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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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A Message from the Section Chair

As you may know, Stephen G. Brooks has been a Co-Editor of *The Senior Lawyer* along with Willard H. DaSilva. Our Section and our publication have been the beneficiaries of Stephen's talent, dedication and commitment for several years. With many thanks to Stephen for his service, I have regretfully accepted his resignation as Co-Editor. However, Stephen will continue to be active in our Section, and Willard, who has been the Editor/Co-Editor since our inception, will continue with consummate professionalism in his position.

In this issue of *The Senior Lawyer* Willard has continued the practice of presenting articles on a wide variety of topics intended to reflect and address the diverse interests of our Section members. Among those topics in this issue are: ethical and security considerations in the use of email; estate planning and tax tips for non-traditional families; ethical boundaries in settlement discussions; and Medicaid recoveries, liens and strategies. If you come across an article which you think would be of interest to our Section members, please feel free to bring this to Willard's attention and, as always, we welcome the submission of original articles for consideration.

In addition to articles, this issue of *The Senior Lawyer* debuts a column written by Rosemary Byrne, Esq., Step-By-Step Coaching (and our Section's Vice President). The column, "On Seniority," will focus on personal issues of interest to our Section members, such as finding a balance in, and enjoying, life regardless of whether the plan includes retirement; the experiences of other attorneys in transition/retirement; professional and/or personal downsizing; travel and other recreational activities; pro bono opportunities; etc. Rosemary is interested in hearing from you as to any questions or issues you would like her to address, as well as any insights or experiences you would like to share. You can reach her at rcb@sbscoaching.com.

As to our CLE programs, on October 28, 2015 we presented our Fall program in New York City, "Retirement Planning for Clients and the Senior Lawyer: The Legal, Financial, Estate Tax and Long Term Care Planning Implications for Clients and Prospective Retirees." This all-day program included social security issues, basics of retirement plans and IRA distribution rules, relevant Medicaid and long term care concerns, and ethical issues incident to retirement from the practice of law. The program was videotaped so that Section members unable to attend in person can access this very comprehensive treatment of retirement planning issues.

In the past our Annual Meeting program has been on Tuesday; however, as of 2016 the program will be on Thursday, in the morning; the date for 2016 is January 28th. Planning is under way for that program; any suggestions you may have for topics and/or speakers for that program, or for future programs, would be welcomed by Anthony J. Enea, Chair of our Program and CLE Committee (aenea@aol.com).

I hope that you enjoy this issue of *The Senior Lawyer*, and I look forward to seeing you at our January 28, 2016 Annual Meeting program.

Carole A. Burns

A Message from the Editor

Have you noticed that time goes faster as we grow older? Yet, despite the accelerated passage of time, we somehow do not feel older. And so it is with this publication. I have been an editor since its inception more than a decade ago. It seems like only yesterday.

During the past decade, I and other editors have solicited original articles. Although the response has not been overwhelming, nevertheless this publication has featured custom written articles for our Section, as well as articles of particular interest to the "senior lawyer" that have been published elsewhere.

It is now time for us—all of us—to develop a singular and unique publication that focuses on the needs and desires of the members of our Section—articles not only relating to legal subjects, but those that can be useful in other pursuits and interests.

For example, vacation time becomes more available as we grow older. I, for one, enjoy the benefit of knowing where some of you have traveled and of your other activities that are not necessarily legal in nature but, nevertheless, are of interest to us.

As we grow older (my father always reminded me that "we don't grow younger"), interests other than the routine practice of law become more important. I, for one, would like to know what other "senior" lawyers have done as they began to ease out of the routine practice of law and have looked to other areas of interest.

Now that "presumably" we have more personal nonlegal time, more time can be spent on the golf course, travel, catering to grandchildren, pursuing hobbies, problems with aging parents—all of the vicissitudes of life of a person who qualifies as a "senior lawyer."

The tales of those experiences are of great interest to other "seniors" as law practices are being to some degree phased down or phased out.

One of the most important articles for seniors—our lead article in this issue of *The Senior Lawyer*—is a prime example of (1) how we can be productive in a meaningful way; and (2) how we can furnish to people in need of legal help the kind of support or legal activity to make their lives easier, more productive, less stressful, etc..

The superb article, one of the best ever to appear in this publication, is entitled "There May Be A Help Center in Your Future," written by C. Bruce Lawrence, an attorney in Rochester, New York. It serves as a guide for all of us to be of value to persons needing competent legal help by an experienced attorney and have the financial means to pay little or nothing for sorely needed legal services. The article is an inspiration and a guideline for each of us "to make a difference."

Other articles in this issue of *The Senior Lawyer* include:

- Ethical Boundaries in Settlement Discussions;
- The Adequacy of Expert Disclosure in Motion Practice;
- Matrimonial Actions and the Use of Supplemental Needs Trusts for Individuals with Disabilities;
- The End of Conflicts of Interest?: Courts Warm Up to Advance Waivers;
- Will Intoxication Negate Depraved Indifference in Alcohol-Based Motor Vehicle Fatalities?;
- Unforseen Practical Ramifications of Accepting an Adjournment in Contemplation of Dismissal;
- Lawyers and Email: Ethical and Security Considerations; and
- Medicaid Recoveries, Liens and Strategies.

Look around. If you have or have had a case or legal experience where the issues can be shared with others, an article is a "cinch" to write. The toughest part is to put a pencil to paper (or typing the keys of a computer).

I look forward to hearing from all or any of you who care about the practice of law as a profession—and want to make a difference.

Willard H. DaSilva

On Seniority

By Rosemary Byrne

I'm pleased to introduce this new feature of *The Senior Lawyer.* These pages will be by, for and about us—the over 2,600 members of the Senior Lawyers Section. They will be more about our lives and our futures than about the law. With your help, they will be a mélange of articles, information, experiences and advice for and about baby boomers (and beyond)—those who are now on the other side of 55—those who have achieved *Seniority*.

The Name Game

I thought long and hard about what to call this feature. We are in a profession in which words matter. References to retirement and old age just don't seem to resonate for me. Visions of rocking chairs dance in my head when I think of retirement! For many of us these terms are laden with negative stereotypes dating from our parent's or grandparent's generation. After considering the range of euphemisms about this stage of our lives, which typically include "the next steps," "the third age," or "the encore years," I returned to my personal favorite and opted for "seniority." As defined by the folks at Merriam-Webster seniority is, *inter alia,* "a ***privileged status*** attained by a length of continuous service." Of course, the emphasis is added.

Consider that federal judges achieve "senior status" based upon their age and length of service. As senior judges they do whatever the Chief Judge asks them to do that they are willing and able to do. Doing whatever I am willing and intellectually, physically and financially able to do seems to me like a good life model for the next several decades.

So, *WELCOME TO SENIORITY!*

Introductions

Since this is a column "all about us," let me introduce myself and give you a bit of my "senior life" story. I am a baby boomer graduate of Cardozo Law School and began my career as a law clerk in the Southern District of New York. After spending seven or eight years as a litigator at a large Wall Street law firm, I joined a small private investment bank, one of our clients, as General Counsel. I completed hundreds (perhaps even thousands) of equity financing transactions in the area of affordable housing.

After almost three decades of practice, there came a time when I realized that, even though I enjoyed my work, there needed to be more to life for me than practicing law. I wanted less time commuting in traffic on the GW Bridge and more time to do those things I always wanted to do but never quite found the time to pursue. Traditional retirement—not working—was not an option I even considered. I decided to downsize my lawyering in Westchester and took (and, thankfully, passed) the New Jersey Bar, thereby creating the option of practicing in my home state. Taking stock of my expertise and skills and analyzing what I enjoyed most (and least) about lawyering, I next focused on exploring career alternatives and possibilities that would match my skill set and values. All of this led me to a place I never thought I'd be—becoming an NYU-certified life and retirement coach.

Although I continue to practice law part-time for my former employer, the bulk of my time is now spent assisting lawyers and other senior business professionals seeking to explore what's next in their personal and professional lives. I also spend significant amounts of time working in the areas of zoning and land use law as chair of the Zoning Board in my New Jersey hometown. In addition to studying history at Fordham University's College at 60 (a great program—check it out at www.fordham.edu/collegeat60), I travel extensively and love to share travel destinations, experiences and photos. Perhaps in my next career I will be a history teacher or a travel agent!

But, enough about me—

Thoughts About Us—*What Will We Need in Seniority*?

Given today's demographics and longevity tables, *our seniority could span a period of 25 or 30 years*. As we reach seniority, many of us ponder traditional retirement, changing careers, cutting back, or downsizing—thoughts that inevitably lead us to question whether we can afford such a move and what we would do instead.

As a coach, I work with clients to explore what they want to do, who they want to be and what they will need in their seniority. Together we develop a plan to achieve those objectives. Of course, just as there is no "one size fits all" seniority, there is no single game changing strategy for a successful senior life. There are, however, common and basic components which, in varying degrees, we are all likely to need. Hopefully, this list of key ingredients for success will assist you as you consider and develop your own game plan.

- *Money*—Not surprisingly, this tops the list. You need enough to satisfy the seniority plan you design; it may be less than you think! Start your planning by tracking your expenses for several months, or even a year, before you think you might transition. This will help clarify your senior life options.
- *Good health and fitness*—Treasure them if you have them; strive to achieve them if you don't. Smoking

and excess weight are life and lifestyle threatening. Physical activity, even moderate walking 3 or 4 times a week, is crucial to maintaining longevity, and physical, psychological and intellectual good health. Indeed, many believe that exercise is the "new fountain of youth." Start now to include time for it in your life.

- *A strong social network of family and friends*—These relationships are crucial to our seniority and they tend to wither unless they are nurtured. Expand and maintain your circle of friends, family and acquaintances as you age.
- *Activities that provide structure*—Work and work-related activities typically consume sixty or seventy hours a week and provide the structure for our days. They involve scores of habits and behavior patterns that disappear if we choose (or are forced) to work part-time or not at all. Give thought to pursuing activities that occur on a regular basis to provide some much needed structure.
- *Intellectual stimulation*—The need for challenging intellectual activities doesn't end because one decides not to work or to work in a less intellectually stimulating or challenging environment. Think of the brain as a muscle. Like any other muscle it atrophies if it is not used and can be strengthened if it is. Look for opportunities to exercise your intellect.
- *A means to maintain a sense of identity and self-worth*—Many of us derive our *persona* and sense of accomplishment from our professional activities. It is critical to determine how we will define ourselves, particularly if we cease working in our prior position or in any position at all. Those who "live to work" and largely define themselves by their work will need to develop other outlets for self-actualization. Volunteerism or a new entrepreneurial venture may be useful options. Explore those alternatives before you downsize your firm or practice.
- *A well-planned home environment and location*—In consultation with your spouse or partner, determine whether and to what extent you want to relocate. Consider the cost of living, proximity to family and friends, the availability of medical facilities and your climate preferences.
- *Good insurance*—Know your retiree medical and health benefits, as well as your Medicare options. Weigh the value and costs of long-term care insurance.
- *A vision for the future you want and the flexibility to adapt and modify it*—Senior life, whether or not it involves traditional retirement, is a very personal journey which can be challenging, daunting, frightening and exciting. It can take many paths and directions. It is virtually impossible to plan for all the contingencies of our seniority. Variables such as health, the economy, and our family situation may, and likely will, change. One thing is virtually certain, however: if you start with a plan, if you know what you want and need and value in senior life, you will have a good foundation upon which to apply the flexibility needed to modify the plan as circumstances require.
- *The confidence to use your resources to pursue the life you want*—We return to money. Making and saving money are often far easier than spending it, and spending in seniority is particularly difficult. Regardless of how successful your financial planning may have been, it is important to use and enjoy what you have. Remember why you engaged in wealth building in the first place. Most likely, you worked more than ninety thousand hours in your legal career and diligently saved to enable you to enjoy life as a senior. Use what you have spent a lifetime acquiring to manage your senior life in the most satisfying and fulfilling way your resources allow.

In sum, the definitions and measures of success in seniority are unique to each of us. We all have our own version of what we will want to do and what we may be physically, financially, intellectually and emotionally able to do as we age. For each of us, however, the process starts with thinking about and recognizing the inevitability of change and the need to perceive, consider and weigh our options and plan accordingly. Ideally, we will each have the work/life/leisure balance we choose and the financial and social support to maintain it.

I look forward to hearing your thoughts on this column and invite you to submit articles, anecdotes, and questions of interest to you. Have you faced a particular issue as a senior, had a successful (or unsuccessful) downsizing of your current home or firm, begun a new career, started a new business or had a travel experience you would like to share? We also look forward to hearing of your pro bono work, part-time lawyering or traditional retirement.

You can email me at rcb@sbscoaching.com.

Until next time—

Rosemary

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 and Quality of Life Planning Committee. She is a graduate of the Benjamin N. Cardozo School of Law and served as 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" appeared in *Experience* magazine, published by the ABA.

There May Be a Help Center in Your Future

By C. Bruce Lawrence

Senior lawyers are just as committed to Access to Justice as younger lawyers, but they may have different concerns about how best for them to help the unrepresented person in need. Chief Judge Lippman in his address to the House of Delegates in New York City on January 30, 2015 spoke of an unmet need, where legal service agencies, because of inadequate resources, turn away as many potential clients as they are able to represent.

Part of the solution to this problem is additional attorney *pro bono* efforts. In New York all admitted attorneys have a *pro bono* aspirational goal, as set forth in the New York Rules of Professional Conduct:

RULE 6.1: Voluntary Pro Bono Service

"Lawyers are strongly encouraged to provide pro bono legal services to benefit poor persons. (a) Every lawyer should aspire to: (1) provide at least 50 hours of pro bono legal services each year to poor persons; and…."

Many of us find it easier and more efficient to do our *pro bono* volunteering in practice areas where we are proficient. That doesn't work when your practice area doesn't coincide with the needs of the poor (i.e., patent litigation). Many *pro bono* legal service agencies run training programs where you can learn how to assist in needed legal areas like matrimonial, support, debt relief, or landlord-tenant.

I serve on the board of one such agency, the Volunteer Legal Service Program (VLSP) of Rochester, NY. We find that there is clearly a reluctance of attorneys to tackle new areas of representation despite the existence of mentors, free CLE courses and free malpractice insurance. This is particularly true of senior lawyers. Sort of an "old dogs don't really want to learn new tricks." And no one wants to make a legal mistake that injures a client.

Then there is the concern about how complex a *pro bono* case may turn out to be, taking on an open-ended time commitment. While there is some movement to allowing *pro bono* attorneys to take just discrete parts of a client's representation (unbundled legal services) this can be a concept that is somewhat unsettling to both the attorney and the client.

Additional concerns for senior attorneys can be issues of time commitment while trying to cut back on working hours, increasing health issues, desire to travel more, assisting in care of family members from aging parents to new grandchildren, or just wanting to take educational courses, get more exercise, etc.

There is an opportunity that I am suggesting senior lawyers consider as part of your *pro bono* activities—helping the unrepresented client in a neighborhood help center. New York has, through the Office of Court Administration (OCA), encouraged the development of legal help centers across the state. These are drop in, no appointment necessary, places for the unrepresented to go to find out how to address their legal problems. They frequently rely on volunteer attorney's efforts. As described on the nycourts.gov website (http://www.nycourts.gov/courthelp/goingtocourt/helpcenters.shtml): "Some courts have Help Centers located right at the courthouse to assist people who do not have a lawyer. These offices are staffed by clerks and court attorneys who provide free legal and procedural information, offer referrals and give out court forms and written information. Some Help Centers have volunteer lawyers to give free legal advice."

Actually, while that last statement is correct, some centers do give legal advice, but most of the programs advise clerks, court attorneys and legal volunteers not to give legal advice. Rather, they give free legal and procedural information, but not legal advice to a client in the way an attorney/client relationship works.

Working in a help center qualifies as a *pro bono* activity under:

Rule 6.1: "(2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons;"

The nycourts.gov website has a list of current Help Centers with addresses, hours of operation and telephone numbers for:

Albany | Bronx | Brooklyn | Dutchess | Erie | Kings | Manhattan| Monroe | Nassau | New York | Orange | Putnam | Queens | Richmond |Rockland | Staten Island | Suffolk | Westchester

By clicking on provided hyperlinks one is taken to the information for that site. Many of the Centers have their own websites with those links also provided at this site. An example of a typical listing is this one for Monroe County:

7th Judicial District Court Help Center
Hall of Justice
99 Exchange Blvd, 5th floor, Room 525
Rochester, NY 14614
585-371-3284
Monday - Thursday: 10:00 am - 12:00 pm & 1:00 pm - 4:00 pm
Friday: 10:00 am - 12:00 pm

Volunteer Coordinator or Volunteer Contact: Scott R. MacPherson, Esq., Phone: (585) 295-5712

This Help Center can help you with:

- Small Claims/debt collection
- Housing Court
- Civil Court
- Divorce/Matrimonial
- Name Change
- Supreme Civil
- Guardianship
- Custody & Visitation
- Foreclosure
- Criminal Issues
- Traffic Violations

This Help Center has:

- Internet Access Terminal (with limitations)
- DIY Form Access
- Free Wifi
- Court Forms
- Informational hand-outs
- Referrals to other organizations
- Sample Forms

Getting Started

So if you are not giving legal advice when at the Help Center, what is it that you are actually doing? First, there is usually an intake process that captures some minimally invasive information so statistics can be kept to track the use of the Center, such as: first name, zip code; subject area of advice requested; family income (broad categories). Volunteers greet, explain and assist with the intake (think Walmart greeter). At some centers there is a sign-in program on a computer that you assist the client in completing.

The next step is identifying the problem. As we are all aware, many clients have trouble explaining their problems, even the paying clients. Most lawyers have become good over the years at drawing out the important information through probing questions. Typically you need to ask the person to let you *look at the sheath of papers* in his or her hands for various court documents that will help you understand the problem and what should be done.

The 7th District Help Center is in a spacious law library in the courthouse. There, I like to have the client sit down with me at a quiet table where I can confidentially ask some questions to clarify the help that he or she needs.

A typical situation is that the client has started at the City Court Clerk's office. There is an intake form for a new Small Claims Court matter that needs to be filled out in order to have the Court Clerk issue a summons and complaint. While to an attorney these forms are pretty self-evident, to a client they are intimidating. It is a matter of walking through the forms with the client and filling in the requested information.

One of my recent cases was a mother trying to help her adult daughter recover the daughter's dog from her ex-boyfriend. I was easily able to tell her what information had to be inserted into the forms, that the relief to be selected was "recovery of personal property." She didn't know what personal property was. Then I told her what happens at a hearing. It's like telling a story to the judge, and you do it with witnesses. I suggested types of evidence of ownership to bring: bill of sale, dog license, vet records and pictures. By the end of our session she had confidence that she could direct her daughter through the process.

Another case involved a woman who wanted to get a divorce. Our *pro bono* agency (VLSP) has *pro se* divorce kits as does *pro se* divorce clinics. The kits have forms and instructions, but the client was a little too overwhelmed to start it on her own. I've never handled a matrimonial action in over forty years of practice. I was able to read through the instructions and help her fill out the forms. Then I directed her to the central intake desk at the nearby joint legal service center (Telesca Center for Justice) so that she could talk to one of the Legal Aid attorneys there. At the end of our session, she had her papers drafted and was going to talk to a matrimonial attorney to obtain advice as to whether she could move forward *pro se*.

Forms

Many people come in to the Help Center looking for forms. Help Centers have computers with internet access so that the clients can find and print information. You can direct them to the nycourts.gov website where there is a form section. These are DIY (Do It Yourself) forms that operate on a program that asks questions. As an example there is a form for "Uncontested Divorce." The site ex-

plains what an uncontested divorce is. For example "Who can use this form?

You can use this program if:

- You and the person you want to divorce are each over 18 years of age;
- You and the person you want to divorce have no children under 21 years of age;
- Your marriage has been over for at least 6 months and your relationship cannot be saved; and
- All marital property issues, including debt, have been settled."

There are drop-down menus for County and Court Type. They tell you what information you will need to complete the forms. For example, "You will need the following information with you when you use this program:

- The name, previous last names (if any), current address, social security number, and phone number of the person you want to divorce;
- A copy of your marriage certificate; and
- If you have any of the following: settlement agreement, order of protection, spousal support order, etc."

There are instructions on how to download and print the checklist of information needed to complete this program. When you "Start" the program it asks you questions. It takes the answers and incorporates them into the pleading. The client can do this on an available computer in the Help Center or at home. If the person works on it in the Center, you would be there to provide guidance as to what is being asked, but the program is very straightforward and has good graphics making it easy to use. There are instructions on how to get an index number and how to obtain service of process. There are forms for: Families and Children, Problems with Money, Homes and Eviction, Name Change, Guardianship, When Someone Dies. Under each category there are multiple choices such as: Custody, Visitation, Paternity and Divorce.

As you can see, much thought has been given to creating a system that *pro se* clients can use without anyone giving actual legal advice. There is an incredible amount of legal information easily available, written in plain English, as well as the tools to prepare legal pleadings. Another example of what is available is advice for financial problems; under "When You Owe Money," there is information on what to do: "When You Get a Summons, Settling the Case, Dismissing the Case, Answering the Case, and Vacating a Default Judgment."

