is an essential tool. Attorneys must make the most of it—so long as the attorney follows this good advice: "Think. Pause. Think again. Then send."[5] This column reviews e-mail etiquette, e-mail tips, and e-mail's implications for the legal profession. Good protocol makes e-mail fit to print.

Etiquette

Lawyers must consider the e-mail's recipient to determine how formal or informal etiquette should be. E-mails among colleagues sent in a series of quick responses are different from e-mails to a potential client. The varied purposes of e-mails and the diversity of recipients lead to conflicting etiquette rules. Many equate e-mail with traditional correspondence. Others see it as a new and different way to write. Some authorities argue that old-fashioned "snail mail" letters are better when interacting with adversaries, clients, and courts.[6] Others criticize the informal and sloppy writing common in e-mails. To them, "the e-mail culture is transforming us into a nation of hurried, careless note makers."[7]

The following etiquette rules outline general concepts and apply to all forms of electronic mail, regardless of the recipient.

Don't hide behind the electronic curtain. Easy access to e-mail leads to the common but poor practice of relying on e-mail's impersonal characteristics to deal with things better done in person. The mantra must be "Never do anything electronically that you would want others to do to you in person."[8] E-mail writers must ask themselves: "Would I say this in person?"[9] Asking this question reduces the potential to use e-mail for an exchange best suited for oral communication.

End confrontations. If communication leads to confrontation, end the dialogue and, if appropriate, agree to speak by telephone or in person.[10] E-mail is an imperfect way to resolve differences. Unlike oral communication, e-mail provides no tone or inflection. The reader must assign character to the communication. Angry, or "flame," mail[11] escalates disputes.[12]

Cut the back-and-forth. Stop e-mailing when an exchange, called a "thread," turns into a long back-and-forth discussion.[13] It's better to discuss on the telephone or in person any matter requiring more than three replies. Long threads lead to confusion when the discussion strays from the original subject. Sending e-mails also gives senders a sense of absolved responsibility when nothing has been accomplished. Just click the "send" button and it's the other guy's responsibility. Clarifying tasks by telephone or in person avoids this trap.

Interpret generously. Just as e-mail writers must consider the tone recipients might assign to the text, so must recipients generously interpret the writer's text.[14] Recipients should assume the best of the writer to avoid overreacting to a text that might be brief, hostile, or unclear. Avoid misunderstandings by giving e-mail writers leeway when deciphering meaning.

Always edit. Avoid confusion through editing. Reading what you've written will let you see how an intended recipient might misinterpret your writing. An example of this is an e-mail that reads "I resent your message" when the writer meant to say, "I re-sent your message."[15]

Editing includes more than reading for meaning. It means checking spelling and grammar. Informality like making typos or using only lowercase letters is fine between friends. It has no place in professional correspondence. To ensure credibility and respect, avoid grammar and spelling errors. Use your e-mail program's spell-check function. Editing is necessary because "[c]lients often can't tell whether your legal advice is sound, but they can certainly tell if you made careless typos."[16]

Be concise. Given the volume of e-mail and the limited time to read and respond, make e-mail readable. Write so that readers can read and comprehend quickly. Compose short sentences, short paragraphs,[17] and short e-mails. To make the reader's job easier, condense brief, casual e-mails into one paragraph.

This doesn't mean that e-mail writers should abandon all formalities of correspondence for brevity. Maintain a professional tone through proper capitalization and word choice. Many traditional-correspondence rules apply to e-mail.[18]

Front load and summarize questions and answers. If you're asking a question in your e-mail, ask it before you say why you're asking. If you ask the question up front, you're more likely to get an answer; the reader is less likely to stop reading before getting to your question.[19] Another technique when you reply is to summarize

the question you were asked—and only then answer the question.[20] That'll let your reader know you're both on the same e-mail page.

Use the subject line to its full potential. Attorneys are inundated by e-mail. They must decide what to read and take care of first. An e-mail's subject line often determines the decision a recipient makes about when, or whether, to deal with it. Use the subject line to inform recipients of the e-mail's subject and purpose.[21]

A recipient will be frustrated by false or insufficient information in the subject line. Include key information to let recipients evaluate quickly whether they've time to deal with your e-mail at that moment. Don't make your subject line too short or too long.[22] Use initial capitals for subject-line messages, but don't capitalize short articles or prepositions. Don't end subject-line messages with a period.

Occasionally you can fit your entire message in the subject line. This works when the message is extremely brief and when asked to reply to a short, simple question. Use the abbreviation "EOM" at the end of the subject line-message.[23] EOM means "end of message." It tells the recipient that the subject line is the complete message and that they needn't waste time opening the message.

Format replies for clarity. Answer at the top of an e-mail so that readers need not search through text.[24] To answer multiple questions or make various points, organize replies with numbers or letters. If you're interlacing your answer between paragraphs of the original e-mail, use a different color, size, or font to set your writing apart from the sender's.[25]

Don't overuse abbreviations. LOL! To be brief and to type quickly, it's tempting to use lots of abbreviations. This isn't as time-saving as it might seem. Abbreviations waste time if your e-mail, filled with ambiguous abbreviations, requires the recipient to reply seeking clarification. The solution is to use them sparingly.[26] Stick with familiar abbreviations that express your meaning.

Use contractions. Although contractions are inappropriate in formal letters, contractions, which enable readers to understand text quickly, are encouraged in e-mails. Not using contractions sounds awkward and fussy and makes readers feel scolded.[27] Using the uncontracted form in the directive "Do not make extra copies of the report," for instance, suggests that dire consequences will follow for doing so.[28] Reserve the uncontracted form for special emphasis.[29]

Be sensitive when e-mailing to and from telephones. Smartphones like Blackberrys and iPhones are increasingly prevalent. Their small screens and cramped keyboards make writing concisely and using the subject line to its full potential even more important. In your quest for concision, never use, in a professional context, SMS (Short Message Service) language, or "textese," like substituting "c u l8r" for "see you later."[30] This extreme form of abbreviation is like writing in another language.

☺ **Emoticons are inappropriate.** Emoticons are small faces made by combining colons, semi-colons, parentheses, and other symbols. The authorities have different opinions about emoticons, but the consensus is that they don't convey meaning in a professional setting.[31]

Correspondence littered with smiley and frowny faces looks juvenile. It reveals the writer's inability to find good words, phrases, and sentences. Readers find emoticons annoying[32] and disruptive.

All capitals are ineffective. All capitals equals SHOUTING. Never use them, regardless of the context.[33]

Exclamation points liven up e-mails! Because e-mail has no affect, "exclamation points can instantly infuse electronic communication with human warmth."[34] They show enthusiasm. Writing "Congratulations!" is more expressive than writing "Congratulations," which sounds apathetic or sarcastic. Don't use multiple exclamation points. Also, don't use exclamation points to convey negative emotion. It means you're throwing a tantrum.[35]

Avoid format embellishments. Many e-mail programs offer options to personalize e-mail. These options include different fonts and background "wall paper" featuring pictures and clip art. Personalize with content, not format embellishments. Stick to a plain font, like Times New Roman or Arial in black type,[36] and 10- to 12-point type size on a plain background.

Project respect. Appropriate salutations and closings express respect. Writers should use salutations and closings in most professional settings. Sometimes official salutations and closings are unwarranted, as in a string of replies between peers or colleagues or among friends.[37]

If you're unsure how to address your recipients, mirror the earlier correspondence.[38] When there's no correspondence, the following are helpful salutations and closings. Use last names and titles until you're told otherwise. For an individual, "Dear Mr./Ms. [*last name*]:" is always appropriate. If you're unsure whether your relationship is familiar enough to allow first names, "Dear [*first name*] (if I may),"[39] allows informality and addresses whether first names are appropriate.

These closings aren't comprehensive, but they're a start to your finding the appropriate ending to correspondence: "All best," "All the best," "Best," "Best regards," "Best wishes," "Cordially," "Regards," "Respectfully," "Sincerely," "Sincerely yours," and "Yours."[40]

Sign your e-mail. An e-mail exchange might be your only correspondence with a recipient. Signatures tell recipients how you like to be addressed and signal that the e-mail is complete. The context of your e-mail determines the appropriate signature. Not every e-mail requires a full signature. Quick responses between co-workers and

friends about simple issues dispense with e-mail formalities, including signatures. Alternatively, consider correspondence between opposing counsel at the start of litigation. Signatures with full names and titles are informative. Make the most of this line to tell recipients whether you wish to be addressed by your first name, your last name, or a title.

Start smart. Don't both begin and end an e-mail with your name and who you are. A formal, polite way to write is to introduce yourself up front but to sign your name only at the end. Thus: "I represent Mr. Y, the defendant in X v. Y. Please telephone me tomorrow. Sincerely, John Smith." Not: "My name is John Smith. I represent Mr. Y, the defendant in X v. Y. Please telephone me tomorrow. Sincerely, John Smith."

Tell recipients how they can contact you. Include contact information below your signature. It sets the right business tone and shows your desire to be available to recipients. Include your full name, title, organization name, telephone number, e-mail address, mailing address, Web site, fax number, and other relevant information.[41] Save time with your e-mail program's automatic signature-line feature.

Announce prolonged absences. Tell correspondents when you'll be away from your e-mail for more than a day or two. If you don't, they might e-mail expecting quick action and grow frustrated when you don't reply. Use your e-mail software's "Out of Office" function to send an automatic reply announcing your absence. Or set your program to forward mail to an account you'll monitor while you're away.

Limit urgent e-mail. E-mail programs contain an option to flag or highlight messages as "urgent" or "important." This option helps senders and recipients supplement information in the subject line, but only if the "urgent" or "important" designation is accurate. Using flags to entice recipients to read e-mail that doesn't qualify for a flag harms the flag's purpose and your credibility.[42] Use "urgent" and "important" sparingly.

Never forward without permission, but always assume that recipients will forward without permission. E-mail makes it easy to reply with the click of a button. Forwarding and carbon copying e-mail is just as simple. The ease with which you can pass along e-mail makes it tempting to do so. But etiquette dictates that you not forward any e-mail unless you have the original sender's permission. Also, when carbon copying (CC) or blind carbon copying (BCC) someone unfamiliar to your reader, state the reason for copying.

Your commitment to following the rules of etiquette doesn't guarantee that others will do the same. Assume that any e-mail you write will be forwarded, copied, and blind copied to others without your permission.[43] Protect your wish that your mail remain with your recipient by placing that request in the subject line and in your e-mail's body. These precautions don't guarantee compliance. E-mail isn't confidential. Don't assume it is.[44]

Don't abuse e-mail. Sending unsolicited advertisements to a mass list of recipients (SPAM) is like clogging up your friends' and colleagues' inboxes with unwanted jokes and chain mail. Don't be a spammer.

Note e-mail policies. Most large employers have e-mail policies. Follow them.

Beware of using business e-mail for personal use. Most large companies can access their employees' e-mail and hard drives. If in doubt, never e-mail anything you wouldn't want to see in tomorrow's newspaper.[45] Never send inappropriate mail, let alone to or from your office e-mail address.[46]

Your company might require a disclaimer at the end of your e-mail to specify the level of privacy assigned to e-mail communications and a warning that the e-mail shouldn't be used outside its stated context.

The New York State Bar Association provides a sample e-mail policy in its resources for small and solo practice firms.[47] The sample includes a list of risks and liabilities, legal requirements to use company e-mail, and suggested format for company e-mail. The policy is helpful if you're setting up an e-mail system.

E-Mail Tips

Here are some tips to make writing, sending, and receiving e-mail efficient and hassle-free.

Fill in the address box only when you're ready to send. The ease of sending out mass e-mail, purposely or inadvertently, means that you must take care when addressing your message. To avoid sending an e-mail before you're ready, write your entire e-mail, do all your edits, and proofread before you fill in the address box.[48]

Make managing e-mail part of your daily tasks. If the constant inflow of mail becomes overwhelming, set up a schedule to read e-mail just as you would an appointment.[49] Otherwise, read e-mail as received.

Start by answering e-mails that require a response. If you can't give the e-mail full attention, send a quick response to let the sender know that you received the message and that a more complete response awaits.

Set up a filing system. Most e-mail programs allow multiple folders you can add to manually or automatically based on your criteria. Consider a pending folder for e-mail you must deal with later, a monthly or weekly review folder for follow-up exchanges, a permanent folder for mail you must never delete, and folders for clients or personal matters. Don't clog up your inbox. Deal with your mail and then discard it or place it in a folder.

Take the time to respond appropriately. The immediacy of e-mail leads people to send messages before they've fully thought through their ideas. Combined with the constant access to e-mail, instantaneous e-mail correspondence leads to situations in which senders often wish they could take their message back. This is wishful thinking: "No one will remember that you responded instantaneously. Everyone will remember if you respond inappropriately."[50]

Some people are always online. When they press the "send" button, their computer immediately sends the e-mail. Most e-mail programs allow an intermediate step between sending e-mail and its actual delivery: the outbox feature. An outbox works like your home mailbox. You place the letter in the box, but it isn't sent until the letter carrier picks it up.[51] Set your program to send all e-mails in the outbox at a particular time or only when you manually empty the outbox. In the meantime, the e-mail is in the outbox and available to edit or delete.

This feature also helps those who e-mail outside business hours. Setting your outbox to deliver all messages at 9:00 a.m. will hide that you were awake at 4:00 a.m. when you wrote it.

Watch out for Reply All. The "Reply All" feature is convenient to exchange responses with a large group. The feature can turn disastrous if used in error. The horror stories are well known, but the mistakes continue.

Use CC and BCC properly. Several options let senders address messages. The "To" box should include all those to whom the message is directed. The "CC" box is reserved for those who should receive the message for informational purposes but from whom no response or action is required. The "BCC" box works the same way as the "CC" box but preserves recipients' anonymity.[52]

Check and explain attachments. Correspondents can instantly share documents by attaching them to e-mails. This useful feature requires careful attention. First, consider whether to send a document by e-mail. Sending large files (anything over two or three megabytes) causes problems. Many servers block large e-mails. Or an e-mail that goes through might exceed the memory capacity of the recipient's inbox, causing it to crash. Next, remember to attach a document when you state in your e-mail that you're attaching it. Also, explain early in the e-mail message what you've attached, in what form, and why. Finally, attach the correct document, especially when dealing with sensitive materials.

Use your address book wisely. Most e-mail programs offer options to store contacts in an address book. This allows you to maintain a database of e-mail addresses to send e-mails without searching for addresses. Ready access to your contact list might lead to costly mistakes. Confusing your intended recipient is embarrassing. Although it's impractical to maintain separate address books for each contact, maintain separate address books for media,[53] professional, and personal contacts.

Save time: Set up group e-mails. When you're collaborating on a project or regularly exchange e-mail with a set of recipients, set up a group e-mail list. This assures completeness and saves time.

Request an acknowledgment of receipt. If you're concerned that your recipient might not receive an e-mail with time-sensitive or other important information, request an acknowledgment of receipt. Most e-mail programs have an option to do this, but you can also request an acknowledgment in the body of your e-mail. Not all e-mail communications require acknowledgment. Give yourself peace of mind, but don't burden recipients.

Rely on timestamps cautiously. Each e-mail message sent or received is stamped with date and time information. This information is good for documentation, but it's not 100% accurate.[54] Glitches in computer software and other electronic anomalies result in inaccurate timestamps.

Be careful with interoffice e-mail. Interoffice e-mail systems offer options and features different from personal e-mail programs. Some interoffice systems allow access to the "Properties" of e-mail exchanges to permit senders to check when their recipients read a message, how long the recipient looked at a message, whether the recipient deleted a message, and whether the recipient forwarded a message. Each system is unique. Be aware of these possibilities.

