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The Senior Lawyer

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

Remembering a Cold War Spy Trial

Tony Palermo and *U.S. v. Rudolf Abel*

Spy's Prosecutor, Assistant Attorney General Tompkins, who directed the operation which resulted in Abel's arraignment, stands in the arcade of Brooklyn federal courthouse with his special assistants, Anthony R. Palermo (left) and James F. Featherstone. (*This photo and caption appeared in the August 19, 1957 issue of* Life.*)*

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A Message from the Section Chair

Dear Section Members:

It's once again my pleasure to bring you up to date on the activities of our Section.

To begin, we have been working on two special projects over the past several months. The first has to do with NYSBA Communities, which are closed internet discussion and information sharing sites. They replace email listserves and offer additional features, such as a document library, member directory, and personalized profiles.

As a first step we have set up the Senior Lawyers Executive Committee Community, and detailed instructions explaining how to access and use the Community have been prepared by our Technology Committee working with NYSBA staff (Stephanie Bugos, our Section's Liaison, and Brandon J. Vogel). The instructions have been distributed to the Executive Committee members to test for any open issues, problems, etc. Once this is completed the instructions will be provided to our Section's members, and we will roll out a Section-wide Community so that we can all experience the many benefits which the Community offers.

The second project was proposed by Fern Schair, Chair of our Pro Bono Committee, and is the establishment of a Pro Bono Award intended to recognize outstanding pro bono work performed by a member of our Section and to promote the goal of increasing access to justice. The Pro Bono Committee members are in the process of working out the details, with the hope that we may be able to present the first award during the 2017 Annual Meeting. Stay tuned for further information but, in the meantime, give some thought to whether there is a Section member you would like to nominate.

Our 2016 Annual Meeting program, "Real Property Law: An Update and Primer," was well attended and well received. Marie Flavin, Esq., who presented on the topic "Basics of Section 1031 Exchanges," has contributed an article, *The Reverse Exchange*, for this issue of *The Senior Lawyer.* Future articles on other aspects of 1031 exchanges are planned.

Rosemary C. Byrne, Vice-Chair of our Section, has dedicated her *On Seniority* column this issue to "The Power and Joy of Reminiscing" and follows up with an article on the most memorable "legal first" of Anthony R. Palermo, Co-Chair of our Law Practice Continuity Committee: *Remembering a Cold War Spy Trial, Tony Palermo and U.S. v. Rudolf Abel.* The Abel trial and the subsequent exchange of Abel for American pilot Francis Gary Powers is the subject of Steven Spielberg's Academy Award nominated film, *The Bridge of Spies.* Whether or not you have seen the film, I think that you will find this article both interesting and entertaining.

Among the other articles in this issue is *The Senior Lawyer in Transition: Tips and Considerations for the Job Search* by Julie Anna Alvarez, Director of Alumni Career Services at Benjamin N. Cardozo School of Law. This article is the result of a request from one of our Section members for information/advice on a transition scenario which some of our members may face. Other articles in this issue cover subjects as diverse as Medicaid crisis planning, liability of a lender for injury at the mortgaged premises, and ethical considerations for the retiring attorney. If there is a subject you would like addressed in one of the issues of *The Senior Lawyer*, please let us know and we will do our best to deliver.

It bears repeating that, in all of our activities, our Section is committed to achieving diversity. To that end I am inviting, and encouraging, all Section members to participate in the work of our Section by, for example, joining one or more of our committees, submitting an article for consideration for publication in *The Senior Lawyer*, or participating in the creation of one of our CLE programs. Make plans today to share your particular talents and experience with your Section colleagues.

I hope that you enjoy this issue of *The Senior Lawyer*, and I look forward to seeing you at our Fall CLE program, which is being held this year in Westchester County.

Carole A. Burns

On Seniority

By Rosemary C. Byrne

The Power and Joy of Reminiscing

"Sometimes you will never know the value of a moment until it becomes a memory."
—Dr. Seuss

It is said that anyone old enough to have a memory enjoys reminiscing. We have all heard children use "remember when" to recall family vacations, sports triumphs and other special times. For those of us "of an age" reminiscing can be even sweeter. There is so much more to remember!

Seniority is a perfect time to recollect and reminisce and "On Seniority" is an ideal forum in which to highlight the value and joy of those activities. Mental health professionals and geriatricians suggest that reminiscence plays an important role in successful aging. These experts agree that learning of our heritage and recalling and sharing our personal and professional memories—often called "story telling"—can enhance family and business relationships and help foster and safeguard our own sense of identity and self-esteem.

Have you considered using some of your time in seniority to study genealogy or to explore and learn more about your heritage? Many of my senior friends and colleagues (and coaching clients) are spending enjoyable and enriching hours researching their lineage and family history. For some this activity, which began as an interesting educational challenge or intellectual exercise (like solving a mystery) merely to satisfy their curiosity, has now become a new hobby. Friends of mine (a couple), for example, began their inquiry because they were intrigued by the somewhat amusing Ancestry.com TV ad. You may have seen it. The spokesman (in full traditional German garb) relates that he always thought he was German but then had his DNA tested (by Ancestry) and discovered he was actually Scottish and Irish and has "traded his lederhosen for a kilt!" My friends had their DNA tested, found some interesting results and are now delving more deeply into finding their ancestors and making the pursuit a part of their future travel plans.

Others search for old photos or family documents, or track down long-lost relatives (making use of social media), or journey to the foreign places from which their ancestors emigrated (often finding or reconnecting with other branches of their family). They take time to convey what they have learned to their children, grandchildren and other family members. To preserve and protect their heritage and their personal and family history they share stories and discuss the meaning and importance of their family and cultural traditions. This process of storytelling and reminiscing clearly helps to strengthen family bonds and to recognize and build connections between generations and the past and the present.

Sharing memories and reminiscing with colleagues and friends (new or of long-standing) also helps us find points of connection we can use to develop and maintain personal and professional relationships—an essential component of a successful seniority. It puts us on common ground—in shared space. Consider, for example, how shared memories of that fateful day in Dallas in 1963 when John Kennedy was assassinated or of planes hitting the Twin Towers on September 11th almost instantly unite us and give us a common bond.

I have found that the relative importance of the recollection often matters less than the fact that it is uniquely shared with others. Bonds can be created by recollections of any shared experience—from the demise of beloved entertainment icons or natural disasters such as Superstorm Sandy to joyous events such as Neil Armstrong's first steps on the moon, the success of favorite sports teams, a great vacation, where you went to high school or college, or the birth of a first child or grandchild. Each can create a bond which enhances a relationship.

Recalling our past accomplishments and experiences—and sharing them—can also help to enhance our own sense of identity and self-efficacy. Memories give shape to our past—where we were and where we are now—and can assist in confronting current challenges. Looking back at the highs and lows of our lives and careers gives us insights helpful in "looking forward." Indeed, looking backward often paves the way to looking forward. It reminds us of our strengths and capabilities and the attributes gained through a lifetime of working, caring, coping and achieving.[1]

For lawyers, reminiscing frequently involves telling stories of our "legal firsts." These stories can be teaching moments, making us smile as we recall who we were then and who we've since become—what we've learned or how we've progressed. Ofttimes those reminiscences can be sweet memories of career highlights; other times they can be bittersweet recollections of "the one that got away." Yet, at this point in our lives, it actually matters little whether our "firsts" had good or bad results. Regardless of the outcome, they provide important life lessons for us to use and pass on to others.

For this "On Seniority" column, I've included one of my memorable "legal firsts" and asked two colleagues to share recollections of theirs. I hope you will enjoy them and let them serve as a springboard to your own reminiscing.

Remembering Legal Firsts

One "first" that has special meaning for me began when I was a student clerk in the SDNY. Just after I started I was asked to work on a habeas petition from a state court proceeding and appeal. I diligently and thoroughly researched the issues and wrote a memo suggesting that there were grounds to grant the petition. Little did I realize at the time that granting such petitions was fairly atypical. Despite my memo (or perhaps because of it), I was fortunate to be offered a post-graduate clerkship in the same chambers and when I returned the matter was still on the Court's docket. To make the long story short—after much research, oral argument and discussion (going as far back as Blackstone and early English common law) the Judge granted the petition. The Second Circuit affirmed, albeit on different grounds, and I celebrated the success of my efforts and contribution. The celebration was a bit premature, however, because the Supreme Court agreed to hear the appeal, and yes, reversed (6-3) in *Smith v. Phillips*, 455 U.S. 209 (1982).

I am still reminded that I have the "distinction" of being the law clerk who worked on the only case in which my Judge was reversed by SCOTUS. The case was memorable for both of us and we still recall it when we meet. Our memories of it have become part of the special bond between us. Moreover, I continue to take some consolation from the fact that the dissent was written by Justice Thurgood Marshall, relying heavily on the reasoning of the District Court!

A friend and mentor of mine, now a seasoned and distinguished trial lawyer and appellate advocate, had a similar early career story of having defeat snatched from victory. He recalls having argued his first case in the Appellate Division, First Department, about 2½ years after joining his firm. The joy of his 3-2 victory was short-lived. Leave to appeal was granted and in the first of his many career arguments in the N.Y. Court of Appeals he lost 6-0. To his chagrin the case has ever after been cited in the casebooks and innumerable decisions as establishing the scope of discovery under Article 31 of the CPLR. *Allen v. Crowell-Collier Pub. Co.*, 26 A.D.2d 516 (1st Dep't 1966), rev'd, 21 N.Y.2d 403(1968). Thankfully, he notes "things have gotten a bit better in the ensuing 48+ years."

The reminiscences of senior women often reflect the times in which we first practiced, the barriers we have overcome and the friends we made along the way. A female colleague recalls her first trial in Geneseo, New York in 1980. She has memories of the beautiful courthouse in which it was held, as well as the kindness and patience of other attorneys and the trial judge. Her story continues, "Perhaps the one memory that will always stay with me is that on the very first day of jury selection, when all the attorneys showed up, another female attorney appeared to represent one of the other defendants. At that time, it was fairly unusual to see two female members of the bar in the same case. But what made this even more memorable for me was that we were both wearing the very same suit and blouse. We looked like twins." They have remained good friends ever since. Thankfully, the selection of attire available to female attorneys, as well as the frequency of their appearance in trial courts, has expanded greatly since then.

* * *

Whether our firsts were successes or bumps on the learning curve (or both), few of us can say that the events surrounding our first trial became the subject of a Steven Spielberg-directed, Academy Award nominated film or that the portrayal of a man we helped prosecute would earn esteemed British actor Mark Rylance a well-deserved Academy Award. **Not so, for Rochester attorney Tony Palermo! Read on to the next story ~~**

* * *

If you have a reminiscence of your "legal first," or have discovered interesting or unexpected facts in your genealogy or family tree, or visited the birthplace of your ancestors or discovered new relatives and you would like to share the stories, please send them my way—rcb@sbscoaching.com.

Until next time—

Rosemary

Endnote

1. I would offer one word of caution—strive to keep your reminiscences in balance and perspective. Like so many things in life, reminiscing and storytelling may be pleasures best undertaken in moderation. Live in and focus on the present to avoid having the enjoyable and desirable goal of "learning from the past" cross the line to the not-so-desirable result of "living in the past."

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.