Programs

The 7th District program in which I participate is just one of many models around the state. It is characterized by the use of lawyers who do not give specific legal advice, so that lawyer volunteers use their general knowledge of legal procedure, not specific subject area expertise. Volunteers work in conjunction with a VLSP lawyer who is employed to staff the Help Center. Every month the volunteer pool receives an e-mail from VLSP seeking attorneys to cover a one-and-a-half hour time slot Monday through Thursday. You link to a sign-up web page and select the slot(s) that you want for the coming month, then receive a confirmation e-mail.

Buffalo's program (8th Judicial District) is a little different. There the Help Desks are court specific; there is a Family Court Help Desk and a Pro Se Assistance Program in the Federal District Court. Each utilizes volunteer attorneys who are very experienced in handling cases in that Court. They do open files and give legal advice. The legal advice is all limited scope representation covered by Rule 6.5 of the Rules of Professional Conduct and the NYSBA Committee on Professional Ethics Opinion 1012 (July 2014) (http://www.nycourts.gov/courts/8jd/helpctr.shtml).

A unique rural program is the Remote Family Law Project in Ontario County. Volunteer attorneys can work from their offices and interact, via webcam, with rural clients at the Wood Library in Canandaigua to receive assistance in completing their family court petitions. It is a joint project of VLSP Rochester along with the Wood Library.

In New York City there is a Mobile Legal Help Center created through a partnership between NYLAG and the New York State Courts Access to Justice Program. The Mobile Center is the country's first-ever legal services office and courtroom on wheels. Attorneys provide counseling, advice, and direct representation without leaving the vehicle. A video link with the courts enables access to judges for emergency hearings, including domestic violence and eviction cases. The Center contains four private meeting areas for attorneys and clients and is equipped with high-speed Internet and state-of-the-art technology. It travels throughout the five boroughs and parts of Long Island and Westchester, focusing on areas with limited public transportation options. Through the Mobile Legal Help Center, low-income New Yorkers in need of legal help can overcome obstacles such as geographic isolation, health and mobility issues, and child care concerns (http://nylag.org/units/mobile-legal-help-center).

Other volunteer opportunities in the New York City area can be found at this website that lists help centers where attorneys may volunteer: http://www.courts.state.ny.us/courts/nyc/housing/resourcecenter.shtml.

So now my advice to you is: **Just Do It!**

C. Bruce Lawrence is a Senior Counsel with Boylan Code LLP in Rochester, NY. He practices in the area of Creditor's Rights. He currently is President of the Foundation of the Monroe County Bar and Secretary of the NYSBA Senior Lawyers Section. He is a Past President of the MCBA and past Secretary of NYSBA. He currently serves in the House of Delegates. He has a long history of involvement with access to justice issues.

Lawyers and Email: Ethical and Security Considerations

By Scott Aurnou

The specter of attorney-client privilege has a long and well-respected history in litigation...but means nothing at all to a hacker. "Delete this email if you are not the intended recipient" or similar language theoretically sounds imposing, but essentially does nothing to protect firm or client data from any nefarious actors who view it (though they may get a good chuckle before reading the "forbidden" email).

In May 2014, LexisNexis published a study pertaining to law firm security awareness versus actual practices with respect to communications and file sharing with clients.[1] Almost 90% of those surveyed used email to communicate with clients and privileged third parties. The vast majority of attorneys surveyed also acknowledged the increasingly important role of various file sharing services and the inherent risk of someone other than a client or privileged third party gaining access to shared documents. Yet only 22% used encrypted email and 13% used secure file sharing sites, while 77% of firms relied upon the effectively worthless "confidentiality statements" within the body of emails to secure them.[2]

Relevant Ethical Standards

The effect of changes to the Model Rules: The ABA Model Rules of Professional Conduct were updated in 2012 specifically to address the effect of technology upon the legal profession, and a number of those changes directly pertain to the need for confidential communications.

The language in Comment 8 to Rule 1.1 (Competence) was amended to emphasize a duty for attorneys to stay up-to-date on technical matters pertaining to the practice of law, generally speaking: "[A] lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*."[3]

Paragraph (c) of Rule 1.6 (Confidentiality of Information) states:

> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[4]

Comment 18 to Rule 1.6 relates to the need for a lawyer to "act competently" to prevent the disclosure of "information relating to the representation of a client." It offers a safe harbor provision and factors to determine the reasonableness of an attorney's conduct in protecting the information at issue:

> Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[5]

In addition, Comment 19 to Rule 1.6 specifically relates to electronic communications with clients, stating, "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."[6] It also offers a safe harbor provision: "This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."[7]

Therein lies the rub. What is reasonable, given the state of modern snooping technology? Moreover, from whom do the communications need to be kept private? Commercial competitors? Cyber criminals? Government actors? Other interested parties? Comment 19 specifically notes a pair of factors to consider when determining the reasonableness of the expectation of privacy. They are: (1) the sensitivity of the data itself, and (2) the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.[8] A client may also give informed consent to a method not otherwise permitted, though that approach may be asking for trouble if a client changes his or her mind later or disputes whether he or she was properly apprised of the relevant risks.

In addition to the Model Rules, failure to reasonably secure communications with clients can run afoul of state privacy laws[9] and potentially provide an effective basis for a colorable legal malpractice claim.

Pertinent Technology Basics

How does email actually work? By its nature, email is not a terribly secure way to share information. When you send out an email, it goes through a more powerful, centralized computer called a server on its way to a corresponding email server associated with the recipient's computer or mobile device. It passes through any number of servers along the way from sender to recipient, like a

flat stone skipping along the top of a pond. And if that email isn't encrypted, anyone with access to any one of those servers can read it.

What is encryption? Encryption is the use of an algorithm to scramble normal data into an indecipherable mishmash of letters, numbers and symbols (referred to as "ciphertext"). An encryption key (essentially a long string of characters) is used to scramble the text, pictures, videos, etc. into the ciphertext. Depending on how the encryption is set up, either the same key (symmetrical encryption) or a different key (asymmetrical encryption) is used to decrypt the data back into its original state (called "plaintext"). Under most privacy and data breach notification laws, encrypted data is considered secure and typically doesn't have to be reported as a data breach if it's lost or stolen (so long as the decryption key isn't taken as well).

A Few Methods to Secure Email

(1) Encrypted email. Properly encrypted email messages should be converted to ciphertext before leaving the sender's computer or mobile device and stay encrypted until they are delivered to the recipient (remaining indecipherable as they pass through each server along the way). This is referred to as *end-to-end encryption*.

There are plenty of encrypted email offerings from larger commercial companies, as well as a number of new and interesting email encryption services that have become available in the wake of disclosures made by Edward Snowden.[10]

When choosing one, be mindful of where the service you use is located (including where the servers handling the emails on the system actually are). Mr. Snowden used a well-regarded U.S.-based encrypted email provider called Lavabit. Not long after Mr. Snowden's revelations came to light, federal law enforcement officials forced Lavabit to secretly turn over the encryption keys safeguarding its users' private communications. Lavabit's founder tried to resist, but was overwhelmed in federal court.[11] As a result, he shut down the service. Another well-regarded service called Silent Mail followed suit shortly thereafter, as it felt it could no longer ensure its customers' privacy.[12] Both have since relocated to Switzerland and are planning to introduce a new encrypted email service called Dark Mail.[13]

Larger companies offering encrypted email services typically control the encryption keys and will decrypt data before turning it over in response to a warrant or subpoena (including one coupled with a gag order). In addition, email service providers can legally read any email using their systems under Title II of the Electronic Communications Privacy Act, referred to as the Stored Communications Act.[14] Moreover, emails remaining on a third party server for over 180 days are considered abandoned.[15] Any American law enforcement agency can gain access to them with a simple subpoena.[16]

Accordingly, if you choose to use a service based in the United States or another jurisdiction with similar privacy protections, be mindful of who controls the encryption keys.

(2) Secure cloud storage. Another way to securely communicate or share files with a client or privileged third party is to place the communication and/or files in encrypted cloud storage and allow the client or third party to have password-protected access to them. Rather than a direct email with possible attachments, the client or third party would receive a link to the securely stored data. The cloud service you select should be designed for security. Before you ask, DropBox and Google Drive would not be suitable options. There are a number of services offering well-protected cloud storage and it's important to do your due diligence before selecting one. If it all seems a bit much to figure out, two services I would recommend looking into are Cubby[17] and Porticor.[18]

(3) Secure Web portal. A third approach is to place the communications and/or files in a secure portion of your firm's network that selected clients and/or privileged third parties can access. As with the secure cloud storage option noted above, the email sent to the client or third party would have a link back to the secure Web portal's log-in page. An advantage to this approach is that the communications and files do not actually leave your computer network and should be easier to protect.

An additional consideration. A government snoop or competent hacker doesn't necessarily have to target a message while it's encrypted. A message that is protected by strong encryption when it's sent or held in secure cloud storage can still be intercepted and read once it has been opened or accessed using a mobile device or computer that has been compromised. The same holds true for intercepting a message before it's encrypted initially. What steps can you take to protect them?[19] The software on any computer or other device that can potentially access confidential data should be kept as up-to-date as possible; it should be protected against possible data loss if lost or stolen; and all firm personnel should have regular security awareness training with respect to social engineering[20] and other threats.

At the end of the day, there is no single silver bullet to provide "perfect security." But there are genuinely helpful steps (including those noted above) that you can take to comply with pertinent ethical standards and better protect your electronic communications with clients and privileged third parties.

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Pitfalls in Pet Planning

By Lenore S. Davis

I read in the *New York Times* obituary section that Barbara Blum had passed away during the same time I was studying Pet Planning. How are they connected?

Barbara Blum was a woman who believed in civil rights. The City of New York used her to break open the doors of the horrific Willowbrook State School, where the disabled and handicapped were hidden away until death freed them. The story of Willowbrook was revealed by Geraldo Rivera, a reporter who went undercover at Willowbrook and exposed the subhuman conditions endured by its inhabitants. It was the spark that ignited great strides in integration of the disabled and handicapped and others with mental and physical illnesses.

Barbara Blum's death reminded me that *Brown v. The Board of Education*[1] is less than 60 years old. The Willowbrook expose in 1972 is merely 40 years old. With human civil rights only recently addressed, it is no wonder that it should take further time for the rights of animals to be addressed. But the commonality of disabled humans and pets are that both will always be dependent on others to plan for their care.

At a casual glance, the area of planning for pets appeared to be a very small niche area because the majority of pet owners have someone in their home that could care for a pet, or at the very least, assume ownership and care of the pet if necessary. After initial research, it became clear that the need is much greater than realized: 63% of American households—or over 100 million households—own pets. They include 83 million dogs and over 96 million cats.[2] The assumption that most pet owners have a relative or friend who could assume the care of a family pet is clearly in error because a significant number of the 4 to 6 million animals euthanized in the United States annually are animals left without care when their owners died. In a 2005 study, 73% of dog owners and 65% of cat owners consider their pets to be akin to a child or other close family member. In 2013, $55.5 billion was spent by Americans on pet supplies. The pet supply field is expected to continue its great growth.[3]

Presently, although pets are considered personal property, recent federal statutes afford pets greater rights.[4] In addition, state laws contain anti-cruelty statutes and enforcement agencies which enforce these animal rights. The State of New York Department of Agriculture and Markets issued Circular 916, effective November 2013, entitled Article 26 of the Agriculture and Markets Law relating to CRUELTY TO ANIMALS, Article 25b, Abandoned Animals, and Sections 601 and 602 of the Vehicle and Traffic Law.[5]

Though an evolution of the statutes and case law of animal rights could be a fascinating separate article, this article focuses on the practical side of estate planning for pets.

I. Partial Planning—Creating the Gaps

A. The Need for Pet Care Terms in a Will

Beginning with the first pet-planning gap, *i.e.*, having no specific plan in place at all, most Americans do not have a will in place.[6] As stated above, many Americans might assume that a family member or friend will care for the pet when they die. Millions of animals are euthanized as a result.

An additional planning gap arises when a will is created and there is no specific reference to the pet. Pets are indeed considered personal property.[7] Failure to provide specifically for pets would have them pass under a will's residuary clause. But what would happen if there are several residuary beneficiaries? Certainly one cannot split a pet in the event more than one beneficiary desires the pet. Additionally, and more importantly, what if the residuary beneficiary or beneficiaries do not want the pet and there is no alternative disposition of the pet?

The second problem in not addressing a pet in a will is that there is no guidance provided to the new owner of the specifics of caring for the pet, *e.g.*, which veterinarian the pet generally uses, what food brands the pet desires, how often and where it is groomed, as well as medical and other information personal to the pet.

Accordingly, the first step for drafting a will for a client with a pet is to include specifics on to whom the pet should be given. The client should be advised at the time of drafting the will to ask whether his intended beneficiary agrees to take the pet and care for it, the same as one might do for a nominated guardian of minor children. The attorney must make clear to the client that even though the beneficiary may acquiesce presently, that person is under no fiduciary obligation to take the pet upon the client's demise. Accordingly, the attorney and client should set forth terms for a successor caregiver in the will.

B. When There Are No Pet Provisions in a Power of Attorney

There is a clear distinction between a disabled human dependent and a pet, specifically in what happens when the client is not capable of caring for the dependent human or pet, either in the short term, long term, or, in the case of death, permanently. Think of a scenario where Emergency Medical Services is called to a scene and there is a child or a disabled adult at the scene. EMS will likely

call the Department of Social Services to take custody of the child or dependent, and find a proper shelter for the child either temporarily or permanently, as required.

Now think of the above scenario when a pet is involved, assuming the client even has a will. When EMS arrives, they may not know or even care whether there the pet owner has a will. Even if the client's will were taped to the door for all to see, it would only become effective upon the client's death. At that point in time, the patient might be very much alive; in fact, there may not even be an imminent threat of death, so any provisions for pet care in a will would not address any immediate need.

EMS or the police might take custody of a friendly pet, but only for a short period of time. First, the animal shelter will determine if there are friends or relatives prepared to step forward and care for the pet on behalf of the pet owner. If no one steps forward after the first few days, the animal shelter might have the ability to find someone else who would care for the pet either short term, long term or permanently. But, depending on the shelter's capacity, it is likely that after a few weeks, if no one claims the pet, the pet will be euthanized. So, if the client made no provisions for the pet in the event of disability, and he recovers weeks later, he could discover that his pet was euthanized during the term of his illness.

II. Filling in the Gaps: Power of Attorney and *Inter Vivos* Pet Trusts

Attorneys who only address the pet issue on a limited basis through wills have permitted a huge gap in coverage for their client's pets. How to fill these gaps? The one-two punch: a provision in power of attorney, and the drafting of an *inter vivos* pet trust. A provision in a power of attorney that the agent should arrange for pet care and custody is the first step in ensuring that the pets are cared for when a client is alive but unable to care for his pet, or communicate to whom the pet should be given.

The power of attorney in and of itself is insufficient. It is an inappropriate place to set forth the details for the care and maintenance of the pet. The job of the attorney-in-fact would purely be to transfer the pet to the caretaker or custodian set forth in an *inter vivos* trust.

The *inter vivos* pet trust is a fairly new estate-planning tool. The concept began as a so-called "honorary trust" because in old trusts there were no means to enforce the terms of the trust for the benefit of a pet, a "beneficiary" that obviously did not have access to the courts to enforce its rights against the trustees. The trustee was part of an honor system where he was trusted to carry out the terms of the trust for the benefit of the pet, but could not be legally forced to do so.

As the concept evolved through the legal system and state statutes, there are now provisions that may be placed in pet trusts for enforcers or those who have the ability to bring the custodian or trustee to court to compel him to carry out the terms of a trust for the benefit of a pet.

One such state is New York. EPTL 7-8.1(a) provides that any individual may intervene for the benefit of the pet, and the court, *sua sponte*, may appoint someone to enforce the terms of the trust.[8] This same section also creates an exception to the rule-against-perpetuities problem in estate planning, which would have forced the pet trust to terminate 21 years after the death of a life in being, *i.e.*, the animal's life. Under the EPTL, the trust shall terminate only when all animal beneficiaries of the trust are no longer alive.[9] The trust names a trustee to manage the funds of the trust, a caretaker who has physical custody of the pet, and an enforcer.

It would be wise for the attorney to include successor fiduciaries to those set forth in the trust, as well as include those provisions for pets previously mentioned to be included in a will: daily routine, eating and grooming preferences, veterinarian's name, pertinent medical information, and other details the client would want a new caregiver to know. Having the triumvirate of power of attorney, *inter vivos* trust and will with provisions for pets, the client will ensure a continuum of care for a pet for the term of its life.

What happens, though, if the client does not have an individual whom he can trust with his pet? Veterinarian schools and other pet-oriented institutions have in recent years established pre-planning programs for pets. A pet owner can contact the organization and pay to have his pet picked up in the event the owner becomes disabled or dies. There is a better chance that such anorganization in good standing will be available for a pet than one person, who can change his mind, or die or become disabled himself.

Some of the better organizations have a planned-giving department that customizes solutions for clients and charge accordingly. Most frequently, the organization is contacted when the client becomes disabled or dies, and arranges for the pet's transportation to a pet facility where either the pet lives for the remainder of its life, or is adopted out.

III. The Funding Gap

Aside from the issue of pet provisions in estate planning and drafting, errors often occur in the funding of estate plans for pets. Funding a testamentary pet trust with an insurance policy on the life of the pet owner might seem to make sense. The life insurance policy will become liquid upon the owner's death and the testamentary provisions go into effect. However, there will be some lapse in coverage.

From the time the owner dies, until the time the will is probated, the death certificate received and forwarded to the insurance company and the insurance proceeds

paid to the testamentary trustee typically takes months. There may be a double gap here. Gap One is the time it takes to get a certified death certificate, and have the insurance company issue the life insurance check. Gap Two is waiting for the Surrogate's Court to issue letters testamentary and letters of trusteeship. Even if the insurance company wants to pay out the life insurance proceeds, it would have to wait for the Surrogate's Court to issue letters of trusteeship in order to issue a check to the legal representative of the testamentary pet trust. If there is other money left for this process, then as soon as letters of trusteeship are issued, the trust may be funded.

This gap in probate and funding should be avoided by having an *inter vivos* pet trust, which acts as a stop-gap measure in the event the client becomes disabled but is still alive. An *inter vivos* trust goes into effect immediately upon the client's signing the document. It should be funded as an emergency fund, ready to be used at any moment, simply because one never knows when a pet owner will fail or cease to serve as the pet's care giver.

Several suggestions might be to have a part of pension proceeds, annuities or minimum required distributions go to the *inter vivos* trust, or fund the trust with an investment, stocks, bonds, mutual fund, etc.

Beware that, unlike any other trust, a pet trust may not be overfunded, *i.e.*, a grantor may not fund a pet trust in excess of what it would reasonably take to care for the pet(s) covered.[10]

Lastly, estate planning is more complicated for pets because under tax laws, pet beneficiaries are treated differently than human beneficiaries. This starts with the definition of person, which does not include pets.[11] To cite just two examples: a trust specifically for the benefit of pets, and a charitable remainder trust (CRAT).

Pets are not considered "persons" under Rev. Rul. 76-486,[12] which states:

IRS HEADING

> Trust for care of pet animal.
>
> In the absence of a state law to the contrary, a bequest in trust to provide for the care of a decedent's pet animal is void from its inception, and unless otherwise indicated in the will or specified by statute, the trust property passes to the residuary legatee and income earned on such property is includible in the income of such legatee.
>
> In jurisdictions where such a trust is not invalid, it is subject to the imposition of the tax of section 1(d) of the Code pursuant to section 641 and no deductions are allowable for distributions under sections 651 and 661.

This makes sense considering that trust income has to be taxed to a person or entity. A simple trust is one where all the income is currently distributed to beneficiaries. The beneficiaries are issued a K-1 and the beneficiaries include the income on their own income tax returns. The trust gets a deduction for distributions paid [and for which the beneficiary will pay income tax], otherwise the same income would be taxed twice.

A complex trust is one where there is no mandatory distribution of all the current income. As a result, if there is trust gross income greater than $600 in one year, the trustee must file a 1041 and pay taxes on said income. The tax rates for trusts are compressed, *i.e.*, the brackets of income require greater tax rates at lower income amounts.

Now we can understand why a pet trust cannot get a tax deduction for distributions made for the benefit of a pet, and why pet trusts are considered complex trusts. A pet is not an entity that pays taxes. A trust cannot issue a pet a K-1. Therefore, all income received by the trust must be paid by the trust, as a complex trust, at compressed tax rates.

Other examples of disadvantaged tax rules for pets are the rules and regulations governing charitable remainder trusts (CRATS). Often, a client would like to fund a trust for the benefit of his pet, and would like the remainder to go to charity. If the trust income were for the benefit of a human beneficiary, the grantor could count on some kind of charitable deduction; not so with trusts for the benefit of pets. Under Revenue Ruling 78-105: "no portion of the amount passing to a valid trust for the lifetime benefit of a pet qualifies for the charitable estate tax deduction, even if the remainder beneficiary is a qualifying charity" because a pet is not a "person."

It is important for attorneys to advise clients to plan for their pets. It is equally important for the estate-planning attorney to know where the hidden gaps and traps lie, and to help the client navigate the estate-planning course to ensure that all dependents, including pets, are cared for in the event of a client's disability or death.

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Estate Planning and Tax Tips for Non-Traditional Families

By Nanette Lee Miller, Janis Cowhey McDonagh and Lorraine Paceleo

ESTATE PLANNING CHECKLIST

1. **PREPARE YOUR LAST WILL & TESTAMENT**: A will or trust is the best vehicle to ensure that your assets pass as you intend. In the absence of a will, the intestacy laws of your state will govern distribution, and assets will not pass to an unrelated (unmarried) partner.