Save your recipient's time with "No reply needed." In an age when so many e-mails are exchanged daily, include a notation in e-mails sent only for informational purposes that no reply is needed.[55]

E-Mail and the Law

E-mail etiquette is important for attorneys because "[e]mail leaves a written, time stamped, and traceable record of your lazy habits, and flip email replies can come back to haunt you."[56]

Not all e-mail between attorneys and clients is privileged: "[E]mail communications in which legal advice is neither sought nor given are not necessarily privileged and could be discoverable."[57] Avoid off-topic banter when corresponding with clients.

You're responsible for your mail. The costs of misdirecting e-mail containing confidential information are incalculable. Check and double check the accuracy of a recipient's address. Attorneys are charged with a standard of care that includes "carefully checking the addresses prior to sending an e-mail and ensuring that privileged information is not inadvertently sent to a third party."[58]

Consider the impact and repercussions each e-mail might have. Arthur Andersen's fall can be attributed to an Anderson in-house attorney's e-mail directing staff

to follow its document retention policy—a direction to shred documents.[59] Because electronically stored data, including e-mail, is generally discoverable in lawsuits,[60] consider the legal implications of what you write.

Conclusion

Corresponding with the click of a button instead of dropping an envelope into a mailbox doesn't give you license to become complacent. When attorneys correspond in their professional capacity, it reflects on their capacity as professionals.

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Developments for Aging in Place

By Neil T. Rimsky

The scope of housing options for seniors has expanded beyond the traditional models. In the 1980s and 1990s we saw the growth of assisted living and multi-level facilities, such as continuing care retirement communities. Assisted living offered a more active and dignified care for persons who could benefit from an institutional setting, but did not require intense nursing home care. Continuing care retirement communities gave residents the comfort of one-stop shopping, with the understanding that their care would be provided under all circumstances.

The services provided by institutions are important and will remain an important component of housing for seniors who cannot care for themselves. However, seniors want to age in place. To the extent that they can, seniors want to remain independent. They want to be more active in their communities. Seniors want to be stimulated with intellectual and physical activity, yet they want to know that long-term care alternatives are possible should they become ill.

What we have seen in most recent years is the dramatic growth of aging-in-place communities. The trend towards aging in place reflects three significant shifts in societal attitude towards aging. The first is self-reliance. Seniors who want to age in place accept and desire a significant amount of self-reliance. A second change is the expansion of a desire of persons to help each other. Neighbors help each other meet challenges. Sometime the neighbors are fellow seniors who share the common goals, needs and desires of their senior neighbors. On other occasions, persons of different generations offer themselves to assist seniors in their community. The result is a pact where the seniors may provide benefits to their younger neighbors, while the more youthful members of the community assist seniors in some of their basic needs.

The third development is a public-private partnership where community services are devoted to seniors. These may include senior centers, transportation assistance, development of community services, including referrals to community resources, organized by a governmental agency, a not-for-profit, or sometimes both, working for a common purpose. While there are undoubtedly costs, the benefits to the public are significant. Needs that can be met on a communal level are far less costly than on a one-to-one basis.

There are several models we will explore, including: "Village community," livable communities and "Co-housing." These models differ from traditional "Over age 55" communities, which are housing arrangements built on the needs of persons over 55. The exciting developments we have seen are models which actively provide services to improve the lives of seniors, at the same time significantly enriching the community as a whole.

The first model, the Village model, is a private option. The Village, as a housing concept, was born in Boston, with the Beacon Hill Village. Each Village offers "members" access to activities and to services. For an annual fee,[1] Village members are provided with a list of services and service providers vetted by the organization. The Village negotiates a discount for its members. Service providers can range from contractors and repair persons to accountants, attorneys or money managers. Village members may also be entitled to discounts at local health clubs or restaurants. The Village may also arrange for an array of cultural activities such as trips to shows, concerts or museums as well as transportation.

Each Village is a separate not-for-profit entity. As Beacon Hill forged the path, the basic model is available to provide knowledge and assistance in the development of these communities. A Village-to-Village Network is available to provide assistance and guidance to communities which want to establish villages. In New York State, there are 22 identified Villages, either open and functioning or in stages of development. Many are in the Hudson Valley Region, with two in New York City. There are also Villages in Kingston, Syracuse, Rochester and Buffalo.

"Livable communities" rarely involve new housing. Instead, the essence of the livable community is a public-private partnership. These initiatives can involve grants from the state, forms of technical assistance, development of accessibility standards. There are also demonstration programs to attract interest. Livable community programs emphasize access to transportation as well as diverse housing options.

Some municipalities in New York State have extensive livable communities programs. Westchester County supports a public-private partnership. Its website boasts health and wellness programs, educational and cultural programs, support services such as accessible and adequate transportation, personal safety, and consumer protection/advocacy for affordable housing, safe sidewalks and roads.

The City of White Plains has a program to encourage aging in place. The City offers a senior center with a nutrition support program, and sponsors a membership organization which provides services, transportation, home maintenance and meal assistance.[2]

Equally exciting is the coordination of services through not-for-profit entities. Also based in White Plains, the Westchester Jewish Community Services, a social service not-for-profit, part of the UJA Federation network of agencies, coordinates multiple programs and services for seniors.

A third approach which has developed is senior co-housing. Co-housing, generically, is a form of collaborative housing. The early co-housing communities were designed as small cluster communities. Units were functionally independent. However, there were common services available. There was a communal dining area, laundry, play areas, pools, etc. The idea is that the community is self sufficient. It is, in many ways, a variation of the model of the early 20th century where multiple generations lived in close proximity, many in the same residence.

Co-housing was designed to offer a multi-generational approach. Residents of co-housing communities provide services for each other. For example, seniors could serve to watch some of the children while parents were at work. At the same time, younger families could assist seniors with some of the heavier tasks. There has been some recent development of senior co-housing.

There is a national trend towards aging in place. The models explored above are early efforts. The challenge, as these models develop, will be the delivery of long-term care services in an affordable model. The Villages may work well for persons who remain independent. It is critical that aging in place evolve to incorporate long-term care services.

The Real Estate and Housing subcommittee of the Elder Law and Special Needs Section is looking at efforts the Elder Law and Special Needs Section can make to encourage and support the development of these communities. We intend to reach out to the communities, the municipalities and the not-for-profit entities to make residents aware of the programs available to age in place, particularly in those cases where residents become frail and need assistance with basic activities of daily living.

A more extensive look at aging in place is available in the Fall Edition of the *NAELA Journal*.

Endnotes

1. Annual fees, although modest, are usually reduced for persons with limited incomes.
2. Details can be seen at Aipwhiteplains.org.

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The Fox in the Henhouse: An Attorney's Experience Sitting on a Jury

By Paul F. Clark

At first glance, there's nothing special about Juror #2. He's about 50 years old with greying hair and dressed in the suburban uniform of khakis and a blue, buttoned-down shirt. He answers the questions of the court easily and seems to enjoy the banter when questioned by the judge.[1]

The attorneys learn that Juror #2 has a wife with four children who are slowly moving out of the family home. He has several police officers in his family, surely an admission that will give the defense some pause before letting him remain on the panel. Yet the juror readily concedes that the testimony of police officers should not be given any undeserved weight because they can be mistaken as easily as anyone else. In sum, there are factors in his profile that appeal to both sides but his employment history concerns the attorneys and court alike: Juror #2 is a practicing attorney who litigates and tries cases himself.

I am Juror #2 and was selected to serve on a criminal case in my home county of Union, New Jersey. After 30 years of litigating cases in New York and New Jersey, the tables turned and I was the one questioned about my background, experience, attitudes and potential biases. I was the object in the attorneys' crystal ball, engaged in their elusive exercise of predicting how I would react to the parties, claims, defenses, and anticipated evidence in the case.

After several rounds, I was left unchallenged and sworn in as a juror. I was initially a reluctant participant but, by the end of the case, I was humbled by the experience of deciding the fate of another human being and gratified by working together with 11 other complete strangers with whom I had little in common other than our residence in Union County. The experience also caused me to reconsider some of the long-held assumptions that trial attorneys hold about jurors and how trial attorneys approach their craft. Here's what I learned.

1. **Never waste the jury's time.** Although each juror approached his or her duty with differing levels of enthusiasm, everyone would have preferred to be somewhere other than the courthouse. We showed up reluctantly but ready to fulfill our civic duty. In return, we expected—no, demanded—that the process respect the value of our time. We noticed which attorneys showed up on time, whether the witnesses were sworn in at their scheduled times and how long we waited during any breaks in the trial. So be on time, be prepared and have your witnesses lined up ready to proceed. You want the jury focused on the case, not their watches.

2. **Be aware of your surroundings.** Courthouses are notoriously cramped quarters. The attorneys, litigants and jurors frequently find themselves using the same elevators, bathrooms and lunch venues. With nothing but time on their hands, jurors focus on any attorney and litigant who cross their paths, unconsciously forming opinions based on these silent interactions. The jurors will notice how you carry yourself. So treat the court staff, the newspaper vendor, and the pizzeria counter worker with courtesy and respect. I suggest you honor the "Five Mile" rule and assume you are under the direct observation of at least one juror anytime you are within five miles of the courthouse and conduct yourself accordingly.

3. **Be careful of your leaders**. Previously, I worried about all jurors equally, debating whether to challenge the silent young man with the tattoos sleeping in the corner or the brash middle-aged women who dominates the entire room when expressing her opinions about the litigious nature of her fellow citizens. Jury experience refined my views on this subject, now armed with personal experience about how twelve strangers arrive at a unanimous decision about the guilt or innocence of a person who they never met before. It sounds self-evident but remember that leaders lead and followers follow. Forget the lambs but take great care of the wolves that you leave on your jury because they will dominate their less confident peers.

4. **Educate and entertain the jury**. Yes, you can educate and entertain at the same time. Ask young people where they get their news and you'll find that they tune into cable TV to watch Jon Stewart or Stephen Colbert. Born entertainers, these hosts chronicle the serious news of the day using parody, satire, hyperbole and irony. They cloak serious discussions in laughter, using skits, interviews and manic, non-stop action to keep things exciting and fresh. Why not try a few blowups when trying to make a point with a document or highlight a prior written inconsistency made by an adverse witness? Better still, project digital images with an ELMO or Smartboard that can be seamlessly displayed on a large screen so that the jury can visually see, with their own eyes, the point you are trying to make. If I am part of the TV generation, the younger jurors are the smartphone, Twitter, and Facebook generation for whom multitasking is a way of life. So be creative with your presentations to keep the jurors'

attention while driving your most favorable points home.

5. **Be respectful.** An experienced judge gently holds the jury's hand during a foreign experience (the trial) in a foreign land (the courthouse). She tells the jury when they can sit, relax or use the restroom. She makes them feel special, dispensing badges that grant them unique access in the courthouse. Unless the court's bias is obvious, a rare thing, the jury comes to respect, admire and bond with the trial judge. Tread lightly when disagreeing with the court. You can object to an adversary's question or the court's ruling but it should be done respectfully and without a whiff of disdain, anger or bitterness. Tempers may flare but the tone of your overall presentation should reflect your respect for the court, your adversary and the judicial process. Otherwise, the juror may perceive you as someone who is breaking the rules, is rude or is trying to gain an unfair advantage.

Attorneys are a difficult lot during jury selection, a reluctant group who pre-judge themselves as unqualified for jury duty because of their prior experience as participants in the process. Like many of my colleagues, I approached jury service with dread, worried about my time, my schedule and how I would juggle the myriad demands of my practice while sitting on a jury. But the experience opened my eyes and, in addition to fulfilling an important civic duty, gave me new insights about how a jury actually functions in its decision-making process.

Endnote

1. In New Jersey, the judge conducts the *voir dire* in both civil and criminal cases.

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Shakespeare Was a T&E Lawyer!

By Jonathan Rikoon

I just met with a new client whose recently deceased aunt, Bertha Shakespeare, was actually a great-great-great-etc.-grand-niece of William Shakespeare. In the decedent's attic was a very old trunk, and when the niece, who is the executor, opened it, she found a centuries-old trove of papers. It appeared to be a scrapbook or journal maintained by the Bard himself. Knowing of my firm's strong entertainment industry ties as well as its excellent trusts & estates practice, she came in for advice about authenticating, appraising and monetizing the collection of previously undiscovered Shakespeare material.

It's utterly riveting. There are many hints in this material that, like Dickens after him, Shakespeare actually started out training as a trusts & estates lawyer. First off, there is his first pay stub, as a summer associate at the London firm of Rosencrantz and Guildenstern, L.L.P. Now at least we know where he got those names in *Hamlet.*

It seems that Uncle Bill had a tough time at the firm of R&G, LLP. The literary talents that later brought him fame started peeking through in some drafts included in his scrapbook that are of astonishing relevance to us. For example, we think that the debate about the use of pourover revocable trusts is new. Not so. Even in the Sixteenth Century, just a few years after the Statute of Wills and the Statute of Uses were enacted during the reign of Henry VIII (1540 and 1536), we find Bill experimenting with the form of soliloquy that will later stand him in such good stead. Here is what he wrote in his journal:

> To will, or not to will: that is the question:
>
> Whether 'tis nobler in the mind to suffer
>
> The slings and arrows of outrageous probate clerks,
>
> Or to take arms against a sea of technocrats,
>
> And by opposing end them?
>
> To pour over: perchance to a revocable trust; ay, there's the rub;
>
> For in that sleep of death what dreams may come
>
> When we have shuffled off this mortal coil,
>
> Must give us pause: incorporation by reference hath not yet been enacted.
>
> For who would bear the whips and scorns of probate clerks,
>
> The oppressor's wrong, the proud man's contumely,
>
> The pangs of despised love, the law's delay,
>
> The insolence of office and the spurns that patient merit of the unworthy takes.
>
> But hie thee to the enlightened state of Delaware, where
>
> Reference may in troth be incorporated;
>
> And uses and trusts support unworthy progeny, even unto perpetuity,
>
> With no taxes to burden the unfettered growth of yon treasure trove.

His law firm was really quite advanced for its time. It sponsored a seminar on new client business development for the associates. As was his wont, Bill distilled that in poetic fashion, in the process coining the term "rainmaker":

> The quality of business generation is not strain'd,
>
> It droppeth as the gentle rain from heaven
>
> Upon the place beneath. It is twice blest:
>
> It blesseth him that originates, and him that is responsible.
>
> 'Tis mightiest in the mightiest: it becomes
>
> The throned senior partner better than his crown;
>
> His sceptre shows the force of temporal power,
>
> The attribute to awe and majesty,
>
> Wherein doth sit the dread and fear of his partners;
>
> But new business is above this sceptred sway,
>
> It is enthroned in the hearts of partners,
>
> It is an attribute to the firm's founders themselves.

It seems that the trusts and estates practice at Rosencrantz and Guildenstern, L.L.P. was not held in the same esteem as the corporate and litigation departments. We see some of Uncle Bill's frustration boiling over in another draft passage in his scrapbook that also presages some of his later success. This is written just after Bill's partnership promotion was deferred for the third time, at the behest of the Presiding Partner. He figures the difference between his associate salary and a partner share is hundreds of thousands annually and the frustration is palpable. Bill's emotions are clearly so strong that he can't even bear to name the object of his despair, but the context makes it clear:

> He hath disgraced me, and hindered me half a million, laughed at my losses, mocked at my gains, scorned my practice area, thwarted my bargains, cooled my friends, heated mine enemies; and what's his reason? I am a trusts and estate lawyer. Hath not a T&E lawyer eyes? Hath not a T&E lawyer hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same means, warmed and cooled by the same winter and summer, as a corporate lawyer is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge?