Remembering a Cold War Spy Trial

Tony Palermo and *U.S. v. Rudolf Abel*

By Rosemary C. Byrne

Spanning almost 60 years, the career of Anthony R. Palermo is replete with achievements and accolades. He is a distinguished bar leader dedicated to the practice of law and its core values of ethics, integrity and service to clients and the community. Now Of Counsel with Woods Oviatt Gilman LLP, Tony has been an Assistant U.S. Attorney in both the Southern and Western Districts of New York. He has had broad practice experiences in both small and large firm settings, as well as service as President of the Monroe County and New York State Bar Associations, and Member of the Board of Governors and Secretary of the American Bar Association.

Yet, despite this stellar career, the most memorable "legal first" for Tony was his initiation to the trial bar as a member of the team which successfully prosecuted the Russian spy Rudolf Abel in October of 1957. Some may recall the case because several years after his conviction Abel was swapped for Francis Gary Powers, an American pilot shot down over Russian territory. For most of us, however, that prisoner exchange and the Abel trial which preceded it were lost in history until revived by Steven Spielberg's Academy Award nominated film, *Bridge of Spies* which earned Mark Rylance a best actor award for his portrayal of Abel.

For Tony Palermo, the Abel case is unforgettable. After all, it was his first trial and he is now the lone surviving member of the cohort of prosecutors and defense attorneys who tried the case.

The year was 1957. America was in the throes of the Cold War. We were gripped with fears of nuclear weapons, the Soviet Union and communism. There were organized civil defense drills. Children were taught to "duck and cover" under their desks to protect against nuclear explosions or go to the school's bomb shelter at the sound of the air raid siren. The Russians had already tested a nuclear weapon. Later that year they would launch Sputnik I (the so-called "Doomsday Machine") inaugurating the space race and further exacerbating fears of nuclear attack. (On a personal note, it was also the year the Dodgers abandoned Brooklyn!)

Tony Palermo was a newly minted Georgetown Law School graduate working in the Internal Security Division of the Justice Department in Washington. Prior to attending law school Tony had completed Army Service which included Counter Intelligence School and German Language studies.

In early July of 1957, less than a year after he had graduated from law school, the 27-year-old Palermo was sent to New York for what he believed would be a two-day assignment working on an investigation and matter in the Eastern District. Six months later, with the trial completed, he would return to Washington having served as a member of the four-man team that prosecuted Rudolf Abel, the highest ranking foreign spy ever convicted in the United States, and having played a key role in one of the most important spy trials of the 20th century.

Tony has graciously taken the time to share with me some of his recollections of the Abel trial and the impact that experience and the release of the *Bridge of Spies* film have had on his career and his seniority.

By today's standards (and perhaps even those of 1957), the time span of the Abel case is remarkable. The entirety of the trial took less than six months—from the end of June when Abel was arrested, through his indictment in August, the two-week trial in October and his sentencing in November.

Equally extraordinary was the level of Tony's responsibility in the proceedings. Notwithstanding that he had been admitted to practice less than a year, Tony and a colleague were charged with the preparation and presentation of the case to the grand jury. Their task was particularly difficult since there were few precedents for charging a foreign citizen, such as Abel, with spying, and the government's star witness was refusing to testify. Tony recalls spending weeks interviewing and prepping FBI and INS investigators and other witnesses, marshalling the evidence, interviewing Reino Hayhanen, the star witness, and then ultimately persuading him to testify before the grand jury. Hayhanen was a Russian defector and KBG agent believed to be Abel's assistant, who brought Abel to the government's attention and assisted in locating him. He had steadfastly resisted testifying for many reasons, including fear of Soviet reprisals against family members residing in Russia.

Tony was present in the courtroom for most of the pretrial and trial proceedings. He prepared the submissions in opposition to the defense's pretrial suppression motion claiming that Abel's Fourth Amendment rights had been violated. Those claims were rejected by the trial court and a unanimous Court of Appeals for the Second Circuit. The constitutional protection afforded foreign citizens and the legality of the search of Abel's art studio and his room at the Hotel Latham were key issues the Supreme Court would ultimately address and affirm (5-4) after not one, but two, hearings.[1]

Today, it seems inconceivable that an attorney in his first year of practice would be given that degree of responsibility in any trial, let alone one involving national secu-

rity and receiving worldwide attention. While the government was confident of its position on the legal issues, a junior attorney could not help but be concerned about the possibility of his "getting it wrong" and "enabling a spy to go free."

Tony was not consulted on the film, but he has been invited to share the story of the Abel investigation and trial with audiences ranging from Monroe County attorneys to Los Angeles radio listeners on the eve of the Academy Awards. When the film was first released, a full house at the Brooklyn Historical Society heard Tony's recollections, as well as those of John Donovan, the son of the late James Donovan (Abel's defense attorney), and other experts on Abel and the trial. A video of that presentation is available at http://www.c-span.org/video/?400022-1/trial-soviet-spy-rudolph-abel. I encourage you to view it.

In these pages I cannot presume to do justice to the story and details of the Abel trial, the twists and turns of the investigation, the personalities of the major characters, or the legal issues the case involved. I leave that to Tony Palermo, Steven Spielberg and his screenwriters, and to others who have researched and written on the subject.[2] I can, however, share some of the highlights of Tony's recollections and note some interesting aspects of the story which I have gleaned from my conversations with him. If you love history, or spy stories, or challenging legal issues (or all three), you may enjoy reading more about these topics or considering them as you view (or review) the *Bridge of Spies* film or watch the Brooklyn Historical Society video.

- How the government learned of Abel (a KGB colonel) through Hayhanen (another KGB operative), who defected at the American embassy in Paris and told officials there was a Soviet espionage agent in the U.S.;
- How the government discovered the artist's studio in Brooklyn rented by Abel using the false identity of a deceased NYC American citizen named "Emil Goldfus." Note the irony that Abel went by the code name "Mark" and that the studio he rented was just across the street from the U.S. Courthouse in which he would be convicted of conspiracy to commit espionage, transmission of national security information to a foreign government and failure to register as a foreign agent;
- How the government located and lost Abel in May, and then relocated him about a month later in June and apprehended him at the Hotel Latham (not exactly as portrayed in the film!);
- The respective roles of the FBI and the INS in questioning Abel and the searches which would become the subject of the Supreme Court arguments;
- The serendipitous chain of events leading to the 1954 discovery of the famous hollowed out nickel containing an undecipherable numeric message on microfiche and Hayhanen's role in deciphering it in 1957.

As trial lawyers tend to do, Tony retained memorabilia from his first trial, including copies of the affidavits and briefs submitted in connection with the suppression motion, and a copy of the original indictment. The entire record is available through the Library of Congress. He also has vivid recollections of the characters of Abel and Donovan and many of the memorable moments in the proceedings which reflect them.

Tony recalls Abel as a "man of quiet reserve," polite, thoughtful, intelligent and articulate. He spoke several languages and was an artist who sketched the judge during the trial. In Tony's view, Mark Rylance's portrayal was "spot on" and "absolutely captured the persona of Abel." He especially recollects early Court proceedings in which Abel was not yet represented by counsel. When the indictment was read Abel was sufficiently astute to "respectfully" request a copy. The record reflects that he was given Tony's! At that hearing District Judge Matthew Abruzzo, who handled certain of the pre-trial proceedings, told Abel that he was entitled to an attorney—indeed two attorneys since this was a capital case. "Would two be better than one?" Abel laconically asked. "Not if the one is a good one," replied Judge Abruzzo.

Given a week to retain counsel, Abel was unsuccessful and returned to Court. It was Abel who asked "would the Court consider asking the Bar Association for help."

Enter Jim Donovan. Contrary to the film's depiction of him as a rather low-key insurance attorney, at the time of the trial in 1957 James B. Donovan was a well-respected and skilled 43-year-old Brooklyn lawyer and graduate of Harvard Law School, with a distinguished record of government service, including the Nuremberg prosecutions where he served as the assistant to Justice Robert Jackson. At the behest of the Brooklyn Bar Association, Donovan agreed to take the Abel case and vigorously defended him at trial and through appeals to the Second Circuit and the Supreme Court. Five years later it would be Donovan who negotiated the prisoner exchange which would return Abel to Russia, where he died a decade later. Later in 1962 Donovan negotiated the release of over a thousand prisoners held by Cuba following the failed Bay of Pigs invasion.

Tony has high praise for the skill, courage and integrity of Jim Donovan. In a time when fear of nuclear war and communism permeated America, he agreed to defend a Russian spy accused of stealing American defense secrets. He did so at great risk to himself, his family and his career and in so doing he was considered by many "the second most hated man in America." Notwithstand-

ing the likelihood that he would be publicly vilified, Donovan took the case believing that in America even a Soviet spy was entitled to a fair trial and a capable advocate. In the Spielberg film Donovan argues: "Who we are is our greatest weapon in this cold war." While it is unclear whether he actually ever uttered those words, they seem to sum up Donovan's view, and in today's troubling times they continue to ring true.

Given Donovan's fortitude and integrity, perhaps even patriotism, in taking the case through trial and appeal, Tony was particularly disturbed by one scene in the film. It depicted a late night visit by Donovan to the trial judge at home urging him to spare Abel the death penalty and suggesting that the time might come when Abel could be useful in a prisoner exchange.

Tony saw Donovan as a zealous and creative advocate in defending his client's life. He may even have been prescient in anticipating what would happen five years later on the bridge in Potsdam when he argued at sentencing that it was possible that in the future an American of equivalent rank might be captured by the Soviets and use of Abel in an exchange of prisoners might be considered in the best interests of the United States. In Tony's view, however, he would never have committed an ethical violation of the magnitude portrayed in the film. To the contrary, Donovan discussed his intention to ask the Court to spare Abel's life in advance of sentencing and, according to Tony, the subject was formally discussed in Chambers with the Court and all lawyers present. The Government did not object to the request and did not ask for the death penalty, but did urge the Court to consider a severe punishment for the serious offence of which Abel was convicted. It is regrettable that artistic license attributed an extraordinary ex-parte communication and breach of ethics to Jim Donovan who Tony believes was a man of the highest ethical caliber.

* * *

Tony Palermo's work on the trial of Rudolf Abel surely places him in the Hall of Fame of "legal firsts." For Tony, the release of Spielberg's film has provided a new focus for his seniority. It afforded him an exciting intellectual challenge and the opportunity (which he has joyously seized) to reminisce—to shed light on a major episode of American history and share his knowledge of the character and personalities of Jim Donovan and Rudolf Abel, two major players in that story. It has given him the chance to keep his mind active and to use his considerable legal prowess and experience in discussing the numerous substantive issues surrounding the case and the dearth of precedents at the time by which to resolve them.

The late William F. Tompkins, former Assistant Attorney General in charge of the DOJ's Internal Security Division, gave Tony the priceless opportunity to participate in a trial which would be so important to the nation and to him. Tony remains deeply grateful for the faith and confidence Tompkins and the DOJ placed in him.

As Tony puts it:

> Today, as I reflect upon my participation in this historic landmark trial in 1957, it is difficult for me to imagine a more memorable initiation to litigation practice. While certainly aware of my substantial involvement in a very significant Cold War event, I could not then have accurately predicted the impact this experience would have upon my future professional career. [The experience] certainly opened new career opportunities for me, including becoming an Assistant U.S. Attorney in the SDNY (which was created by President George Washington by Executive Order) and later becoming AUSA-In-Charge in Rochester, NY, my birthplace where I have engaged in the general practice of law since 1960.

For us, Tony's recollections of the Abel investigation and trial make a real life spy drama come alive and give us the opportunity to learn history through the eyes of someone who lived it. He helps us see that the challenge of balancing privacy and security is timeless.