2. **CREATE A TRUST**: A trust can be a useful alternative to a will for LGBT couples whose families may not support their relationships, thereby making a will contest more likely. In addition to providing privacy by virtue of not becoming public record (as is the case with a will once it is probated), trusts are also more difficult to contest than wills which have stringent execution rules, etc.

3. **BENEFICIARY DESIGNATIONS**: Certain types of assets, such as life insurance, 401(k)'s and IRA accounts, may be transferred directly upon death and are not subject to the probate process. However, when the designation forms are not filled out completely and/or correctly, the assets default to the decedent's estate and become part of the probate estate. Therefore, LGBT couples may wish to list each other as beneficiaries on such accounts or policies. On non-retirement accounts, consider establishing transfer-on-death (TOD) or payable-on-death (POD) provisions where state law permits such transfers.

4. **ESTABLISH A DURABLE POWER OF ATTORNEY**: A durable power of attorney permits you to designate an agent to handle all aspects of your financial affairs. You may select a power of attorney that becomes effective immediately upon signing, or one that becomes effective at a future time or upon the occurrence of some contingency (commonly known as a "springing power of attorney") such as your incapacitation. Power of attorney documents become especially important for same-sex couples who are not afforded the same range of privileges and access to each other's financial information as opposite sex married couples enjoy.

5. **ESTABLISH A HEALTH CARE PROXY AND LIVING WILL**: A health care proxy allows you to designate an agent to make medical decisions on your behalf if you are unable to do so for yourself. A living will sets forth your wishes concerning life-sustaining measures. These documents are crucial for same sex couples, who are often denied "next of kin" status by hospitals and other medical care providers. This is especially true when a same sex couple that is married in one state has a medical emergency while on vacation in another state that does not recognize their marriage. In such an instance, although the couple is married in their home state, the spouse may be treated as a legal stranger.

6. **ESTABLISH A DESIGNATION FOR THE DISPOSITION OF REMAINS**: Such a document can be used to designate which individual(s) have the right to make funeral and burial decisions. If the decedent has any particular wishes concerning their final disposition, such wishes should be explicitly set forth in the designation. Further, language concerning who should have the ability to select a grave marker, and the language contained thereon, should be included in order to avoid battles with family members who may not agree with the language on the tombstone (*i.e.*, "beloved partner") of the decedent.

7. **ESTABLISH A COHABITATION AGREEMENT**: For couples that are going to mix assets, financially support one another and incur debt together, a cohabitation agreement should be considered in order to delegate how the assets will be handled during the relationship and in the event the relationship ends. For same-sex married couples, a prenuptial agreement should be prepared for the same purposes. Prenuptial agreements are especially crucial for members of the LGBT community, many of whom have amassed substantial wealth when same-sex marriage was prohibited, and now face entering into a marriage with significant assets to protect.

8. **ESTABLISH A JOINT CUSTODY AGREEMENT**: Most states permit second-parent adoptions, and it is strongly recommended that couples consider such adoptions. However, a joint custody agreement is one alternative which helps protect the rights of both parents in their home state and while traveling to non-LGBT friendly jurisdictions.

9. **PROPERTY CONSIDERATIONS**: Owning property as joint tenants with the right of survivorship offers a simple solution to many of the difficulties unmarried or same sex couples face regarding their assets, but this approach also has many pitfalls. By taking title to an asset (bank account, real estate, etc.) in this manner, the surviving partner will become the owner of the property automatically by operation of law. Such transfers pass outside

of the Will and are not subject to probate, thereby eliminating many of the challenges that adverse parties can potentially bring. However, very careful consideration must be given to issues such as gift tax, state prohibitions against non-married persons executing joint deeds, coop board restrictions, proof of contribution, and many similar issues, before any transfers are made or ownership on purchase is determined.

10. **RETIREMENT PLANNING**: One of the most popular retirement tools, the Roth IRA, is federally governed. Therefore, one partner of a same-sex couple is unable to create a Roth IRA for the benefit of a stay-at-home partner, married or not. Further, while a federally recognized married person can inherit a 401(k) without incurring taxes, unmarried 401(k) beneficiaries may be subject to extra taxes without proper estate planning. LGBT couples also have a difficult time accessing the Social Security benefits of their partners, even when their home state recognizes their marriage. In order for same-sex or unmarried couples to ensure sufficient savings for retirement, the working partner should maximize contributions to his or her own 401(k) especially when his or her employer has adopted a contribution-matching policy. Further life insurance, especially if one partner depends on another's income to survive, should be purchased and used as part of the larger estate plan.

TAX TIPS FOR LEGALLY MARRIED SAME-SEX COUPLES

1. **MARRIED TAX STATUS**: Determine if there is any benefit to filing amended income tax returns using "married" status. Married tax status as compared to single or head of household status could result in a lower joint tax liability because of the netting of income and deductions, eligibility for certain tax credits, and income exclusions. It could also result in an increased tax liability due to the marriage penalty tax or because of limitations on deductions based on combined adjusted gross income. File amended returns as soon as possible; don't wait until April 15th. Amended returns must be filed before the Statute of Limitations runs—generally 3 years from the filing of the original return or 2 years from when the tax was paid, whichever is later.

2. **NON-TAXABLE FRINGE BENEFITS**: Consider amending income tax returns to exclude previous taxable income which was used to purchase job-related benefits for your spouse, such as health insurance, life insurance, and other fringe benefits. Employers may be entitled to a refund of matching FICA payments on fringe benefits that are now non-taxable. The Statute of Limitations for refund claims also applies.

3. **EMPLOYER SPOUSAL BENEFITS**: Save current tax dollars by contacting your company's Human Resources Department for a list of marital benefits available. Take advantage of all non-taxable fringe benefits available to your spouse. Also look for a benefit that may pay you a buy-back amount if you no longer need employer-paid benefits (because you are now covered under your spouse's plan).

4. **RETIREMENT ACCOUNTS**: To save taxes your beneficiaries will pay after your death and allow the payout to be stretched out as long as possible, check your IRA/401K plan designations. A same-sex spouse may not inherit or roll over such a plan to his/her own name in states that do not recognize same-sex marriages. Also, consider making a year-end retirement account contribution for your spouse (if applicable) and receive an additional deduction.

5. **SOCIAL SECURITY**: Apply for social security marital benefits and the lump sum death benefit, if applicable. Currently, the Social Security Administration is only processing claims for same-sex married couples who reside in a state that recognizes their marriage. If you reside in a state that recognizes same-sex marriage, apply for benefits before you move to a state that does not recognize same-sex marriages.

6. **ESTATE TAXES**: If your spouse recently died and the estate paid estate taxes on the portion of the estate that you inherited, file a claim for refund. If you and your spouse did not do any estate planning prior to death, be sure to consult with an attorney or an accountant in a timely manner as there are estate planning techniques and elections available for married couples after death. Even if you are not required to file a federal estate tax return, consider filing one to take advantage of portability. Portability allows your deceased spouse's unused federal exemption amount to be rolled over to you as the surviving spouse. The estate must timely file an estate tax return to elect portability.

7. **MAKING GIFTS**: Consider the effect of transferring assets, gift tax free, to your spouse. When making gifts to loved ones and children, consider the benefits of year-end gift-splitting. One spouse may now utilize the other spouse's annual gift tax exclusion amount by electing to split gifts (annual gift tax exclusion: $14,000 for 2013 and 2014).

8. **ESTATE PLANNING**: If you reside in a state that has a death tax and recognizes same-sex mar-

riages, establish a marital trust, Qualified Terminable Interest Property Trust (QTIP) or disclaimer trust for your spouse in your Will. If you reside in a jurisdiction that does not recognize same-sex marriages, you must plan as if you are single and execute a Will as state laws control inheritance rights. Your spouse will not automatically inherit or be entitled to any of your estate if you die without a Will.

9. **PAYROLL TAX WITHHOLDING:** Update your Form W-4 with your employer to change your status to married and increase or decrease your exemptions. Make a note and place it with your other 2013 tax preparation documents so your tax preparer can advise you again in April if another revision is recommended.

10. **OTHER POINTS**: Same-sex couples in a Domestic Partnership or Civil Union should consider getting married, as different laws apply. Same-sex married couples who divorce may now be able to take a deduction for alimony payments. Same-sex spouses may now take advantage of innocent spouse protection rules.

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Ethical Boundaries in Settlement Discussions

By Eileen E. Buholtz

I. Pre-trial Conferences and Settlement Conferences

A. History and Origin of Pre-Trial and Settlement Conferences

Settlement conferences date back to early 20th century efforts by municipal courts to apply Scandinavian conciliation techniques to local cases to produce harmony among the parties consistent with communitarian values. At some point in the 1920s efficiency became a rationale for settlements; settlements relieved congested court dockets. Settlement conferences were originally voluntary but eventually have become mandatory. Menkel-Meadow, *Essay: For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA Law Rev. 485, 490-493.

A parallel but separate move to aid judicial administration is the development of the pre-trial conference to streamline trials: issues are narrowed, and evidence and rulings are made on preliminary motions. These conferences derived from English and Scottish practices of the early 19th century that provided for oral presentation of preliminary matters in open court. Menkel-Meadow, *Essay: For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA Law Rev. 485, 490-493.

In 1938, Rule 16 of the Federal Rules of Civil Procedure was promulgated and in its first version explicitly excluded the use of the pre-trial conference for settlement purposes. But given the ever increasing pressure on the courts by the ever increasing number of cases, Rule 16 changed. Rule 16 as it currently stands encourages judges to put more time into the management of the front end of cases and explicitly encourages, if not requires, judicial involvement in settlement discussions at two points: immediately after the complaint is filed and just before trial. Menkel-Meadow, *Essay: For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA Law Rev. 485, 490-493.

"Mandatory settlement conference" is an oxymoron. It involves fundamental conceptions of our adversary system as distinguished from more judicially activated inquisitorial systems. Menkel-Meadow, *Essay: For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA Law Rev. 485, 490-493.

Use of magistrates and court mediators relieves the tension caused by having the judges (the adjudicators and decisions makers) settle and manage the cases. Menkel-Meadow, *Essay: For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA Law Rev. 485, 490-493.

There is a range in judges' styles in handling settlement conferences from those who do nothing more than set a trial date to those who are actively involved in bringing the parties together to those who use coercive techniques to get the parties to settle. Among those who are actively involved, some express opinions and offer suggestions on the issues of liability and damages; some find a common ground for the parties from whatever point each starts at; and some use a formula approach, the simplest being splitting the difference between the two starting positions.

B. Pre-trial Conferences. Settlement Can Be Discussed at Any Court-Mandated Conference

Rule 16 of the Federal Rules of Civil Procedure reads as follows:

> Pretrial Conferences; Scheduling; Management
>
> (a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:
>
> (1) expediting disposition of the action;
>
> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
>
> (3) discouraging wasteful pretrial activities;
>
> (4) improving the quality of the trial through more thorough preparation; and
>
> (5) *facilitating settlement*.
>
> …
>
> (c) Attendance and Matters for Consideration at a Pretrial Conference.
>
> …
>
> (2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:
>
> …

(P) *facilitating in other ways the just, speedy, and inexpensive disposition of the action*.

II. Types of Settlement Conferences

Settlement discussions take place in a variety of settings:

A. Informal conversations between/among counsel.

B. Privately arranged mediation with a privately paid mediator.

C. Any type of conference with the court. In federal court, any conference can be treated as a settlement conference, so one must be prepared. In New York State Supreme Court, settlement discussions are expressly expected in all actions at the preliminary conference (22 NYCRR §20212(c)(5)) and the pre-voir-dire conference (22 NYCRR §202.33(b)); in medical, dental and podiatric malpractice actions at the settlement conference after the note of issue has been filed (22 NYCRR §202.56(c)); and in commercial cases at the settlement and pre-trial conferences after the note of issue has been filed (22 NYCRR §202.70).

D. Mandatory settlement conferences and court-ordered mandatory mandatory mediation. Because one or both parties may not want to participate, the federal courts and some state courts have adopted the requirement that parties to a mandatory mediation participate in good faith. *In re A.T. Reynolds & Sons, Inc.*, 452 B.R.374, 381-384 (S.D.N.Y. 2011).

III. Confidentiality of the Settlement Process

Rule 408 of the Federal Rules of Evidence makes settlement discussions confidential:

> Compromise Offers and Negotiations
>
> (a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Confidentiality encourages the parties to be candid with the mediator by making them comfortable that their positions, willingness to settle, weaknesses of their case, etc. will not prematurely influence the trial judge. See, e.g., Alternate Dispute Resolution Act, 28 U.S.C. §652(d) (each district court shall, by local rule, provide for the confidentiality of the mediation process and prohibit disclosure of confidential mediation communications); *Clark v. Stapleton Corp.*, 957 F.2d 745, 746 (10th Cir. 1992); *Fields-D'Arpino v. Restaurant Assocs., Inc.*, 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999); *Hand v. Walnut Valley Sailing Club*, No. 10-1296-SAC, 2011 U.S. Dist. LEXIS 80465, 9-19, 12-15 (D. Kan. July 20, 2011).

But there is a caveat: Settlement negotiations between a plaintiff and settling defendants in a patent dispute were held discoverable by a non-settling defendant because plaintiff's expert relied on the testimony of plaintiff's executive about plaintiff's reasons for entering into the settlement agreements with the settling defendants. This decision does not limit its holding to intellectual property litigation. *In re MSTG*, 675 F.3d 1137 (Fed. Cir. 2012).

The federal courts are divided as to whether there is a settlement privilege under Fed. R. Evid. 501. No privilege: *In re MSTG*, 675 F.3d 1137 (Fed. Cir. 2012); *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106 (7th Cir. 1979); *Matsushita Electric Indus. Co. v. Mediatek, Inc.*, No. C-05-3148, 2007 U.S. Dist. LEXIS 27437 (N.D. Cal. Mar. 30, 2007); *In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F. Supp. 2d 201 (D.D.C. 2005). Privilege: *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979-83 (6th Cir. 2003); *California v. Kinder Morgan Energy Partners, L.P.*, No. 07-1883, 2010 WL 39888448 (S.D. Cal. Oct. 12 2010); *Software Tree LLC v. Red Hat, Inc.*, No. 6:09-CV-097, 2010 WL 2788202 (E.D. Tex. June 24. 2010).

The Eighth Circuit views Rule 408 as sufficiently broad to encompass certain work product, internal memos, and other materials created specifically for the purpose of conciliation, even if not communicated to other party, in addition to actual offers of settlement. *EEOC v. UMB Bank Fin. Corp.*, 558 F3d 784 (8th Cir. 2009).

CPLR 4547 similarly makes settlement discussions confidential:

> Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting,

> or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution.

In New York, where a communication is intended to be disclosed to third persons for the purpose of negotiating a settlement of litigation it is not privileged. *See, e.g., Hernandez v. Brookdale Mills, Inc.*, 201 A.D. 325 (1st Dep't 1922) (affidavit from witness to attorney or use in negotiation with party in other litigation was admissible); *Timmermann v. State*, 48 Misc. 2d 678 (Ct. Cl. 1965) (letter of negotiation from attorney to adverse party); *Brown v. Ingersoll*, 226 N.Y.S.2d 479 (Sup. Ct. Monroe County 1962). *See generally* 8 Wigmore, Evidence §2325 (McNaughton rev. 1961).

Since, however, there is a strong policy in favor of negotiated settlements, perhaps revelations of a client's communications made between attorneys in the course of an attempt to settle a case should be deemed privileged even if the client was aware of the negotiation. 9-4503 New York Civil Practice: CPLR P 4503.18. *Cf. In re Grand Jury Subpoena Duces Tecum etc*., 406 F. Supp. 381 (S.D.N.Y. 1975) (matters disclosed during joint conference between attorney and client and co-defendants or potential co-defendants and their independently retained attorneys are privileged when a joint defense was contemplated because of the expectation of confidentiality but not privileged when disclosures occurred in the presence of a third party not demonstrated to be interested in a joint defense; even when corporate co-defendant commenced separate action against individual co-defendants, joint conference materials remained privileged against disclosure in a third-party proceeding other than the private litigation between former co-defendants). *See also Magnaleasing, Inc. v. Staten Island Mall*, 76 F.R.D. 559 (S.D.N.Y. 1977) (communications among the attorneys for co-defendants are privileged only if the communications are designed to further a joint or common defense) (citing Weinstein, Korn & Miller.). On the related problem of the exchange of information between attorneys representing clients with common interests see Note, *Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information*, 63 Yale L. J. 1030 (1954).

IV. Learn the Court's Procedures

Different courts require different tasks to be done before the conference. Some courts require a settlement memorandum or position paper be submitted. Some courts require the client or a representative from the insurer insuring the defendant be present at the conference. Some courts issue letters that set forth the requirements; some issue orders such as in *Easterbrook v. Life Ins. Co. of N. America*, No. CV-06-956-PHX-MHM, 2007 U.S. Dist. LEXIS 17990, 1-12 (D. Ariz. 2007) (attached hereto as exhibit A). Submit the paperwork that is required to avoid sanctions. *Nick v. Morgan Foods, Inc.*, 99 F. Supp. 2d 1056, 1057 (E.D. Mo. 2000), aff'd 270 F. 3d 590 (8th Cir. 2001).

V. Know Your Case Factually and Legally

An attorney who lacks knowledge of the facts of a case at a scheduling conference is "substantially unprepared" to participate in a scheduling or other pre-trial conference and is subject to sanctions. Fed. Rule Civ. Proc. 16(f). The New York commercial-part rules also require that counsel who appear at conferences must have knowledge of the case. 22 NYCRR §202.70, rule 1.

Preparation includes familiarity with the facts of the case sufficient to permit meaningful discussion with the court and opposing counsel. *Flaherty v. Dayton Elec. Mfg. Co.*, 109 F.R.D. 617 (D. Mass. 1986) (magistrate's decision). In *Flaherty*, plaintiff's attorney attended the scheduling conference and explained that "this is a products liability case involving a bench grinder manufactured by Dayton Electric" and briefly described what a bench grinder was. He stated that the plaintiff injured his hand because the safety guard failed while plaintiff was operating the grinder at work. Plaintiff's attorney could not describe the injury other than to say that it was a hand injury involving one or two fingers and that he thought that plaintiff had reached an end result in treatment. Plaintiff's attorney could not say whether plaintiff received anything from his employer's workers' compensation carrier and could not name the workers' compensation carrier. Plaintiff's attorney did not know the extent of plaintiff's lost wage claim other than that he thought plaintiff had returned to work. Plaintiff' attorney could not say whether he intended to sue a corporation not named in the complaint but against whom the complaint alleged a cause of action. The magistrate held that plaintiff's attorney was "substantially unprepared" because "one of the primary purposes of the scheduling conference is to explore the possibilities of settlement early in the litigation, as the notice of scheduling conference noted." The magistrate

ordered plaintiff's attorney personally to pay defendant's attorney $110 being the amount of time at $100 per hour that defendant's attorney spent preparing for and attending the conference.

VI. Understand Your Client

Is your client a risk taker or risk averse? Some research concludes that when a defendant-client expects to pay out, he is more likely to pursue risk, for example, to go to trial and take his chances rather than settling, and a plaintiff client who expects to gain money will tend to be risk adverse, that is, accept an offer rather than risk losing all. However, my empirical experience in litigating cases for thirty years has demonstrated the opposite: that plaintiffs are more likely to roll the dice and go to trial and that defendants are more willing to settle.

Double-check your client's position. Beware of the client or claim representative who exhibits an extreme emotional reaction to the case and takes a "scorched earth" or "millions-for-defense-but-not-a-penny for tribute" attitude, especially early in the case. The individual client who is overly insistent on the merits of his case frequently is compensating for his own wrongdoing by deflecting scrutiny away from himself and towards the opponent. The client's employee or the insurer's claim representative who is overly zealous may be out of line with the company's philosophy. The attorney who blindly follows those instructions risks being blamed later on for that course of action; when the case gets to trial, the individual client will change 180 degrees and the supervisors of the employee or claim representative will countermand the aggressive stance previously taken by the subordinate employee. After the fact, the individual client will wonder why the attorney led him down the aggressive path and the supervisors will wonder about the attorney's judgment in handling files.

VII. Inform Your Client of the Settlement Conference and Obtain Settlement Authority from Your Client Before the Conference

Sanctions can be imposed for failure to obtain settlement authority. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pre-trial conference. Fed. R. Civ. P. Rule 16(c)(1). On motion or on its own, a district court may issue any just orders if a party or its attorney is "substantially unprepared to participate—or does not participate in good faith—in the conference." Fed. R. Civ. P. Rule 16((f)(1)(B).

Identify the client who holds the right to control settlement decisions. Where there is coverage and the insurer controls the litigation, the insurer is the "client" for purposes of extending settlement authority. But in a reservation-of-rights case, the insured has the ultimate decision regarding settlement. *See, e.g., Carrier Express v. Home Indem. Co*., 860 F. Supp. 1465 (N.D. Ala. 1994). In *Carrier Express*, the insurer defended the insured under a reservation of rights. Early in the case, the insured directed its carrier-retained counsel to tender the policy limits in response to a settlement offer but counsel refused. The case ultimately settled for more than the policy limit and the insured paid the balance. A jury in the subsequent bad-faith action by insured against the carrier found in favor of the insured and awarded the insured punitive as well as compensatory damages. Vis-à-vis the carrier-retained attorney, the district court stated that although retained by the insurer, the attorney was ethically bound to represent only the insured's interest in the underlying litigation. Therefore, it was the insured who made the ultimate choice regarding settlement.