Uncle Bill used this in his outline of a new play he was thinking about. He was not very good at titles yet. The working title was "The Shyster of Venice." The protagonist, of course, was Shylock the shyster, a very unsympathetic character. Shylock's plan of revenge for not getting promoted (due to his practice area) was an NLRB discrimination complaint, frivolous litigation, burdensome discovery and endless interlocutory appeals. The market research, however, persuaded Bill to drop Shylock as a lawyer character and go with the less offensive merchant/pound of flesh idea.

The last draft in the scrapbook shows that Uncle Bill finally figured he had had enough. Consigned to permanent Counsel status and denied a partnership slot, he has an offer from a smaller firm that has just lost its T&E department. The firm is Mudd, Rose, Woody, Alex & We'redone, and Bill's notes say something like "Though thy name be Mudd, yet by any other name the rose smells as sweet." Seems he still needed to work on that one a little.

As he contemplates leaving Rosencrantz & Guildenstern, LLP, once again he is drawn to the soliloquy format as he considers this major career move:

> To leave, or not to leave—that is the question:
>
> Whether 'tis nobler in the mind to suffer
>
> The slings and arrows of an outrageous Management Committee,
>
> Or to leave for a firm that may soon collapse?
>
> To run a practice group and hope to end
>
> The heartache, and the thousand natural shocks
>
> That flesh is heir to. 'Tis a consummation
>
> Devoutly to be wish'd. To leave, to join another firm;
>
> Perchance to reach the dream of partnership
>
> Ay, there's the rub;
>
> For in that new firm what dreams may come
>
> When it has shuffled off this mortal coil,
>
> The risk of liability must give us pause: there's the respect
>
> That makes calamity of so harsh a choice.
>
> For who would bear the whips and scorns of billable hours,
>
> Th' oppressor's wrong, the proud partner's contumely
>
> The pangs of a despised practice, the law's delay,
>
> The insolence of office mates, and the spurns
>
> That patient merit of th' unworthy takes,
>
> When he himself might his quietus make,
>
> With a bare quill? But the dread of something after dissolution,
>
> The undiscovered country, from whose bourn
>
> No traveler returns, puzzles the will,
>
> And makes us rather bear those ills we have
>
> Than fly to those that we know not of?

Unfortunately Bill's journal ends there. Perhaps he was too busy and happy with his new firm, and his new career as a playwright and actor, to continue his observations.

Mr. Rikoon was an Associate and Principal Attorney (Counsel) at Paul, Weiss, Rifkind, Wharton & Garrison from September 1979 through January 1995; Counsel at Mudge, Rose, Guthrie, Alexander & Ferdon from February through October, 1995, when that firm dissolved; Counsel and then Partner (and Department Chair) at Debevoise & Plimpton, LLP from October 1995 until April, 2013; and is currently a partner at Loeb & Loeb, LLP, where his department moved. This material is adopted from his remarks at a Debevoise Trusts & Estates department farewell dinner upon the department's move.

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Identity Theft—Know the Law

By Clifford S. Weber

Identity theft pervades our personal and professional lives. Consumer groups warn about its perils and vendors hawk their products' defenses against it, while the Federal Trade Commission reports that in 2012, identity theft topped the list for the 13th consecutive year in its annual compilation of consumer complaints.

Bankers know about identity theft from both actual experience, as well as regulators' alerts about its financial and reputational risks. While they typically know about the operational and technological aspects of identity theft, bankers may be unfamiliar with the governing laws and regulations. To make well-informed decisions about their human and financial investment in identity theft detection and prevention, compliance officers should understand the basic legal framework, especially the extent to which it favors consumers.

Account Hijacking

Identity theft takes many forms. Account hijacking is a kind of identity theft to which financial institutions are particularly vulnerable because they house mountains of deposit and loan account data. Hijackers get account information by penetrating security measures through the telephone, email or other electronic media. Once the information is acquired, the hijacker accesses account funds and, through one device or another, steals them. A recent case shows how the law treats the victim bank and customer.

A husband and wife maintained a checking account and a $150,000 home equity line of credit at a community financial institution. The accounts were linked in a typical arrangement so that the customers could draw down HELOC funds and transfer them to the checking account. They could access the account by telephone with a pre-set voice activated code.

On a Thursday before a holiday weekend, a thief acquired the depositors' phone access code and penetrated into the linked accounts through the phone system. Before this security breach, the depositors had only drawn about $6,000 in HELOC funds, leaving a $144,000 balance available and they had only transferred funds between the accounts once, when they moved the $6,000 to the checking account to pay a bill. They had never used the telephone access system.

The hijackers worked fast. By the close of business on Friday, they had tested the bank's security features with 16 transfers back and forth between the checking account and the HELOC. No alarm sounded, no wires tripped, so they emptied the HELOC balance into the checking account. The following Tuesday, the bank received a fax from the thief, instructing it to wire the $144,000 to a South Korean bank account. The depositors had never before wired funds from the account to anywhere, let alone South Korea. Without inquiry or notification to the customers, the bank complied with the imposter's directions. Later that day, an employee notified the depositors of the account transfers and the wire. By that time, of course, the money was long gone, beyond recall.

The Law

Even in a world without federal consumer protection laws, this bank would have been in trouble. Numerous intra-account transfers in previously quiet accounts, poor voice/code security and reliance on an unverified fax to wire the entire HELOC balance to Korea, all add up to plain old negligence. But of course we do have a federal consumer protection law that covers the case, and that is the Electronic Funds Transfer Act ("EFTA")[1] and its implementing Regulation E.[2]

EFTA/Regulation E

Congress enacted EFTA in 1968 to "provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems."[3] As noted in Regulation E, EFTA's primary purpose is "the protection of individual consumers engaging in electronic funds transfers…."[4]

EFTA provides that an electronic funds transfer is any transfer of funds initiated through an electronic terminal, telephone, computer or magnetic tape for the purpose of ordering, instructing or authorizing a financial institution to debit or credit a consumer account.[5] Even though telephone transfers are included in the general language, EFTA and Reg. E specifically exclude them from coverage as an electronic funds transfer, unless they take place under a written plan in which periodic or recurring transfers are contemplated.[6] Unfortunately for banks, the Official Interpretations of EFTA (formerly administered by the Federal Reserve, now transferred to the Consumer Financial Protection Bureau under the Dodd-Frank Act) define a written plan quite broadly to include written statements available to the account holder that describe a telephone transfer initiation system, for example, a "brochure or material included with periodic statements."[7]

The husband and wife depositors in this case had received just such a brochure in the form of a booklet that described a telephonic audio response access service for their accounts. Since the brochure amounted to a written plan, the 16 transfers between the HELOC and the checking account qualified as electronic funds transfers. More importantly, each transfer was an "unauthorized electronic funds transfer" because it was made by a person without actual authority to initiate the transfer, the customers received no benefit from the transfer, and they did not furnish the hijacker with an access code or card.[8] Since they were unauthorized electronic funds transfers, the bank was liable for all but $50.00 of the loss resulting from the drawdown

of HELOC funds to the checking account, from which the money was wired to Korea.

UCC

Article 4-A of the Uniform Commercial Code governs wire transfers. The UCC generally imposes liability on the bank for unauthorized transfers ("interloper fraud," in the words of a federal court decision).[9] Liability shifts to the customer where the bank and the customer have agreed to an authentication security procedure that is commercially reasonable and the bank accepts the payment order (i.e., the fax) in good faith and in compliance with the procedure.[10]

In this case, the bank hadn't agreed to *any* security procedures with the customers, so the question of commercial reasonableness never arose. The bank was liable to the customers for the full amount of the funds wired from the checking account to Korea.

Thoughts

The facts here were extreme: in fact they were so one-sidedly in favor of the customers under the UCC and the EFTA that the bank settled with them by refunding the full amount of the wired funds. The customers just had to furnish forgery affidavits in support of the bank's claim for insurance coverage.

Most banks have much better security controls and procedures to deter identity theft. Still, this case is instructive because it shows what happens when systems fail or don't exist: the law takes over, and that law is designed to protect consumers, not banks. That's the real takeaway.

Endnotes

1. 15 U.S.C § 1693 (2013).
2. *See* 12 C.F.R. pt. 1005 (2013).
3. 15 U.S.C § 1693(b).
4. 12 C.F.R. § 1005.1(b).
5. 15 U.S.C § 1693a(7) (2013).
6. 15 U.S.C § 1693a(7)(E); 12 C.F.R. § 1005.3(b)(6)(ii).
7. Official Staff Interpretation 3(c)(6), http://www.bankersonline.com/regs/205/regecomm.html.
8. 15 U.S.C § 1693a(12); 12 C.F.R. § 1005.2(m).
9. *Regatos v. North Fork Bank and New Commercial Bank of New York*, 257 F. Supp. 2d 632, 640–41, n. 16 (S.D.N.Y. 2003).
10. U.C.C. §§ 4-A-202, 4-A-204.

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Bergman on Mortgage Foreclosures: Danger in Settlement Negotiations Redux

By Bruce J. Bergman

If there was ever a time that foreclosing lenders were under pressure to settle cases—at least those involving home loans—today is the time. Courts insist upon it; the government demands that it be done and there is the mortgage lender or servicer's own desire to achieve a performing loan. So there can hardly be anything wrong in pursuing some settlement path—except that in actuality, danger lurks if the lender or servicer does not assiduously make clear its position.

To immediately make the point, a foreclosure can be upset at any stage if the borrower comes forward and convinces a court that he thought settlement negotiations were proceeding and that he therefore was not obliged to defend the case. We called attention to this anomaly at some greater length in our *New York Law Journal* article of December 31, 2008 entitled "Entertainment of Settlement Could Backfire on Lender," at 5, col. 2. [Reference there for the noted lengthier review is invited.] And it has happened again in a recent case: *Wells Fargo Bank, N.A. v. Chateau*, 36 Misc.3d 280, 947 N.Y.S.2d 773 (2012).

We hasten to observe that this is rarely an issue in a commercial foreclosure, a notation which supplies an enlightening thought. As many readers will recognize, in the commercial foreclosure action, the typical magnitude of the case, and as a matter of custom, the foreclosing plaintiff has both the wherewithal and the desire to assure that settlement negotiations do not lead to borrowers' untoward claims that some concession had been made by the lender. This is accomplished by the lenders' insistence that borrowers sign a pre-negotiation letter before discussions can proceed. Among other things, such a letter provides that no change in the mortgage document obligations is arrived at unless there is a new writing signed by the plaintiff and that the foreclosure proceeds during any settlement negotiations, all without waiver of any of the plaintiff's rights. [There is more to it than this, and for those who wish to explore it, attention is invited to 2 *Bergman on New York Mortgage Foreclosures* §24.07, LexisNexis Matthew Bender (rev. 2012)].

This formality, however, is rarely pursued in the residential foreclosure case, which then leaves lenders and servicers open to a possible charge that a borrower believed settlement was in the offing. The case which was the subject of the earlier-mentioned article is worthy of revisiting, but we will move on to the new case since the article can be consulted.

In the recent case, a borrower had defaulted in the foreclosure action and later moved to vacate that default claiming that his lawyer had failed to interpose an answer. For reasons not particularly relevant here, the court was unimpressed with that excuse. In addition, though, the borrower stated that its (inattentive) attorney had assured him that the foreclosure action would not proceed while negotiations took place and that his counsel had made five attempts to obtain a loan modification.

Although all this lacked any documentary support (upon which basis we opine the court could have rejected them) the court also found that the assertion was combined with the borrower's claim that his failure to timely respond to the complaint was also due to his good faith belief in settlement negotiations. The court then ruled that such a good faith belief will supply a reasonable excuse for failure to timely answer.

While it sounds like the borrower's belief was based upon what his own attorney told him, rather than any representations by the servicer, there was nevertheless some indication that the servicer was entertaining the possibility of a settlement, i.e., perhaps by way of mortgage modification.

The failure here—what led to the court allowing the borrower to vacate the achieved stages of the action—was the absence of a lender written declaration that the foreclosure action was proceeding apace, notwithstanding any possible negotiations or any consideration of a mortgage modification. Without that, the door was open for the court to do what it really wanted to do—give the borrower a chance to submit an answer.

The ultimate damage was that an answer would require a motion for summary judgment and all the expense and delay that portends. It likely could have been avoided by a more dedicated approach to the settlement process—and such is the lesson of the cited case.

Mr. Bergman, author of the three-volume treatise, *Bergman on New York Mortgage Foreclosures*, LexisNexis Matthew Bender, is a member of Berkman, Henoch, Peterson, Peddy & Fenchel in Garden City. He is a fellow of the American College of Mortgage Attorneys and a member of the American College of Real Estate Lawyers and the USFN. His biography appears in *Who's Who in American Law* and he is listed in Best Lawyers in America and New York Super Lawyers.

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Estate Planning for Same-Sex Married Couples After the Demise of DOMA

By Jeffrey A. Asher

The need for legal and estate planning advice for same-sex couples is more critical than ever after the Supreme Court's recent decision striking down the Defense of Marriage Act of 1996 (DOMA), the federal law that prohibited the federal government from recognizing same-sex marriages legalized by the states, and allowing states to refuse to recognize same-sex marriages performed under the laws of other states.

The Supreme Court's recent decision in *United States v. Windsor*[1] struck down the parts of DOMA that prohibited the federal government from recognizing same-sex marriages legalized by the states.

DOMA contained two operative provisions: Section 2 of DOMA, codified at 28 U.S.C. § 1738C, allows states to refuse to recognize same-sex marriages performed under the laws of other states. It provides that "[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." The Supreme Court's decision did not address the constitutionality of Section 2.

Section 3 of DOMA, codified at 1 U.S.C. § 7, which was the subject of the challenge before the Supreme Court, defined "marriage" and "spouse" as excluding same-sex partners. Section 3 provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

While DOMA did not, by its terms, forbid states from enacting laws permitting same-sex marriages or civil unions or providing state benefits to residents in that status, its definition of marriage for purposes of more than 1,000 federal laws, regulations, and/or directives denied federal benefits to same-sex married couples.

United States v. Windsor began as follows: Edith Windsor and Thea Spyer met in New York City in 1963. In 2007, Edith and Thea were married in Canada where same-sex marriages were, and still are, legal. And, since New York recognizes valid marriages from other states and countries, Edith and Thea were legally married as far as New York State was concerned.

In 2009, Thea died and left her entire estate to Edith. On Thea's federal estate tax return, Edith claimed the federal unlimited, dollar-for-dollar marital deduction, which would have resulted in a zero taxable estate. However, because DOMA denied federal recognition to same-sex marriages, Thea's estate did not qualify for the federal marital deduction. Edith paid $363,053 in estate taxes and sought a refund from the Internal Revenue Service ("IRS"). The IRS denied the refund—under DOMA, Edith was not a "surviving spouse." Edith commenced a refund suit in the United States District Court for the Southern District of New York, where she argued that DOMA violated the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment to the U.S. Constitution. While the tax refund suit was pending, on February 23, 2011, the U.S. Attorney General issued a statement agreeing with Edith's position that DOMA violated the U.S. Constitution and stating that the U.S. Department of Justice ("DOJ") would no longer defend the constitutionality of DOMA's definition of marriage and spouses which excluded same-sex partners (i.e., Section 3 of DOMA). On June 6, 2012, the United States District Court for the Southern District of New York issued its opinion agreeing with Edith and ruled that Section 3 of DOMA was unconstitutional under the due process guarantees of the Fifth Amendment and ordered the federal government to issue the tax refund, including interest. On October 18, 2012, the U.S. Second Circuit Court of Appeals affirmed the decision.

The Bipartisan Legal Advisory Group (BLAG), which intervened in the lawsuit to defend the constitutionality of DOMA, and the DOJ appealed the decision to the U.S. Supreme Court, which granted a writ of certiorari in December 2012. On March 27, 2013, the court heard oral arguments. On June 26, 2013, the U.S. Supreme Court issued a 5-4 decision declaring Section 3 of DOMA to be unconstitutional "as a deprivation of the liberty of the person protected by the Fifth Amendment."