In Tony's words, "*Bridge of Spies* is the gift that keeps on giving" and he has made extraordinary use of that gift. He demonstrates to all of us that while memories and reminiscences may be the products of our past, used well, as Tony Palermo has, they can be the raw materials and building blocks of our futures.

Thanks, Tony, for sharing the memories!

Endnotes

1. *U.S. v. Abel*, 362 U.S. 217 (1960).
2. Of particular note are *Strangers on a Bridge*, written by the late Jim Donovan; Abel: The True Story of the Spy They Traded for Gary Powers by Vin Arthey, a British historian; and a case commentary written by Professor Jeff Kahn of SMU Dedman School of Law in Dallas, which was published in the Journal of National Security Law and Policy in 2011.

The Senior Lawyer in Transition: Tips and Considerations for the Job Search

By Julie Anna Alvarez

Lawyers at any stage in their careers may find themselves in transition—from winding down a practice preceding retirement, to seeking a new job (or an entirely new career) because retirement is not an option—for a variety of reasons. Let us look at some of the considerations and resources available to senior lawyers facing a change in their professional lives.

First and foremost, there is no need to go it alone during a time of transition. There are professionals available to help you assess your future, strategize a plan of action to follow toward reaching your objectives, and who can share appropriate resources to support your search. Many law schools around the country offer counseling and resources to their alumni through their career services office at no cost. If you do not live near the school from which you graduated, a majority of schools can arrange for reciprocity with a school in your current region in order to access certain resources. To obtain more information and assistance, contact your law school's career services department. You may also opt to hire a career coach who will be able to work with you on a more frequent and focused basis and who will keep you accountable in the process. The International Coach Federation site at www.coachfederation.org is a good starting place to find the right coach for you. Additionally, there are online resources, such as AARP's website (www.aarp.org/work/job-search) or their new AARP Life Reimagined work curriculum offerings that can provide a good starting point for general guidance, inspiration and practical tools.

While the focus of this article is on the job search, for those senior lawyers whose path is retirement, hiring new or additional staff as part of a succession plan for your practice is likely a part of the solution. One piece of advice to assist in the succession planning process is not to overlook graduates of your alma mater or area schools that are known for producing graduates that are well-trained in practical lawyering skills (or provide focused training or concentrations in particular practice areas that reflect yours) as a source of talent. Seek out graduates of schools that tend to have a population that includes a large number who have a strong desire to "someday" have their own law firm practice—that "someday" will come sooner for them as you get closer to achieving your goal of exiting practice. Contact the career services office or the alumni office to be put in touch with the administrators who can help you connect with the talent you need.

Discovering and Preparing for Your New Career Direction

Self-awareness and some introspection are necessary at the earliest stage of this process of reinvention. Do you want to continue to practice, but in a different setting or with a different focus? Are you looking for a non-practice alternative that builds on your past legal experience? Do you want to work for someone else or do you want to be an entrepreneur? What skills or knowledge would you need to obtain, if you do not already have them, in order to effectuate the desired transition? These and a host of other self-reflective questions will guide you to arriving at your overall career search goal while providing a number of pathway options to consider at the early stage of your journey. Viewing a variety of job postings from your law school's job bank or other resources, such as job databases like Indeed.com, can help you begin to sort through what sounds attractive, as well as what you are qualified for and what requires more preparation.

To save yourself from wasting time or a career misstep, exploring the options that are of greatest interest to you is non-negotiable. One of the best ways to ensure that your new aspiration is not just a case of the "grass being greener on the other side" is to speak with others who are engaged in the same or similar work. Over the years, you probably engaged in "informational interviews" or what I like to call "informational coffee chats" with colleagues, during which you learned more about what they do over the course of a great conversation. Now your objective is not only to learn about what they do so you can determine if this is the path for you, but to also ask questions about what are some typical pathways to entry to this type of work for a seasoned attorney, where are the best places to network, what qualifications are being sought, and any additional advice that this professional can provide. A crucial question to ask at the conclusion of your coffee chat for best results is the following: "Is there anyone else with whom I should be speaking?" This will help you to organically grow your professional network in the new field. Once you have engaged in enough self-assessment, research, exploration, and information gathering, you will be set to fully launch your active job search.

The insights you have gathered will help you to both refresh and tailor your resume and other application materials to appeal to your target employer. You will now be fully conversant in any buzzwords, professional affiliations, volunteer work, or evidence of continuing educa-

tion you can present to make yourself the most compelling candidate possible. Being an experienced attorney in and of itself is not enough to get you where you want to go next. You have to demonstrate to a prospective employer that you have prepared yourself for this transition and are committed to this new path, as well as illustrate through your materials that you have an understanding of their world and needs.

Finding a New Opportunity for Yourself

The Internet and technology tools need to be an essential part of an effective job search in today's day and age. However, do not let that rattle you just because LinkedIn was not around the last time you changed jobs. The fact is many of the fundamentals of an effective job search rely on techniques and skills with which you are already very familiar—and in which you very well may excel beyond your millennial colleagues. Virtually all the senior lawyers I have encountered in my work have more than sufficient tech savvy to handle the needs of a job search.

In structuring your job or career search, it is wise to devote a substantial amount of time to the endeavor (or at least as many hours as you can solidly commit to the purpose) and set daily, weekly and monthly goals for how you will invest that time. When considering job search fundamentals, most people will agree that there are three main conduits to finding a job. Devoting the time you have allocated based on the likely rate of return for each of these conduits makes the most sense. The suggested breakdown would then be the following for each pathway to finding a new opportunity:

- 10% Job Postings
- 20% Targeted Direct Outreach to Potential Employers with Follow-up to uncover potential positions not posted (sending out tailored resumes and cover letters by hard copy or email, then calling the employer within a week to ten business days) and
- 70% Networking—and even the online networking through LinkedIn and other means ideally should at some point become in-person networking!

Technology has made setting up ongoing alerts about potential job opportunities easy and helps you be more efficient with your time in reconnecting or connecting to colleagues through social media. However, remember that the key to your success is in the strength of personal referrals from your network. Personal connections will bolster positive results. So traditional networking goes hand in hand with tech tools like LinkedIn. Go beneath the surface, and you will find that many an applicant getting a job through a job posting also had a colleague put in a good word with someone internally at the employer that placed that person's application near the top of the stack of resumes being reviewed. This is often where the professional reputation you have built, the number of people in your circle, and your confidence in speaking to others will help you make strides in your job search. However, your target employers have to be able to Google you and find something positive and look you up on LinkedIn. As such, it is imperative that your online presence be professional and in keeping with the new goals you have set for yourself. There are many resources available on how to use social media for an effective job search. One that is particularly helpful to lawyers is *The 6 Ps of the Big 3 for Job-Seeking JDs* by Amanda C. Ellis, Esq.

Once you put yourself out there in the marketplace, at some point you will begin getting invited to interviews. You may feel like your years of experience exempt you from having to practice, but that is a huge mistake. Engaging in one or more mock interviews can make a marked difference in acing the real interview. We do not always see our own "blind spots." Therefore, it makes sense to do a trial run of how you may answer some of the questions that may arise during an interview with someone who can help you assess if your answers (or your demeanor while delivering them) is helping you or hurting you.

Are you conveying the "why" for your wanting to do this new work in the best way possible? Are you connecting with the employer effectively? Are you highlighting the most compelling reasons that would inspire someone to hire you? Your mock interviewer (whether it is a law school career advisor or a lawyer colleague) will be able to provide valuable feedback on how others perceive your responses, so you can increase your likelihood of getting a job offer.

Executing the fundamentals of a solid job search, combined with the "secret sauce" of your personality, skills, drive and networking connections will soon have you accepting a job offer!

"But My Search Is Different…"

Every job search is different. However, I can hear some of you clamoring that you have particularly difficult or unique circumstances to overcome. There is hope for you too. This article can only address this topic in broad strokes and is not meant to replace the individualized advice you should get from a law school alumni counselor or a professional career coach. However, with some further exploration, there are resources that may be particularly well-suited to your special circumstances. For example, if you are an attorney looking to re-enter the profession after a period of time, perhaps due to caring for an ill parent, recovering from an illness yourself, raising children, or bouncing back from a downsizing, it may make sense to look into whether any of the growing number of work re-entry programs or resources would

be a good fit for you (the New Directions for Attorneys program at Pace Law School, and iRelaunch.com, and OnRampFellowship.com are examples).

A Real World Scenario

The two most important things to keep in mind is that 1) your process, journey and results will be as unique as you and your circumstances are; and 2) there is a lot more gray than black and white when it comes to career outcomes that can work for you. To provide an illustration of how the senior lawyer search can play out I will share (with permission from the subject) a real life scenario.

Three years ago, I had a senior attorney alumnus visit my office to get advice on entering an alternative career. After learning more about him, I asked why he wanted to leave the law. He spoke about his process of winding down his law practice in recent years, but admitted that he was not ready to fully retire given that he was of the "sandwich generation," caring for an elder parent, while still having a child's college tuition to pay. Yet he strongly yearned to do something more fulfilling and going back to his "first love," playing clarinet, was a strong point of focus.

The essential question I had to ask was: "Are you ready to stop practicing law and not have any regrets, either financially or because you would miss lawyering?" He conveyed he would not miss practicing in the least, but given his situation, could envision continuing some legal work to provide stability to the family finances until the new career transition was viable on its own. Through further dialogue, we also discovered he had the necessary entrepreneurial skillset and mindset to establish a new career path that brought him back to his musical roots. Our initial chat, in which we tossed about various options, finally settled on two points of focus for him to act upon: 1) expanding ways to play music with local musicians; and 2) aiming to hang his shingle as a clarinet instructor within the year. The first action step proved easy, as he was already playing with a local metropolitan orchestra in his area as a volunteer.

I provided advice and resources for creating a business plan, networking, creating his LinkedIn profile, and creating a website to add credibility to the services he was going to provide to prospective students.

Within six months, he informed me he had wrapped up his last case and had begun receiving musicians' testimonials. After a year he reported: "I can claim only a continual sense of renewed life, energy, and hope." Intensified networking not only helped him with new opportunities to play clarinet with other musicians and gain the above-mentioned testimonials, but he rekindled relationships with former students from his "prior life" who are now local school band directors—resulting in a natural pipeline for referrals that could lead to paying students. Since we communicate throughout the process at different intervals, he and I can adjust his game plan as "life happens." Last year when his elderly parent was confronting health issues, the plan was adjusted to take on flexible legal work and still maintain a musical presence, while allowing him time to focus on his parent. Hanging the shingle as a clarinet teacher full-time would have to wait a bit more. However, by engaging in the process mindfully, taking time for accurate self-assessment, adopting a realistic view of his priorities, combined with a willingness to take chances, engage in specific actions to move his plan for transition forward, and make course corrections as needed, this senior attorney has achieved a workable and fulfilling balance that satisfies his current life and professional needs. May the same be true for you as you embark on your journey!

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New York's Proposed Aid-in-Dying Bill: What You Should Know

By Anthony J. Enea

Every year thousands of Americans grapple with excruciatingly painful terminal illnesses. For many of these individuals, the thought of their lives being unnecessarily prolonged is abhorrent. While the issue of euthanasia and/or physician assisted suicide has been front and center in the American psyche since the days of Dr. Kevorkian and Karen Ann Quinlan, the controversial nature of this issue is still as strong today as it was forty to fifty years ago.