But in contrast, the federal district court in *State Farm & Cas. Co. v. Myrick,* 611 F. Supp. 2d 1287, 1298-1299 (M.D. Ala. 2009), noted that there was no dispute that the carrier hired competent defense counsel who understood that only the insureds were his clients. The clients retained the right to decide on settlement and authorized the settlement of the case. The insurer, which had issued a reservation of rights, refused to settle and its refusal was found to be justified given its reservation of rights.

With regard to uncovered claims, the insured is the client. The insurer has no duty to consider uncovered claims, such as a punitive damages claim, in responding to plaintiff's settlement demand. *St. Paul Fire & Marine Ins. Co. v. Convalescent Servs*., 193 F.3d 340, 345 (5th Cir. Tex. 1999). Therefore, the insured controls the grant of settlement authority.

Defendant's attorney is obliged to advise insured that he has a right to contribute money towards settlement where the damages clearly exceed the insured's coverage. *Kaudern v. Allstate Ins. Co*., 277 F. Supp. 83, 90 (D.N.J. 1967).

Have sufficient settlement authority for the conference. Courts and court mediators may impose sanctions for lack of good faith if counsel has "insufficient" settlement authority. An extreme example, in which the attorney was spared on appeal, is *In re A.T. Reynolds & Sons, Inc*., 452 B.R. 374, 384-385 (S.D.N.Y. 2011), in which the Southern District of New York reversed sanctions and a contempt finding imposed by a bankruptcy court judge on the creditor's attorney for failure to have "sufficient authority" at a court-ordered mediation. The bankruptcy judge sanctioned the attorney, who had appeared with an employee from his client-creditor, on several grounds: for having insufficient authority to settle the case for an amount greater than the amount in controversy, for failure to be able to discuss any theory of legal liability including issues that did not affect the creditor, and for failure to enter in to "creative solutions" that were not defined. The bankruptcy court had taken particular

umbrage at the creditor's attorney and the creditor's employee calling a more senior person at the creditor to discuss issues. On appeal, the district court reversed the sanctions and contempt because the the bankruptcy court applied an unworkable and overly stringent standard for measuring sufficient settlement authority. The district court held that settlement authority is met by sending a person who has authority to settle for the anticipated amount in controversy and who is prepared to negotiate all issues that can be reasonably expected to arise.

Defense counsel should notify the court before the conference if there will be no offer. *Kyeame v. Buchheit*, 1:07-CV-1239, 2011 U.S. Dist. LEXIS 120106, 4-5 (M.D. Pa. 2011). Defense counsel notified the mediator four days before the mediation that defendant would be making no offer, thereby letting the court know that the settlement conference would be a futile act. The mediation/conference was canceled. Plaintiff's attorney's motion for sanctions based on defendant's failure to mediate in good faith was denied.

Plaintiffs who didn't speak English participated sufficiently via their attorney who translated for them the dialog of private mediation. Defendant sought sanctions afterwards because the mediator could not speak directly with plaintiffs. The Eastern District of California denied defendant's motion. There is no requirement that the mediator be able to speak directly to plaintiffs. If defendant felt it was that important for the mediator to speak directly with plaintiffs, defendant should have arranged for a translator to be at the mediation. *U.S. EEOC v. ABM Industries*, 1:07-cv-01428-LJO –JLT, 2010 U.S. Dist. LEXIS 24570, 11-12 (E.D. Cal. 2010).

VIII. At the Conference

Make sure you appear at the conference. On motion or on its own, the district court may issue any just orders if a party or its attorney fails to appear at a scheduling or other pre-trial conference or fails to obey a scheduling or other pre-trial order. Fed. R. Civ. P. Rule 16(f)(1)(A) and (C). The Eastern District of California levied a $2,500 monetary sanction against an attorney who failed to provide a required dismissal of an action after his client was paid in full, failed to respond to the court's inquiries about the status of the case, and failed to appear for a status conference that the court scheduled because the attorney had ignored the court's other efforts. *Waterbury v. Veneman*, No. CV-F-02-6162 LJO, 2006 U.S. Dist. LEXIS 82206 (E.D. Cal. 2006).

The Ninth Circuit affirmed the sanctions against an attorney who failed to appear at a settlement conference where the other attorney received the court's notice, the post office did not return the notice to the offending attorney, and the offending attorney when called by the court clerk said that the date had slipped by him. *Ayers v. Richmond*, 895 F.2d 1267 (9th Cir. 1990).

Bring your client's contact information (and claim number) to the conference/mediation, and bring your client or carrier claim representative if required. More likely than not, the judge or the court-appointed mediator will require that the carrier's claim representative physically appear at the conference. Fed. R. Civ. P. Rule 16(c)(1) states that if appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

Representatives include insurer's claim representatives. A claim representative's failure to appear in response to a court directive to appear can result in criminal contempt. In *Matter of Novak*, 932 F.2d 1397 (11th Cir. Ga. 1991) the district court faxed the claim representative an order directing him to appear for a settlement conference and so informed the carrier-retained attorney representing the insured. The claim representative authorized the attorney to make a higher offer and did not appear at the conference. The district court issued an order directing the claim representative to show cause why he should not be held in criminal contempt. The claim representative challenged the court's jurisdiction over him. The district court held him in criminal attempt and the Eleventh Circuit affirmed. The Eleventh Circuit held that although the order to appear was invalid because it was unauthorized by statute, rule or the district court's inherent power, the order was valid until vacated and the claim representative willfully disobeyed the order.

The Eastern District of Missouri issued sanctions against defendants for failing to participate in court-ordered mediation. Defense counsel failed to provide its pre-mediation brief for the mediator and defendant failed to send a representative with settlement authority. Defendant sent only a person with little knowledge of the litigation. Plaintiff made two offers but defendant made no counteroffers because of lack of settlement authority. *Nick v. Morgan Foods, Inc.*, 99 F. Supp. 2d 1056, 1057 (E.D. Mo. 2000), *aff'd*, 270 F. 3d 590 (8th Cir. 2001).

Plaintiff's attorney was sanctioned for abruptly terminating a court-ordered mediation. Defendants had made a serious offer to plaintiff, who rejected it out of hand and said that if defendants did not make a serious offer within five minutes, plaintiff would leave. Plaintiff's attorney did not allow the mediator to explain the reasoning behind the offer and unilaterally terminated the mediation. *U.S. EEOC v. ABM Industries*, 1:07-cv-01428-LJO –JLT, 2010 U.S. Dist. LEXIS 24570, 11-12 (E.D. Cal. 2010).

Negotiate with confidence. Experienced opposing counsel and the judge may take advantage of an attorney who lacks confidence. Correspondingly, do not be forced into settling. Rule 2.6 of the Model Code of Judicial Conduct states that a judge shall accord to all who have a legal interest in a proceeding and to their attorneys the right to be heard according to law, and that a judge may encourage parties and their lawyers to settle matters

but shall not act in a manner that coerces any party into settlement.

Ex parte communications with the judge during the settlement conference are permitted. Although ex parte communications with the judge are forbidden as a general matter, it is customary during settlement conferences for the judge to confer with each side separately. This exception to the ban on ex parte communications is generally assumed but is sometimes made explicit in federal court court-specific rules and scheduling orders. In New York, judges are prohibited from ex parte communications except (in pertinent part) that a judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters. 22 NYCRR §100.3(B)(6)(d).

You have no obligation to tell opposing counsel the attorney's limit of authority, but the attorney cannot lie about it to the judge. Under Rule 1.6 (confidentiality of information) of the New York Rules of Professional Conduct, the limits of the client's settlement authority and the terms that a lawyer would recommend to client are confidential client information that cannot be disclosed without the client's express consent. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 93-370 (1993). The attorney has no implied authority by virtue of his representing the client to disclose the limit on the attorney's settlement authority. This information should not be disclosed to a judge, a mediator, or opposing counsel without the client's informed consent.

The attorney cannot make false statements to a judge about the limit of the attorney's settlement authority. See Code of Prof'l Conduct Rules 3.3 (candor towards the tribunal) and 8.4(c) (misconduct). The judge is not supposed to ask what the limit of the attorney's settlement authority is, but if the judge does ask, the appropriate response is to decline to answer the judge's question. N.Y. Rules of Prof'l Conduct Rules 3.3 and 8.4(c).

The attorney can, however, make false statements to opposing counsel about the limit of the attorney's settlement authority. N.Y. Rules of Prof'l Conduct Rule 4.1, comment 2: "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation."

ABA Formal Ethics Opinion 06-439 acknowledges that it is not unusual for lawyers to be "less than entirely forthcoming" with opposing counsel during settlement negotiations, and gives examples of what are not false statements of material fact or law under Model Rule 4.1 [see N.Y. Rules of Prof'l Conduct Rule 4.1]:

- "puffing," posturing and other statements upon which parties to negotiations are ordinarily not expected to rely.
- Exaggerating the client's negotiation goals.
- Downplaying the client's willingness to compromise.

But statements that are false statements of material fact or law under Rule 4.1 are:

- When a lawyer representing an employer in labor negotiations states to union lawyers that adding a particular employee benefit would cost the company an additional $100 per employee, when the lawyer knows it will actually cost $20.
- When defense counsel declares that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist.
- When either side in a criminal case tells the other during a plea negotiation that he knows of an eyewitness to the facts in question when he knows that is not the case.

False statements that have led to discipline or voiding of settlements. Plaintiff's attorney was disciplined for settling a personal injury case without disclosing that the plaintiff had died. *Kentucky Bar Ass'n v. Geisler,* 938 S.W.2d 578 (Ky. 1997); *In re Warner*, 851 So. 2d 1029 (La. 2003); *Toledo Bar Ass'n v. Fell*, 364 N.E.2d 872 (Ohio 1977).

Defendant's attorney was disciplined for stating to opposing counsel that his client's insurance coverage was only $200,000 when he knew that the limits were $1 million. *In re McGrath*, 96 A.D.2d 267 (1st Dep't 1983).

Settlement was voided because of defense counsel's failure to disclose material facts adverse to his client's position relating to the plaintiff's medical condition. *See, e.g., Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962) which was a case involving a crash injury to the chest of a 20-year-old minor plaintiff. Defendant's examining doctor discovered an aortic aneurysm caused by the accident which plaintiff's treating physicians had missed. The aneurysm was a serious condition given the plaintiff's young age. Defense counsel, knowing of the aneurysm but not disclosing it to the court or plaintiff's attorney, settled the case for $6,500 and the court approved it as an infant compromise. Two years later, plaintiff's physician found the aneurysm during a routine physical, re-read the films taken immediately after the accident, and related the aneurysm to the accident. The court set aside the settlement because it was an infant compromise. Had plaintiff

been an adult, the court would have relegated plaintiff to malpractice actions against his attorney and physicians.

Attorneys and litigants cannot be forced to settle. Rule 2.6 of the ABA Model Code of Judicial Conduct states that a judge shall accord to all who have a legal interest in a proceeding and to their attorneys the right to be heard according to law, and that a judge may encourage parties and their lawyers to settle matters but shall not act in a manner that coerces any party into settlement. New York's Code of Judicial Conduct states that a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. 22 NYCRR §100.3.

IX. Make a Record of the Settlement

Make a record of the settlement and its terms. Write down the settlement with all of its terms and have it signed by the plaintiff personally and by defense counsel, or place the agreement and its terms on the record and memorialize it with a so-ordered from the judge. The judge should elicit an acknowledgement by all parties, especially plaintiff, that the parties understand the terms of the settlement and agree to them. *See, e.g., Quinones v. Police Dep't of N.Y.*, 10 Civ. 6195 (JGK) (JLC), 2012 U.S. Dist. LEXIS 51697, 9-20 (S.D.N.Y. Apr. 12 2012) (magistrate decision) in which the judge's colloquy with the plaintiff bound plaintiff to the settlement.

Make sure all represented parties have the advice of their counsel in signing the agreement or release. A represented party who signed a stipulation of settlement without its attorney's advice was entitled to reprieve from the terms of the settlement. *National Labor Relations Board v. Autotronics, Inc.*, 596 F. 2d 322 (8th Cir. 1979). The Eighth Circuit in *Autotronics* held that the NLRB's attorney acted unethically in obtaining the signature of the corporation's president to a stipulation which the NLRB then attempted to enforce. Enforcement was denied.

Settlements that are subject to a client's approval are not final until approved. When a municipality or governmental agency settles a case, actual authority to settle is required, and the settlement is not final until the appropriate board or body approves the settlement. Thus, neither side can enforce the settlement until the approval is obtained. *See, e.g., Morgan v. South Bend Community School Corp.*, 797 F.2d 471 (7th Cir. Ind. 1986) (plaintiff was not entitled to enforcement of a written settlement agreement that was expressly subject to approval by the school board); *Heuser v. Kephart*, 215 F.3d 1186, 1191-1192 (10th Cir N.M. 2000) (plaintiff was permitted to disavow the settlement because the City and County that were required to approve the settlement had not yet approved it).

X. If the Client Did Not Attend the Conference, Report Back Immediately to the Client

The attorney must convey all settlement offers to the client, no matter when made. *Kaudern v. Allstate Ins. Co.*, 277 F. Supp. 83, 90 (D.N.J. 1967); N.Y. Rules of Prof'l Conduct Rule 1.4, comment 2; N.Y. Rules of Prof'l Conduct Rule 1.4(a)(1)(iii); 22 NYCRR §1210.1 (Statement of Client's Rights).

XI. Other Issues

Keep your and your client's hands off your opponent's file when you are alone in a room with your opponent's file during court conferences. In *Lipin v. Bender*, 193 A.D.2d 424 (1st Dep't 1993), plaintiff's suit was dismissed with prejudice because plaintiff, who was working for her attorney as a paralegal, attended a discovery hearing and when no one was looking reviewed the opposing attorney's internal counsel memorandums, informed her attorney, and made copies of them. Plaintiff's attorney then took advantage of that information and scheduled a "settlement conference." The First Department affirmed dismissal of plaintiff's suit with prejudice. *See also Furnish v. Merlo*, 1994 U.S. Dist. LEXIS 8455, 24-26, 128 Lab. Cas. (CCH) ¶ 57,755 (D. Or. 1994) (plaintiff who was a former manager of the defendant, whom she was suing for discrimination, and her attorney were sanctioned because plaintiff had copied a number of confidential documents from her personnel file that was maintained by her employer and then turned them over to her attorney for use in litigation).

Be reasonable in billing for travel time for and attendance at settlement conferences. A creditor applied to a bankruptcy court for reimbursement of expenses and attorney fees relating to mutual obligations under a pre-petition credit agreement with a Chapter 11 debtor. Out-of-town counsel for the creditor billed 211 hours for non-working travel time for various hearings and conferences. Although the creditor had local counsel in the venue, the out-of-town firm sent one and sometimes two attorneys even for events in which the creditor did not actively participate. The court held the billings to be unreasonable and disallowed them. *In re Latshaw Drilling*, LLC, 481 B.R. 765, 816 (Bankr. N.D. Okla. 2012).

Settlement conferences on appeals. Settlement conferences may be held regarding appeals. Rule 33 of the Federal Rules of Appellate Procedure provides that the court may order settlement conferences to address any matter that may aid in the disposition of the matter including simplification of issues and settlement of the matter. In the New York State Second and Third Departments, settlement conferences may be ordered. 22 NYCRR §670.4 (Second Department), §730.2 (Appellate Terms in the Second Department), and §800.24-b (Third Department).

High-low agreements are ethical; *Mary Carter* agreements are not. A "Mary Carter" agreement occurs when a defendant settles with plaintiff in secret, capping defendant's liability, but remains in the suit through trial as if there was no settlement, and the defendant receives an offset on his settlement based on plaintiff's recovery against the non-settling co-defendants. See *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla. Ct. App. 2d 1967). Most jurisdictions hold these agreements to be unethical and against public policy because Mary Carter settlements hide a motive for the settling defendant to give testimony against a co-defendant.

High-low agreements, however, are ethical and enforceable. In a high-low agreement, the parties agree that the defendant will pay an amount to be determined by the trier of fact but that the amount will be between a high "ceiling" and a low "floor" but agree that those parameters are not disclosed to the trier of fact. As long as there is no sham amount used to hide what is really a Mary Carter agreement, most jurisdictions allow high-low agreements.

A client's personal attorney who may be called as a fact witness at trial may nevertheless participate in pre-trial proceedings. The prohibition against the attorney acting as an advocate applies only to trials. It does not automatically disqualify the attorney from all pre-trial activities such as strategy sessions, pre-trial hearings, pre-trial conferences, settlement conferences, or motion practice. Disqualification would be appropriate in the pre-trial setting if the activity includes obtaining evidence which if admitted at trial would reveal the attorney's dual role. *Lowe v. Experian*, 328 F. 2d 1122 (D. Kan. 2004) (the attorney in question had drafted the trust that was issue.)

Hearing-impaired clients may be entitled to an ALS interpreter ordered by the judge and paid for by the court system. *Patrick v. U.S. Postal Service*, No. CV-10-0650-PHX-ECV, 2010 U.S. Dist. LEXIS 128677 (D. Ariz. Nov. 23 2010).

Do not use a crystal ball, even a toy one, during settlement conferences. *Dodds v. American Broadcasting Co.*, 145 F.3d 1053, 1061-1062 (9th Cir. 1998). Judge Dodds sued ABC for defamation arising out a report that ABC aired to the effect that Judge Dodds used a crystal ball during settlement conferences. The judge sued ABC claiming that the report was false. The Ninth Circuit dismissed some of the claims and granted defendant summary judgment on the rest. The judge admitted using a toy crystal ball in one settlement conference for "levity." One of the show's producers took advantage of an open door to the judge's chambers and forced his way inside to where the crystal ball sat in plain view. Many sources told ABC that they were personally aware of the judge's use of the crystal ball as described by litigants who appeared on the show.

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The Adequacy of Expert Disclosure in Motion Practice

By David A. Glazer

At the heart of every products liability case is the liability expert. Inevitably, the adequacy of the expert disclosure will be brought up in either a motion for summary judgment or a motion *in limine*. To ensure that a case is decided on the merits, it is imperative that the expert exchanges are done properly.

In the state of New York, expert disclosure is governed by a CPLR 3101(d) and in the federal court under FRCP 26(a)(2). In federal court, disclosure is further modified by the Federal Rules of Evidence § 702.

CPLR 3101(d)

CPLR 3101 governs disclosure of material in litigation, with subsection (d) directed at disclosure of relevant expert witness information and materials.

CPLR 3101(d)(1)(i) specifically states:

> Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative, the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph.

Section 3101(d) also requires that a party seeking discovery of section 3101 materials (i.e., reports, expert's documents, etc.) show that it has "substantial need" of the materials in the preparation of the case, and that it is unable "without undue hardship" to obtain the information by other means. CPLR 3101(d)(2).

Identity of Expert Witnesses

Notably, CPLR 3101(d)(1) carves out several exceptions to the disclosure requirements of the rule for malpractice suits only. For example, a party need not disclose the name of or revealing information regarding expert witness in a medical malpractice suit. However, where a plaintiff brings claims involving both medical malpractice and products liability against a defendant, he must disclose only the identity of the expert witness who will be testifying in support of the products liability claim.[1]

Expert Witness Qualifications

"Practical experience" may qualify a witness to testify in a products liability case based upon allegations of defective design, even though the witness "was not a *designer* of and had never participated in *constructing*" the kind of product at issue.[2]

Time for Disclosure

While CPLR 3101(d) does not provide a time frame or require expert disclosure at any particular time as a practical matter, disclosure needs to be made early enough to avoid prejudice to the other side. In a case where a motion for summary judgment is being contemplated, that time frame has been interpreted to mean by the filing of the note of issue.