The Supreme Court's decision in *Windsor* held that DOMA's operation in practice created two different classes of married couples in states that allow same-sex marriage. The Court stated that same-sex couples were forced to "live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of a basic personal relationship the state found proper to acknowledge and protect." And because, as the Supreme Court held,

DOMA's principal purpose and practical effect was to create inequality among state-sanctioned marriages whereas federal law is normally supposed to create equality among U.S. citizens, the Supreme Court struck down Section 3 of DOMA as unconstitutional.

Following on the heels of the Supreme Court's decision, on July 17, 2013, the Office of Personnel Management, the federal government's Human Resource Agency, issued its Benefits Administration Letter,[2] which announced that the federal government is extending federal benefits to legally married same-sex spouses of federal employees and children of legally married same-sex spouses of federal employees. These federal benefits include, but are not limited to, health care benefits, life insurance, dental insurance, vision insurance, flexible spending accounts, long-term care insurance, and retirement benefits.

On August 29, 2013, the Treasury Department (a/k/a the Internal Revenue Service) issued Revenue Ruling 2013-17,[3] which announced that, for federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" now include an individual legally married to a person of the same sex, and the term "marriage" now includes a legal marriage between individuals of the same sex, even if the couple now lives in a state that does not recognize same-sex marriages.

For the first time, same-sex married couples, and their families, are entitled to various federal benefits they otherwise were denied because of DOMA. For example, same-sex spouses of government employees are now entitled to government health care benefits without additional costs and taxes. Same-sex married couples are now able to jointly file their federal income tax returns—no longer forced to file state income tax returns one way and federal income tax returns another. Same-sex married couples are now able to inherit federal pensions and retirement accounts the same way opposite-sex married couples can; may now be buried together in veterans' cemeteries; and are now entitled to the Bankruptcy Code's special protections for domestic-support obligations.

The Supreme Court's decision in *Windsor* also guarantees Social Security benefits to families upon the loss of a spouse and parent, benefits that were previously denied because of DOMA's across-the-board effect. It also serves to resolve problems in immigration cases where same-sex couples may have been legally married but the federal government, because of DOMA, refused to acknowledge the marriage.

The Supreme Court's decision also allows same-sex married couples the benefit of the federal marital deduction, thus potentially saving millions of dollars in federal estate and gift taxes.

Federal gift and estate tax law enables married couples who are U.S. citizens to make gifts and bequests to one another entirely federal gift and estate tax free. These gifts/bequests may be made in unlimited amounts and may be made outright or in trust, all because of the federal unlimited dollar-for-dollar marital deduction. The marital deduction, however, requires that the spouses be legally married. Prior to the Supreme Court's decision in *Windsor*, same-sex couples were not entitled to the federal unlimited marital deduction because they were not legally married in the eyes of the federal government. With the demise of DOMA, a same-sex married couple is entitled to the same federal marital deduction as an opposite-sex married couple, thus paving the way for same-sex married couples to properly and effectively plan their estates to save as much in federal estate and gift taxes as opposite-sex married couples already do.

Now, a same-sex married couple is able to avail themselves of the same basic estate planning an opposite-sex married couple routinely receives from their estate planning attorney. For example, in a typical marital estate plan, each spouse might leave to the surviving spouse the totality of his or her testamentary estate, with a carve-out either (a) of an amount up to the first-deceased spouse's exclusion from estate taxes ($5,250,000 in 2013), known as the "Applicable Exclusion," or (b) allowing the surviving spouse to "disclaim" (into a "disclaimer trust" usually for the benefit of the surviving spouse) a portion of the inheritance, which disclaimer would typically be up to the amount of the first-deceased spouse's Applicable Exclusion. This allows the surviving spouse to maximize the first-deceased spouse's full use of the Applicable Exclusion, knowing that whatever is in excess of that amount would pass to the surviving spouse estate tax free because of the marital deduction. Prior to the *Windsor* decision, that basic building block of an estate tax savings plan was out of reach for same-sex married couples.

Another new benefit to same-sex married couples is the use of "portability." Portability, or the "portability election,"[4] is a tax election to use a deceased spouse's unused Applicable Exclusion on the surviving spouse's estate tax return. Imagine the same example above, but this time the first-deceased spouse provided no estate tax planning and merely left everything to his or her spouse, outright, free of trust, and subject solely to the marital deduction. The surviving spouse would typically not disclaim because doing so would deem the surviving spouse as having died before the first-deceased spouse, thus causing the disclaimed portion to pass to the couple's child(ren) or other beneficiary(ies). With the proper exercise of the tax election, portability allows the surviving spouse to inherit the entirety of the first-deceased spouse's estate, even subject wholly to the marital deduction, and still be allowed the first-deceased spouse's unused Applicable Exclusion on the surviving spouse's estate tax return. Thus, portability ultimately

gives the surviving spouse's estate the full benefit of the first-deceased spouse's Applicable Exclusion, as if the first-deceased spouse properly provided for proper estate tax planning in his or her Will or other testamentary document. With the *Windsor* decision, same-sex married couples are now married for tax purposes, and thus entitled to the full benefits of the portability election.

Another new benefit is the ability of a same-sex married couple to name each other as beneficiaries of their life insurance policies, knowing that the life insurance proceeds paid to the surviving spouse would be free of federal (and most probably state) estate tax because of the marital deduction.

As a final example, equalizing taxable estates to take full advantage of available Applicable Exclusions tends to require use of the gift tax marital deduction. Imagine one spouse owns the marital home, together with the majority of the investment accounts, such that if the less than financially endowed spouse dies first he or she may not have enough assets in his or her taxable estate to take full advantage of his or her Applicable Exclusion. To ensure full use of the first-deceased spouse's Applicable Exclusion, one technique is to make gifts from the financially endowed spouse to the less than financially endowed spouse during life which, in essence, "equalizes" the estates of both spouses. Prior to *Windsor*, such equalization was not possible for same-sex married couples because it would result in federal (and maybe state) gift taxes on the gifts.

In conclusion, while the Supreme Court's decision in *United States v. Windsor* is certainly a historic decision, let us not forget its real-world application for some of our clients. This decision brings real, practical estate and gift tax savings to same-sex married couples that were only recently off limits to them. This may afford you, the good practitioner, the opportunity to provide qualified legal services and estate planning advice to same-sex married couples, or work with attorneys who will provide qualified legal services and estate planning advice to same-sex married couples, for the benefit of your clients.

Endnotes

1. 570 U.S. __ (2013) (Docket No. 12-307).
2. Which can be found at http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf.
3. Which can be found at http://www.irs.gov/pub/irs-drop/rr-13-17.pdf.
4. A key provision of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (Pub. L. 111–312, H.R. 4853, 124 Stat. 3296), which was passed by the U.S. Congress on December 16, 2010 and signed into law by President Obama on December 17, 2010, and made permanent by the American Taxpayer Relief Act of 2012.

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Calculations Under the "Spousal Impoverishment" Budgeting Rules for Managed Long Term Care

By David Goldfarb

New York will apply Medicaid "spousal impoverishment" budgeting rules for home care under the Managed Long Term Care (MLTC) program.

New York's laws on spousal impoverishment budgeting, New York Social Services Law § 366-c(2)(a), was amended in 2013 to include for the purposes of budgeting under the definition an "institutionalized spouse" a person who is receiving care, services and supplies under the Managed Long Term Care (MLTC) Program to the extent that federal financial participation is available therefor. 2013 N.Y. Laws Ch. 56, Part A, § 68. The law had previously been amended to apply to other community-based waiver programs (2009 N.Y. Laws Ch. 58, Part D, § 42).

Couples, where one person is receiving Medicaid home care through the Managed Long Term Care program, will now be able to use the "spousal impoverishment" budgeting rules or the old community-based budgeting rules—whichever is more favorable. On Sept. 24, 2013, the New York State Department of Health announced in GIS 13 MA/018 that "spousal impoverishment protections" are available to married participants in all Managed Long Term Care (MLTC) plans, including PACE and Medicaid Advantage Plus plans. These rules were previously expanded to the Traumatic Brain Injury (TBI) and Nursing Home Transition and Diversion (NHTD) waiver programs and had previously been applied to the "Lombardi Program" (Long Term Home Health Care Program). See GIS 12 MA/013, which explains the methodology for calculating spousal impoverishment budgeting in Home and Community-Based Waiver Programs.

These "spousal impoverishment protections" have been used since 1988 by couples where one spouse is in a nursing home. Under these rules income can be shifted from the spouse receiving Medicaid to the well spouse to bring his or her income up to a Minimum Monthly Maintenance Allowance (MMMNA) ($2,931 in 2014). However, in community-based programs the Medicaid spouse can keep a calculated personal needs allowance (PNA) (in 2014 $383). GIS 12 MA/013 explains the methodology for calculating the personal needs allowance: The PNA for a community-based or waiver recipient is the difference between the two-person and one-person income levels. In 2014 it is $383 ($1,192 minus $809).

It is necessary to determine how much in addition to the recipient's PNA can be shifted to the spouse. You need to calculate the Community Spouse Monthly Income Allowance (CSMIA), which is the difference between MMMNA and the Community Spouse's net income. For example, if the Community Spouse's gross income from pension, Social Security and Minimum Required Distribution from an IRA is $2,000 per month and he or she has a $240 deduction for Medicare Supplemental Insurance, the CS's net income is $1,760 ($2,000 minus $240) and the CSMIA is $1,153 (MMMNA $2,913 - $1,760). Therefore, in addition to the CS's income the couple gets to keep $1,536 (PNA $383 + CSMIA $1,153). Or, for example, if the Applicant/Recipient's income (after deduction for Medicare Supplemental Insurance) is $2,000, then the A/R keeps $383, and he shifts $1,153 to the CS and his remaining Medicaid spenddown is $464.

Alternatively under single-person budgeting the A/R could have kept only his or her single person PNA of $809 plus a $20 disregard and his spenddown would have been $1,171 ($2,000 - $829).

NYC HRA has said a pooled trust cannot be used with spousal impoverishment budgeting. If not using spousal impoverishment budgeting, the spouse could exercise her right to "spousal refusal." Under both budgeting options, spousal impoverishment rules are to be applied to the couple's resources. In 2014 the A/R may keep $14,550 in his own name. As for the CS, the minimum resource allowance is $74,820. However, it is unknown how the maximum would be calculated since it is one-half of the combined resources "as of the first day of institutionalization" up to a maximum (for 2014) of $117,240. Of course, in community-based care there is no first day of institutionalization. Other resource exemptions apply.

The rules are complex and there are advantages and disadvantages. Generally, according to the GIS, if the sum of the recipient's Personal Needs Allowance ($809 in 2014), Community Spouse Monthly Income Allowance (Difference between MMMNA and the Community Spouse's net income) and a Family Member Allowance, if applicable, is less than or equal to the sum of the Medicaid income level for a household of one and the $20 unearned income disregard, spousal impoverishment budgeting with post-eligibility rules is not more advantageous. In cases where the spousal impoverishment budgeting will eliminate a spenddown and eliminate the use of a pooled trust, it may be more advantageous.

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Metadata: The Hidden Disaster That's Right in Front of You

By Randall Farrar

What Is Metadata?

Succinctly defined, metadata is "data about data." Metadata is embedded in all Microsoft Office documents

Microsoft Word, Excel and PowerPoint include automated features to aid in document production and collaboration. These features embed electronic information (metadata) in a file, which can reveal the identity of those who edited the document (revision authors); track the time, date, and frequency of edits (track changes and revisions); reveal inserted comments and the document template; and other data employed to control the document's text and format. Metadata is placed in a document by the operating system, the application, and by users utilizing the automated features of the application.

The metadata contained in a Word document doesn't necessarily create risk of adverse disclosure. In fact some document metadata is necessary for formatting or automation macros within a document. Some document metadata, such as tracked changes, may be used to collaborate with co-counsel, but one might not wish to share such information with one's adversary. The commonly held opinion is that information should be removed before a file is shared outside a firm's electronic walls to avoid violating attorney-client privilege, disclosing sensitive information to third parties and so on.

Before determining how your law office is going to manage metadata, it is important to understand the basic facts about document metadata.

Fact 1: Metadata Exists in ALL Microsoft Office Documents

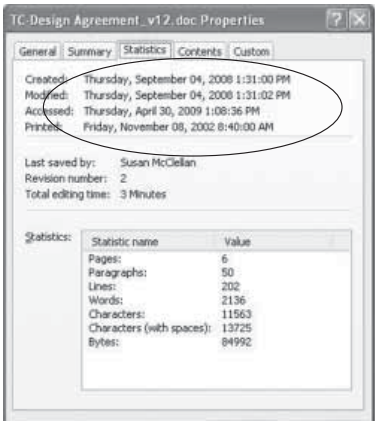
A rule of thumb when considering metadata is that every time a document is opened, edited and saved, metadata is added by the operating system, the application itself, and through the use of certain automation features.

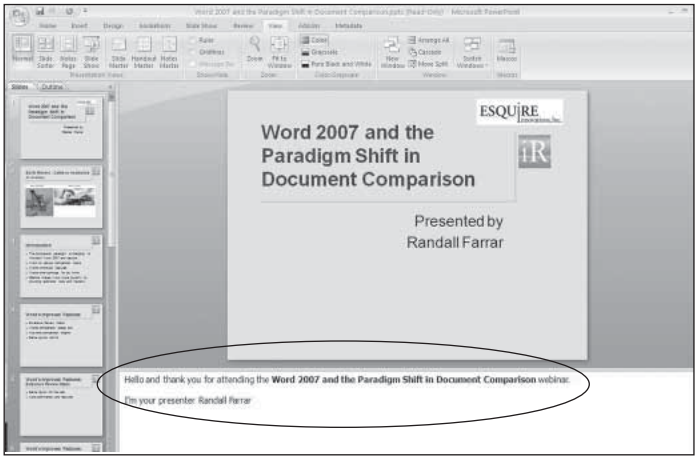
Some firms claim that they do not have a "metadata problem" when in fact ALL Microsoft Office documents contain some kind of metadata. The question is whether the metadata revealed is harmful or not. It is always better to err on the side of caution.

Fact 2: Metadata Can Be Useful

Microsoft Word metadata is often essential to the document production process to automate formatting and reduce editing and collaboration time. For example, the date fields (under document properties) are referenced when searching for documents created in a specified time frame, or to gain quick access to documents from "My Recent Documents."

Tracked changes can be useful when editing a document with multiple co-counsel or colleagues to identify which editors have made specific changes. In Excel, metadata can also be very useful and includes formulas in a spreadsheet, hidden columns, author names and creation dates of documents. In PowerPoint, metadata includes author information and presentation creation dates, as well as speaker notes and links to graphs or other statistics from outside documents.





Fact 3: Metadata Can Be Harmful

Metadata can be harmful when users unknowingly send documents that contain confidential or potentially embarrassing information. There have been many well-publicized cases in which tracked changes or hidden comments have been left in a document sent via email or shared on the Internet. Two examples of high profile metadata blunders are the SCO Group's lawsuit against DaimlerChrysler and a United Nations report.

A Microsoft Word document from SCO's suit against DaimlerChrysler originally identified Bank of America as the defendant instead of the automaker. Metadata revealed that SCO spent considerable time building a case against the bank before changing the name on the suit to DaimlerChrysler. More information can be found at the following web link: http://news.cnet.com/2100-7344_3-5170073.html.

In a United Nations report, tracked changes were discovered in a document that supported the published conclusion that Syria was behind an assassination in Beirut. Confidential and sensitive information as well as evidence that the report may have been altered after it was submitted to the United Nations were disclosed. More information can be found at http://www.timesonline.co.uk/tol/news/world/middle_east/article581486.ece.