While euthanasia is illegal in most states and has been found morally unethical by many organized religions, there are now four (4) states (Washington, Oregon, Vermont and Montana) where physician assisted dying (PAD) is permitted. Additionally, it is also permitted in Bernalillo County, New Mexico.

The major distinction between euthanasia and PAD is who administers the lethal dose. With euthanasia, the physician or other third party administers the lethal dose, whereas with PAD, the lethal dose is self-administered by the patient and the patient determines whether and when to administer it.

New York State Assemblywoman Amy Paulin, D-Scarsdale, has sponsored the Aid-in-Dying bill in the Assembly, while Senator John Bonacic, R-Mt. Hope (Orange County), has sponsored the bill in the Senate. The proposed legislation was first introduced in February 2015, and a new push for its enactment has occurred this February.

Under the proposed legislation, the Public Health Law of New York would be amended to include a new Article 28-F "Aid in Dying" provision. The proposed legislation would permit a terminally ill adult (age 21 years or older and expected to live six months or less because of terminal illness or condition) who has the capacity (ability) to understand and appreciate the nature and consequences of health care decisions (including risks and benefits), and who is able to reach and communicate an informed decision to a physician licensed to practice in New York State, to decide to end his or her life.

The proposed legislation allows the attending physician (one who has primary responsibility for the care and treatment of a patient's terminal illness) to prescribe a lethal dose of medication to the terminally ill patient that he or she can self administer. The medication has to be capable of ending life and can include any other ancillary medication(s) intended to minimize the discomfort to the patient.

The request for this medication must be made in a writing which is signed and dated by the patient and witnessed by at least two (2) individuals who, in the presence of the patient, attest that to the best of their knowledge and belief, the patient has capacity, is acting voluntarily, and is not being coerced to sign the request. One of the witnesses cannot be a relative of the patient (by blood or by marriage). Additionally, the witnesses can neither be individuals who would be entitled to inherit upon the death of the patient, the attending physician, nor the owner or operator of a health care facility where the patient is residing or receiving treatment.

One of the issues that will surely arise when a decision is made by a terminally ill patient to end his or her life is whether the patient has the requisite capacity to make the decision. The proposed legislation provides that if, it in the opinion of the attending physician, the patient is suffering from a psychiatric or psychological disorder or depression causing impaired judgment, the attending physician shall refer the patient for counseling.

The proposed legislation further provides that no medication to end a patient's life shall be prescribed, dispensed or ordered until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment, and that the patient has the requisite capacity.

Although the proposed legislation has bi-partisan support, it is not without controversy and opposition in the NYS Assembly and Senate. Only time will tell whether the legislation is enacted. However, irrespective of where one's opinion falls on this issue, it is safe to say that whenever any legislation is proposed that allows one to end his or her own life, it should be approached carefully and with a great deal of caution and deliberation.

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Ethical and Professional Considerations for the Retiring Attorney

This material was prepared by Matthew Lee-Renert, with thanks to Thomas Leghorn, Esq., for his guidance on malpractice issues, in connection with Mr. Lee-Renert's presentation at the Senior Lawyers Section Fall 2015 CLE program, Retirement Planning for Clients and the Senior Lawyer. *As a free benefit to Senior Lawyers Section members, a recording of that program is available at SeniorLawyers@nysba.org.*

Introduction

The "retirement from the practice of law" in New York is a defined professional status that has specific implications. Furthermore, retirement from the practice of law does not eliminate an attorney's ethical obligations both during the course of retiring and thereafter. The purpose of this outline is to highlight some of these ethical and professional considerations and refer to resources to provide guidance and direction in addressing such.

I. Retirement as an Attorney Registration Status

A. Registering as Retired: In New York, an attorney's professional registration is governed by Judiciary Law 468-a and Part 118 of the Rules of the Chief Administrator [22 NYCRR 118] and is overseen by the Office of Court Administration. New York's attorney registration system does not provide an "inactive" status for non-practicing attorneys, but does provide for the "retirement from the practice of law." Under that status, an attorney's biennial registration fees (presently $375) are waived and the attorney is exempt from New York's Continuing Legal Education requirements [22 NYCRR 1500.5(b)(4)]. However, a retired attorney is still required to maintain his or her attorney registration and timely submit the biennial registration form. Both the Judiciary Law and the Rules of the Chief Administrator define the failure to comply with the registration requirements as conduct to be referred for disciplinary action [Judiciary Law 468-a(5) and 22 NYCRR 118.1(h)].

Definition of "retirement from the practice of law" for Attorney Registration purposes:

> **Retirement**—when an attorney, other than the performance of legal services without compensation, does not practice law and does not intend ever to engage in acts that constitute the practice of law.
>
> **Practice of Law**—the giving of legal advice or counsel to, or providing legal representation for, particular body or individual in a particular situation in either the public or private sector in the State of New York or elsewhere, it shall include the appearance as an attorney before any court or administrative agency [22 NYCRR 118.1(g) (emphasis supplied)].

Therefore, in order to qualify as "retired" for the purposes of being exempt from the registration fees and CLE requirements, an attorney must no longer be practicing law for compensation in any jurisdiction [*See*, *e.g.*, *Matter of Kahn*, 28 AD3d 161 (1st Dep't. 2006]. It should also be done with the intention that this is a permanent decision. What happens if the attorney changes his or her mind? The attorney should contact the Office of Court Administration with regard to whatever administrative steps (i.e. retroactive payment of fees) may be required.

B. **Voluntary Resignation**—For the retiring attorney who wants to dispense with all New York's registration obligations, removal from the roll of attorneys is necessary. In turn, this voluntary process is administered through the Departments of the Appellate Division, which are vested with the authority to admit and remove attorneys in New York [Judiciary Law Section 90]. Each of the four Judicial Departments have information available on their respective websites regarding the requisites for an attorney's application for voluntary resignation.

> **First Judicial Department**—www.nycourts.gov/courts/ad1/ (Information regarding voluntary resignations is available in the website's "Committee on Character and Fitness" section).
>
> **Second Judicial Department**—www.nycourts.gov/courts/ad2/ (Information regarding voluntary resignations is available in the website's "Attorney Matters" section).
>
> **Third Judicial Department**—www.nycourts.gov/courts/ad3/ (Information regarding voluntary resignations is available under the website's "Attorney Admission's" section under the website's "Information for Admitted Attorneys" section).
>
> **Fourth Judicial Department**—www.nycourts.gov/courts/ad4/ (Information regarding voluntary resignations is available in the website's "Attorney Matters" section. This process is also codified in Department's rules of practice at 22 NYCRR 1022.26(b)).

The websites and/or Department rules of practice [*See*, 22 NYCRR 691.11-a (Second Department) and 22

NYCRR 1022.28(d) (Forth Department] advise that reinstatement require a formal motion to the Court and other possible administrative requirements.

II. Ethical Issues Raised by Retirement

A. Withdrawal From Representation

An attorney seeking to retire in the midst of pending matters is withdrawing from representation and is subject to the requirements of Rule of Professional Conduct 1.16. As it relates to an attorney retiring from the practice of law, the subsections of Rule 1.16 include the following provisions:

> **Rule 1.16(b)(2):** A lawyer *shall* withdraw from representation of a client when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client (emphasis supplied).
>
> **Rule 1.16(c)(1):** A lawyer *may* withdraw from representing a client when…withdrawal can be accomplished without material adverse effect on the interests of the client (emphasis supplied).
>
> **Rule 1.16(c)(9)**—A lawyer *may* withdraw from representing a client when…the lawyer's physical or mental condition renders it difficult for the lawyer to carry out the representation effectively.
>
> **Rule 1.16(c)(10)**—A lawyer may withdraw from representing a client when…the client knowingly and freely assents to the termination of employment.
>
> **Rule 1.16(d)**—If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

The foregoing provision for the attorney in a litigated matter applies even to the attorney who is seeking to retire fully from practice. In Ethics Opinion 178 (1971), the New York State Bar Association (herein "NYSBA") stated that "once an attorney accepts employment in a litigation matter, he is not at liberty to withdraw at will." Ethics Opinion 178 further provides that if the client does not assent to the withdrawal, then the attorney is required to obtain a determination from the Court whether, under the circumstances of the matter, the attorney has the right to withdraw over the client's objection, and, if so, what steps are necessary to secure the client's interests [*See*, *also*, Nassau County Bar Association Ethics Opinion No. 95-9].

> **Rule 1.16(e)**—Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for the employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

B. Ongoing Ethical Obligations to Preserve Confidentiality

Rule of Professional Conduct 1.6(a) defines confidential information as,

> information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.

An attorney is prohibited, pursuant to Rule 1.6(a)(1) from knowingly revealing client information (subject to certain exceptions specified in Rule 1.6(b)). Furthermore, the New York State Bar Association in Ethics Opinion 842 (2010) stated plainly that:

> The obligation to preserve client confidential information extends beyond merely prohibiting an attorney from revealing confidential information without client consent. A lawyer must also take reasonable care to affirmatively protect a client's confidential information.

Pursuant to Rule of Professional Conduct 1.9, an attorney's duty to preserve confidentiality is the same for former clients [*See*, NYSBA Ethics Opinion 1061 (2015)]. That obligation does not conclude with the attorney's retirement and withdrawal from practice. As a practical matter, two areas in which the retiring attorney should be mindful of this issue are in the potential sale of the attorney's law practice and in the maintenance or disposal of client files.

Sale of the Law Practice [Rule of Professional Conduct 1.17]—For the potential sale of a law practice's cases and goodwill, Rule 1.17 sets forth specific procedures to balance the obligation to preserve client confidences with the need to provide sufficient information to the prospective buyer to evaluate the practice and perform conflict checks.

> **Rule 1.17(b)(5):** Absent the consent of the client after full disclosure, a seller shall not provide the prospective buyer with information if doing so would cause a violation of attorney-client privilege.

Rule 1.17(b)(6): If the seller has reason to believe that the identity of the client or the fact of the representation itself constitutes confidential information in the circumstances, the seller may not provide such information such information to the prospective buyer without first advising the client of the identity of the prospective buyer and obtaining the client's consent to the proposed disclosure.

Subject to the foregoing restrictions, Rules 1.17(b)(1), (2) and (3) provide a framework for the incremental disclosure of information to the prospective buyer, as necessary, in order to allow for the performance of a conflict check and to minimize disclosure in the event that a potential conflict is discovered.

Maintenance and Disposal of Records and Files—Appropriate care must be given to ensure that any confidential records or information that the retired attorney maintains or disposes is handled in a manner that preserves the confidentiality of such. As NYSBA noted in Ethics Opinion 842 (2010), "even when a lawyer wants a closed client file to be destroyed '[s]imply placing the files in the trash would not suffice. Appropriate steps must be taken to ensure that confidential information remains protected and not available to third parties'" [*citing* New Jersey Opinion (2006), *quoting* New Jersey Opinion 692 (2002)].

The Rules of Professional Conduct do not have specific guidelines for what may constitute "appropriate steps." Rather, NYSBA has explained that an attorney should take reasonable precautions and that the determination of what is "reasonable" is "squarely" on the attorney [Ethics Opinion 1019 (2014)]. Comment 17 to Rule 1.6, in referring to attorney communications, states that "factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement." Pursuant to 1.6(c), the lawyer's duty to use "reasonable care" extends to the prevention of "the lawyer's employee's, associates and others whose services are utilized by the lawyer from disclosing or using confidential information of a client."