Violations of Disclosure—State Court

In *Mankowski v. Two Park Co.*, the Second Department held that it was proper for the Supreme Court to preclude the use of an expert or the expert's affidavit to oppose a motion for summary judgment since the plaintiff failed to timely respond to the defendant's discovery demands.[3] Throughout the years, the Second Department made similar rulings.[4]

In *Pellechia v. Partner Aviation Enterprises, Inc.*, the plaintiff allegedly sustained injuries when he slipped and fell while disembarking from defendant's charter jet.[5] The Second Department affirmed the Supreme Court's granting of summary judgment for the defendant on the grounds that the defendant made out a prima facie showing for summary judgment and the plaintiff was unable to raise a triable issue of fact. The Second Department upheld the Supreme Court's decision to disallow the plaintiff's expert affidavit "because the plaintiff never complied with any of the disclosure requirement of CPLR

3101(d)(1)(i), and only first identified his expert witness in opposition to the defendant's summary judgment motion, after the plaintiff filed the note of issue and certificate of readiness." The Court also held that: (1) the expert did not demonstrate that he was qualified to render an opinion and (2) the affidavit was "speculative and conclusory, and was not based on accepted industry standards…."[6]

In *Ehrenberg v. Starbucks Coffee Company,*[7] the plaintiff sued Starbucks Coffee Company when a cup of hot tea spilled on him, claiming that the accident was the result of a dangerous and defective condition on the premises. Starbucks moved for summary judgment, which was denied by the Supreme Court. On appeal, the Second Department reversed on the grounds that the Supreme Court improperly considered the affidavit of the plaintiff's expert that was submitted in opposition to the motion. The Second Department held that the Supreme Court should not have considered the affidavit "since that expert witness was not identified by the plaintiffs until after the note of issue and certificate of readiness were filed, attesting to the completion of discovery, and the plaintiffs offered no valid excuse for the delay." As a result, the Court granted summary judgment to Starbucks.[8]

In the first case, *Tomaino v. 209 E. 84th Street Corporation*, the plaintiff slipped and fell down a flight of steps and sued the owner of the premises.[9] The defendant moved for summary judgment on the grounds that the plaintiff was unable to state exactly where she fell and the exact cause of her fall, but the Supreme Court denied the motion. On appeal, the First Department affirmed the denial of the defendant's motion for summary judgment and to preclude plaintiffs' expert testimony. It held that the Supreme Court properly did not exclude the plaintiff's expert's affidavit and testimony because "[p]laintiffs established good cause for the untimely disclosure, which does not appear to have surprised or prejudiced defendant."[10]

In *Harrington v. City of New York*, the First Department affirmed the Supreme Court's order which granted defendants' motion for summary judgment and denied plaintiff's cross motion for partial summary judgment. The First Department held that even if the defendant's were negligent, "such negligence was not a substantial cause of the events producing the injury" and that the plaintiff "failed to establish prima facie entitlement to summary judgment in her favor on liability." However, the court also stated that "the motion court properly declined to consider the [plaintiff's] expert's affirmation because plaintiff failed to timely disclose his identity."[11] In making this statement, the court cited to a Second Department case, *Wartski v. C.W. Post Campus of Long Is. Univ.*, which held that "[t]he plaintiff's expert affidavit should not have been considered in determining the motion since the expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and the plaintiff offered no valid excuse for her delay in identifying the expert."[12] However, the First Department also made clear that even if the expert's affidavit were allowed, that it was insufficient to raise an issue of fact.[13]

FRCP 26(a)(2)

Expert Disclosure is federal court is more detailed. It is governed by FRCP 26(a)(2) which states:

> (2) Disclosure of Expert Testimony.
>
> (A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.
>
> (B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:
>
> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the facts or data considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.
>
> (C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

As is evident from the statute, there is a lot more information that must be disclosed in federal court. In federal court, parties must exchange the report, the facts and data used to form the expert opinion and exhibits that the expert will rely upon to for that opinion.

Violations of Disclosure—Federal Court

In general, a motion seeking to preclude expert testimony on grounds of an improper disclosure is to be made under FRCP 37(c)(1) which states:

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

Thus, the standard to impose sanctions for a late or incomplete disclosure is whether or not the improper disclosure was either harmless or justifiable.

In *Wills v. Amerada Hess Corp.*, the plaintiff disclosed expert's report concerning causation of seaman's injury pursuant to FRCP 26(a)(2), but did not disclose reports of two other experts except in response to defendants' motion for summary judgment, exclusion of two proposed expert witnesses as untimely disclosed was proper; plaintiff's manner of identifying experts appeared intended to delay completion of pre-trial process and it was questionable whether substance of proposed experts' testimony would be sufficient to allow plaintiff to survive summary judgment.[14]

Conversely, in *Commercial Data Servers, Inc. v. IBM*, the plaintiff computer systems company's submission, with its response to defendant competitor's summary judgment motion, of expert witness affidavit that was inconsistent with its corresponding FRCP 26 reports such that submission was, in essence, new and untimely expert report, was harmless and did not warrant excluding consideration of experts' evidence under FRCP 37 sanction provisions.[15]

Perhaps as important is that objections to an improper expert disclosure must be made timely or the court will deny the requested relief. In *Rupolo v. Oshkosh Truck Corp.*, the court held that preclusion of admission of defendant's expert's testimony as sanction under FRCP 37(c)(1) was inappropriate, even though defendant's FRCP 26(a)(2) disclosure concerning expert was inadequate, because plaintiffs waited more than one and half years before objecting on this basis and did not seek more complete disclosure, expert's testimony was crucial to defendant's case on issue of causation, and any prejudice to plaintiff was due to its delay before objecting to report.[16]

Federal Rules of Evidence 702

Fed. R. Evid. 702 governs testimony by expert witnesses. It states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Under the *Daubert*[17] standard, a witness must first be shown to be sufficiently qualified by "knowledge, skill, experience, training, or education," pursuant to Fed. R. Evid. 702. In a products liability action, an expert may be qualified as an expert, even though he may not be the "best qualified" expert, or have direct "specialization" in a field, if his expertise in similar areas is sufficient to assist the trier of fact understand the issues.[18]

As with all other types of claims, the testimony of expert witnesses in products liability suits may be precluded if the witness is unqualified, has no expertise, or if his methodology is clearly unreliable.[19] In the alternative, a court may limit the type and use of an expert witness's testimony to contain it within the scope of the witness's expertise.[20]

Federal Rules of Evidence 104(a)

Fed. R. Evid. 104(a) provides that "The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege." This Rule is applied in the context of *Daubert*[21] determinations, as described below.

A court is not required to hold a 104(a) hearing to determine the admissibility of expert witness testimony where it conducts a thorough review of the record, including the witness's deposition transcript.[22] A court may also forgo the full 104(a) hearing where the witness's testimony is so blatantly unreasonable that a hearing would be useless.[23] While there is no requirement that a court hold a 104(a) hearing, the court must have a proper and reviewable foundation for making its admissibility findings.[24]

Admissibility of Expert Testimony Under *Daubert* and *Frye*

The threshold standard for admissibility of novel scientific evidence in New York State is derived from *Frye v. United States*.[25] The *Frye* rule requires that innovative scientific evidence be based on "a principle or procedure [which] has 'gained general acceptance' in its special field." "[T]he particular procedure need not be 'unanimously endorsed' by the scientific community but must be 'generally accepted as reliable.'"[26] The proponent of a scientific procedure "is required to show the generally accepted reliability of such procedure in the relevant scientific community through judicial opinions, scientific or legal writings, or expert opinion other than that of the proffered expert."[27]

The *Frye* rule as applied in New York differs from the more liberal federal standard established by the United States Supreme Court in *Daubert v. Merrell Dow Pharms.*[28] In *Daubert*, the Court rejected the *Frye* rule in favor of a "reliability standard" derived from the Federal Rules of Evidence Rule 702. Under the *Daubert* standard, the court makes "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid."[29] In contrast, under *Frye*, the court does not determine whether a scientific technique is reliable but, instead, "whether there [is a] consensus in the scientific community as to its reliability."[30] The *Daubert* test essentially requires federal trial judges to play the role of a "gatekeeper," insuring that the fact-finding process does not become distorted by "expertise that is *fausse* and science that is junky."[31]

Under the *Daubert* standard, a witness must first be shown to be sufficiently qualified by "knowledge, skill, experience, training, or education," pursuant to Fed. R. Evid. 702. Second, the Federal Rules of Evidence require that the judge "ensure that any and all scientific testimony or evidence admitted is not only relevant, but [also] reliable." *Daubert*, 509 U.S. at 589. "[T]he trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id*. at 592-593.

Although *Daubert* was decided in the context of scientific knowledge, the test has since been extended to the kind of "technical or other specialized knowledge" often at issue in products liability cases.[32]

New York

There is some disagreement in New York courts as to whether the *Daubert* or *Frye* standard is generally applicable. After the *Daubert* decision was rendered, some New York courts continued to use the stricter "general acceptance" test of *Frye* in cases where the issue was the reliability and admissibility of novel scientific evidence.[33] However, where the evidence is not scientific or novel, some courts have held that the *Frye* analysis is not applicable.[34] "Nevertheless, whenever directly confronted with the issue, appellate courts have consistently rejected the idea that *Daubert* should be the controlling standard in New York rather than *Frye*."[35]

In products liability cases where the testimony is based upon recognized technical or other specialized knowledge, courts have applied the liberal *Daubert* test.[36] However, where there is a question as to whether the witness's testimony is supported by accepted scientific methods, as where the expert's conclusions are novel, courts have applied the stricter *Frye* standard.[37]

Endnotes

1. *See, e.g., Travis v. Wormer*, 524 N.Y.S.2d 913 (App. Div. 4th Dep't 1988) (plaintiff must disclose identity of medical expert to defendant drug manufacturer sued in strict products liability and breach of warranty notwithstanding other pending claim of medical malpractice against codefendants).
2. *See Caprara v. Chrysler Corp.*, 52 N.Y.2d 114 (1981) (emphasis in original).
3. *Mankowski v. Two Park Co.*, 225 A.D.2d 673, 639 N.Y.S.2d 847 (2d Dept. 1996).
4. *See Vailes v. Nassau County Police Activity League, Inc., Roosevelt Unit*, 72 A.D.3d 804 (2d Dept. 2010); *Yax v. Development Team, Inc.*, 67 A.D.3d 1003 (2d Dept. 2009); *Gerardi v. Verizon N.Y., Inc.*, 66 A.D.3d 960 (3d Dept. 2009); *Wartski v. C.W. Post Campus of Long Is. Univ.*, 63 A.D.3d 916 (2d Dept. 2009); *King v. Gregruss Mgt. Corp.*, 57 A.D.3d 851 (2d Dept. 2008); *McArthur v. Muhammad*, 16 A.D.3d 630 (2d Dept. 2005); *Ortega v. New York City Tr. Auth.*, 262 A.D.2d 470 (2d Dept. 1999).
5. 80 A.D.3d 740, 916 N.Y.S.2d 130 (2d Dept. 2011).
6. *Id.*
7. 82 A.D.3d 829, 918 N.Y.S.2d 556 (2d Dept. 2011).
8. *Id.*
9. 72 A.D.3d 460, 900 N.Y.S.2d 245 (1st Dept. 2010).
10. *Id.* (internal citations omitted).
11. *Id.*
12. 63 A.D.3d 916, 917, 882 N.Y.S.2d 192 (2d Dept. 2009).
13. *Harrington*, 79 A.D.3d 545.
14. *Wills v. Amerada Hess Corp.* (2004, CA2 NY) 379 F3d 32, 2004 AMC 2082, 64 Fed Rules Evid Serv 1153, cert den (2005) 546 US 822, 126 S Ct 355, 163 L Ed 2d 64.
15. *Commercial Data Servers, Inc. v. IBM* (2003, SD NY) 262 F Supp 2d 50, 2003-1 CCH Trade Cases P 74022.
16. Rupolo v. Oshkosh Truck Corp. (2010, ED NY) 749 F Supp 2d 31.
17. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).
18. *Pineda v. Ford Motor Co.*, 520 F.3d 237 (3d Cir. 2008); *see also McCloud v. Goodyear Dunlop Tires N. Am., Ltd.*, 479 F. Supp. 2d 882 (C.D.Ill. 2007) (witnesses qualified to testify as experts where they qualified as experts to the field of tires in general, although they did not specialize in the particular subset of motorcycle tires at issue).
19. *Smith v. Goodyear Tire & Rubber Co.*, 495 F.3d 224 (5th Cir. 2007); *Khoury v. Philips Med. Sys*, 615 F.3d 888 (8th Cir. 2010).
20. *See Schaff v. Caterpillar, Inc.*, 286 F. Supp. 2d 1070 (D.N.D. 2003).
21. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).
22. *Anderson v. Raymond Corp.*, 340 F.3d 520 (8th Cir. 2003) (no abuse of discretion where court did not hold 104(a) hearing for admissibility of an engineer's testimony in a product liability case).
23. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1246 (E.D.N.Y. 1985) (no need for 104(a) hearing in products liability suit where the witness relied on litigants' checklists to reach a conclusion, a process that "no reputable physician" would use).
24. *See In re Paoli R. Yard PCB Litigation*, 916 F.2d 829, 854 (3d Cir. 1999).
25. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
26. *People v. Wesley*, 83 N.Y.2d 417, 422 (1994).
27. *Cameron v. Knapp*, 137 Misc. 2d 373, 375 (Sup. Ct, NY County 1987).
28. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).
29. *Id.*
30. *Wesley*, 83 N.Y.2d at 439 (Kaye, J, concurring).
31. *Kumho Tire Co, Ltd. V. Charmichael*, 526 U.S. 137, 159 (1999) (Scalia, J., concurring).
32. *Kumho Tire, Ltd.*, 526 U.S. at 159; *see also, Clay v. Ford Motor Co.*, 215 F.3d 663 (6th Cir. 2000).
33. *Wahl v. American Honda Motor Co.*, 693 N.Y.S.2d 875, 877 (Sup. Ct. Suffolk County, 1999).
34. *See People v. Wernick*, 89 N.Y.2d 111 (1996); *Wesley*, 83 N.Y.2d at 417.
35. *Matter of Seventh Jud. Dist. Asbestos Litig.*, 797 N.Y.S.2d 743, 751 (2005).
36. *See, e.g., Wahl*, 693 N.Y.S.2d at 878 (permitting engineer's expert witness testimony under the *Daubert* standard).
37. *See Selig v. Pfizer, Inc.*, 13 N.Y.S.2d 898, 902-903 (Sup. Ct. NY County, 2000) (applying the *Frye* standard and precluding testimony not generally accepted in the scientific community).

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The End of Conflicts of Interest?: Courts Warm Up to Advance Waivers

By C. Evan Stewart

One of the greatest comedic teams of the 20th Century was George Burns and Gracie Allen. Their television show, which came after a long career in vaudeville and radio, ran from October 12, 1950 until September 22, 1958; it was (and is) a classic. Burns, the straightman, would end each show with "Say goodnight, Gracie." Allen's response: "Goodnight."[1] Pretty simple, huh?

We lawyers, of course, love the opposite: complexity. And no part of lawyers' ethical obligations seems quite as complex as that of conflicts of interest; and within that field itself, the most puzzling set of issues tends to relate to the doctrine of advance waivers.

The "Good" Old Days?

Once upon a time, advance waivers were looked upon with a high level of suspicion, at best.[2] After all, the notion of a lawyer asking her client to agree to the lawyer being adverse to it at some point in the future does seem to run counter to the historical, laser-like beam of undivided (and zealous) loyalty that is at the bedrock of our profession.[3]

But the American Bar Association seemed eager to change all that in 2002, when it enacted the current version of Model Rule 1.7; advance waivers were now to be countenanced, so long as the client gives "informed" consent. According to the ABA, informed consent requires that a waiving client must "reasonably understand[ ] the material risk that the waiver entails."[4] The criteria for such an understanding include, *inter alia*: (i) a (more) detailed statement of the type of engagements that might be undertaken; (ii) a (more) detailed statement of the "reasonably foreseeable adverse consequences" of said engagements; (iii) whether the "particular type of conflict" is one with which the waiving client is familiar; (iv) whether the waiving client is "an experienced user of the legal services" at issue; (v) whether the waiving client is represented by other counsel for purposes of giving consent; and (vi) whether the consent is limited to prospective engagements unrelated to the current representation.[5]

In the years that followed the 2002 version of ABA Model Rule 1.7, courts took dramatically different approaches to advance waivers,[6] and even practitioners that routinely used advance waivers in client retainer agreements doubted their efficacy.[7] Two new cases, however, would suggest that the future has arrived, big time.

A "Brave" New World?

The first case is *Galderma Laboratories v. Actavis Mid Atlantic*.[8] There, a federal judge in the Northern District of Texas ruled that a general, open-ended advance waiver with a sophisticated corporate client represented by in-house counsel made it permissible for Vinson & Elkins to represent the client's opponent in unrelated litigation.

The client that sought Vinson's disqualification was Galderma Laboratories (and two of its affiliates). Galderma had first retained Vinson in 2003 for advice on employment and H.R. issues. At that time, the company's general counsel executed Vinson's retainer agreement, which included the following provision:

> We [Vinson] understand and agree that this is not an exclusive agreement, and you [Galderma] are free to retain any other counsel of your choosing. We recognize that we shall be disqualified from representing any other client with interests materially and directly adverse to yours (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnished to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with yours in litigation, business transactions, or other legal matters. *You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations*. (emphasis added).

Fast forward to 2012, when Galderma brought a patent infringement case against Actavis Mid Atlantic. Vinson, which had previously represented Actavis on intellectual property matters, was retained to defend the company. Galderma asked Vinson to stand down. Vinson instead terminated its attorney-client relationship with Galderma. Galderma's motion to disqualify followed shortly thereafter.

Interestingly, Judge Ed Kinkeade did not apply Texas state ethics rules in ruling on the disqualification motion (Texas allows lawyers to oppose current clients in most

unrelated matters *without* getting the client's informed consent). Rather, he looked to the ABA's Model Rule 1.7 because he wanted to apply the "national" standard. Judge Kinkeade then broke down the informed consent issue into two questions: (i) did Vinson give reasonably adequate disclosure for a generic client; and (ii) was such disclosure adequate for *this* client. He answered yes to both questions and then denied Galderma's motion.

The key to Judge Kinkeade's ruling appears to have been his focus on the sophistication of the company, the top-flight law firms the company regularly retains (beyond Vinson), and (most particularly) the expertise and experience of Galderma's general counsel—who was the signatory to the 2003 retainer agreement. In reaching his decision, Judge Kinkeade recognized that he was doing so in the face of a prior federal court decision on very similar facts: *Celgene Corp. v. KV Pharm Co.*[9] Taking that decision head on, the judge found it inapposite for several reasons: (i) he noted that New Jersey has a different, stricter standard of what constitutes "full disclosure and consultation;" (ii) he found that the *Celgene* court's looking to whether the waiver identified particular risks (e.g., potential classes of adversaries or disputes) was no longer important in light of the ABA's 2002 action; and (iii) he disagreed that having "independent" counsel judge the advance waiver was important (following *Celgene* "would ignore the knowledge and advantage that clients gain by employing their own counsel to advise them").

Judge Kinkeade did acknowledge that Vinson's general waiver language might not work in all cases.[10] But in this one, and for Galderma, he ruled that it did.

Even more recently, New York's First Department upheld an advance waiver in *Macy's Inc. v. J.C. Penney Corp.*[11] There, the court affirmed a lower court's ruling that allowed the Jones Day law firm to represent Macy's in a bitter contract dispute with J.C. Penney over the use of Martha Stewart's products.

In 2008, Jones Day had been retained by J.C. Penney to represent the company with respect to Asian trademark matters. The law firm's engagement letter included a very broad advance waiver provision:

> Jones Day represents and in the future will represent many other clients. Some may be direct competitors of J.C. Penney or otherwise may have business interests that are contrary to J.C. Penney's interests. It is even possible that, during the time we are working for you, an existing or future client may seek to engage us in connection with an actual or potential transaction or pending or potential litigation or other dispute resolution proceeding in which such client's interests are or potentially may become adverse to J.C. Penney's interests.
>
> Jones Day cannot enter into this engagement if it could interfere with our ability to represent existing or future clients who develop relationships or interests adverse to J.C. Penney. We therefore ask J.C. Penney to confirm that Jones Day may continue to represent or may undertake in the future to represent any existing or future client in any matter (including but not limited to transactions, litigation or other dispute resolutions), even if the interests of that client in that other matter are directly adverse to Jones Day's representation of J.C. Penney, as long as that other matter is not substantially related to this or our other engagements on behalf of J.C. Penney. In the event of our representation of another client in a matter directly adverse to J. C. Penney, however, Jones Day lawyers or other service providers who have worked with J.C. Penney will not work for such other client, and appropriate measures will be taken to assure that proprietary or other confidential information of a non-public nature concerning J.C. Penney acquired by Jones Day as a result of our representation of J.C. Penney will not be transmitted to our lawyers or others in the Firm involved in such matter.
>
> In other words, we request that J.C. Penney confirm that (1) no engagement that we have undertaken or may undertake on behalf of J.C. Penney will be asserted by J.C. Penney either as a conflict or interest with respect to, or as a basis to preclude, challenge or otherwise disqualify Jones Day from, any current or future representation of any client in any matter, including without limitation any representations in negotiations, transactions, counseling or litigation adverse to J.C. Penney, as long as that other matter is not substantially related to any of our engagements on behalf of J.C. Penney, (2) *J.C. Penney hereby waives any conflict of interest that exists or might be asserted to exist and any other basis that might be asserted to preclude, challenge or otherwise disqualify Jones Day in any representation of any other client with respect to any such matter*, (3) J.C. Penney has been advised by Jones Day, and has had the opportunity to consult with other counsel, with respect to the terms and conditions of these provisions and its prospective waiver, (4) J.C. Penney's consent to these provisions is

> both voluntary and fully informed, and (5) J.C. Penney intends for its consent to be effective and fully enforceable, and to be relied upon by Jones Day.
>
> ***
>
> Please sign and return to us the enclosed copy of this letter in order to confirm that it accurately reflects the scope, terms and conditions with respect to this engagement. However, please note that your instructing us or continuing to instruct us on this matter will constitute your full acceptance of the terms set out above and attached. If you would like to discuss any of these matters, please give me a call. (emphasis added).

J.C. Penney never signed the retainer letter. Notwithstanding, Jones Day went forward with representing the company, and several years later it also sued J.C. Penney on behalf of Macy's.

In the litigation with Macy's, J.C. Penney sought Jones Day's disqualification, arguing that this was the broadest, most open-ended advance waiver provision, with no attempt whatsoever to identify the types of possible future adverse representations, clients, or matters.[12] Not surprisingly, the company also contended that it had never agreed to such a waiver, noting that it did not execute the retainer agreement.