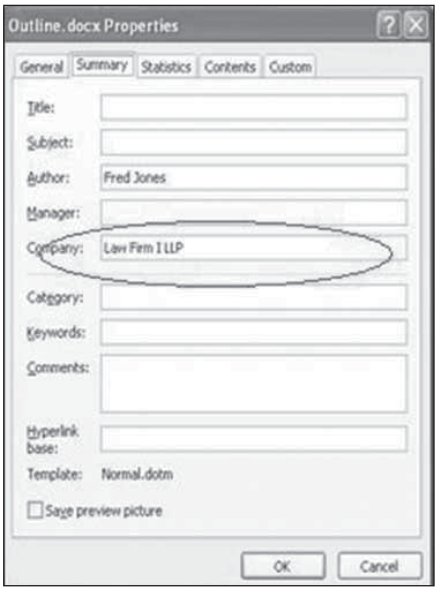
Law firms that deal with sensitive and confidential information on a daily basis must be diligent in managing their metadata or they too may find themselves the subject of media reports and embarrassment.

Fact 4: Tracked Changes Can Easily Be Left in a Document

Despite the far-reaching negative effects of metadata discovered in a document, something as simple as leaving tracked changes in a document can easily happen. Consider the following scenario.

An attorney switches on the "Track Changes" feature in Word to make edits to a document. After collaborating with his assistant and associates he is satisfied with the changes. He decides to send it to the client for review and clicks on the "Review" ribbon in Word 2007 and changes the document to "Final" in the Tracking section.

The tracked changes disappear from the document. He assumes they are no longer there, clicks on send via e-mail and forwards the document to his client. The client opens the document to see all of the tracked changes displayed. This occurred because the attorney did not accept all of the changes in the document; he merely hid them from view. When the client opened the document the "Display for Review" settings were set by default to "Final Showing Markup," thus revealing all of the changes in the document.



When a document is created from an earlier document using Save As, the author name from the original document will stay with the document as will the company name. Often an attorney will create new documents from legacy documents that could have been produced when working for a previous firm. Unless the company information is manually updated by the user, or cleaned by a metadata software application, it will stay with the document.

If a law firm regularly uses the same document for multiple clients and/or uses documents created by lawyers when they were employed by previous firms, the client could see a different author, law firm and client listed in the properties. This information could lead to serious questions from a client as to a firm's billing practices. However, there are ways to control author information on documents. Microsoft Word has five areas that collect author information:

User Name

User Initials

Document Author

Manager

Last Author

To make sure that this scenario does not occur, and that there are no tracked changes left in a document, always accept all changes.

Fact 5: Metadata Can Be Found in the Document Author Information

Multiple author names can remain with a document as it is edited and revised. Microsoft Word automatically pulls the author name from the User Information for the "Last saved by" author (found by accessing the Office Button then Word Options | Popular), and will save the names if there have been multiple editors of a document.

The User Name and User Initials control what appears in the author properties of a Microsoft Word document. User Name and User Initials are found in Word Option | Popular | Personalize, depending on your copy of Microsoft Office.

Microsoft Word documents also contain other properties that reveal the document author, which can be found in the built-in document properties of a document.

To view these properties click on the Office button select Prepare | Properties. A display bar will open at the top of the document.

The document author is pulled from the "Word Options" settings described above and inserted when the document is created. This stays with the document until it is changed or deleted.

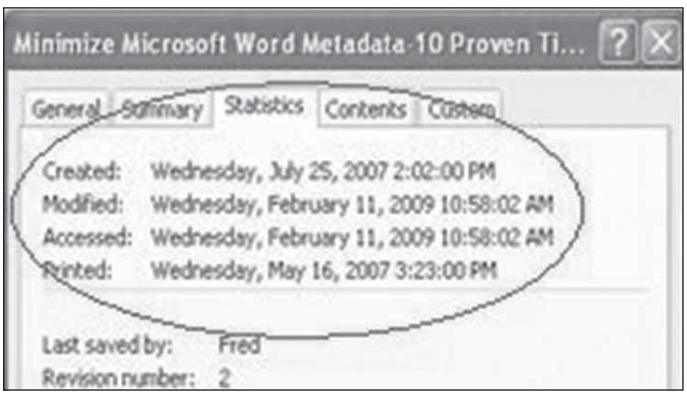
The other fields displayed are user input properties. That means one has to manually place text here. Some template and macro applications use this field for automation purposes and place information in these properties. Unless the firm is using an automated metadata software, be aware of these properties and that they will remain with the document until they are changed or deleted.

Fact 6: Metadata Is a Document's Dates and Times

In the Microsoft Word "Statistics" tab the Created, Modified, Accessed and Printed fields are displayed. This information can cause potential problems for a law firm.

For example, an attorney is creating a new contract for a client. The contract requires some standard language. The attorney has prepared similar contracts before, so she opens up a contract that she had created in Microsoft Word for another client when she worked at a different firm. The attorney makes edits as needed and e-mails the contract to her client. Upon receipt, the client opens the document and, since she has heard about metadata, opens "File Properties" to view any data. File properties can be accessed in Office 2007 by clicking on Office Button | Prepare | Document Properties | Advanced Properties. By viewing the Statistics tab the client sees a Created date of Wednesday, July 25, 2007, one year before she was a client and a Modified date of Wednesday, February 11, 2009, which is the current date.

Even more puzzling is the Printed date, which is several years earlier, indicating that the last time this document was printed was Wednesday, May 16, 2007. This date will remain unchanged until the document is printed again.



Word files can contain a history that reveals the true age of a document. That history will stay with the document until it is "cleaned" using a metadata management tool.

Metadata of this type can be useful when searching for documents created in a specified time frame, or to gain quick access to documents from, for example, My Recent Documents. But a firm may not wish to reveal this type of information to a client being billed an hourly rate for creating the document.

Fact 7: There Are More Than 200 Types of Document Metadata

There can be more than 200 types of metadata added to a document.

In addition to the examples cited above, less commonly known metadata include:

Field Codes – Naming conventions for custom field codes may disclose information about the drafting process not disclosed by the text.

Bookmarks – Naming conventions for bookmarks may disclose information about the drafting process.

Routing Slips – When the File | Send | Routing Recipient function is used, the recipients' email addresses are stored in Word's electronic file (not available in Office 2007).

Firm Styles – Custom style names can sometimes be firm specific and therefore considered metadata.

Prevent Metadata Issues—Establish a Metadata Policy

Law firms, more than most users of Microsoft products, can be embarrassed – or worse – if metadata is not properly managed. Each law firm should have a metadata policy that is utilized by all attorneys and staff who work on firm documents. Considerations to take into account when establishing a metadata policy include:

- Educate yourself and your users about metadata.
- Review the applicable New York opinions (and those of other states and entities, as needed) regarding metadata.
- Review firm documents (on internal networks and published on external networks). Is your firm inadvertently sharing confidential information?
- Involve attorneys and your IT department and establish a firm approach based on your findings.
- If necessary, bring in a consultant to advise your firm on a metadata policy.

- Periodically review the firm's policy to address any new rulings on metadata and/or changes to Microsoft.

Enforcing the Policy

All firms should consider purchasing metadata management software. The software should be flexible enough to execute firm policy, automated enough to enforce firm policy and easy enough for users to understand and utilize.

The latest Microsoft Office program includes a metadata tool called Document Inspector. Since Microsoft applications add metadata to files, it presents a somewhat contradictory position for Microsoft to provide a tool for removing that metadata. Firms who already practice a metadata policy have found that the main weakness with Document Inspector is the lack of automation. The onus is on individual users to "inspect" documents and then decide which metadata to remove. This approach proves ineffective in enforcing a metadata policy throughout an organization. Metadata management software, on the other hand, removes metadata more thoroughly and is designed to help firms automate and therefore enforce metadata policies. The most popular products available for metadata management can be found by searching for "metadata management software" in Google.

The success of any policy hinges on the execution. A firm's metadata policy will be more successful if staff can grasp what metadata is, when it can be useful, when it can be harmful and how to manage the metadata in documents. Consider bringing in outside trainers to help educate your firm with hands-on training.

Metadata and New York Law Firms

Historically, opinions on whether there is a significant risk with metadata and if so what must be done to address that risk have varied among attorneys, IT departments, management, bar associations and other governing entities. In the past few years, a multitude of governing bodies have drafted and issued opinions regarding metadata. New York has opinions specifically addressing an attorney's ethical obligations regarding metadata in place. Law firms in New York should ensure they are in accordance.

Law associations throughout New York, including the New York State Bar Association, the New York City Bar Association and the New York County Lawyers' Association, have released formal opinions on attorneys' ethical responsibilities regarding metadata.

The New York State Bar Association's Committee on Professional Ethics Opinion 749 and Opinion 782 state that a lawyer's ethical obligations regarding metadata are summarized as follows:

> Lawyers may not ethically use available technology to surreptitiously examine and trace e-mail and other electronic documents.[1]
>
> and
>
> Lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in "metadata" in documents they transmit electronically to opposing counsel or other third parties.[2]

The New York State Bar Association has also developed a basic guide for attorneys regarding metadata, which outlines the legal and ethical issues for lawyers regarding metadata, how to preserve and produce metadata, and the ethical obligations specific to New York lawyers.[3]

The New York County Lawyers' Association's Professional Ethics Committee Opinion 738 states in part,

> [A]ttorneys are advised to take due care in sending correspondence, contracts, or other documents electronically to opposing counsel by scrubbing the documents to ensure that they are free of metadata, such as tracked changes and other document property information.[4]

As more states sound off on metadata and an attorney's responsibility, New York firms with practices in multiple states should also make sure that their policies are acceptable in every jurisdiction in which they practice.

Endnotes

1. New York State Bar Association, Committee on Professional Ethics: Opinion 749 (2001), *available at* http://ww.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=6533.
2. New York State Bar Association, Committee on Professional Ethics: Opinion 782 (2001), *available at* http://www.nysba.org/AM/Template.cfm? Section=Ethics_Opinions&CONTENTID=6871&TEMPLATE=/CM/ContentDisplay.cfm.
3. "Metadata: Basic Guidance for New York Attorneys" was produced in April 2008 by the Committee on Electronic Discovery of the Commercial and Federal Litigation. The guide can be found at http://www.nysba.org/Content/NavigationMenu4/Committees/Metadata.pdf.
4. New York County Lawyers' Association, Committee on Professional Ethics: Opinion 738 (2008), *available at* http://www.nycla.org/siteFiles/Publications/Publication1154_0.pdf.

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There's No Place Like Home, Says the Taxman: A Residency Primer

By Yvonne R. Cort

In 2004, Robin Ingle[1] decided that the time had come to leave her home in New York City and move back to her childhood state of Tennessee, not far from where her parents lived. The move was motivated by the almost two million dollars she would receive on April 30, 2004 from the sale of her stock in TripAdvisor, where she was employed. In the first few days of April, she registered to vote in Tennessee, obtained a Tennessee driver's license, and signed a lease for an apartment in Tennessee.

Unfortunately for Robin Ingle, it was determined at audit and recently affirmed by the Appellate Division that despite these actions in early April, she did not show a change of domicile prior to receiving the funds. According to the court, she remained a resident of New York until July, 2004, when she and her boyfriend finally had time to paint, pack and move her belongings out of her New York apartment. Until that time, her lifestyle had not changed, as she continued to travel often for work and return to her New York apartment. The result was a tax bill of over $250,000 plus interest.

Two Tests for Residency

As the *Ingle* case shows, failing to prove residency can be costly. New York law has two tests for determining when a taxpayer is a resident of New York: either the taxpayer is domiciled in the state; or the taxpayer is a statutory resident, defined as maintaining a permanent place of abode in the state and spending more than 183 days of the taxable year in the state.[2] The determination is significant because residents of the state may be subject to New York state tax on their worldwide income. The same tests apply when determining New York City residency, with the law relating to New York City substituting the word "City" for "State" where appropriate.[3]

The New York State Department of Taxation and Finance continually reviews filed tax returns and uses sophisticated data mining techniques to select taxpayers for audit who may have erroneously relied on nonresidency status. Here are a few important points to consider in anticipation of and during a possible residency audit.

Business Ties and Other Domicile Factors

As detailed in the Nonresident Audit Guidelines,[4] the Department compares the old and the asserted new domicile, examining five primary factors: the nature and use of the taxpayer's dwellings; active business involvement; family ties; the time spent in each place; and where items are kept that are important to the taxpayer.

All of these factors are weighed to determine whether the taxpayer has weakened or abandoned ties to the old domicile, and established strong connections to the new place. The party asserting the change, typically the taxpayer, bears the burden of proving the domicile change with clear and convincing evidence.

Business owners who have difficulty "letting go" of their companies could run into problems with changing domicile. The Liebermans[5] learned this the hard way. For many years, Rose and Donald Lieberman were snowbirds, spending winters in Florida, and they finally decided to file as nonresidents of New York.

While in Florida, Mr. Lieberman continued to operate and manage his real estate business through frequent contact with an employee in New York; he negotiated directly with tenants, and he regularly visited his investment properties on his trips to New York. Mr. Lieberman's strong continued business ties to New York figured heavily in the Administrative Law Judge's determination that the taxpayers were still domiciled in New York.

Taxpayers sometimes mistakenly believe that obtaining a driver's license in the new domicile and similar administrative steps are critical to nonresident status. These may shift the balance when the five primary factors are inconclusive. Nevertheless, as the Administrative Law Judge stated in *Ingle*, referring to the taxpayer's Tennessee driving license and voter registration, "such formal declarations are less significant than informal acts demonstrating an individual's general habit of life."[6]

Establish a Local Pattern of Life

The central issue is whether the asserted new place is truly "home" with the feeling and sentiment generally associated with that word. It's hard, if not impossible, to measure intangible emotions, yet that is what the Department is ultimately seeking to do when evaluating domicile.

In *Lieberman*, the Administrative Law Judge noted sharply that the taxpayers did not demonstrate that they had a daily routine or social life in their claimed Florida domicile, or any evidence of sentiment or association with the Florida location.

In *Matter of Cooke*,[7] however, it was determined that the taxpayers had moved from New York City to the Hamptons, where the taxpayers showed that their lives were centered in the asserted domicile. Among other elements, they were able to prove that they celebrated family events and milestones in the Hamptons including

a baptism and a wedding, and they described an active network of friends, social activities and local hobbies.

The lesson to be drawn is that regular activity at the new place and involvement in local life can be significant indicators of the taxpayer's ties to the new domicile. Absence of such evidence may be critical.

Changing Definitions Regarding a Permanent Place of Abode

Once a taxpayer has established a non-New York domicile, the Department will consider statutory residency, determining whether the taxpayer maintained a permanent place of abode in New York and spent more than 183 days in New York during the year being audited.

Case law and the Department's 2014 Nonresident Audit Guidelines have recently addressed the definition of "maintaining a permanent place of abode." In the closely observed *Gaied*[8] case, the taxpayer's elderly parents lived in an apartment owned by the taxpayer. The taxpayer had a key and occasionally stayed overnight on the couch when his parents needed his assistance.

In 2011, the Tax Appeals Tribunal, affirmed by the Appellate Division, concluded that the taxpayer's ownership of the property was sufficient to establish that it was the taxpayer's permanent place of abode; there was no need to consider the taxpayer's subjective use of the property, or to determine that he lived there.[9]

This extreme view was overturned by the Court of Appeals in 2014, stating that there was "no rational basis" for the interpretation of the lower court.[10] The Court of Appeals noted that the intent of the law was to prevent tax evasion by individuals who actually dwelled in New York yet claimed to be nonresidents. The Court of Appeals held that "there must be some basis to conclude that the dwelling was utilized as the taxpayer's residence" in order to be the taxpayer's permanent place of abode for statutory residency purposes.[11]

It is unclear how aggressive the Department will be in future audits regarding permanent place of abode issues. Taxpayers who purchase a place for their elderly parents or adult children should remain alert to the risk of unintentionally creating their own residential interest in the property.