Insight can be gained from NYSBA's Ethics Opinions relating to the use of electronic and digital media for the purpose of communications and/or data maintenance. In Ethics Opinion 842, which discusses the use of an online "cloud" computer data system, NYSBA concluded that "reasonable care" may include the affirmative inquiry into the cloud provider's obligations and policies regarding confidentiality; the adequacy of the provider's security measures; and, the availability of technology to protect against possible infiltration. NYSBA reiterated these considerations in Ethics Opinions 940 (addressing the use of electronic backup tapes for files) and 1019 (addressing a law firm's use of a remote access system for files and records). As a result, the Ethics Opinions appear to suggest that an attorney has an affirmative duty to assess the security afforded by the method of storage.

However, NYSBA has also stated that "exercising reasonable care does not mean that the lawyer guarantees that the information is secure from any unauthorized access" [Ethics Opinion 842]. In that regard, Comment 17 to Rule 1.6, in discussing communication, notes that a lawyer is not required to use special security measures if the method of communication affords a reasonable expectation of privacy.

C. **The Retention of Records and Files**

Mandatory Retention—Bookkeeping Records

Rule of Professional Conduct 1.15(d)(1), which addresses "Required Bookkeeping Records," specifies certain records that a lawyer must maintain for **seven years after the events that they record**:

Bookkeeping Entries:

Rule 1.15(d)(1)(i): For **every account** that "concerns or affects the lawyer's practice of law"

> The records of all deposits in and withdrawals from the account which *shall specifically identify*—
>
> **Deposits**—the date, source and description of each item.
>
> **Withdrawals**—the date, payee and purpose of each disbursement.

Rule 1.15(d)(1)(ii): For **special accounts** (escrow):

> **Deposits**—the source, the names of all persons for whom funds are or were held and the amounts.
>
> **Withdrawals**—the description, amount and names of all persons to whom funds were disbursed.

Documents Generated During the Course of Representation

> **Rule 1.15(d)(1)(iii):** Copies of all retainer and compensation agreements with clients.
>
> **Rule 1.15(d)(1)(iv):** Copies of all statements to clients or other persons showing disbursements to them or on their behalf.
>
> **Rule 1.15(d)(1)(v):** Copies of all bills rendered to clients.
>
> **Rule 1.15(d)(1)(vi):** Copies of all records showing payments to lawyers, investigators or other persons "not in lawyer's regular employ" for services rendered.

> **Rule 1.15(d)(1)(vii):** Copies of all retainer and closing statements filed with the Office of Court Administration.
>
> **Rule 1.15(d)(1)(viii):** All checkbooks, check stubs, bank statements, prenumbered cancelled checks, and duplicate deposit slips.

NOTE: For this Subsection, Rule 1.15(d) does not refer to "copies." In turn, the Rule has been interpreted to require the retention of "original" records. As many banks, however, no longer provide original cancelled checks to account holders, it is suggested that an attorney maintain the records in the form in which they are received in the ordinary course of business [See, NYSBA Ethics Opinion 758 (2002); Roy Simon, *New York Rules of Professional Conduct Annotated*, at 826-828 (2014 ed.)].

> **Rule 1.15(d)(3)**; provides that a "**copy**" for the records in this part can be one of the following: original records, photocopies, microfilm, optical imaging, or other medium that preserves image and cannot be altered without detection. In Ethics Opinion 680, the New York State Bar Association emphasized that common thread with all of the record options listed above should be the inability for someone to alter the images without detection.

The mandatory bookkeeping records do not necessarily have to be maintained by the attorney himself if they are being maintained by the firm from which the attorney is retiring or another appropriately authorized party. Rule of Professional Conduct 1.15(h), which addresses the "Dissolution of a Firm," requires that appropriate arrangements must be made for the maintenance of records by a member of the firm or the successor firm.

Client Files and Documents

Although the foregoing bookkeeping records are the only ones specified for retention by the Rules of Professional Conduct, there may be duties created by Court Rules or Statute that impose the retention of records and documents in certain matters. For example, in the First and Second Judicial Departments, there is mandatory retention of specific records from cases involving claims or actions for personal injury, property damage, wrongful death and other similar matters listed therein [22 NYCRR 603.7(f) (1st Dep't) and 22 NYCRR 691.20(f) (2 Dep't.)].

On a more general level, the attorney's duty falls under the obligations to safeguard client property. In *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP* [91 NY2d 30 (1997)], the New York State Court of Appeals determined that clients have a broad property right giving them presumptive access to the attorney's entire file, subject only to very limited exceptions [*Id*., at pp.36-38]. In turn, Ethics Opinions issued subsequently have treated the client file as property covered by the provisions in Rule of Professional Conduct 1.15(c), which set forth an attorney's duties, *inter alia*, to safeguard and, when appropriate, deliver client property [*See*, *e.g*., NYSBA Ethics 766 (2003) (Discussing a former client's right to the file in light of the *Sage Realty* decision)].

The client's property interest should also be considered in the context of the attorney's withdrawal or conclusion of representation. As noted earlier, and discussed in NYSBA Ethics Opinion 766, Rule of Professional Conduct 1.16(e) requires that an attorney, upon termination of representation, should deliver to the client "all papers and property to which the client is entitled" [*Id*.]. This requirement, however, does not preclude an attorney from keeping a copy of the file in order to safeguard the attorney's own interests. In Ethics Opinion 780 (2004), NYSBA concluded essentially that an attorney also has a property interest in the file, albeit, one that is not superior to that of the client. Thus, an attorney generally could retain copies of the file, produced at the lawyer's expense, over the client's objection.

Furthermore, Ethics Opinion 780 reflects that an attorney may negotiate for a release of liability as a condition of not keeping a copy of the client's file. NYSBA distinguished such circumstances from its longstanding position that an attorney cannot demand a release from liability as a condition of turning over the client's file [*See*, NYSBA Ethics Opinion 399 (1974)]. However, this should be viewed as a negotiated transaction in which the attorney has an obligation to ensure the fairness of this negotiation. Rule of Professional Conduct 1.8(h)(2) provides that a lawyer shall not:

> settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent counsel in connection therewith.

Beyond the documents and records for which retention is mandatory pursuant to the Rules of Professional Conduct and/or other legal obligations, there are no "hard and fast" ethical rules regarding the maintenance and disposal of client files. Although NYSBA, in Ethics Opinion 623 (1991), suggests that an attorney contemplating the disposal of a client file has an ethical obligation to inspect the file before doing so, it also concluded that "the ethics of our profession suggest that a considerable amount of flexibility in articulating specific procedures is necessary." In light of the desire to "avoid hard-edged rules" NYSBA offered suggestions in Ethics Opinion 623 "for the general edification of the bar" regarding how a lawyer could approach and dissect the task of maintaining and disposing of client documents:

- **Documents belonging to the lawyer vs. documents belonging to the client:** Ethics Opinion 623 preceded the Court of Appeal's determination in *Sage Realty*. In light of that determination, the docu-

ments belonging to the lawyer is a much narrower category, the definition of which is a question of law and fact. The *Sage Realty* decision discussed that this category may include assessments of the client and other documents intended solely for internal law office review and use [*Sage Realty*, 91 NY2d at 37-38]. Documents belonging to the lawyer ordinarily can be destroyed by the lawyer without consultation or notice to the client.

- **Documents in Need of Salvaging ("DINS") vs. Documents That Can Be Destroyed:** NYSBA defined a broad category of documents as needing to be salvaged, which include documents for which there is a legal duty for the lawyer and/or client to maintain and any documents that a client would foreseeably need to establish personal or property rights.
- **DINS That the Lawyer Is Obligated to Maintain vs. the Client's Own Obligation:** DINS identified by the lawyer as records that the lawyer is required to maintain should than be maintained as required by rule or statute. DINS that the client should maintain should be returned to the client. If the lawyer is unable to transfer them, the lawyer should continue to maintain those documents. Ethics Opinion 623 suggests that a lawyer may be able to charge the client for the cost of maintaining these documents provided the lawyer has given the client adequate notice of the intention to do so.
- **Communicating With the Client:** Consistent with the requirement for a lawyer to deliver all papers and property to which a client is entitled at the termination of representation [Rule 1.16(e)], the Association of the Bar of the City of New York has suggested that "it is good practice to discuss with the client the retention and disposition of the files at the time of the termination of the matter, or, in appropriate circumstances when there is a continuing client relationship, at the conclusion of the representation [NY City Ethics Opinion 1986-4]. However, that Opinion concluded that there is no "hard and fast rule as to when the client should be contacted, and good judgment should govern in making this decision" [*Id*.].

In reviewing the file and contemplating what to maintain, the lawyer should contact the client, preferably in writing, to advise of the intention of disposing of the appropriate portions of file. The lawyer should then provide a reasonable opportunity for access and retrieval/delivery of the file. The lawyer should communicate the existence of possible DINS and explain the significance of such to the client. Ethics Opinion 623 advises that if the client fails to respond within a reasonable time period, or the lawyer cannot contact the client after reasonable efforts, non-DINS materials may be destroyed. If the client responds, the attorney should then act in accordance with the client's directions.

Medium in Which Records May Be Maintained—According to NYSBA Ethics Opinion 940 (2012), the form in which records may be maintained depends upon the kinds of records at issue. Where the Rules allow for "copies" to be maintained [*i.e.*, Rule 1.15(d)(1)(i)—(vii)], then a digital/electronic format which cannot be altered without detection may suffice. Where original records are required [Rule 1.15(d)(1)(vii)], the "original" records should be maintained in the form received in the ordinary course of business. Furthermore, certain DINS, such as wills, deeds, contracts and promissory notes, should be retained in original form due to the potential legal and evidentiary effect of such.

D. **The Escrow Account**

When Seeking to Close the Account—Although arising incident to an attorney's practice of law, the holding of funds in escrow may be viewed as an independent fiduciary obligation. In turn, the retirement of an attorney does not terminate an attorney's obligations as to funds deposited into an attorney escrow account. If funds on deposit cannot be disbursed pursuant to the terms of the escrow, and the attorney wishes to close the account, then an attorney may seek the consent of all parties with an interest in the funds to have them transferred to another attorney for the continuation of the escrow. If an attorney cannot do so, another option is to bring a stakeholder action pursuant to CPLR 1006 for the attorney to be judicially relieved the fiduciary obligation.

When a lawyer cannot locate the party entitled to escrow funds in order to disburse such, Rule of Professional Conduct 1.15(f) provides that an application may be brought for an Order to have the funds due to the lawyer disbursed (in lieu of the consent of the missing party) and for the funds due to the missing party to be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to entitled persons.

- If funds were obtained through a commenced legal action commenced in the Unified Court System, the application should be filed in the Court where the action was brought.
- If no action brought in the Unified Court System, the application should be brought in the Supreme Court, in the County where lawyer maintains an office for the practice of law.

Although Rule 1.15(f) specifies missing payees, it has also been applied in situations where the attorney has unaccounted remaining funds in escrow. The Lawyers' Fund for Client Protection has sample pleadings for these contingencies available on its website at www.nylawfund.org (in the "Escrow and Ethics Materials" section).

When Other Signatories will Actively Maintain the Account

Remaining a Signatory on an Active Account—In remaining a signatory on an account, an attorney has the ability to access both the funds in the account and the bank records related to such. A signatory on an attorney escrow account may be found to have a responsibility related to issues with the account created by the conduct of others [*See*, *Matter of Galasso*, 19 NY3d 688, 694 (2012), *on remittitur*, 105 AD103 (2d Dep't 2013)]. In turn, the retired attorney, depending on the circumstances, may be found to have an ongoing duty to safeguard the funds and, in turn, bear a level of responsibility and liability for improprieties that occur even if the attorney was not directly involved in such [*See*, *Matter of Posner*, 118 AD3d 18, 21 (2d Dep't 2014) (Attorney suspended for one year based, *inter alia*, upon escrow misappropriations by partner even though the attorney was no longer an active participant in the firm)].