Neither argument was persuasive, however. The First Department emphasized the clear and unambiguous language of the waiver; clearly the Macy's case is subsumed under that language. As for the non-execution issue, the court ruled that J.C. Penney's conduct constituted a contractual "yes," given that the retainer agreement had an express negative consent provision (which is highlighted above); thus, the fact that Jones Day actually did the Asian trademark work equaled the client's complete assent to all the contractual terms of the retainer agreement.

Lessons to Be Learned

As we watch the dust settle, the quick and dirty lessons from these two decisions are at least the following. The first is: make sure what law applies to the retainer agreement. That Judge Kinkeade blithely brushed aside (seemingly applicable) Texas law to apply instead ABA Model Rule 1.7 is troubling; the ABA's Model Rules, after all, are not the "national" standard of anything—they are merely an aspirational set of rules which bind **no one** (each state is free to follow, amend, or reject each and every ABA Model Rule).[13] Given the continuing disparity in states' rules, as well as court rulings (*e.g.*, *Galderma v. Celgene*), making clear what law governs the attorney-client relationship is an important and necessary first step in this process.[14]

Next up would be for clients to take retainer agreements a little more seriously. Given the clear trend lines (disturbing as they are) to allow lawyers to bend and twist like pretzels in order to search for the deepest pocketed client, often at the expense of less well-heeled clients,[15] all clients need to think about pushing back on these advance waiver provisions. Once thought to be unenforceable (even by the lawyers who drafted them), a blind man can see that this is not where the case law is developing. Here is an area where in-house counsel can really earn their pay, or not (*e.g.*, the Galderma general counsel) because after the agreement is inked, it will be too late.[16]

And that leads to the last lesson: it would appear that sometimes a one-sided contract (drafted by one party) which is **not** executed **can** be an enforceable agreement. The First Department's decision in *Macy's* seems quite troublesome; indeed, it would have come as a big surprise to my very distinguished professor of contracts at law school! Whether the decision is good law outside of New York is unknown; but it is obviously good law (at least) in the First Department. Clearly, clients faced with this precedent cannot just say "no" silently or to themselves only.[17]

Conclusion

Chico Marx once famously remarked in *Duck Soup*, "Well, who you gonna believe, me or your own eyes?"[18] Prior to the *Galderma* and *Macy's* decisions, I would not have believed that the law with respect to advance waivers would today be where it appears to be. And given lawyers' desires to be on all sides of conflicted clients, it is just possible that the law in this area will get even whackier.[19] Stay tuned!

Endnotes

1. Contrary to legend, Allen never responded "Goodnight, Gracie." Burns was once asked why they did not use what he acknowledged would have been a funny line. His response: "Incredibly enough, no one ever thought of it."
2. *See, e.g.*, ABA Formal Op. 93-372 (1993); Richard W. Painter, *Advance Waiver of Conflicts*, 13 Geo. J. Legal Ethics 289 (2000).
3. *See* S. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 The Record 534 (1975).
4. Model Rules of Prof'l Conudct R. 1.7 cmt. 22 (2011).
5. *Id.* These criteria differ from the prior criteria, which required a pretty specific identification of the nature of the likely future matter and the potential party or class of parties likely to be adverse. See ABA Formal Op. 05-436 (2005) (withdrawing ABA Formal Op. 93-372 and endorsing "open-ended" waivers where the waiving client is sophisticated or represented by counsel).
6. Compare Bringham Young Univ. v. Pfizer, Inc., 2010 WL 3855347 (D. Utah Sept. 29, 2010); Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796 (N.D. Cal. 2004); McKesson Info. Solutions v. Duane Morris, No. 2006 CV 12110 (Fult. Super. GA 2006); Avocent Redmond Corp. v. Rose Electronics, 491 F. Supp. 2d 1000 (W.D. Wash. 2007); Colene Corp. v. KV Pharmaceutical Co., 2008 WL 2937415 (D.N.J. July 28, 2008) (all rejecting advance waivers) with Visa, U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100 (N.D. Cal. 2003); St. Barnabas Hosp. v. New York City Health & Hosp. Corp., 7 A.D.3d 83, 775 N.Y.S.2d 9 (1st Dept. 2004); In re Shared Memory Graphics

LLC, 659 F.3d 1336 (Fed. Cir. 2011); Gen. Cigar Holdings, Inc. v. Altadis, S.A., 54 F. App'x 492 (11th Cir. 2002) (all okaying advance waivers).

7. *See, e.g., ABA/BNA Lawyers' Manual on Professional Conduct*, 21 ABA/BNA Law, Manual on Prof. Conduct 96, 96–97 (Feb. 23, 2005) ("Advance consents are uniformly being used in large law firms, even though lawyers are doubtful that they'll hold up.") (Comment of Diane Karpman); *see also* Samson Habte, *In-House and Outside Counsel Often Divided on Issue of Advance Waivers, Panelists Say*, 29 ABA/BNA Law, Manual on Prof. Conduct 2, 2–3 (June 15, 2013).
8. Galderma Labs. v. Actavis Mid Atlantic, LLC, 927 F. Supp. 2d 390 (N.D. Tex. 2013).
9. 2008 WL 2937415 (D.N.J. July 29, 2008).
10. *See, e.g.*, GSI Commerce Solutions, Inc. v. Baby-Center, LLC, 618 F.3d 204 (2d Cir. 2010) (applying, *inter alia*, Model Rule 1.7 to bar advance waiver with respect to a corporate affiliate).
11. 107 A.D.3d 616 (1st Dept. June 27, 2013), *reported in* ABA/BNA Lawyer's Manual on Professional Conduct 393 (July 3, 2013).
12. *See supra* note 4.
13. See C. E. Stewart, *Lawyers and the Border Patrol: The Challenge of Multi-Jurisdictional Practice*, NY Business Law Journal 17 (Summer 2011).
14. Importantly, the ABA has recently "tweaked" ABA Model Rule 8.5 to allow for lawyers and clients to enter into a written agreement that specifies which jurisdiction's law will govern disputes with respect to conflicts of interest. See Model Rules of Prof'l Conduct R. 8.5 cmt. 5 (2011) ("With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.").
15. See *supra* note 13.
16. Obviously, the maximum point of client leverage on this point is *before* the outside firm is retained.
17. Unfortunately, this is not the first idiosyncratic (and troubling) decision by the state courts of New York recently. *See* C.E. Stewart, *Ohio Takes a Bite Out of the Big Apple*, New York Business Law Journal (Fall 2012); C. E. Stewart, *Just When Lawyers Thought It Was Safe to Go Back Into the Water*, New York Business Law Journal (Fall 2011).
18. This famous line is frequently attributed to Chico's brother Groucho. In fact, it is delivered by Chico's character, Chicolini, who at that point in the movie is impersonating Rufus T. Firefly (Groucho). *Duck Soup* (Paramount 1933) is generally considered the Marx Brothers' best film.
19. My "favorite" example of this—thus far—is Pioneer-Standard Electronics Inc. v. Cape Gemini America Inc., 2002 WL 553460 (N.D. Ohio 2002) (court rejected Shearman & Sterling's attempt to drop a client like a "hot potato," instead allowing the firm to represent adverse clients in separate cases "with equal vigor").

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Will Intoxication Negate Depraved Indifference in Alcohol-Based Motor Vehicle Fatalities?

By Edward L. Fiandach

Assume a fatal motor vehicle accident. Further assume that the defendant, who was highly intoxicated at the time of the accident, is charged with Murder in the Second Degree under a depraved indifference theory.[1] Can that very same intoxication work as a defense to the homicide charge? The answer may surprise you.

Depraved indifference to human life, simply put, has been viewed as reckless conduct that is imminently dangerous and presents a grave risk of serious physical injury or death.[2] It had been described as including both a mental element (recklessness) and a voluntary act (engaging in conduct which creates a grave risk of death).[3] The *mens rea*, recklessness, was delineated by statute while the *actus reus*, "the risk creating conduct," was seemingly defined by the degree of danger presented.[4] The assessment of the objective circumstances evincing a defendant's depraved indifference to human life was a qualitative judgment to be made by the trier of fact.[5]

Although depraved indifference to human life has a long historical basis,[6] it took *People v. Register,*[7] a 1977 bar shooting in Rochester, for the Court of Appeals to determine that a defendant's intoxication could not be considered as a defense since it did not negate an element of the offense. Decided primarily on the issue of intoxication, for almost thirty years *Register* and its progeny nonetheless stood firmly for the proposition that actions falling under this rubric did not require a culpable mental state.

While not germane to the issue of intoxication, *Register* began to lead to boilerplate usage of two-count indictments charging both intentional and depraved murder. Commencing in 2002, the Court, in a series of cases,[8] commenced a process of slowly edging away from this practice and year by year began to sound the death knell for depraved indifference as it had stood for more than a century.

In 2006, with *People v. Feingold,*[9] the bell was finally struck. A 4-to-3 Court overruled *People v. Register* by holding that "depraved indifference to human life is a culpable mental state."[10] In doing so, the Court stated:

> We say today explicitly what the Court in *Suarez* stopped short of saying: depraved indifference to human life is a culpable mental state. Our dissenting colleagues contend that this final step in the overruling of *Register* is unwarranted and unnecessary. Perhaps we would agree with that were it not for the setting in which the present case comes to us. In earlier cases (*People v. Hafeez*, 100 N.Y.2d 253, 762 N.Y.S.2d 572, 792 N.E.2d 1060 [2003], *People v. Gonzalez*, 1 N.Y.3d 464, 775 N.Y.S.2d 224, 807 N.E.2d 273 [2004], *People v. Payne*, 3 N.Y.3d 266, 786 N.Y.S.2d 116, 819 N.E.2d 634 [2004], *People v. Suarez*, 6 N.Y.3d 202, 811 N.Y.S.2d 267, 844 N.E.2d 721 [2005], we reversed depraved indifference murder convictions without having to discuss explicitly the question of *mens rea*. It was enough to say—and we said it repeatedly—that those defendants did not commit depraved indifference murder because depravity or indifference was lacking.[11]

Feingold is best understood by viewing its rather unique facts. In *Feingold*, the 52-year-old defendant, an attorney working as an Administrative Law Judge, attempted suicide in his 12th floor Manhattan apartment. Sealing the apartment door with tape, he blew out the pilot lights of his stove, turned on the gas, took tranquilizers and fell asleep in front of the oven expecting the gas to kill him. Several hours later a spark, apparently from the refrigerator compressor, ignited the gas, causing an explosion that wrecked the walls of his apartment and heavily damaged a number of neighboring apartments. No one else was seriously injured and the defendant himself survived. As a result of the explosion, he was charged with First Degree Reckless Endangerment,[12] which provides that a person violates the statute "when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person." The Supreme Court, in a non-jury trial, found that defendant's state of mind was not one of depraved indifference but nevertheless, relying upon *People v. Register*, *supra,* found him guilty and sentenced him to five years probation. Thereafter, the defendant appealed and his conviction was upheld by the Appellate Division.

The difficulty created by *Feingold* is this. The court specifically found that the defendant did not act with depraved indifference to a human life beyond his own. Hence, what was missing is *any* form of *mens rea* directed toward another. Feingold had no intention to kill anyone but himself. On the other hand, opening the gas valves and closing the windows in a New York City apartment building factually presents a situation not unlike that found in *Register*, firing shots in a crowded bar, or for that matter, the classic Penal Law description of opening the door of the lion's cage in the zoo. For the majority, the absolute lack of any intention to harm another crossed the line and demonstrated the need for intent.

When I lectured on fatal accidents several years ago at the New York State Bar Association's Big Apple XI Seminar, I opined, incorrectly it seems, that the *Feingold* decision would pretty much bring an end to the use of depraved indifference in cases involving alcohol-influenced operating offenses. By and large, my confidence was based upon two cases, *People v. S. E-W*,[13] and *People v. Valencia*.[14]

In *People v. S. E-W*, the defendant was at a golf club outdoor café/bar with friends and drinking alcohol. Adjacent to the café was a paved area divided into four aisles of parking. At the end of each of the two center aisles was a concrete and grass "U" turn area which permitted access to all parking. The café was at the non-entrance end of the two middle aisles and abutted the parking lot. At approximately 2:30 a.m., an altercation occurred between the defendant and another café patron. At the time, the defendant was escorted out of the bar to the parking area by S.B., one of the bouncers, and M.G., a patron. S.B. was restraining the defendant who was cursing and threatened to "kill all you guys."

The bar's patrons came out to the parking lot to observe the altercation and were milling around as the defendant finally walked to his car. He pulled out of the parking area, but upon reaching the exit end of the lot suddenly made a "U" turn and accelerated toward the crowd at a high rate of speed. He struck two bystanders, M.H. and S.M., causing physical injury. He then continued to drive directly at S.B. and M.G. whom he also hit, tossing them into the air with resultant serious physical injuries. As a result of these actions, the defendant was charged, *inter alia*, with Assault in the First Degree, which mandates depraved indifference.

Following indictment, the defendant moved for discovery and inspection of the Grand Jury minutes. Following inspection, the court (Calabrese, J.) found the same to be sufficient. Clearly, the fact that the defendant was heard to utter an intention to ""kill all you guys" served to move the case beyond *Feingold*.

Three years later, in *People v. Valencia*,[15] the defendant appealed from a judgment convicting him of, *inter alia,* Assault in the First Degree, which likewise mandates depraved indifference.

His primary contention was that the evidence at trial, viewed in the light most favorable to the prosecution, was legally insufficient to establish that he acted with the culpable mental state of depraved indifference to human life at the time he collided with the complainants' vehicles and, thus, did not support the conviction of Assault in the First Degree. The Second Department agreed and found unpersuasive the prosecution's contention that the *mens rea* component of depraved indifference assault may be satisfied by considering the defendant's state of mind at a point much earlier than the accident, that being when the defendant allegedly made a conscious decision to consume an excessive amount of alcohol with the awareness that he subsequently would be operating a motor vehicle. Phrased differently, the court concluded, over a dissent, that the defendant's state of mind at the time he consumed the alcohol was too temporally remote from his operation of the vehicle to support a conviction for Depraved Indifference Assault, a determination that was subsequently affirmed by the Court of Appeals.[16]

A thorough reading of the briefs filed by counsel before the Court of Appeals in *Valencia* establishes that the defendant was drunk, *very* drunk. Nevertheless, since the prosecution unsuccessfully argued that depraved indifference entered the case through the defendant's conscious decision to become intoxicated, *Valencia* never reached the essential issue of whether the defendant's intoxication would block the formation of a culpable mental state through the operation of Penal Law § 15.25.[17]

While the Second Department has since affirmed two alcohol/motor vehicle cases of depraved indifference homicide, both of those matters involved proof that the depravity was not intoxication but rather the wanton, callous *and knowing* means in which each of these defendants operated their motor vehicles in the wrong direction on limited access highways. For instance, in *People v. McPherson*[18] the evidence was that:

> the defendant helped Taylor leave the nightclub. In addition, McCalla testified that when the defendant left the nightclub, the defendant "looked okay to [him]," "didn't look like intoxicated to me [sic]," and that the defendant "seemed like he could handle himself."[19]

Accordingly, the court observed:

> The evidence did not establish that the defendant was too intoxicated to form the culpable mental state necessary to prove depraved indifference [internal citation omitted]. Thus, the record supports a view of the evidence that the defendant was coherent and able to form the requisite *mens rea* prior to leaving the parking lot.[20]

Noting that the devil is indeed in the details, the court stressed the need for the nature of the proof:

> We do not believe that *Prindle* and *Valencia* stand for the proposition that a defendant who is *per se* intoxicated (*internal citation omitted*), and drives into oncoming traffic resulting in a fatality, can never be found guilty of depraved indifference murder or assault because such a defendant is incapable of forming the requisite *mens rea* of depraved indifference to human life. Rather than

> supporting the defendant's position, the above-cited cases merely illustrate that, in situations where a defendant is alleged to have acted with depraved indifference to human life while operating a motor vehicle, the nature of the evidence presented is crucial.[21]

Then there is *People v. Heidgen*,[22] Like *McPherson*, *Heidgen* involved a head-on collision on a limited access highway. *Heidgen* also involved an excessively high BAC. In affirming a conviction for depraved indifference murder,[23] the *Heidgen* majority observed that *Valencia* "[did] not foreclose a finding of depraved indifference under the particular facts of this case, notwithstanding that the defendant's blood alcohol concentration registered .28%."[24] In so doing, the majority strongly emphasized those indications in the proof that the defendant was at least cognizant of his actions. It observed that 15 to 30 minutes before the collision, the defendant, although intoxicated, remained steady on his feet and held conversations without slurring his speech; that other drivers who observed the pickup truck traveling on the Meadowbrook State Parkway testified that the pickup truck maintained a steady speed, successfully negotiated the curves of the parkway and stayed within one lane of travel. Further, they stressed those factors of which the defendant was clearly aware: "wrong way" signs, the back side of highway signs, at least five sets of headlights shining directly at him, at least one set of headlights suddenly veering to one side, and tail lights on the other side of the guide rail. In addition, the court observed that he was confronted with a horn blaring three times and the noise of a loud motorcycle on the other side of the median strip keeping pace with him in the same direction. Finally, the court noted that testimony from the People's expert was that a blood alcohol concentration of .28% would not prevent a person, such as the defendant, from reacting to the aforementioned stimuli. The expert also stated that a person's response to stimuli would be completely shut down only if the person were rendered unconscious. In view of these factors, the majority concluded:

> [g]iven all of the foregoing evidence, it was reasonable for the jury to conclude that the defendant was aware that he was driving the wrong way and deliberately chose to continue to proceed in the northbound direction, against traffic, without regard for the grave danger to himself and others traveling on the parkway that night.[25]

Most interesting in *Heidgen* is the discussion regarding the defendant's extremely high BAC. Inasmuch as the court chose to heavily rely upon the manner in which the defendant operated his vehicle, doesn't the apparent need to hinge culpability upon the defendant's knowing responses to his surroundings evince an awareness on the part of the majority that extreme intoxication may nonetheless bar a finding of the necessary *mens rea*?

All this leads to *People v. Andrew Lessey*.[26] In *Lessey*, the defendant was charged with one count of Assault in the First Degree.[27] It was alleged that, under circumstances evincing a depraved indifference to human life, he recklessly engaged in conduct which created a grave risk of death to another person and thereby caused serious physical injury to that person. The People charged that the defendant pushed a 63-year-old man, who was previously unknown to him, onto the subway tracks of the Times Square Subway Station at approximately 4:55 a.m. on a Saturday morning. The victim was not hit by a train but suffered significant injuries including a badly broken kneecap, a broken nose, a broken elbow and a concussion. The incident followed a night which Mr. Lessey had spent at a nightclub where he consumed alcohol. Multiple witnesses and videotape from the subway station showed that the defendant was acting in an highly belligerent and intoxicated manner prior to the assault and that he had verbally and physically abused other train passengers immediately prior to the crime. Testifying on his own behalf, Mr. Lessey testified that he had blacked out and could not remember the incident. The defense also maintained that Mr. Lessey may have been involuntarily intoxicated by a drug of some kind, which the defense claimed may have been slipped into his drink by a man he had met at the nightclub who accompanied him to the train station.

At the close of the evidence, the defense asked that the Court instruct the jury that it could consider whether the defendant's mind was affected by intoxicants to such a degree that he was incapable of forming a culpable mental state. The defense asked for the optional standard pattern jury charge on that issue.[28] The People, citing *People v. Register,*[29] argued that no such instruction was authorized and instead urged the Court to instruct the jury that voluntary intoxication could not negate depraved indifference. The Court thereafter granted the defendant's application. The defense also moved, and the People consented, to charge the jury on the lesser included offense of Assault in the 3rd Degree.[30] That crime occurs when a defendant recklessly causes physical injury to another person. After a full day of deliberations and multiple read-backs of the legal definitions of the crime elements, including the effect of intoxication on a defendant's liability for depraved indifference, the jury found the defendant not guilty of Assault in the First Degree but guilty of Assault in the Third Degree.

In a decision apparently written after the verdict, the Court (Conviser, J.) began with a discussion of *People v. Register* (*supra*) and observed that in *Register*, "[t]he Court held that the term 'depraved indifference to human life' did not refer either to the mental state required for the crime or the acts constituting it."[31] Thereafter it acknowledged that in *Feingold* the Court held that "depraved

indifference to human life is a culpable mental state" but "did not rule on whether this new conception of depraved indifference modified the *Register* court's holding that intoxication could not be used to negative depraved indifference."[32]

Turning to the Penal Law, the court found resolution of this essential issue to be contained in Penal Law § 15.25, which declares in no uncertain terms:

> Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.