Factors to consider, as outlined in the Guidelines, include the taxpayer's actual use of the property, unfettered access, size of the dwelling, and whether the taxpayer keeps personal belongings there.[12] A two bedroom apartment may be viewed differently from a studio apartment, for example.

Selling Your House? Pack Up and Move Out

Selling a house is not always easy, and extra time needed to find a buyer may result in additional tax owed. After changing domicile, a taxpayer may continue to have a residential interest in her former New York home, even if the property is listed for sale. She could be a statutory resident if she also spent more than 183 days in New York during the taxable year.

Hiring a moving van may make a big difference. The taxpayer's residential interest could be extinguished if the house contents are transferred to the new domicile. The Guidelines sensibly acknowledge that the taxpayer is not expected to live in a vacant house, even with unfettered access.[13]

Keep Track and Document the Days

To meet the second prong of the statutory resident test, the taxpayer must prove, by clear and convincing evidence, that she did not spend more than 183 days in New York during the taxable year. It has been repeatedly held that any part of a day in New York will be counted as a day for these purposes, with limited exceptions such as traveling through the state and inpatient medical treatment.[14]

Documentation is crucial. Telephone records, calendars, EZ-Pass records, credit card receipts, ATM withdrawals—all of these can show the location of the taxpayer.

The taxpayer in *Robertson*[15] was meticulous about contemporaneously counting his days in and out of New York City, recording a New York City day when he unexpectedly visited the city and left later the same day, or when he arrived in New York City at a quarter to midnight. His detailed electronic diary kept by his assistant, combined with credible testimony, helped to prove his whereabouts on each day, saving him $27 million in New York City tax.

Sometimes documentation can be misleading. The Knoebels[16] encountered difficulties when the landline phone records from their New York City apartment did not reflect what they knew to be true: calls were made from the New York City apartment on days when the Knoebels were certain they were not in New York City.

In *Knoebel*, the taxpayers were able to show, with credible testimony, that the calls were made by friends or by the taxpayers' adult children who used the apartment on the days in question. If the taxpayers had produced additional receipts or other documents showing their location outside of New York on the questioned days, it might have been easier to prove their points.

Conclusion: Preparation Is Key

Preparation and knowledge can have far-reaching effects in a residency audit. The difference between prevailing at an audit, or paying additional tax, interest and penalties, may come down to keeping receipts or showing

that the taxpayer has become part of the new community. Professionals and taxpayers need to be aware of the tax pitfalls affecting residency and the steps that can be taken to avoid these complications.

Endnotes

1. *Ingle v. N.Y.S. Tax App. Trib.,* No. 514245, 2013 N.Y., Slip Op. 7094 (3d Dep't, Oct. 31, 2013).
2. New York Tax Law § 605(b)(1)(A) and (B).
3. *See* New York Tax Law § 605(b)(1)(A) and (B); New York City Administrative Code § 11-1705(b)(1)(A) and (B).
4. Nonresident Audit Guidelines, State of New York, Department of Taxation and Finance, Income Franchise Field Audit Bureau (2014).
5. *In re Lieberman,* ALJ DTA No. 824101 (N.Y. Div. of Tax App., July 11, 2013). Determinations issued by administrative law judges are not precedential.
6. *In re Ingle,* ALJ DTA No. 822545 (N.Y. Div. of Tax App., October 14, 2010) (*aff'd* N.Y. Tax App. Trib., Dec. 1, 2011) (*aff'd Ingle v. N.Y.S. Tax App. Trib.,* No. 514245, 2013 N.Y., Slip. Op. 7094 (3d Dep't, Oct. 31, 2013)).
7. *In re Cooke,* ALJ DTA No. 823591 (N.Y. Div. of Tax App., Nov. 15, 2012). Determinations issued by administrative law judges are not precedential.
8. *Gaied v. N.Y.S. Tax App. Trib.,* N.Y., No. 26, February 18, 2014, 2014 NY Slip Op. 1101, *rev'g* 101 App. Div. 3d 1492, 957 NYS 2d 480 (3d Dep't, 2012).
9. *In re Gaied*, DTA No. 821727 (rehearing)(N.Y. Tax App. Trib., June 16, 2011), *aff'd* 101 App. Div. 3d 1492, 957 NYS 2d 480 (3d Dep't, 2012), *rev'd Gaied v. N.Y.S. Tax App. Trib.,* N.Y., No. 26, February 18, 2014, 2014 NY Slip Op. 1101.
10. *Gaied*, 2014 Slip Op. 1101 at 4.
11. *Gaied*, 2014 Slip Op. 1101 at 2.
12. Nonresident Audit Guidelines, *supra* fn. 4 at 56.
13. Nonresident Audit Guidelines, *supra* fn. 4 at 54.
14. *See In re Zanetti*, ALJ DTA No. 824337 (N.Y. Div. Tax App. May 23, 2013), *aff'd* DTA No. 824337 (N.Y. Tax App. Trib. Feb. 13, 2014); *Stranahan v. N.Y.S. Tax Commission*, 68 A.D. 2d 250 (3d Dep't 1979).
15. *In re Robertson*, DTA No. 822004 (N.Y. Tax App. Trib., Sept. 23, 2010).
16. *In re Knoebel*, ALJ DTA No. 824117 (N.Y. Div. of Tax App., Sept. 19, 2013). Determinations issued by administrative law judges are not precedential.

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Lost Trusts in New York—The Case for Statutory Intervention

By Amy F. Altman, Karin Sloan DeLaney, Antar P. Jones, Paulina Koryakin and Michael S. Schwartz

New York does not have a statutory mechanism for dealing with lost or destroyed lifetime trusts. The need for clear guidelines is becoming increasingly important as more individuals use lifetime trusts as will substitutes. Practitioners have reported numerous situations where only an unsigned copy, abstract or other secondary evidence of a trust agreement could be found, while assets such as bank accounts, securities, or real property have been registered in the name of those trusts. Some of these situations are the result of the destruction of lifetime trusts, along with other documents, in the devastating attacks on September 11, 2001. More commonly, however, writings establishing lifetime trusts are lost or destroyed as a result of carelessness or lack of procedures for safekeeping of these documents by clients or their attorneys.

Although New York case law has provided some assistance in dealing with this issue, clear statutory guidance may be beneficial to ensure that assets held in a trust continue to be held and administered for the trust beneficiaries in accordance with the settlor's intent. Such guidance already exists for lost or destroyed wills and the testamentary trusts established thereunder.[1] When an individual wishes to establish a lifetime trust, he or she should be given the same measure of comfort that his or her wishes will be honored, whether the trust is created under a will or under a separate trust instrument.

Lost or Destroyed Trusts in New York

Estates Powers and Trusts Law (EPTL) 7-1.17 requires all lifetime trusts created on or after December 25, 1997 to be in writing, executed and acknowledged by the settlor and at least one trustee. Even though SCPA 1407 clarifies the issue of how to prove a lost or destroyed will and the testamentary trusts created thereunder, neither EPTL 7-1.17 nor any other provision of New York law directly addresses how to establish the existence of lost or destroyed lifetime trusts.

A review of New York case law, on the other hand, reveals that there is a strong history of cases that have addressed the issue of lost documents. For example, in cases dealing with the statute of frauds, New York courts have consistently ruled that parol evidence can be used to prove the existence of a valid trust.[2] These cases stand for the proposition that the absence of an original or copy of an executed trust document is not dispositive of the issue of the document's existence, and that the trust could still be deemed to be valid.[3] Nevertheless, there is no legal presumption given to the existence of a trust and, instead, there are certain elements that must be proven by the party claiming that the writing establishing the lifetime trust in fact exists.[4] These elements include: a designated beneficiary, a designated trustee, a clearly identifiable res to enable title of the res to pass to the trustee, and delivery of the res by the settlor to the trustee with the intent of vesting legal title in the trustee.[5] For lifetime trusts created after 1997, courts will likely require further proof that the trust was validly formed in conformity with EPTL 7-1.17, such as an attorney affirmation.

This standard appears to have been most recently applied in *Greene*, a case in the Kings County Surrogate's Court in which petitioners could not find the original or signed copy of a writing establishing a lifetime trust.[6] Complicating matters further, a deceased settlor purportedly conveyed to the petitioners, as successor co-trustees, two parcels of real property. In an unpublished decision, the court stated that as long as the four above-described essential elements of a trust are clearly demonstrated, absence of the executed original trust document does not prevent a finding that a valid trust exists. In addition, although EPTL 7-1.17 was not directly cited by the court, it seems that the burden was on the petitioners to also demonstrate that the trust was originally validly formed in conformity with EPTL 7-1.17.

The petitioners in *Greene* offered the following evidence to establish the existence of these essential elements: (1) an abstract of the trust signed by the settlor and his attorney; (2) an unexecuted copy of the trust; (3) two executed deeds showing the transfer of property to the trust and the date on which they were filed; and (4) an attorney affirmation wherein the draftsperson stated that he prepared the trust agreement, that it was duly executed by two uninterested witnesses, that the settlor retained the executed version and that to the draftsperson's knowledge, the settlor never revoked the trust. Based on this offered evidence, the court in *Greene* found that the trust was valid, in spite of the lack of an original or a copy of the signed trust document.

Lost or Destroyed Trusts in Other States

Jurisdictions other than New York have also struggled with the issue of how to handle lost or destroyed trusts. Although the authors are aware of no other state that has enacted a statute specifically addressing this is-

sue, both case law and other non-legislative sources from across the country provide some guidance.[7]

In Kansas, for example, a bar association treatise suggests that generally the rules of construction that govern wills also apply to revocable trusts. However, the treatise maintains that the presumption of revocation of a will by a testator that arises if the original will cannot be found does not apply to revocable trusts.[8] Therefore, the inability to find a lifetime trust does not preclude a finding that the trust is still valid.

Courts in other jurisdictions have gone even further. In Connecticut, for instance, the courts have relied on the Restatement (Second) of Trusts § 49, which provides that "the loss or destruction of a memorandum does not deprive it of its effect as a satisfaction of the requirements of the Statute of Frauds, and oral evidence of its contents is admissible unless excluded by some rule of the law of evidence." In the Connecticut case of *Estate of Richard Getman*, the court adopted the position of the Restatement (Second) of Trusts and found that the trust was valid in spite of the lost trust document, because it had been established to the satisfaction of the court that (1) the loss of the original document had been proven by clear and convincing evidence; (2) the contents of the trust had been proven; (3) due execution of the trust instrument had been proven; and (4) the fact that the trust was not revoked had been proven by an attorney affidavit.[9] The court also relied upon case law in New Jersey, Oklahoma and Illinois in arriving at its decision to allow outside evidence to prove the validity of a lost trust document.[10]

Similarly, the California Court of Appeals has stated that secondary evidence is admissible to substantiate a lost trust in that state.[11] Under California law, a writing must be authenticated before it or secondary evidence of its contents can be admitted into evidence.[12] In order for a document to be authenticated, sufficient evidence must be introduced to sustain a finding that it is the writing that the proponent of the evidence claims it to be.[13] Moreover, California law also provides that the contents of a writing may be proven by otherwise admissible secondary evidence, as long as (1) there is no dispute concerning material terms of that writing and justice does not require exclusion; and (2) the admission of the secondary evidence would not be unfair.[14]

Texas courts have also addressed the issue of lost or destroyed trusts. In the case of *In Re Estate of Berger*, the Texas Court of Appeals dealt with both a trust and a will, neither the original nor a copy (signed or unsigned) of which could be found.[15] The Texas Trust Code provides that a party asserting the existence of a trust that holds real property (which the trust in question supposedly held) must present evidence of the trust terms, with the signature of the settlor.[16] However, in its decision, the Texas Court of Appeals relied on an evidentiary rule which allows the admission of other evidence to establish the contents of a writing if the original of that writing has been lost or destroyed.[17] Under this evidentiary rule, one must first prove that there was a search and inability to secure the document, and then prove the contents of that writing.[18] Ultimately, the Texas Court of Appeals held that there was enough proof to overcome a summary judgment motion dismissing the case for lack of an original or copy of the trust.

This is only a sampling of the authorities that have grappled with the issue of lost or destroyed lifetime trusts across the country. With the rise in use of revocable trusts as substitutes for wills, this will increasingly become a more common issue to deal with in every jurisdiction.

Possible Legislative Solution

The authors of this article propose that it would be beneficial for the New York State legislature to consider enacting legislation that would provide clear guidance for proving the existence of lost or destroyed lifetime trusts. Doing so would provide certainty and comfort to both settlors and beneficiaries, as they would be assured that assets held in lifetime trusts would continue to be held and administered in accordance with the settlor's intent. This is especially important as the use of revocable trusts, as opposed to wills, is generally gaining favor among practitioners.

In addition, with more certainty as to the treatment of lost or destroyed trusts, such legislation may discourage some unnecessary litigation, and may also provide courts with clearer guidance when a controversy actually arises. This could bolster lower court opinions with respect to these matters, the result of which may be to dissuade appeals of these lower court decisions. This could potentially further save the parties, and the State, unnecessary expense.

This legislation would conform the rules that already exist for lost or destroyed wills, and the trusts established thereunder, to lost or destroyed lifetime trusts. Enacting a statute to address this issue would codify tested New York State case law that is consistent with case law and guidance from other jurisdictions.

Critics of such proposed legislation may argue that the current state of case law in this area is sufficient, and that formal codification of a statute would be unnecessary. However, it is axiomatic that many statutes have been passed to codify, clarify or slightly alter the effects of existing case law. Enacting such a statute could offer certainty and clarity that case law may not be able to provide.

In light of the possibility of loss or destruction of lifetime trusts in the normal course of events, not to mention potential loss or destruction of such documents as a result of, hopefully rare, extraordinary events (such as terrorism, civil unrest, hurricanes or other acts of God), legisla-

tion in this context may very well be desirable and cost efficient for both settlors and beneficiaries.

Just because the physical document evidencing a trust has been lost or destroyed, the assets of that trust and the rights and interests therein should not be lost or destroyed as well.

Endnotes

1. N.Y. Surrogate's Court Procedure Act (SCPA) 1407.
2. *See, e.g., Lynch v. Savarese,* 217 A.D.2d 648, 650, 629 N.Y.S.2d 804 (1995); *Webb & Knapp v. United Cigar-Whelan Stores Corp.*, 276 A.D. 583, 584, 96 N.Y.S.2d 359 (1st Dep't 1950); *Posner v. Rosenbaum*, 240 A.D. 543, 546, 270 NYS 849 (1st Dep't 1934).
3. *In re Marcus Trusts*, 2 A.D.3d 640, 641, 769 N.Y.S.2d 56 (2d Dep't 2003).
4. *Id.*
5. *In re Doman*, 68 A.D.3d 862, 890 N.Y.S.2d 632 (2d Dep't 2009).
6. *In the Matter of the Proceeding for Determining the Status of Real Property Concerning the Estate of Eureka Greene, Deceased, and the Greene Trust*, Sur. Ct, Kings County, March 14, 2013, López-Torres, M., No. 2011/2194/A.
7. The Uniform Trust Code, adopted by 25 jurisdictions, does not appear to contain provisions directly addressing the issue of lost or destroyed lifetime trusts.
8. The Kansas Bar Association publication of Kansas Probate & Trust Administration After Death § 4.4.3(b)(3).
9. *Estate of Richard Getman*, 15 Quinnipiac Prob. L.J. 257 at 262 (2001).
10. *Id*. at 262-265, citing *J.A.B. Holding Co. v. Nathan*, 194 A. 829 (N.J. E&A 136); *Kimberly v. Cissna*, 16 P.2d. 1090 (Okla. 1932); and *Hiss v. Hiss*, 81 N.E. 1056 (Ill. 1907).
11. *Penny v. Wilson*, No. B161317, March 24, 2004.
12. Cal. Evid. Code, § 1400.
13. Cal. Evid. Code, § 1401.
14. Cal. Evid. Code, § 1521.
15. *In Re Estate of Berger*, 174 S.W.3d 845 (Tex. App. 2005).
16. *Id.*, relying on Tex. Prop. Code Ann. §112.004.
17. Texas Rule of Evidence 1004a.
18. *Id*.