A useful resource for a retiring attorney in the process of closing a law office is *Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death*. This publication, which was produced by NYSBA's Committee on Law Practice Continuity, is available on NYSBA's website at www.nysba.org/PlanningAhead as a free download. In addition to covering many professional and ethical issues related to closing an office, it also includes checklists and sample forms to facilitate that task.

III. A Brief Word About Malpractice Insurance—"TAIL"

A retiring attorney will likely need and want continuing malpractice coverage as claims against the attorney may arise after the point that the attorney has retired from active practice. When an attorney is retiring from a continuing law firm, the situation is relatively simple as the attorney's coverage will continue within the scope of the firm's policy for matters taking place while the attorney was working for the firm, pre-retirement.

In contrast, when an attorney's retirement does not provide for such continuing coverage and the attorney cancels malpractice coverage or lets it lapse, there will usually be only a limited period of 30-60 days for which reported claims will be covered. As a result, retiring attorneys should consider a TAIL policy to cover an extended period after the period of active coverage. The recommended length of the policy will vary based upon cost and needed coverage, but a consideration should be the three-year statute of limitations. If an attorney will be receiving continuing coverage from an existing firm, but has concern that the policy may be cancelled or allowed to lapse, the retiring attorney should make arrangements for notice if the policy is being cancelled or lapsing so that a TAIL policy can be purchased.

The "semi-retired" lawyer, who intends or is considering a limited continuation of practice, should consult with his or her malpractice broker/carrier about scope of needs. This may allow for a policy that scales down, which, in turn, might reduce the cost of a subsequent TAIL policy if and when the attorney retires completely. Be wary of the idea of practicing in retirement without coverage, especially if there is consideration to the idea of returning to full time practice, as obtaining "prior acts" coverage for an uncovered period may be costly and onerous.

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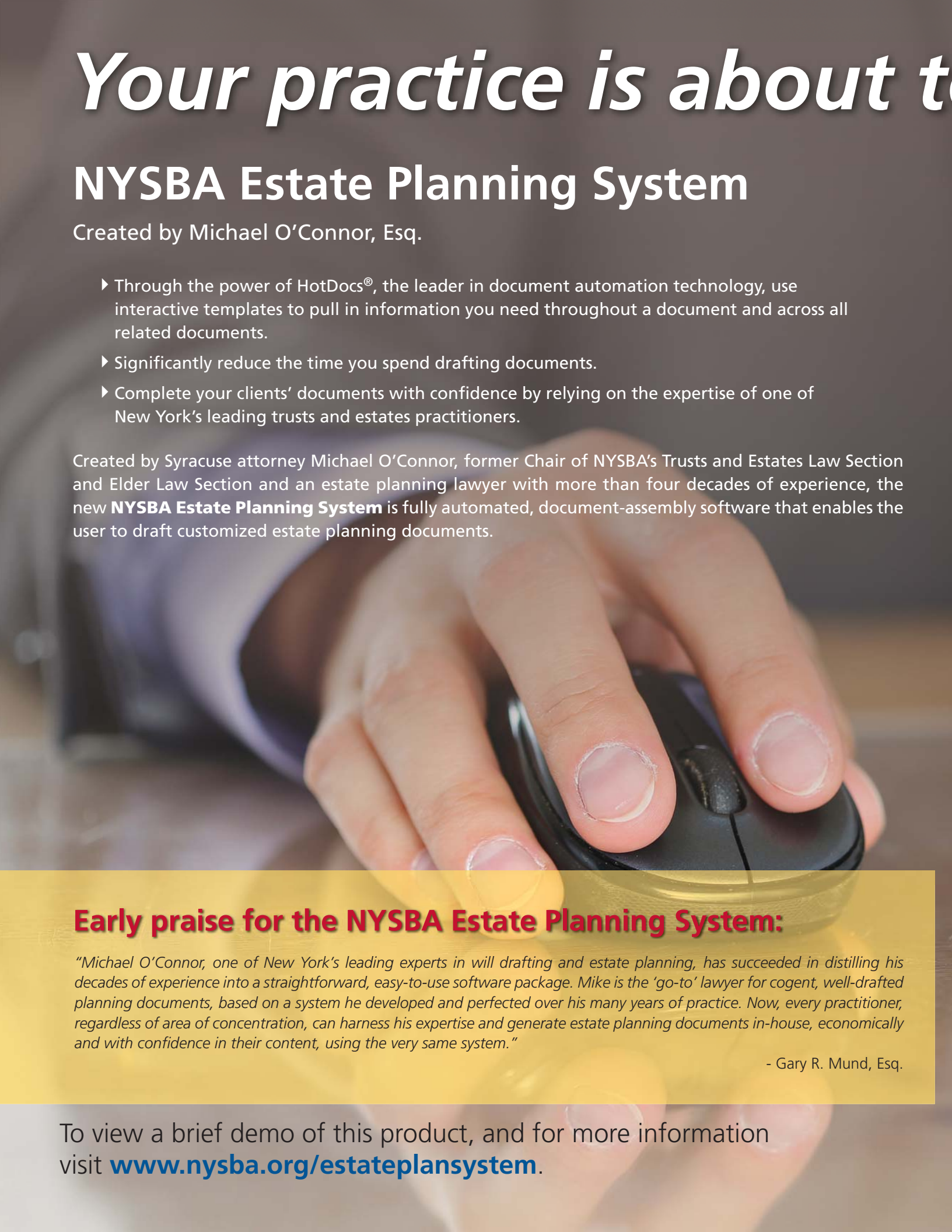

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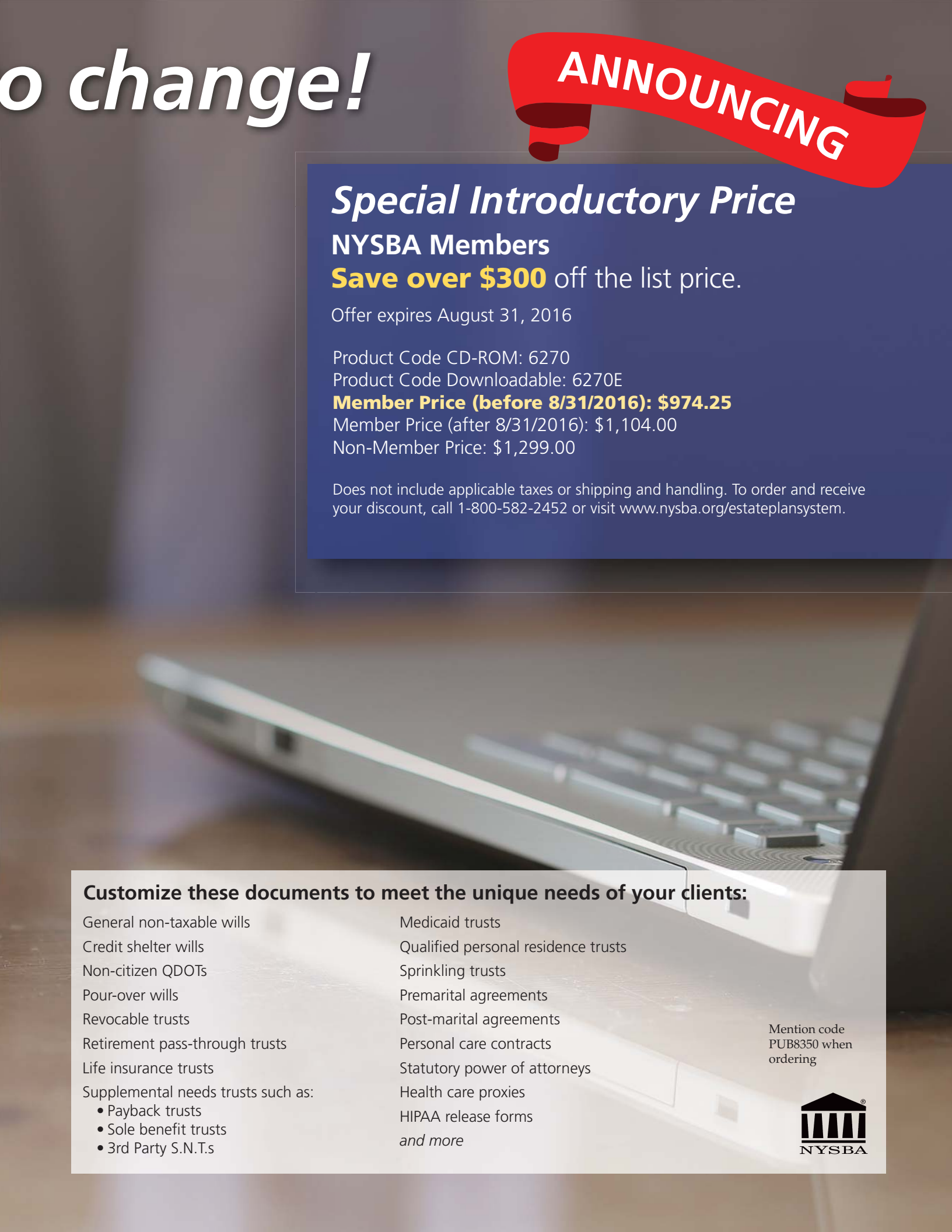

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What If? Answers to Frequently Asked Questions About Closing a Law Practice on a Temporary or Permanent Basis

By the Law Practice Management Committee Subcommittee on Law Practice Continuity of the New York State Bar Association

If you are planning to close your office or if you are considering helping a friend or colleague close his or her practice, there are numerous issues to resolve. How you structure your agreement will determine what the Assisting Attorney must do if the Assisting Attorney finds (1) errors in the files, such as missed time limitations; (2) errors in the Planning Attorney's trust account; or (3) defalcations of client funds.

Discussing these issues at the beginning of the relationship with your friend or colleague will help to avoid misunderstandings later when the Assisting Attorney interacts with the Planning Attorney's former clients. If these issues are not discussed, the Planning Attorney and the Assisting Attorney may be surprised to find that the Assisting Attorney (1) has an obligation to inform the Planning Attorney's clients about a potential malpractice claim or (2) that the Assisting Attorney may be required to report the Planning Attorney to the Disciplinary Committee (RPC 8.3. See also NYSBA Ethics Opinions 531, 734, 854).

The best way to avoid these problems is for the Planning Attorney and the Assisting Attorney to have a written agreement, and, when applicable, for the Assisting Attorney to have a written agreement with the Planning Attorney's former clients. If there is no written agreement clarifying the obligations and relationships or plainly limiting the scope of the Assisting Attorney's role, an Assisting Attorney may find that the Planning Attorney believes that the Assisting Attorney is representing the Planning Attorney's interests. At the same time, the former clients of the Planning Attorney may also believe that the Assisting Attorney is representing their interests. It is important to keep in mind that an attorney-client relationship can sometimes be established by the reasonable belief of a would-be client. (RPC 1.7, 1.8, and 1.9).

This section reviews some of these issues and the various arrangements that the Planning Attorney and the Assisting Attorney can make. All of these frequently asked questions, except #9, are presented as if the Assisting Attorney is posing the questions.

1. Must I notify the former clients of the Planning Attorney if I discover a potential malpractice claim against the Planning Attorney?