Noting that under *Register* depraved indifference to human life was not a culpable mental state and accordingly Penal Law § 15.25 was of no significance, it likewise observed that *Feingold* changed all this by rendering depraved indifference to human life a culpable mental state and accordingly such culpable mental state becomes an element of any offense specifying depraved indifference to human life. Hence, if Penal Law § 15.25 declares that "evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged[,]" intoxication may be proven to negate the existence of depraved indifference. As set forth by the Court:

> When depraved indifference to human life was not a mental state, an act or a true crime element, the Court's conclusion in Register made perfect sense. When depraved indifference was considered to be an objective circumstance in which a crime occurred, then, obviously, that objective circumstance could not possibly vary with the defendant's level of intoxication. Now that depraved indifference is a culpable mental state, however, there is no basis to treat it differently than other mental states when considering the impact of intoxication.[33]

Indeed, simple statutory construction leads one to this point. Penal Law § 15.25 has been consistently read to include the *mens rea* as an element of the offense, thus permitting intoxication to mitigate such an element when present.[34] Moreover, as observed by the court in *Lessey*, when the Legislature is of the mind to exclude intoxication as a defense to a particular culpable mental state, it has specifically done so.[35]

As a point in fact, the defense in *Valencia* may have received far more than they bargained, or for that matter, hoped for. If the deliberate and conscious decision *to become* intoxicated cannot constitute depraved indifference, how can *the involuntary* state produced as a result of that excluded act be deemed to constitute the necessary *mens rea*? Phrased differently, if you cannot consider *the conscious act* of becoming intoxicated, then you cannot consider *being* intoxicated since the same requires no culpable conduct whatsoever on the part of the defendant. Thus, if depraved indifference is to be found, it must be found in *an act* separate and remote from the state of intoxication. Accordingly, the intoxication is therefore free to negate the required culpable mental state. As phrased by the *Lessey* court:

> If a court cannot consider a defendant's "conscious decision to consume an excessive amount of alcohol" (*Valencia*, 58 AD3d at 880) at a much earlier time than a depraved indifference crime as part of the depraved indifference calculus it is obvious that voluntarily intoxication can negative depraved indifference. A court considering a defendant who is, in fact, unable to form the mental state of depraved indifference at the moment of a crime due to intoxication and cannot look back to the defendant's culpable mental state at the time of his alcohol consumption would seem to have implicitly adopted such a rule.[36]

Support for this argument may be found in Judge Jones' *Valencia* concurrence:

> it is a basic premise of Anglo–American criminal law that the physical conduct and the state of mind must concur. Although it is sometimes assumed that there cannot be such concurrence unless the mental and physical aspects exist at precisely the same moment of time, the better view is that there is concurrence when the defendant's mental state actuates the physical conduct.[37]

Then there is the issue of legislative intent. Penal Law § 15.25 has a long and illustrious history with roots as far back as 1881.[38] Now that the Court has reversed itself and placed depraved indifference squarely within the confines of Penal Law § 15.25, one may now legitimately ask if application of this section to depraved indifference alcohol-based vehicular homicides comports with the Legislative intent. At the present time, it may. Both Judge Graffeo, in her *Valencia* concurrence, as well as the *Lessey* decision, point to the creation of Aggravated Vehicular Assault[39] and Aggravated Vehicular Homicide[40] as a probable Legislative response to *Feingold*.[41] Each section added the concept of recklessness by the introduction of Reckless Driving.[42] Arguably, these amendments may serve to insulate each and every aberrant act in the operation of the motor vehicle from mitigation by operation of Penal Law § 15.25 since intoxication is precluded as a mitigating factor when recklessness is charged by operation of the last clause of Penal Law § 15.05(3).[43.] Further evidence

of the probable Legislative intent may be seen in the punishment meted out for these offenses. Aggravated Vehicular Assault is a Class C Felony and accordingly carries a maximum term of imprisonment of five to fifteen years, while Aggravated Vehicular Homicide is a Class B Felony carrying a term of eight and one-third to twenty-five years. While these new offenses fall below their depraved indifference equivalents,[44] the potential sentences are stiff indeed.

So will intoxication bar a finding of depraved indifference? Yes, but with an exception that has the capacity to swallow the rule. *Heidgen* and *McPherson* clearly demonstrate that in this post-*Feingold* world the defendant must be truly intoxicated; intoxicated to the point where he or she is unable to comprehend the nature of what he or she is doing. Treat it as though it is a rebuttable presumption. Even though the defendant establishes *prima facie* intoxication, that showing can be rebutted by evidence that the defendant was otherwise of a state of mind to form the requisite culpable mental state.

It all boils down to four "shoulds." First, intoxication should not be charged as the sole basis for depraved indifference to human life in an alcohol-related operating offense since that very same intoxication may be negated by Penal Law § 15.25. Second, when the charge is one of depraved indifference murder or assault, defense counsel should, by means of a demand for a Bill of Particulars, force the prosecution to declare precisely those actions which it will attempt to prove were depraved.[45] Third, where both depraved *and* aggravated charges are filed, defense counsel should move against the indictment alleging that a probable defense to the depraved indifference charge may implicate the defendant on the aggravated charge. Fourth, the Legislature should directly address the rather strange anomaly of being able to plead as a defense what in many cases is the cause of the accident and determine if, post-*Feingold*, the state of the law is really what it intends it to be.

Endnotes

1. Penal Law § 125.25[2].
2. *People v. Roe*, 74 NY2d 20, 544 NYS2d 297, 542 NE2d 610 [1989].
3. *See Penal Law,* § 125.25, subd 2; §§ 15.05, 15.10; *see also*, Fiandach, New York Driving While Intoxicated 2ed., § 6:6.
4. *Id*.
5. *People v. Roe*, *supra* at 25; *see, People v. Jack*, 199 A.D.2d 980, 606 N.Y.S.2d 471, 4th Dept. [1993]; *People v. Gonzalez*, 1 N.Y.3d 464, 807 N.E.2d 273, 775 N.Y.S.2d 224 [2004]; *People v. Payne*, 3 N.Y.3d 266, 819 N.E.2d 634, 786 N.Y.S.2d 116 [2004].
6. *See*, Rev Stat of NY [1829], part IV, ch I, tit I, § 5, subd 2,"[w]hen perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual"; *and see People v. Jernatowski*, 238 N.Y. 188, 144 N.E. 497 [1924]. The archetypical "shots into a house" case.
7. 60 N.Y.2d 270, 274-275, 457 N.E.2d 704, 469 N.Y.S.2d 599 [1983], *cert. denied, Register v. New York,* 466 U.S. 953, 104 S.Ct. 2159, 80 L.Ed.2d 544.
8. *People v. Sanchez*, 98 N.Y.2d 373, 748 N.Y.S.2d 312 [2002]; *People v. Hafeez*, 100 N.Y.2d 253, 762 N.Y.S.2d 572 [2003]; *People v. Gonzalez*, 1 N.Y.3d 464, 775 N.Y.S.2d 224 [2004]; *People v. Payne*, 3 N.Y.3d 266, 786 N.Y.S.2d 116 [2004]; *People v. Saurez*, 6 N.Y.3d 202, 811 N.Y.S.2d 267 [2005].
9. 7 N.Y.3d 288, 852 N.E.2d 1163, 819 N.Y.S.2d 691 [2006].
10. *Id.* at 294.
11. *Id*.
12. Penal Law §120.25.
13. 13 Misc.3d 1050, 827 N.Y.S.2d 557 [N.Y. Sup., 2006].
14. 58 A.D.3d 879, 873 N.Y.S.2d 97 [2nd Dept., 2009], aff'd, 14 N.Y.3d 927, 932 N.E.2d 871 [2010].
15. *Supra*.
16. 14 N.Y.3d 927, 906 N.Y.S.2d 515, 932 N.E.2d 871 [2010].
17. Penal Law 15.25 states:

    > Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.

18. 89 A.D.3d 752, 932 N.Y.S.2d 85 [2nd Dept., 2011], *leave to app. granted,* 19 N.Y.3d 969 [2012].
19. *McPherson* at 754.
20. *McPherson* at 755.
21. *McPherson* at 757. Disturbing in the context of this factual assessment is *People v. Pindle*, 16 N.Y.3d 768, 944 N.E.2d 1130 [2011]. *Prindle* had no BAC since the defendant fled the scene and was arrested several days later. Nevertheless, the actions which preceded and constituted the fatal accident can reasonably be characterized as callous beyond description.
22. 87 A.D.3d 1016, 930 N.Y.S.2d 199 [2011].
23. Penal Law § 125.25[2].
24. *Heidgen*, at 1020.
25. *Heidgen*, at 1021.
26. 40 Misc.3d 530, 966 N.Y.S.2d 848 [Sup. Ct., NY County, May 29, 2013].
27. Penal Law § 120.10(3).
28. *See,* Penal Law § 15.25; Criminal Pattern Jury Instructions ("CJI"), PL § 120.10(3).
29. *Supra.*
30. Penal Law § 120.00(2).
31. *Lessey*, at 532.
32. *Lessey*, at 533.
33. *Id*.
34. *See, e.g., People v. Rodriguez,* 76 N.Y.2d 918, 563 N.Y.S.2d 48, 564 N.E.2d 658 [1990]; *People v. Perry,* 61 N.Y.2d 849, 473 N.Y.S.2d 966, 462 N.E.2d 143 [1984]; *People v. McCray,* 56 A.D.3d 359, 867 N.Y.S.2d 440 [1st Dept. 2008], *lv. denied,* 12 N.Y.3d 760, 876 N.Y.S.2d 712, 904 N.E.2d 849 [2009]; *People v. Raffaele,* 41 A.D.3d 869, 841 N.Y.S.2d 311 [2d Dept. 2007], *lv. denied,* 9 N.Y.3d 925, 844 N.Y.S.2d 180, 875 N.E.2d 899; *People v. Stewart*, 296 A.D.2d 587, 744 N.Y.S.2d 569 [3d Dept. 2002].
35. *See* Penal Law § 15.05(3). In defining "reckless" the statute declares: "[a] person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto."
36. It is unfortunate that the *Lessey* Court was not clearer in this portion of what is otherwise an exceptionally written decision. Nevertheless, from the context of the discussion, it is clear that what the court was attempting to say was that if you cannot

include the act of becoming intoxicated as depraved indifference, then all you are left with is the intoxication which, as noted above, falls clearly within the purview of Penal Law § 15.25.

37. 14 N.Y.3d 927 at 933–934, quoting, LaFave, Substantive Criminal Law § 6.3[a], at 451 [2d ed.].
38. *See*, Penal Code of 1881, § 22.
39. Penal Law § 120.04-a.
40. Penal Law § 125.14.
41. "After enactment of the 2006 legislation, and apparently as a result of our revision of depraved indifference jurisprudence, it became more difficult to prove depraved indifference in vehicular crimes where assault in the first degree or murder in the second degree was charged—a drunk driver accused of acting with depraved indifference to human life could '[p]erversely' try 'to defend such a charge by using a claim of extreme intoxication' (Letter of Michael E. Bongiorno, President of New York State District Attorneys Association, to Governor Spitzer, June 15, 2007, Bill Jacket, L 2007, ch 345, at 16) to negate the requisite state of mind requirement. Consequently, in 2007, the Legislature created the new crime of aggravated vehicular assault (see L 2007, ch 345)[.] * * * In addition, another provision was added to article 125 of the Penal Law enacting the offense of aggravated vehicular homicide[.] * * * The stated purpose of this 2007 legislative package was to 'repair th[e] apparent anomaly' (Bongiorno Letter, Bill Jacket, L 2007, ch 345, at 16) caused by *Feingold* in cases where an inebriated driver who maimed or killed another person could rely on his intoxication to mitigate criminal responsibility" (*Velancia*, 14 N.Y.3d 927 at 930-931).
42. *See* Vehicle and Traffic Law §1212.
43. "A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto."
44. Depraved indifference assault (Assault in the First Degree, Penal Law 120.10) is a class B felony and carries a potential sentence of eight and one-third years to twenty-five. Depraved indifference murder (Murder in the Second Degree, Penal Law 125.25) is an A-1 felony and carries a maximum term of fifteen years to life.
45. *See* Fiandach, New York Driving While Intoxicated, 2ed., § 30:9.

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Unforeseen Practical Ramifications of Accepting an Adjournment in Contemplation of Dismissal

By Douglas H. Wigdor and Matthew Pisciotta

The vast majority of criminal defense attorneys believe that Adjournments in Contemplation of Dismissal ("ACD") are a victory for their clients. Lurking behind the acceptance of an ACD, however, is the very real possibility that by accepting an ACD your client may be prevented from ever holding a position at a Federal Deposit Insurance Corporation ("FDIC") insured bank. Most attorneys believe that ACDs are sealed records that cannot be used in any way against their clients, but this belief is sorely misguided. This article sheds light on the practical and very real ramifications of accepting an ACD for criminal defense attorneys and their clients.

Under New York law, the ACD program is designed to nullify the arrest that is ultimately dismissed, returning the defendant "to the status he occupied before arrest and prosecution." *See* NYCPL §170.55 (8). The nullification of the arrest serves to protect the professional standing of the Defendant and NYCPL §160.60 explicitly states that an ACD shall not "operate as a disqualification of any person from any occupation or profession." *See* NYCPL §160.60. Following these guidelines, the New York Human Rights law ("NYHRL") makes it unlawful to discriminate against an individual on the basis of a termination of criminal proceedings favorable to that individual, stating that:

> It shall be unlawful discriminatory practice unless specifically required or permitted by a statute for any corporation to act upon, adversely to the individual involved, any arrest or criminal accusation of such individual not then pending, against the individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the Criminal Procedure Law. (Emphasis added).

See NYHRL §296(16). An ACD is defined as a termination of criminal proceedings in favor of the accused,[1] and therefore the above section makes it unlawful to discriminate against an individual on the basis of an ACD. See NYCPL §160.50(2). However, the NYHRL contains one extremely important qualification to this protection: a corporation may be specifically required or permitted to consider a past ACD by statute. So while there is evidence that New York lawmakers intended for an ACD to leave an individual with a clean slate, they did leave open the possibility of a statutory basis under which some individuals who accepted an ACD may not be covered by the NYHRL's prohibition against hiring discrimination.

Unfortunately for those who have accepted an ACD, this type of statutory provision exists in the Federal Deposit Insurance Act ("FDIA"). Section 19 (a) of the FDIA (Section 19") prevents the hiring of "any person who has been convicted of any criminal offense involving dishonesty or a breach of trust or money laundering, or has agreed to enter into a *pretrial diversion or similar program* in connection with prosecution for such offense" (emphasis added). *See* 12 U.S.C. §1829(a)(1). This raises the question of whether an ACD fits the definition of a "pretrial diversion or similar program" within the meaning of Section 19.

Strong evidence that an ACD *should* be considered a "pretrial diversion or similar program" can be found in the FDIC's Section 19 Statement of Policy, which defines a "pretrial diversion or similar program" as being "characterized by a suspension or eventual dismissal of charges or criminal prosecution upon agreement by the accused to treatment, rehabilitation, restitution, or other noncriminal or nonpunitive alternatives." *See* 63 Fed. Reg. at 66, 184-85. Similarly, ACDs are an agreement that must be voluntarily consented to by the Defendant, and are characterized by a "suspension or eventual dismissal of charges or criminal prosecution." Under New York law, charges in an ACD are initially suspended with "a view to" ultimate dismissal provided the Defendant complies with certain conditions for a set period of time. See NYCPL §170.55(2). Furthermore, dismissal in an ACD is based on "noncriminal or nonpunitive" conditions being fulfilled. These conditions may include the Defendant participating in dispute resolution or performing public service, and generally involve the Defendant not being re-arrested for any crime. See NYCPL §170.55(5), (6). Thus, the characteristics of the ACD program appear consistent with the FDIC's definition of a covered program.

The first definitive step towards a decision on whether the New York ACD program falls under Section 19 came in a May 13, 2009 opinion letter from the FDIC. In that letter, the FDIC officially agreed that an ACD falls within the meaning of Section 19 of the FDIA, stating that "the granting of an ACD constitutes entry into a pretrial diversion or similar program within the meaning of Section 19." In coming to this conclusion, the FDIC acknowledged that the ACD program has "characteristics of a pretrial diversion program," including its nonpunitive alternatives to punishment and the fact that an ACD comes prior to entry of a plea and is "not deemed to be a conviction or admission of guilt." See Opinion Letter, Federal Deposit Insurance Corporation (May 13, 2009).

Two Courts have weighed in on this issue. Both cases involved commercial banks that claimed to be barred under Section 19 from hiring an individual who had previously consented to an ACD. In *HSBC v. NYC Commission on Human Rights*, the Court ruled that it was "unclear whether New York's ACD is a pretrial diversion program within the meaning of the [FDIA]," and dismissed an injunction against the New York City Commission on Human Rights barring enforcement of the NYHRL. *See HSBC v. NYC Commission on Human Rights*, 673 F. Supp. 2d 210, 217 (S.D.N.Y. 2009). However, in *Smith v. Bank of America*, the Court endorsed the decision of the FDIC in its Opinion Letter, stating that New York's ACD program does constitute a pre-trial diversion program because it imposes non-punitive conditions, and is not deemed a conviction or admission of guilt. The court in *Smith* allowed Section 19 to serve as justification for not hiring a woman who had an ACD on her record. *See Smith v. Bank of America*, 865 F. Supp.2d 298, 306 (E.D.N.Y. 2012).

Including ACD as a "pretrial diversion or similar program" pursuant to Section 19 has potentially wide-ranging implications. As of March 31, 2013 the FDIC insured over 7,000 banks nationwide,[2] meaning that broad swaths of the public are now subject to exclusion from consideration for employment across much of the banking industry, traditionally one of the largest employers in the country. This will undoubtedly have a disparate impact on minorities, who are charged with crimes at greater rates, and therefore are more likely to have accepted an ACD.

Those accused of crimes involving dishonesty who may wish to work at an FDIC-insured institution in the future are left with two options, apply for a waiver from the FDIC or reject an ACD and risk a criminal conviction. Defendants seeking an individual waiver must fill out an application with the FDIC. The instructions to the application make clear that waivers are subject to a heavy burden, advising that an "individual waiver will be granted on an infrequent basis, and only in truly meritorious cases and upon good cause shown."[3] This presents a high threshold for plaintiffs to meet, not to mention the time cost of going through the waiver process. Defendants unwilling or unable to obtain a waiver are forced to reject an ACD and proceed with the criminal process. This will clog the court system with relatively minor cases that the ACD program had previously disposed of, making the judicial process longer and potentially more expensive for all defendants, as well as exposing more defendants to criminal liability.

Faced with these alarming effects on the ACD program, it is clear that the best remedy to these issues would be an amendment to Section 19 of the FDIA. Given the type of service that banks provide there is undoubtedly a policy reason for attempting to regulate the employment of individuals with a history of dishonesty. However, the prohibitive language in Section 19 is too broad as currently written. In short, the benefit of excluding people who have committed minor crimes of dishonesty from the floors of banks is *greatly* outweighed by the burdens that the regulation imposes on people's rights, as well as the smooth operation of the judicial system.

Looking to other sections of federal law provides a clear roadmap for how to structure a potential amendment to Section 19. For example, 49 U.S.C. §44936 makes a background check mandatory for individuals who are granted unescorted access to a "secured area of an airport." See 49 U.S.C. §44936. Employers are then allowed to exclude from consideration potential employees who have committed certain enumerated felonies. *Id*. The benefit here is obvious, as protecting airports and airline passengers is of paramount importance. However, the regulation is tailored so that exclusion is only permitted in the case of extremely serious felonies. Section 19 could potentially adopt this same form, limiting its exclusion to the hiring of individuals who have committed only serious crimes of dishonesty, such as embezzlement or other financial crimes.

In conclusion, the need to reform Section 19 of the FDIA is apparent in light of the recent support for including the New York ACD program as a "pretrial diversion program," as this prevents FDIC-insured banks from hiring individuals who have gone through the ACD process. However, until Congress amends Section 19, criminal defense lawyers would be well served to inform clients that an ACD could very well carry serious professional consequences for their client.

Endnotes

1. It should be noted that an ACD is not considered a favorable outcome in every context, such as Section 1983 malicious prosecution and false arrest claims (see, e.g., *Singleton v. City of New York*, 632 F. 2d 185, 193 (2d Cir. 1980)). This distinction is based on the definition of favorable outcome at common law, while ACDs are specifically included favorable terminations under NYCPL §160.50. New York law confirms an ACD is a favorable outcome under the NYHRL (see, e.g., *Johnson v. New York City Comm'n on Human Rights*, 270 A.D. 2d 186 (1st Dep't 2000)) (conviction under Maryland statute was analogous to New York ACD and therefore was "terminated in [plaintiff's] favor").
2. Federal Deposit Insurance Corporation, Industry Analysis-Statistics at a Glance, at http://www.fdic.gov/bank/statistical/stats/2013mar/industry.html.
3. Federal Deposit Insurance Corporation, Application Pursuant to Section 19 of the Federal Deposit Insurance Act, at http//www.fdic.gov/formsdocuments/6710-07.pdf.

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Matrimonial Actions and the Use of Supplemental Needs Trusts for Individuals with Disabilities

By Elana M. Simha and Mordecai Y. Simha

In negotiating matrimonial settlements, it is essential that families of individuals with disabilities are aware of associated special needs planning issues.

Means-Tested Government Programs

Children and adults with disabilities often rely on means-tested Federal and State government programs for health and financial benefits. Means-tested government programs have limits on the income and resources that a qualifying individual can have. In New York, such programs include supplemental security income (SSI)[1] and Medicaid.

SSI provides a monthly stipend to an individual with disabilities who has limited countable resources and monthly income. The stipend is intended for use towards basic needs including food and shelter. A child under eighteen (18) will only qualify for SSI benefits if his or her parents' countable resources and monthly income are below the state's eligibility requirement.[2] Upon turning eighteen (18) a child with disabilities is viewed independently for SSI purposes. As a result, the amount of his or her SSI stipend will depend on individual factors, including the amount he or she needs for monthly rental and household expenses,[3] the amount he or she earns from employment (if employed), and the amount of cash, gifts or other monthly income he or she receives.