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Determining "Custody" of Beloved Companion Pets in Matrimonial Actions

By Sherri Donovan

Trisha Murray and Shannon Travis had a short marriage—marrying in 2012, filing for divorce in 2013. They had no children, few assets and their sole dispute was over who would keep Joey, their miniature dachshund. In *Travis v. Murray,*[1] Justice Matthew Cooper issued a 19-page decision which ordered the parties to appear for a one-day hearing to determine which party would win possession of the dog. The judge would apply a "best for all concerned" standard following the hearing, thus departing from strict property analysis traditionally used for possessory disputes over animals, yet falling short of engaging in a full-fledged child custody analysis.

In 2011, a year before their marriage, Ms. Travis purchased Joey at a pet store and brought him home to the couple's shared apartment. When Ms. Murray moved out in 2013 while Ms. Travis was away on a business trip, she took with her a few pieces of furniture, some personal possessions and Joey. When Ms. Travis asked for Joey's return, Ms. Murray claimed she had lost him in Central Park.

One month later, Ms. Travis proceeded to file for divorce. Two months later, she brought a motion seeking an account of Joey's whereabouts and an order directing that he be returned to her "care and custody" and that she be granted "sole residential custody of her dog." Ms. Murray revealed that Joey was not in fact lost, but rather living with her mother in Maine.

In her papers, Ms. Travis argued that Joey was her property because she had purchased him with her own funds prior to the marriage. Further, she stated that she was the party who had provided primary financial support for Joey. Ms. Murray replied that Joey was her property, as Ms. Travis had purchased him as a gift for her as consolation after she had given away her cat at Ms. Travis's insistence. Ms. Murray also stated that she, too, had contributed financially to Joey's care.

While Ms. Travis asserted that she was the party who had cared for Joey on a primary basis, Ms. Murray countered that Joey slept on her side of the bed and that she was the one who "attended to all of Joey's emotional, practical and logistical needs." Ms. Murray concluded that it was in Joey's "best interests" to be with her mother in Maine, where she could visit him regularly and where he is "healthy, safe and happy," adding that Ms. Travis traveled often for work.

In his November 29, 2013 decision, Justice Cooper noted that both parties invoked two distinct approaches in determining which one should be awarded Joey: traditional property analysis, *i.e.*, ownership stemming from purchase or gift, and child custody analysis, whereby core custody concepts such as primary caretaking and best interests were called into play.

The judge engaged in a thorough analysis, referencing cultural articles in *New York* magazine and the *New York Times* that discuss the "humanification" of our pets and the important role that dogs play in our emotional lives[2] and citing research detailing the ever increasing amount of time, money and attention that household pets receive in the United States.[3]

Following a review of New York case law, Judge Cooper noted that while the *New York* magazine and *New York Times* articles prove that New Yorkers consider their pets as far more than mere property, prevailing New York law continues to treat a dog as just that—specifically, as "chattel."[4]

In most non-matrimonial actions regarding ownership and possession of dogs, unless a dog is a pure-bred show dog, the most an owner can expect to recover for negligent care of or failure to return a dog is the animal's fair market value. The aggrieved owner would pursue an action for "replevin," where the standard is defined as superior possessory right in the chattel, thus based solely upon the property rights of the litigants, rather than their respective abilities to care for the pet or emotional ties.[5] Cooper notes only one New York case where temporary possession of a dog was granted to a wife in a matrimonial action, which decision was based solely upon the fact that the dog was an interspousal gift to her.[6]

Yet a few New York cases showed that courts were willing to acknowledge the importance of pets beyond that of ordinary, inanimate property. In *Corso v. Crawford Dog and Cat Hospital, Inc.*,[7] the plaintiff recovered damages beyond the market value of the dog whose remains were wrongly disposed of by a veterinarian, holding that "a pet is not just a thing but occupies a special place somewhere in between a person and a personal piece of property." In *Feger v. Warwick Animal Shelter,*[8] the court observed that "companion animals are treated differently from other forms of property. Recognizing companion animals as a special category of property is consistent with the laws of the State."

Justice Cooper then engaged in a nationwide survey of the analyses utilized in pet-related disputes, finding that while there were a small number of cases that actually used the term "custody" when making an award of a dog to a spouse,[9] the majority of cases from other jurisdictions have declined to extend full-fledged child custody precepts to pet-related disputes, such as the "best interests" standard.[10]

Finally, Justice Cooper turned to the most relevant New York case, *Raymond v. Lachmann,*[11] to inform his decision, a case involving a dispute over the ownership and possession of an elderly cat named Lovey. The First Department wrote:

> Cognizant of the cherished status accorded to pets in our society, the strong emotions engendered by disputes of this nature, and the limited ability of the courts to resolve them satisfactorily, on the record presented, we think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, remain where he has lived, prospered, loved and been loved for the past four years.

From here Justice Cooper finds the standard he would apply to the *Travis v. Murray* matter: "best for all concerned." He notes that the concept of a household pet being treated as mere property is outmoded and that the court in *Raymond* offered a perspective for determining possession of a pet that differs radically from traditional property analysis. Yet, while the factors in the decision included concern for the animal's well-being and the relationship that existed between the cat and the person with whom he lived, the court stopped short of applying a traditional "best interests" child custody standard. The judge states that it is impossible to truly determine what is in a dog's best interests and that the subjective factors that are key to a best interests analysis—particularly those concerning a child's feelings or perceptions—are unascertainable when the subject is an animal.

Judicial resources are also cited as a major concern in limiting the scope of the standard applied in pet-related disputes. A court needs a tremendous amount of information in child custody disputes, often necessitating the appointment of an attorney for the child and a forensic psychologist, collateral interviews, testimony, and possibly *in camera* proceedings with the children themselves. Justice Cooper notes that our court system is already overwhelmed with child custody cases and to allow full-blown "dog custody" cases in which the same "best interests" analysis is applied would further burden the courts to the detriment of children.

Cooper also recognizes the reality that significant judicial resources are already devoted to matters such as who gets a luxury car or second home, and therefore room should rightly be made in order to give real consideration to a case involving a treasured pet.

Accordingly, Justice Cooper granted the parties a full one-day hearing, where he would apply a "best for all concerned" standard. Each side would have the opportunity to prove why she would benefit from having the dog and why the dog would have a better chance of living, prospering, loving and being loved in her care. The judge advised the parties to address questions such as: Who bore the major responsibility for meeting Joey's needs (feeding, walking, grooming, trips to the veterinarian)? Who spent more time with Joey on a regular basis? Why did Ms. Travis leave Joey with Ms. Murray at the time of separation? Why did Ms. Murray send Joey to live in Maine with her mother rather than have him stay with her or Ms. Travis in New York?

The judge made it clear that the hearing would result in only one party retaining sole possession of the dog and that he would not entertain any kind of joint custody or visitation arrangements, which would result in both parties remaining involved in the dog's life, thus inviting post-judgment litigation. Again, Justice Cooper voiced his concern that judicial resources in cases of pet disputes be limited, stating that "while children are important enough to merit endless litigation, as unfortunate as that may be, dogs, as wonderful as they are, simply do not rise to that level of importance."

Shortly after receiving the decision, Ms. Travis and Ms. Murray settled privately with the aid of their attorneys. Rhonda Panken, Esq. represented Ms. Travis and I represented Ms. Murray. While the hearing was ultimately unnecessary, Justice Cooper has indeed crafted a thoughtful and thorough analysis that should help both courts and practitioners deal more successfully with disputes over beloved pets in the wake of a divorce.

Endnotes

1. 42 Misc 3d 447 (Sup Ct NY Co 2013).
2. John Homans, *The Rise of Dog Identity Politics*, New York, Feb. 1, 2010; Gregory Berns, *Dogs Are People, Too*, New York Times, Oct. 6, 2013; Alexandra Zissu, *After the Breakup, Here Comes the Joint-Custody Pet*, New York Times, Aug. 22, 1999.
3. Ann Hartwell Britton, *Bones of Contention: Custody of Family Pets*, 20 J. Am. Acad. Matrim. Law 1 (2006); Derek Thompson, TheAtlantic.com, *These 4 Charts Explain Exactly How Americans Spend $52 Billion on Our Pets in a Year*, http://www.theatlantic.com/business/archive/2013/02/these-4-charts-explain-exactly-how-americans-spend-52-billion-on-our-pets-in-a-year/273446/(Feb. 23, 2013).
4. *See Mullaly v. People*, 86 NY 365 [1881]; *Schrage v. Hatzlacha Cab Corp.*, 13 AD3d 150 (1st Dept 2004); *Rowan v. Sussdorff*, 147 App Div 673 (2d Dept 1911); *ATM One, LLC v. Albano*, 2001 NY Slip Op 50103[U] [Nassau Dist Ct 2001].
5. *See, e.g., Jason v. Parks*, 224 AD2d 494 (2d Dept 1996); *Mercurio v. Weber*, 2003 NY Slip Op 51036[U] (Nassau Dis Ct 2003); *Merriam v. Johnson*, 116 App Div 336 (1st Dept 1906); *LeConte v. Lee*, 35 Misc 3d 286 (Civ Ct, NY County 2011); *Webb v. Papaspiridakos*, 23 Misc 3d 1136[A], 2009 NY Slip Op 51152[U] (Sup Ct, Queens County 2009); *Saunders v. Reeger*, 50 Misc 2d 850 (Suffolk Dist Ct 1966).
6. *C.R.S. v. T.K.S.*, 192 Misc 2d 547 (Sup Ct, NY County 2002).
7. 97 Misc 2d 530 (Civ Ct, Queens County 1979).
8. 59 AD3d 68 (2d Dept 2008).
9. *See e.g., Juelfs v. Gough*, 41 P3d 593 (Alaska 2002) (granting "sole custody" of a dog to ex-husband); *Van Arsdale v. Van Arsdale*, 2013 WL 1365358, *4 (2013), 2013 Conn Super LEXIS 574 (granting "joint legal custody" of dogs, with "principal place of residence" to plaintiff); *Placey v. Placey*, 51 So3d 374 (Ala Ct Civ App 2010) (awarding dog to one party, expressly referring to the "best interests" of the dog).
10. *See e.g., Desanctis v. Pritchard*, 803 A2d 230, 232 (Pa Super Ct 2002) (declining to award "shared custody" of a dog because he is "personal property," such as a table or lamp); *Clark v. McGinnis*, 298 P3d 1137 (Kan Ct App 2013) (declining to award custody of a dog, holding that the "argument that child custody laws should be applied to dogs is a flawed argument").
11. 264 AD2d 340 (1st Dept 1999).

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Immigration Law: On Your Turf

By Anna K. McLeod

In our profession there is increasing pressure to specialize in a particular practice area. While dedication to one practice area may build expertise more quickly and avoid the skepticism met by "jack-of-all-trades" lawyers, ample exposure to other relevant practice areas is necessary to best serve your client. U.S. immigration law is one such body of law that intersects with a variety of other disciplines. We need not stumble across these intersections, but rather we should see them up ahead and prepare for the ways they may complicate our devised strategy for accomplishing our clients' goals.

This article intends to better prepare young lawyers to see the intersections between their practice areas and immigration law, demystify immigration law (to a degree), and urge diligent study of these intersections and others to protect your client.

Immigration Law Today: Overview of the Law and Agencies

The basic body of our nation's immigration laws is the Immigration and Nationality Act (INA).[1] It was passed by Congress in 1952 and consolidated and codified many existing provisions regarding immigration. It has been amended several times since 1952, most notably by the Immigration Reform and Control Act of 1986[2] (IRCA), and with the latest overhaul in 1996, known as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[3] (IIRAIRA).

Generally speaking, our U.S. immigration system is divided into three parts: family-based immigration, employment-based immigration, and miscellaneous (nonimmigrants). Foreign nationals (here to mean everyone but U.S. citizens and U.S. nationals) may immigrate to the U.S. on the basis of a qualifying familial relationship, qualifying employment relationship, or due to particular individualized circumstances which provide for nonimmigrant status for a period and eventual eligibility to apply for lawful permanent residence on the basis of the nonimmigrant status.[4] To immigrate is to come to the U.S. with the intent to permanently reside here.[5]

However, nonimmigrants are generally defined by the fact that they have a foreign residence that they do not intend to abandon.[6] The dichotomy between immigrants and nonimmigrants is an important one because of the rights generally available to each group. Lawful Permanent Residents (LPRs), or green card holders, have the right to live and work freely in the U.S. and apply for citizenship once they meet the several requirements, including the accrual of the requisite time in the U.S. as a lawful permanent resident.[7]

By way of example, the three facets of our immigration system include the following scenarios:

(1) John Smith, U.S. Citizen, petitions for his wife, Bella Italiana, a national of Italy. John Smith and Bella Italiana's marriage provides a qualifying relationship that is the basis for a family-based green card case for Ms. Italiana.[8]

(2) Ms. Bella Italiana is employed as a doctor for a U.S. employer; the U.S. employer may file a petition for her establishing the foundation for an employment-based (EB) green card case.[9]

(3) Lastly, the miscellaneous category I mentioned above includes an alphabet soup of nonimmigrant visa categories with a variety of requirements. One such nonimmigrant status is the U visa.[10] The U visa provides nonimmigrant status to undocumented victims of certain qualifying crimes following cooperation with law enforcement in the investigation of the crime committed against them.[11] The U nonimmigrant status is not lawful permanent residence, but after 3 years of continuous presence in the U.S. in U nonimmigrant status, he or she may apply for lawful permanent residence based on his or her U nonimmigrant status.[12] This lawful immigration status is independent of her employer or her family members; rather, the U visa, like other nonimmigrant visas in the alphabet soup, is based on a particular set of individualized circumstances.

There are several federal agencies which handle various aspects of the immigration system. For example, the Department of Labor manages the Program Electronic Review Management (PERM) process, a necessary step for many employment-based lawful permanent resident cases, or "green card" cases. The Department of Homeland Security houses several component agencies, including the United States Citizenship and Immigration Service (USCIS), U.S. Customs and Border Patrol (CBP), and U.S. Immigration and Customs Enforcement (ICE). In addition to these agencies, the Department of State is typically involved in an immigrant's lawful journey to the U.S. Each agency's functions affect the lives of immigrants in different ways.

Family Law

Our family-based immigration system is predicated upon familial relationships, formed through birth, marriage, and adoption.[13] The INA defines "child," "spouse," "parent" and other key terms for the purposes of determining qualifying relationships.[14] To derive a benefit from a child, the parent must meet the INA definition of parent.[15] "She has his eyes" just will not cut it. Therefore, a paternity action or court action to legitimate the child under state law of the child's domicile may be necessary to establish the parent-child relationship under the INA.[16]

Marriage has long been recognized as a "social relation subject to the State's police power"[17] and so marriage is largely a matter of state law. For immigration purposes, the analysis of whether a marriage is valid for immigration purposes hinges on whether the marriage is valid according to the laws of the place of celebration.[18] Also, when assessing the validity of a marriage, any prior divorces must be valid, that is, the divorce must be valid under the laws of the jurisdiction granting the divorce.[19] The validity of remarriage depends on the laws of the state of remarriage, and depending on said state's laws, if the prior divorce was not final at time of remarriage, the remarriage may be voidable not void.[20] Each formation and dissolution of a marriage must be done correctly according to state law or there are profound limitations to family-based immigration options. Also, few shocks are as problematic as learning a U.S. citizen spouse is not actually a spouse.