The answer is largely determined by the agreement that you have with the Planning Attorney and the Planning Attorney's former clients. If you do not have an attorney-client relationship with the Planning Attorney, *and* you are the new lawyer for the Planning Attorney's former clients, you must inform *your* client (the Planning Attorney's former client) of the error, and advise the client of the option of submitting a claim to the professional malpractice insurance carrier of the Planning Attorney, unless the scope of your representation of the client excludes actions against the Planning Attorney. If you want to limit the scope of your representation, do so in writing and advise your clients to get independent advice on the issues.

If you are the Planning Attorney's lawyer, and not the lawyer for his or her former clients, you should discuss the error with the Planning Attorney and advise the Planning Attorney of the obligation to inform the client of the error. (RPC 1.4(a)). If you are the attorney for the Planning Attorney, you would not be obligated to inform the Planning Attorney's client of the error. You would, however, want to be careful not to make any misrepresentations. (RPC 4.1, 8.4(c)). For example, if the Planning Attorney had previously told the client a complaint had been filed, and the complaint had *not* been filed, you should not reaffirm the misrepresentation and you might well have a duty to correct it under some circumstances. In any case, you or the Planning Attorney should notify the Planning Attorney's malpractice insurance carrier as soon as you become aware of any circumstance, error or omission that may be a potential malpractice claim in order to prevent denial of coverage under the policy due to the "late notice" provision.

If you are the Planning Attorney's lawyer, an alternative arrangement that you can make with the Planning Attorney is to agree that you may inform the Planning Attorney's former clients of any malpractice errors. This would not be permission to represent the former clients on malpractice actions against the Planning Attorney. It would authorize you to inform the Planning Attorney's former clients that a potential error exists and that they should seek independent counsel.

2. I know sensitive information about the Planning Attorney. The Planning Attorney's former client is asking questions. What information can I give the Planning Attorney's former client?

Again, the answer is based on your relationship with the Planning Attorney and the Planning Attorney's clients. If you are the Planning Attorney's lawyer, you would be

limited to disclosing any information that the Planning Attorney wished you to disclose. You would, however, want to make clear to the Planning Attorney's clients that you do not represent them and that they should seek independent counsel, as well as that you are not able or permitted to answer all of their questions. If the Planning Attorney suffered from a condition of a sensitive nature and did not want you to disclose this information to the client, you could not do so.

3. Since the Planning Attorney is no longer practicing law, does the Planning Attorney have malpractice coverage?

This depends on the type of coverage the Planning Attorney had. Lawyer professional liability policies are "claims made" policies. As a result, as a general rule, if the policy period has terminated, there is no coverage. However, most malpractice policies include a short automatic extended reporting period of usually 60 days after the termination date of the policy. This provides the opportunity to report known or potential malpractice claims when a policy ends and will not be renewed. In addition, most malpractice policies provide options to purchase an extended reporting period endorsement for longer periods of time. These extended reporting period endorsements do not provide ongoing coverage for new errors, but they do provide the opportunity to lock in coverage under the expiring policy for errors that surface after the end of the policy, but within the extended reporting endorsement time frame. See Appendix 24 for further information.

4. What protection will I have under the Planning Attorney's malpractice insurance coverage, if I participate in the closing or sale of the office?

You must check the definition of "Insured" in the malpractice policy form. Most policies define "Insured" as both the firm and the individual lawyers employed by or affiliated with the firm. This typically is broadened to include past employees and "of counsel" attorneys. In addition, most lawyers' professional liability policies specifically provide coverage for the "estate, heirs, executors, trustees in bankruptcy and legal representatives" of the Insured, as additional insureds under the policy.

5. In addition to transferring files and helping to close the Planning Attorney's practice, I want to represent the Planning Attorney's former clients. Am I permitted to do so?

Whether you are permitted to represent the former clients of the Planning Attorney depends on (1) if the clients want you to represent them and (2) whom else you represent.

If you are representing the Planning Attorney, you are unable to represent the Planning Attorney's former clients on any matter against the Planning Attorney. This would include representing the Planning Attorney's former client on a malpractice claim, ethics complaint, or fee claim against the Planning Attorney. If you do not represent the Planning Attorney, you are limited by conflicts arising from your other cases and clients. You must check your client list for possible client conflicts before undergoing representation or reviewing confidential information of a former client of the Planning Attorney. (RPC 1.7, 1.8 and 1.9).

Even if a conflict check reveals that you are permitted to represent the client, you may prefer to refer the case. A referral is advisable if the matter is outside your area of expertise, or if you do not have adequate time or staff to handle the case. If you intend to participate in a referral fee, the requirements of RPC 1.5(g) must be met. In addition, if the Planning Attorney is a friend, bringing a legal malpractice claim or fee claim against him or her may make you vulnerable to the allegation that you didn't zealously advocate on behalf of your new client. To avoid this potential exposure, you should provide the client with names of other attorneys, or refer the client to the New York State Bar Association's Lawyer Referral Service (telephone number 1-800-342-3661) or other appropriate lawyer referral service.

6. What procedures should I follow for distributing the funds that are in the Planning Attorney's escrow account?

If your review of the Planning Attorney's escrow account indicates that there may be conflicting claims to the funds in the account, you should initiate a procedure for distributing the existing funds, such as a court-directed interpleader, pursuant to CPLR 1006.

If the client cannot be located, a judicial order may be sought seeking to fix the Planning Attorney's fee and disbursements, and deposit the missing client's share with the Lawyer's Fund for Client Protection. (RPC 1.15(f)). As a matter of public policy, the Lawyer's Fund will accept deposits in sums of less than $1,000, without a formal application and court order.

7. If there was a serious ethical violation, must I tell the Planning Attorney's former clients?

The answer depends on the relationships. The answer is (A) no, if you are the Planning Attorney's lawyer; (B) maybe, if you are not representing the Planning Attorney or the Planning Attorney's former clients; and (C) maybe, if you are the attorney for the Planning Attorney's former clients.

(A) If you are the Planning Attorney's lawyer, you are not obligated to inform the Planning Attorney's former clients of any ethical violations or report any of the Planning Attorney's ethical violations to the disciplinary committee if your knowledge of the misconduct is a confidence or secret of your

client, the Planning Attorney. (RPC 8.3, RPC 1.6). Although you may have no duty to report, you may have other responsibilities. For example, if you discover that some of the client funds are not in the Planning Attorney's escrow account as they should be, you, as the attorney for the Planning Attorney, should discuss this matter with the Planning Attorney, and encourage the Planning Attorney to correct the shortfall.

If you are the attorney for the Planning Attorney, and the Planning Attorney is deceased, you should contact the personal representative of the estate. Remember that your confidentiality obligations continue even though your client is deceased. If the Planning Attorney is alive but unable to function, you may notify the Planning Attorney's clients of the Planning Attorney's situation and suggest that they seek independent legal advice.

If you are the Planning Attorney's lawyer, you should make certain that clients of the Planning Attorney do not perceive you as their attorney. This should include informing them in writing that you do not represent them.

(B) If you are not the attorney for the Planning Attorney, and you are not representing any of the former clients of the Planning Attorney, you may still have a fiduciary obligation (as an authorized signer on the escrow account) to notify the clients of the shortfall, and you may have an obligation under RPC 8.3 to report the Planning Attorney to the Disciplinary Committee. You should also report any notice of a potential claim to the Planning Attorney's malpractice insurance carrier in order to preserve coverage under the Planning Attorney's malpractice insurance policy.

If you are the attorney for a former client of the Planning Attorney, you have an obligation to inform the client about the shortfall and advise the client of available remedies such as pursuing the Planning Attorney for the shortfall and filing claims or complaints with the Lawyers' Fund for Client Protection, 119 Washington Ave., Albany, NY 12210 (telephone number 1-800-442-3863); the malpractice insurance carrier; and the Disciplinary or Grievance Committee. If you are a friend of the Planning Attorney, this is a particularly important issue. You should determine *ahead of time* whether you are prepared to assume the obligation to inform the Planning Attorney's former clients of the Planning Attorney's ethical violations. If you do not want to inform your clients about possible ethics violations, you must explain to your clients (the former clients of Planning Attorney) that you are not providing the clients with any advice about ethics violations of the Planning Attorney. You should advise the clients in writing to seek independent representation on these issues. Limiting the scope of your representation, however, does not eliminate your duty to report pursuant to Rule 8.3.

As a general rule, whether you have an obligation to disclose a mistake to a client will depend on the nature of the Planning Attorney's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm from the possible error or omission, and the likelihood that the Planning Attorney's conduct would be deemed so deficient as to give rise to a malpractice claim. Ordinarily, since lawyers have an obligation to keep their clients informed and to provide information that their clients need to make decisions relating to the representation, you would have an obligation to disclose to the client the possibility that the Planning Attorney has made a significant error or omission.

8. If the Planning Attorney stole client funds, do I have exposure to an ethics complaint against me?

You do not have exposure to an ethics complaint for stealing the money, unless in some way you aided or abetted the Planning Attorney in the unethical conduct. Whether you have an obligation to inform the Planning Attorney's former clients of the defalcation depends on your relationship with the Planning Attorney and with the Planning Attorney's former clients. (See #7 above.)

If you are the new attorney for a former client of the Planning Attorney, and you fail to advise the client of the Planning Attorney's ethical violations, you may be exposed to the allegation that you have violated your ethical responsibilities to your new client.

9. What are the pros and cons of allowing someone to have access to my escrow account? How do I make arrangements to give my Assisting Attorney access?

The most important "pro" of authorizing someone to sign on your trust account is the convenience it provides for your clients. If you suddenly become unavailable or unable to continue your practice, an Assisting Attorney is able to transfer money from your trust account to pay appropriate fees, disbursements and costs, to provide your clients with settlement checks, and to refund unearned fees. If these arrangements are not made, the clients' money must remain in the trust account, until a court allows access. This court order may be through a guardianship proceeding, or an order for a court-directed interpleader, pursuant to CPLR 1006. This delay may leave your clients

at a disadvantage, since settlement funds, or unearned fees held in trust, may be needed by them to hire a new lawyer.

On the other hand, the most important "con" of authorizing access is your inability to control the person who has been granted access. Since serving as an authorized signer gives the Assisting Attorney the ability to write trust account checks, withdraw funds, or close the account, he or she can do so at any time, even if you are not disabled, incapacitated, or for some other reason unable to conduct your business affairs, or dead. It is very important to carefully choose the person you authorize as a signer, and when possible, to continue monitoring your accounts.

If you decide to allow your Assisting Attorney to be an authorized signer, you must decide if you want to give the Assisting Attorney (1) access only during a specific time period or when a specific event occurs (e.g., incapacity) or (2) access all the time.

10. The Planning Attorney wants to authorize me as an escrow account signer. Am I permitted also to be the attorney for the Planning Attorney?

Not if there is a conflict of interest. As an authorized signer on the Planning Attorney's escrow account, you would have a duty to properly account for the funds belonging to the former clients of the Planning Attorney. This duty could conflict with your duty to the Planning Attorney if (1) you were hired to represent him or her on issues related to the closure of his or her law practice and (2) there were defalcations in the escrow account. Because of this potential conflict, it is probably best to choose to be an authorized signer OR to represent the Planning Attorney on issues related to the closure of his or her practice, but not both. (See #4 above.)