Medicaid is a government program which provides medical assistance for persons who meet income guidelines and who have limited resources. Many individuals with disabilities rely on the Medicaid program to meet their basic health needs. Medicaid is also used by many Americans as they age in order to fund community based nursing care and/or nursing home care.

Classic Child Support Arrangements and Means-Tested Benefits Programs

Divorce settlements usually delineate specific financial responsibilities of each party towards the children's care and schooling, either through the age of majority and/or through college. Often, the non-custodial parent's responsibility takes the form of a monthly child support payment. In many cases it is also advisable for the settlement to require that each party pay for a life insurance policy on the life of the other, to ensure that there will be enough money to support the children in the event of the untimely death of one of the parties. When the divorcing couple has a child with special needs, the divorce settlement often recognizes that the child will require support into adulthood and makes provisions for support beyond the typical age of majority.

According to Social Security regulations,[4] two-thirds of child support payments for a child under eighteen are considered income to the child. Once a child with disabilities turns eighteen, one hundred percent of child support payments are considered countable income of the child. Therefore, child support payments from the non-custodial parent that are made directly to the custodial spouse are includable when calculating the child's income for purposes of SSI and Medicaid eligibility. Additionally, since the purpose of child support is for food, shelter and other basic needs of the child, and the purpose of SSI is for the same items, Social Security will reduce a child's SSI payments by the amount of child support dollar-for-dollar. In that way, child support payments may have the unintended consequence of denying or reducing the child with disabilities' access to means-tested benefits.

Consider the following two examples pertaining to a child with disabilities who is under the age of 18:

> ***Ex. 1:*** *O. is a 10-year-old with severe Autism. He lives at home with his father. O.'s father's income and resources are low enough to make O. eligible for SSI. O.'s mother does not provide any child support. O. receives $744 in SSI monthly, currently the highest amount available to an individual living in the household of another in New York.*

> ***Ex. 2:*** *Same facts as in Ex. 1, except here, O.'s mother pays $300 of child support monthly. Two-thirds of that payment, or $200, is countable for SSI purposes and offsets the SSI payment dollar-for-dollar. As a result, instead of receiving a monthly SSI check for $744, O.'s monthly payment is reduced to $544.*

The damage of outright child support payments is magnified when a child with disabilities turns 18.

> ***Ex. 3:*** *M. is 18 years old with developmental disabilities. She lives at home with her mother and attends a day habilitation program in the local community. There is a rental agreement so that M. contributes monthly towards household expenses. She has no income from employment, does not have reportable cash or gifts and her mother receives no child support. In this case, M.'s income and resources make her eligible for SSI and Medicaid. She receives $744 in SSI monthly, currently the highest*

amount available to an individual living in the household of another in New York.

Ex. 4: *Same facts as in Ex. 3 except here, M.'s father pays $400 of child support monthly. As M. is over 18, the entire $400 child support payment is countable for SSI purposes, and offsets the SSI payment dollar-for-dollar. As a result, instead of receiving a monthly SSI check for $744, M.'s monthly stipend is reduced to $344.*

There are legal options available to avoid the above scenarios, and to ensure that child support payments do not jeopardize a disabled child's means-tested benefits. Attorneys representing such couples must be cognizant of the interplay between child support and means-tested benefits and the available options in order better advise their clients.

Supplemental Needs Trusts

A supplemental needs trust (SNT)[5] is the most basic and crucial planning tool for families of individuals with disabilities. SNTs may be established for a loved one with chronic or severe disabilities. They allow family members or others to set aside money for a loved one with disabilities without jeopardizing government benefits. By law, SNT funds are available only to supplement (and not to supplant) government benefits, meaning funds can be used only for those items that cannot be paid for using government benefits.

There are two basic types of SNTs. *First party SNTs*, also known as self-settled or payback trusts, are funded with the disabled individual's own funds. In order to establish a first party SNT, a number of criteria must be met: (1) the individual must be under 65 years old, (2) the individual must be disabled as defined in the Social Security act, (3) the trust must be for the benefit of the individual with disabilities, (4) the Grantor must be a parent, grandparent or legal guardian of the individual with disabilities (or a court), and (5) the trust must have a provision providing that state entities such as Medicaid that expend funds on the individual with disabilities during his or her lifetime must be repaid out of any funds that remain upon the individual's death . *Third party SNTs* are funded with the funds of someone other than the individual with disabilities. Grandparents, parents or friends who want to leave money for use by an individual with disabilities can utilize an *inter-vivos* third party SNT.

Divorcing parties may consider establishing an SNT to hold monthly child support payments. The use of an SNT is only recommended when a child would otherwise qualify for government benefits—if a child is under 18 and his or her parents' finances would prevent the child from receiving government benefits anyway, an SNT is not necessary and would place unnecessary restrictions on the money. However, for a child or adult with disabilities who would otherwise be eligible for government benefits, assigning child support payments to an SNT would allow for child support payments while still maintaining the child or adult's government benefit eligibility.[6] The assignment must be irrevocable.[7] For purposes of SSI, child support is viewed as the child's money. Therefore, if the child support will be assigned to an SNT, a first party SNT with payback provisions must be established. The assignment can be made through court order, or through a post-order agreement between the parties.

Third party SNTs may be utilized as part of divorce agreements as well. As discussed previously, parties sometimes agree to maintain life insurance on each others' lives, in order to ensure a surviving party will have necessary finances in the event of the untimely death of one of the parties. When a child with special needs is involved, the parties may want to consider naming an *inter-vivos* third party SNT as a beneficiary of the life insurance policy.

Other Issues Related to Children with Disabilities That Divorcing Couples Should Consider

Though outside the scope of this article, it is important to note a number of other areas pertaining to children with disabilities of which attorneys representing divorcing couples should be aware.

1. **Guardianship**—Parties should agree as to who will be appointed guardian and successor guardians when a child with special needs reaches the age of majority.
2. **Special Education Decision Making**—Parties should agree on which parent will have the authority to make decisions pertaining to the education of the child with special needs.
3. **Estate Planning**—Parties may want to agree on certain estate planning provisions regarding the child with special needs. Depending on whether or not *inter-vivos* SNTs have been established, a testamentary SNT may be advisable.

SNTs and the Elderly or Disabled Ex-Spouse

According to a recent *New York Times* article, more Americans over the age of 50 are divorced than widowed.[8] For attorneys advising older divorcing couples, it is important to realize that Medicaid is the largest payer for nursing home care and community based health care services in the country. The goal of preserving Medicaid eligibility should therefore inform the structure of the divorce agreement.

Under N.Y. Medicaid laws, alimony received by a Medicaid beneficiary, regardless of whether that person is disabled, will be viewed as income and will be taken into consideration when deciding whether he or she will

remain eligible for Medicaid services. Moreover, for individuals applying for nursing home Medicaid, there is a five-year look-back period. Medicaid will look at any transfers made within the five year period preceding an individual's application and if non-exempt transfers above the Medicaid threshold were made, Medicaid will impose a penalty period commensurate to the amount of money transferred. During the penalty period, an individual will be denied Medicaid benefits and will be responsible to pay for nursing home care out of pocket.

Older divorcing couples who do not anticipate using Medicaid benefits within five years can agree to a lump sum payment in lieu of continuing monthly alimony/maintenance. The receiving party can conceivably quickly spend down the money on real or personal property purchases that are exempt from Medicaid's calculation of income or resources. The risk inherent in this approach is that if the transferor requires nursing home Medicaid within five years, Medicaid may attempt to impose a penalty period commensurate with the value of the alimony paid. However, it could be argued that the transfer was made for a purpose other than qualifying for Medicaid.

Another option is to structure the divorce settlement so that alimony funds go directly to an SNT. Funds in the SNT will be available to provide for any need of the beneficiary that is not met by Medicaid or other government benefits. An SNT is beneficial with regard to SSI as well, as according to SSI rules any funds paid directly to a trust as a result of a court order are not considered income. While putting funds in an SNT does limit what the funds can be used for, for many older couples it may be the best route to preserving eligibility for crucial means-tested government benefits.

Endnotes

1. See 42 USC 1381 et seq.
2. In New York, the 2014 monthly limits are $2000 for individuals and $3000 for couples.
3. If a valid rental and household agreement is created, an adult with disabilities who lives at home may still be considered liable for rent and household expenses.
4. Program Operation Manual Systems (POMS) SI 00830.420 Child-Support Payments.
5. Estates Powers and Trusts Law (EPTL) 7-1.12.
6. POMS SI 01120.200 G.1.d.
7. *Id.*
8. Roberts, Sam, *Divorce After 50 Grow More Common*, September 20, 2013. URL: http://www.nytimes.com/2013/09/22/fashion/weddings/divorce-after-50-grows-more-common.html?_r=1&.

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Medicaid Recoveries, Liens and Strategies

By Michael L. Pfeifer

Since 1993, states have been required to seek recovery for Medicaid medical expenses where possible, and New York State seems to be becoming more aggressive in seeking such recovery. Many of our clients have received letters from the State of New York Office of the Medicaid Inspector General. It is important for us to understand what the rules are concerning recovery so that we can advise our clients properly.

The State is a preferred creditor when it provides medical services.[1] In general, that means that the State must be paid before any other creditors unless that creditor has a prior specific lien.[2]

The State may always recover incorrectly paid Medicaid. Incorrectly paid Medicaid may be recovered even where the agency made the mistake.[3] However, in SSI related cases, the recovery is limited to the amount of the recipient's excess resources. Recovery cannot exceed the amount of medical expenses paid.[4]

A. Recovery Against the Medicaid Recipient's Estate

In 2011, New York State passed an expanded estate recovery statute, which would have allowed recovery against such things as life estates, revocable trusts, annuities and joint property. However, this controversial statute was repealed in 2012 and we have gone back to the traditional way in which New York has defined an estate, which is as follows:

> …[T]he term "estate" means all real and personal property and other assets included within the individual's estate and passing under the terms of a valid will or by intestacy.[5]

Federal law still allows states to expand their definitions of an estate to include property and assets other than one's probate or intestate estate.[6] Thus, it is possible that we could see expanded estate recovery again. However, for now, political and practical concerns seem to have made New York abandon its attempts at expansion of estate recovery.

As noted above, the State is a preferred creditor when it provides medical services. Executors would be well advised to make sure that the State is paid when Medicaid has been provided to the decedent. There is a statute that protects an executor from being personally liable for creditor claims seven (7) months from the date of the Letters Testamentary. However, the executor must have acted in good faith to pay the estate's creditors.[7] Where the decedent has received Medicaid, the executor probably cannot argue that he was not aware that the State had a claim for medical services provided and would not likely be successful in arguing "good faith" because of unawareness that such a claim existed.

The State can only recover from the estate of the Medicaid recipient for medical expenses paid for a person who is age 55 or older or permanently institutionalized.[8]

Recovery can be had from the Medicaid recipient's estate only if there is no surviving spouse or a child who is under the age of 21, certified blind or disabled.[9] What if there are other beneficiaries of the estate who do not fit into the foregoing categories or what if there is a surviving disabled child but she is completely disinherited? Can the State recover from the estate or that part of the estate not going to a spouse or minor, blind or disabled child? For two opposing points of view, see *Matter of Burstein*[10] and *Matter of Samuelson.*[11]

Personal injury proceeds may be recovered against the estate even if there is a surviving spouse, minor, disabled or blind child.[12]

B. Recovery Against Spouse and the Estate of the Spouse of a Medicaid Recipient

A community spouse is liable for the Medicaid recipient spouse's support if said spouse has sufficient resources.[13] Thus, if the community spouse has more assets than the Minimum Community Spouse Resource Allowance (CSRA) and signs a spousal refusal, the State may seek recovery from that spouse for the cost of the Medicaid recipient spouse's medical expenses. The spouse may transfer assets one month after the approval of Medicaid for the institutionalized spouse.[14] However, this action may not insulate the community spouse from a lawsuit.[15] You should also be mindful of the Debtor Creditor Law if a transfer by the community spouse is being contemplated.

To recover against the community spouse's estate, said spouse must have had sufficient resources to support the Medicaid recipient.[16] A spouse is only liable for support (and only for medical services) provided before his death.[17]

The State must make a claim within six (6) years of a fiduciary being appointed.[18] Furthermore, the State may only recover the cost of services provided within ten (10) years of the Medicaid recipient's death.[19]

C. Medicaid Liens

A lien cannot be placed upon the personal residence of an individual who is residing in that residence. Thus, no lien can be placed upon the personal residence of an indi-

vidual who is receiving home care. However, a lien may be placed upon the personal residence of a person who is permanently institutionalized, except if one of the following is lawfully living in the residence:

1. a spouse;
2. a child who is under 21 or who is certified as blind or permanently and totally disabled; or
3. a sibling who has an equity interest in the home and who resided in the home at least a year before the Medicaid recipient was institutionalized.

Note that the relevant statute and regulation do not prevent a lien on a home that a caretaker child is occupying.[20]

A lien also cannot be placed on the personal residence of an institutionalized Medicaid recipient, if she has a "subjective" intent to return home.[21] (However, if there is no reasonable expectation that the Medicaid recipient will actually return home, the Medicaid agency may commence a fair hearing in order to have a lien placed upon the home.)

No lien may be imposed for correctly paid Medicaid if the individual exhausted his benefits under a long term care insurance policy pursuant to the Partnership for Long Term Care up to the value of the benefits under the policy.[22]

The State cannot enforce its lien as long as a spouse or minor, blind or disabled child is living in the residence.[23] It also cannot enforce its lien as long as a sibling with an equity interest or a caretaker child resides in the home.[24] A permanently institutionalized individual must be given a reasonable time to transfer the residence to an exempt individual.[25]

With respect to personal injury and medical malpractice liens, the State has a lien to the extent that Medicaid services were provided for the injuries suffered.[26] However, no lien is permitted under the following circumstances:

1. The action is against a residential care facility for injuries sustained by a Medicaid recipient.[27]
2. When Medicaid was provided for school based medical care to which a disabled child is entitled pursuant to the Federal Individuals with Disabilities Act.[28]
3. For claims under the Workers' Compensation Law or the Volunteer Fireman's Benefit Law.[29]

The local agency must serve a notice of lien that contains information about the parties, the accident and the nature of the lien. The notice must be served upon the plaintiff, defendant, their respective attorneys, the insurance carrier, the Medicaid recipient and his or her attorney by registered mail.[30] The notice must also be filed with the relevant County Clerk.[31]

For now, the personal injury lien is limited to the amount of the proceeds that compensate the individual for medical costs and does not attach to damages for pain and suffering, lost wages or loss of future earnings.[32] However, changes were made to the Social Security Act that were effective as of October 1, 2016. "[T]he legislation makes changes to sections 1902(a)(25), 1912 and 1917. The changes give states the ability to recover costs from the full amount of a beneficiary's liability settlement, instead of only the portion of the settlement designated for medical expenses, and it establishes an option for states to place liens against Medicaid beneficiaries' liability settlement."[33]

The above limitations do not apply to a Medicaid recovery against an estate[34] or to public assistance funds in general.[35] There is an exception for wrongful death proceeds because the purpose of such a claim is to compensate decedent's distributees for their pecuniary injuries.[36]

The personal injury lien must be satisfied prior to funding a Supplemental Needs Trust.[37]

D. Other Considerations

If one has long-term care insurance under the partnership program, has met the minimum duration requirement of the policy and applies for Medicaid Extended Coverage (MEC), some or all of the Medicaid recipient's assets will be protected.[38]

The State cannot recover reparations paid to special populations.[39]

If a claim is made against a Medicaid recipient, she may be able to claim an undue hardship.[40] "Undue hardship is not considered to exist based on the inability of the beneficiaries to maintain a pre-existing lifestyle or when the alleged hardship is the result of Medicaid or estate planning methods involving divestiture of assets."[41]

E. Tips on Negotiating Medicaid Claims

In order to successfully negotiate claims due to the receipt of Medicaid, one must be thoroughly familiar with the law and the legal limitations on claims.

You should review the Claim Detail Report (NYC) or Assistance Statement & Claim (Nassau County). You should also consider whether undue hardship can be claimed. Are there any other circumstances that should be considered? For instance, if the non-institutional spouse is paying for an assisted living facility, recovery may deprive her of moneys she needs to stay in the assisted living facility and she may be forced into a nursing home. In the long run, the State may lose money by making a recovery. There may be other equitable circumstances that the State will take into consideration.

In the right circumstances you might also request that the recovery be paid in installment payments. Or you might ask for deferral of payment, for instance in a case where a house would have to be sold in order to pay the recovery. Always obtain a release for your payment.

Conclusion

The prevention of recovery from the community spouse or the estates of the Medicaid recipient or the Medicaid recipient's spouse is an important part of Medicaid planning. Hopefully this article will be of help in assisting you to do such planning.

Endnotes

1. SSL § 104(1).
2. *Matter of Robinson*, 194 Misc. 2d 695, 754 N.Y.S.2d. 525 (Surrogate's Court, Nassau County 2003).
3. *Oxenhorn v. Fleet Trust Co.*, 94 N.Y.2d 110 (1999).
4. Medicaid Reference Guide (MRG), page 678.
5. SSL § 369(6).
6. 42 U.S.C. 1396p (a)(4)(B).
7. SCPA § 1802.
8. 02 OMM/ADM–3, page 7.
9. SSL § 369 (2)(b)(ii); 18 NYCRR § 360-7.11(b)(2).
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13. SSL § 101.
14. 96 ADM-11.
15. *Matter of Steele*, 85 A.D.3d 1375, 925 N.Y.S.2d 250 (3d Dept. 2011); and *Commissioner of the Dept. of Social Servs. of the City of N.Y. v. Scola*, 2011 N.Y. Misc. LEXIS 5509, 2011 NY Slip Op 33019U (N.Y. Sup. Ct. Nov. 15, 2011).
16. *Matter of Craig*, 82 NY 2d 388 (1993).
17. *Richardson v. Bryant*, 19 Misc. 3d 1129A, 866 N.Y.S.2d 95 (Sup. Court, Monroe County 2008), *aff'd*, 66 A.D.3d 1411, 885 N.Y.S.2d 848 (4th Dept. 2009); *Matter of Schneider*, 15 Misc. 3d 1146A, 841 N.Y.S.2d 823 (Sur. Court, Nassau County 2007).
18. SSL § 104; CPLR § 213; *Matter of Bustamente*, 256 A.D.2d 463, 682 N.Y.S.2d 102 (2d Dept. 1998).
19. SSL § 104.
20. SSL § 369(2)(a)(ii); 18 NYCRR § 360-7.11(a)(3)(ii)); Medicaid Reference Guide (MRG), page 684.
21. SSL § 369(2)(a)(i); 18 NYCRR § 360-7.11(a)(1).
22. SSL § 367-f.
23. SSL § 366(2)(b)(ii).
24. SSL § 369(2)(a)(iii); 02 OMM/ADM-3, pages 7 & 8.
25. 02 OMM/ADM-3, page 7.
26. SSL § 104-b(1); 02 OMM/ADM-3, 14-17.
27. PHL § 2801-d(5); 02 OMM/ADM-3, 15.
28. 02 OMM/ADM-3, 15.
29. SSL § 04-b; 02 OMM/ADM-3, 15.
30. SSL § 104-b 02 OMM/ADM-3, 16.
31. SSL § 104-b(3); 02 OMM/ADM-3, 16.
32. *Arkansas HHS v. Ahlborn*, 547 U.S. 268 (2006); and *Wos v. E.M.A.*, 568 U.S. 2 __ (2013).
33. CMCS Informational Bulletin, dated December 27, 2013. The changes were originally supposed to go into effect on October 1, 2014; however, according to *Elderlawanwers.com* the changes were delayed until October 1, 2016. See http://attorney.elderlawanswers.com/congress-delays-anti-ahlborn-medicaid-lien-amendment-14572.
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35. *Corridan v. Public Adm'r*, N.Y.L.J., June 10, 2009, at 110.
36. *Matter of Paez*, 20 Misc. 3d 1102A, 867 N.Y.S. 2d 18 (Sur. Ct. Bronx County 2008).
37. *Crichio v. Pennisis and Link v. Town of Smithtown*, 90 NY 2d 296 (1997).
38. SSL § 367-f. See also http://www.nyspltc.org.
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40. 42 USC § 1396p(b)(3); SSL § 369(5); 02 OMM/ADM-3, 8; State Medicaid Manual, § 3810.
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18 NYCRR 360-7.

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New York Elder Law and Special Needs Practice, Vincent J. Russo and Marvin Rachlin, West, 2011 Edition.

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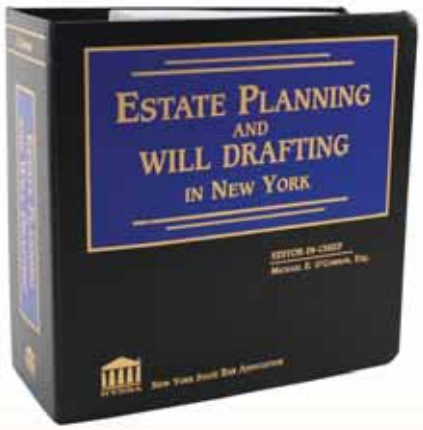

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