I can recall an instance when I was representing a couple who were victims of a qualifying crime for U nonimmigrant status. The woman was the principal applicant, and she planned to petition for her husband to be granted derivative U nonimmigrant status. However, after obtaining the signed U visa law enforcement certification, we learned that the couple was not in fact legally married. The "husband" was still married to his estranged wife. They had been living separate lives for over 15 years and he had fathered three children with his current "wife," though they were not legally married. "Husband" needed to divorce and remarry within 6 months in order to be the beneficiary of a derivative U visa petition as planned. A U visa certification, which is signed by law enforcement, expires after 6 months, so time was of the essence.[21] It was critical that we find a family lawyer who could swiftly assist the client in filing for divorce and see the matter to its conclusion. For this and many other reasons, family lawyers must ensure that their clients' marriages and divorces comply with the relevant state law or else a family-based petition will not be granted for lack of a qualifying relationship. The burden of proof is on the petitioner[22] and the qualifying relationship must be established by "clear and convincing evidence."[23] Often there is no time for hiccups.

Domestic violence is another relevant family law topic. It intersects squarely with immigration law due to the previously mentioned U visa and the Violence Against Women Act (VAWA) self-petition.[24] In the case of the U, filing a Domestic Violence Protective Order is cooperation with a qualifying "certifying agency"[25] (court) and assists in the detection of a qualifying crime (domestic violence). Also, a VAWA self-petition is available for an abused spouse of a U.S. citizen or LPR.[26] Child custody is another family law matter that can substantially affect a child's immigration options. For example, changes in child custody may provide the basis for automatic U.S. citizenship for certain minors under the Child Citizenship Act of 2000.[27] Needless to say, quality representation in the family law arena can profoundly affect foreign nationals' immigration options.

Criminal Law

The U.S. Supreme Court recognized in *Padilla v. Kentucky* that "[t]he importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[28] When deportation is one of the most severe consequences of a criminal conviction, and is swiftly handed down under today's immigration laws Sixth Amendment protection against ineffective assistance of counsel is triggered for the non-citizen client. Therefore, when criminal counsel advises her non-citizen criminal defendant client regarding the consequences of a particular plea deal, she must provide assistance that does not run afoul of the standard set out in *Strickland v. Washington*.[29] Under *Padilla*, when the consequences are clear, criminal defense counsel must provide correct advice to her noncitizen criminal defendant client regarding the immigration consequences of the particular plea deal. Also, when the consequences are not clear, criminal defense counsel has a duty to inform her client that the consequences are not clear but the plea deal in question "may carry a risk of adverse immigration consequences."[30] Although the duty of criminal counsel established under *Padilla* is not retroactive,[31] as of the *Padilla* decision, criminal counsel must familiarize themselves with the immigration consequences of criminal activity and be prepared to advise their client correctly.[32] Increased cooperation between the criminal defense bar and the immigration bar is crucial to ensure the full protections guaranteed by the Sixth Amendment are available to each represented criminal defendant. With deportation and exile on the line, the stakes are high.

Business Law

Within the alphabet soup of nonimmigrant visas, there is a core group of visas (E, H, L) based on an employer-employee relationship.[33] For example, where Alpha U.S. Company is 100% owned by Alpha Foreign Company, the predicate ownership relationship exists between a foreign entity (sending company) and a domestic entity (receiving company). After Mr. High Achiever has been with Alpha Foreign Company for a year in a qualifying position, he may qualify to be an "intra-company transferee," the shorthand term for an L visa.[34] Due to the ownership relationship between the foreign entity and the U.S. entity, the U.S. entity can petition for Mr. Achiever to work in the U.S. in a qualifying position on L nonimmigrant status. However, if Alpha Foreign Company is bought by another U.S. company, then there is no requisite foreign entity, even though Mr. Achiever may already be working the U.S. for Alpha U.S. Company. This sale undermines Mr. Achiever's status and he is no longer authorized to work in the U.S. on the L visa. Additionally, any filed green card case based on this intra-company transferee status has vanished. This is just one example of how corporate ownership structures

are foundational components to certain immigration benefits. Therefore, U.S. employers of foreign national workers must carefully assess how business decisions create or limit opportunities for their foreign national workers and at what cost.

Employment Law

In 1986, IRCA created the obligation for employers to verify the identity and work authorization of their employees and prohibited them from hiring unauthorized aliens.[35] Thus, the I-9 form is born.[36] The form has various fields for the employee and the employer to complete. It is very important for companies to properly train their human resources personnel to manage I-9 compliance.[37] Employers have responsibilities with regards to the proper completion, handling, updating, and retaining of an I-9 form. Writing "U.S. Gov" instead of "SSA" or "Social Security Administration" as the issuing authority on List C of the form is considered a technical violation, one that can be remedied, but when uncorrected and appearing throughout the entire batch of I-9s, the civil fines could quickly add up. The form I-9 is a liability minefield for employers who neglect to properly train their human resource personnel.

Involved in verifying identity and work authorization of a new hire is the examination of documents. Foreign nationals will have more documents to present because U.S. citizens can prove identity and work authorization with one document: a U.S. passport. When asking a new hire to complete the I-9, the employer should merely give the I-9 form (with instructions) to the employee, and complete Section 2 of the form with the documents the employee chooses to provide. Requiring certain documents or more documents than necessary ("document abuse") is a recipe for possible civil liability under the anti-discrimination law.[38]

The key is for companies to establish consistent HR practices with regards to the I-9 completion process. There are ample tools available online to do this.[39] Multiple individuals with disparate practices generate incomplete and incorrect I-9s and in the event of an ICE audit, only 3 days' notice is required before the I-9s must be produced pursuant to a Notice of Inspection.[40] Therefore, centralizing the I-9 management process is recommended in order to avoid costly errors and potential liability for discriminatory practices.

Generally speaking, consistency is the name of the game with foreign national workers. Employers should apply the same policies and procedures to foreign national workers as to U.S. citizens in order to avoid exposure to discrimination liability. Establishing and abiding by procedures is crucial in other contexts, too (e-verify compliance, employment contracts, and applicable federal and state labor laws). Be correct in your I-9 practices, but if you cannot be correct, be consistent. With documented efforts at correct procedures and consistent application of the procedures the employer believes to be correct, the employer may be able to negotiate a reduced fine from ICE following an ugly audit.

Tax Law

Tax law and immigration law commonly intersect because each actor, be it a company or a foreign national, wishes to understand the tax consequences of a particular action. Confusion regarding the tax treatment of foreign nationals begins with the fact that the same key terms in each realm have different meanings. For example, a basic tax treatment inquiry is whether the individual is a U.S. resident or a U.S. non-resident under the Internal Revenue Code (I.R.C.). I.R.C. § 7701(b) defines each of these terms. However, U.S. resident under the I.R.C. is not exclusively applicable to U.S. citizens and "lawful permanent residents" (LPRs). In fact, a U.S. resident under the I.R.C. includes U.S. citizens, lawful permanent residents, and individuals who meet the substantial presence test[41] set forth in the I.R.C.[42] Further complicating the issue, there are exceptions to the substantial presence test.[43]

The U.S. resident versus U.S. nonresident distinction is crucial because U.S. residents are taxed on their worldwide income, while U.S. nonresidents are solely taxed by the Internal Revenue Service on their U.S. earned income. Another term affecting tax deductions which has a different definition under the INA is "dependent." In immigration law, one's dependents may include spouse or children who are going to piggy-back onto a particular immigrant visa petition, for example, or who are considered "derivatives" of the principal applicant for a particular visa application. It is possible for someone to be a dependent of a foreign national for immigration purposes but not her dependent for tax purposes.

Because tax treatment often is a factor in foreign nationals' decision-making, companies and others transacting with these individuals need to be conscious of the issue. Finally, the tax treatment of foreign nationals is relevant to employers for W-4 compliance and withholdings purposes, since "foreign persons" receive different withholding treatment than "U.S. persons."[44] Again, the immigration categories are imperfect indicators of tax treatment.

Conclusion

As you can see from this sampler of intersections between immigration law and other bodies of law, there is need for study and collaboration. When distinguishing yourself in your respective practice area, please remember that the trust your client places in you is not bound to one practice area, but demands that you keep your eyes ahead and do your best to anticipate issues, even if you must call on a colleague to fully address the issue.

Endnotes

1. 8 U.S.C. § 1101-1537.
2. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 STAT. 3445.

3. Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 STAT. 3009.
4. 8 U.S.C. § 1153.
5. 8 U.S.C. § 1101 (a)(15)(B).
6. *Id.*
7. 8 U.S.C. § 1427(a)(1); 8 U.S.C § 1430(a).
8. This is an example of an Immigrant Visa Petition filed pursuant to INA § 204(a)(1)(A) on behalf of an "immediate relative" as defined under INA 201(b)(2)(A).
9. Green card cases, by their very nature, require an immigrant visa number. However, the speed at which a beneficiary can obtain an immigrant visa number depends on the type of qualifying relationship she has with a U.S. employer or family member (U.S. citizen or LPR). *See* 8 U.S.C. § 1153 for annual allocation of visas per year.
10. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 22 U.S.C. § 7101 et seq.
11. 8 U.S.C. § 101(a)(15)(U).
12. 8 C.F.R. § 245.24(b).
13. The Hague Adoption Convention entered into force in the U.S. on April 1, 2008, so petitions filed with USCIS after that date must conform to the Hague process, where home country is also a party to the Convention, in order for the immigration benefits to follow based upon the familial relationships established in the INA. *See* http://www.uscis.gov/adoption/immigration-through-adoption/hague-process.
14. 8 U.S.C. § 1101(a).
15. 8 U.S.C. § 1101(b).
16. *See* 8 U.S.C. § 1101(b) and (c) for definitions of child use within the various titles of the INA.
17. *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (citing *Maynard v. Hill*, 125 U.S. 190 (1888)).
18. *See* 9 FAM 40.1 N1.1(b); see also *U.S. v. Gomez-Orozco*, 289 F. Supp. 2d 1092 (C.D. Ill. 1998), *rev'd on other grounds*, 188 F.3d 422 (7th Cir. 1999); *In re Ceballos*, 16 I&N Dec. 765 (BIA 1976); *see also* http://www.uscis.gov/family/same-sex-marriages, USCIS's Statement on July 1, 2013 from Secretary of Homeland Security Janet Napolitano regarding USCIS's implementation of U.S. Supreme Court decision in *U.S. v. Windsor*, 570 U.S. __ (2013), confirming that, generally, the place of celebration determines the validity of a marriage for immigration purposes.
19. *In re Hamm*, 18 I&N Dec. 196 (BIA 1982); *In re Miraldo*, 14 I&N Dec. 704 (BIA 1974); *In re Karim*, 14 I&N Dec. 417 (BIA 1973); *In re Darwish*, 14 I&N Dec. 307 (BIA 1973).
20. *In re Arenas*, 15 I&N Dec. 385, 386 (BIA 1983).
21. http://www.uscis.gov/sites/default/files/files/form/i-918instr.pdf.
22. *In re Brantigan*, 11 I&N Dec. 493 (BIA 1966); *In re Ma*, 20 I&N Dec. 394 (BIA 1991).
23. *Id.*
24. 8 U.S.C. § 1154(a)(1)(A)(iii).
25. 8 C.F.R. § 214.14(a)(2).
26. *Id.*
27. *See* 8 U.S.C. § 1431; s*ee also* 8 C.F.R. § 320.2.
28. *Padilla v. Kentucky*, 559 U.S. 356, 6 (2010).
29. *Strickland v. Washington*, 466 U.S. 668 (1984).
30. *Padilla*, 559 U.S. at 12.
31. *Chaidez v. U.S.*, 568 U.S. __ (2013).
32. *See* INA § 212(a) and INA § 237(a) for the criminal grounds of inadmissibility, applicable to individuals not "admitted" to the U.S., and the criminal grounds of deportability, applicable to lawful permanent residents, respectively.
33. 8 U.S.C. § 1101(a)(E), (H), (L).
34. 8 U.S.C. § 1101(a)(L).
35. Immigration Reform and Control Act, Pub. L. 99-603, 100 Stat. 359.
36. 8 C.F.R. Part 274(a)(2)(a)(2). Employer must complete the I-9 form for every new hire after November 6, 1986.
37. 8 U.S.C. § 1324(a) establishes the imposition of civil penalties for various specified unlawful acts related to the employment eligibility verification process (i.e. Form I-9) and the employment of unauthorized aliens.

    ICE conducts an investigation or "audit" and initiates the process for imposing civil monetary penalties with respect to employer sanctions under section 274A of the INA and 8 C.F.R. Part 274a. 8 U.S.C. § 1324(b) establishes the imposition of civil penalties for specified actions constituting immigration-related unfair employment practices. The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) is responsible for investigating alleged violations of § 1324(b), and is authorized to file a complaint to initiate a civil penalty proceeding. 8 U.S.C. § 1324(c) provides for imposition of civil penalties for specified actions relating to immigration-related document fraud. ICE conducts the investigations and initiates the process for imposing civil money penalties with respect to document fraud under section 1324(c) and 8 C.F.R. part 270.
38. Immigration Act of 1990, Pub. L. 101-649, Sec. 535(a), created the prohibition of document abuse, which prohibits discriminatory documentary practices during the employment eligibility verification process.
39. United States Citizenship and Immigration Service, M-274 (Rev. 04/30/13), Handbook for Employers: Guidance for Completing Form I-9 (Employment Eligibility Verification Form), available at http://www.uscis.gov/sites/default/files/files/form/m-274.pdf.
40. United States Immigration and Customs Enforcement, I-9 Inspection Fact Sheet, http://www.ice.gov/news/library/factsheets/i9-inspection.htm.
41. Internal Revenue Service, "The Green Card Test and the Substantial Presence Test," http://www.irs.gov/Individuals/International-Taxpayers/The-Green-Card-Test-and-the-Substantial-Presence-Test (Page Last Reviewed or Updated: 22-Apr-2013).
42. I.R.C. § 7701(b)(3).
43. The exceptions to the substantial presence test available to aliens are found at I.R.C. § 7701(b)(3)(B) and (C) and I.R.C. § 7701(b)(5)(D) and (E). For foreign nationals, the most common exceptions are for certain students (e.g., F or J nonimmigrant status) who meet certain requirements and I.R.C. § 7701(b)(5)(D) and (E).
44. I.R.C. §§ 1441-1443.

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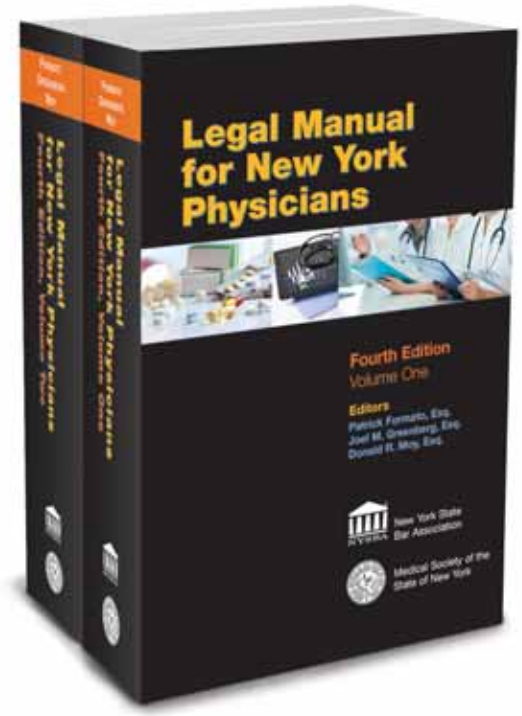

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