This article is Appendix 1 in E-Book—The Planning Ahead Guide (2016), *published by the Law Practice Management Committee Subcommittee on Law Practice Continuity of the New York State Bar Association, available at http://www.nysba.org/PlanningAhead.*

Bioethics and the Law: Trends and Future Directions

Mary Beth Morrissey and Wendy J. Luftig

History: The Legal Foundation of Bioethical Analysis

In recent decades, almost no theoretical discipline has exerted more influence on the practice of health law policy in this country than bioethics. Shaped by historical events such as the Nuremberg Trials and the Tuskegee Syphilis Study conducted by the U.S. Public Health Service (1932-1972), bioethical principles first entered our legal lexicon through the Belmont Report, issued by the National Commission for the Protection of Human Subjects (1979)[1] and the 1991 Federal Policy for the Protection of Human Subjects in Experimentation, referred to as "the Common Rule."[2] The core principles comprising traditional bioethical analysis—*patient autonomy* from which informed consent and privacy interests are derived; *beneficence* requiring a risk/benefit analysis for all medical procedures; *non-maleficence*, embodying the standard that medical professionals should "do no harm"; and *justice,* referring to the equitable distribution of medical services and advances among all populations, including vulnerable populations—were articulated in a landmark work by Beauchamp and Childress (1983).[3] In turn, these principles have shaped the legal foundation for the conduct of clinical care and medical research, as well as provided guidance for the behavior of physicians, hospitals, insurers, pharmaceutical companies and other stakeholders in the health care system.

In coming years, bioethical principles will continue to exert a powerful sway on health law policy in the face of rapidly changing medical and technological advance. As one example, the Common Rule was recently revised to address issues concerning the use of bio-specimens such as blood, tissue and other biological material. Are these substances individual property or a donation? Do patients and research subjects providing such samples retain privacy rights over genetic information? How should these samples be collected, stored and eventually used for future investigations? As medical knowledge advances, these types of questions will invariably arise.

Human rights law has also influenced the development of bioethics. From a policy perspective, the pursuit of health and well-being is the goal of all developed and developing societies, recognized by the World Health Organization and under international law as a fundamental human right. But this goal remains elusive for many peoples across the globe, even in light of the inalienable human right to health.[4] The International Covenant for Economic, Social and Cultural Rights established the right to "the enjoyment of the highest attainable standard of physical and mental health,"[5,6] which is operationalized by nations through availability and accessibility of adequate health systems and services. Through the early work of Jonathan Mann and Lawrence Gostin, it is now well understood that there is a reciprocal and interdependent relationship between health and human rights such as rights to food, housing, education, and dignity.[7, 8] Yet in the practical sphere many individuals and peoples are denied equitable access to care and live in states of chronic pain and suffering and the absence of dignity. In the United States, the Institute of Medicine reported in 2011[9] that an estimated 100 million Americans are living with chronic pain. The locus of these concerns may be an ethics of rights or an ethics of care, sometimes competing frameworks. Within these frameworks, bioethical inquiry explores questions of moral experience, ethics and law from the perspectives of seriously ill persons, as well as professionals, and asks the overarching questions: what is the relationship between health and well-being and ethics? And what is the relationship of health and ethical interests to the law? There is a growing tension between a broad professional, common sense understanding of health as an achievement of technical rationality and natural science paradigms upon which health systems and services have been built, and the lived experience of health as an achievement of ethics grounded in social practices.

Recent trends in scholarship suggest that there are converging perspectives between bioethics and public health, ecological ethics, humanism, as well as the qualitative research movement. These influences are expanding the boundaries of bioethics beyond traditional domains of interest, and affording bioethics opportunities to engage meaningfully in dialogues with professionals, scholars and advocates across diverse forms of inquiry and policy. For example, compelling narratives of suffering experience for which natural science provides no cure or solution, and stories of responsive care, caregiving and community that locate possibilities for agency and self-actualization, well-being, resilience, recovery and human flourishing in relationship to others, are challenging the advances of medicine and technology.

Medical Research: The Regulatory Schemes of the NIH and the FDA, and Legislative Protections for Patients and Clinical Trial Subjects

Medical research in America occurs under the legislative auspices of the National Institutes of Health ("NIH"), the largest source of funding for scientific investigations in the world, acting through the Public Health Services Act[10] and other legislative mandates, as well as through the Food and Drug Administration ("FDA"), the regulatory agency empowered to enforce the Food, Drug & Cosmetic Act ("FDA Act").[11] Funded by the congressional budgetary process, the NIH's research mission is impressive. In

a related fashion, the FDA oversees the process whereby pharmaceutical and medical device companies receive regulatory approval for marketing, advertising and distributing safe and effective products. Some notable controversies have surrounded the drug approval process, including the thalidomide incident of the late 1950s and the push to hasten or "fast track" drug approval during the height of the AIDs crisis in the 1990s.

Most recently, landmark federal legislation in the form of the 21st Century Cures Act[12] is currently pending in the U.S. Congress. Designed to stimulate a more robust research environment, leading to the streamlined approval of drug and device therapies, the Act has garnered widespread bipartisan support. At its core, the Act significantly increases funding for projects at the NIH that will target diseases with no known cure, including many forms of cancer. In addition, the Act infuses the FDA with budgetary and other enhancements designed to accelerate the process of drug development, testing and agency approval for marketing.

The pace and direction of medical research have also been affected by patient advocates eager to gain access to promising but not yet authorized treatments. Beginning with the *Abigail Alliance* case (2008),[13] individuals have been more assertive in pressing for a right to promising drugs that have not completed the process of regulatory review. Although a constitutional right to obtain experimental treatment for terminally ill patients was ultimately rejected by the court in *Abigail Alliance,* many states have taken up this cause and recently passed "Right to Try" laws intended to promote access to investigational drugs by the terminally ill. Indeed, such a law is currently pending in the New York State legislature.[14] While the likelihood of the New York bill's passage remains uncertain, it is clear that health law policy will play an important role as the public becomes more involved in advocating for treatments and cures for intractable medical conditions.

Brave New World: Legal Challenges Posed by Biotechnologies, Stem Cell Research and Genetic Testing

Few would dispute that emerging biotechnologies, stem cell research and access to the human genome have sparked notable changes in the legal landscape with respect to reproductive rights and access to innovative treatments. As some illustrations, laws governing parental surrogacy, the *in vitro* creation of embryos, and fetal testing and surgery—topics beyond imagination not that long ago—are now the norm in many states.

At the same time, however, medical progress has also triggered an increased awareness of the sensitivity of personal health and genetic data, as well as the potential for discrimination as a result of the misuse of these categories of information. The first key federal legislation directed at such individual privacy concerns is, of course, the Privacy Rule of the Health Insurance Portability and Accountability Act ("HIPAA") of 1996.[15] More recently, the completion of the Human Genome Project in 2003 and the subsequent ability to map an individual's unique genomic profile have reignited the discussion about how such information will be used.

A key challenge to the characterization of genetic information was at the heart of the *Myriad Genetics* case,[16] in which the U.S. Supreme Court held that naturally occurring DNA is a product of nature and not patent eligible, while also observing that the artificial creation of new DNA sequences *might* be patent eligible. It is important to emphasize that preserving rights related to genetic information may pose unique legal challenges, since an individual's genomic profile contains not only key health information about the particular individual, but also about children and other relatives. The Genetic Information Nondiscrimination Act of 2008,[17] dubbed by some as the first civil rights legislation of the twenty-first century, was a landmark statute designed to prohibit the misuse of genetic information for purposes of obtaining health insurance and in the employment arena. Currently, several challenges under this law have focused on the use of "wellness programs" by employers. No doubt, as further progress is made in understanding the blueprint of our genetic code, additional legal challenges may be anticipated.

Organ Donation and Transplantation: The Legal and Ethical Rationing of Scarce Medical Resources

Since the first successful kidney transplantation operation in the U.S. in 1954, the ethical and legal ramifications associated with these procedures have been debated. The dramatic medical success of transplantation surgery and its record of achievement in saving the lives of desperately ill patients cannot be denied. Yet, numerous controversies continue to surround this medical specialty. Among these issues are: (a) formulating criteria for determining when death occurs so that organs may be harvested; (b) developing an equitable process so that scarce organs may be fairly allocated; and (c) establishing guidelines relating to the decision-making process for organ donation.

This innovative field of medicine is governed by three key statutes: (a) the Uniform Anatomical Gift Act and revisions thereto (1968, 2005);[18] (b) the National Organ Transplant Act ("NOTA") and subsequent amendments (1984, 1990)[19] which outlaw the sale of human organs and provide for an Organ Procurement and Transplantation Network; and (c) the Uniform Determination of Death Act (1981)[20] which was intended to provide a "comprehensive and medically sound basis for determining death in all situations."

Despite the strength of this foundational legislation and the overarching structure for managing an equitable system of organ allocation, NOTA has come under criticism primarily because it prohibits any form of compensation for the donation of human body parts. As one example, in *Flynn v. Holder*,[21] a 2012 Ninth Circuit case, the court issued a narrow yet noteworthy ruling, holding that the selling of bone marrow extracted through a special technique would not violate the NOTA ban. Other challenges have been brought relating to the organ allocation regulations and guidelines used by the United Network for Organ Sharing. As transplantation techniques become more sophisticated and increasing numbers of U.S. citizens are eligible for life-saving transplantation, the challenge will be to insure that the legal guidelines in place are equitable and fair in terms of access, and that as many patients as possible are able to benefit from this medical breakthrough.

Serious Illness and the End of Life: Controversial Legal and Bioethical Decisions

Advances in biomedical technology have enabled physicians to sustain life under circumstances that would have caused certain death just a few decades ago. In this regard, some of the most challenging issues in bioethics concern the provision of marginally beneficial or non-beneficial care, or the prolongation of suffering in serious illness or at end of life. In light of judicial policy making in the landmark case of Karen Ann Quinlan *(In re Quinlan 1976)*[22] and in U.S. Supreme Court decisions in *Cruzan v. Dir., Mo. Dept. of Health* (1990),[23] *Vacco v. Quill* (1997)[24] and *Washington v. Glucksberg* (1997),[25] issues such as individual rights and liberty interests, as well as the legal authority of health care agents and surrogates to make decisions when an individual no longer has capacity, have taken center stage. Federal and state legislation and regulations have been designed to address these difficult circumstances, including the Federal Patient Self-Determination Act,[26] the New York Health Care Proxy Law,[27] the New York Family Health Care Decisions Act[28] and the MOLST Program.[29] In New York, there is a right to palliative care under existing palliative care laws.[30, 31]

Historically viewed as legally and ethically distinct from decisions to forgo life-sustaining treatment, Aid-in-Dying is being actively debated in many states. Bills have been introduced in the New York State legislature (A. 5261-C (Paulin)/S. 5814-A (Bonacic);[32] S. 3685 (Savino) /A. 2129A (Rosenthal)[33]). However, public policy issues such as the basis of social allocation or who benefits, the benefits to be allocated, how the benefits will be financed and delivered, and impact upon the public's health, especially vulnerable persons and groups who may not have equitable access to palliative and end-of-life care, have not been addressed in proposals advanced to date.

Bioethics as Lived Social Practice: Education and Training

The existential structure of this orientation is grounded in a view of ethics as giving expression to and making visible lived moral experience that is socially constituted. The focus of this orientation is on practice and the life-world, not on expertise or technique. Ethics is not imposed from the outside through appeal to expertise or authority. Methodology is instead viewed as a tool that gives access to lived moral experience and social practices, but in itself is not a source of authority. The focus under this orientation is on the life-world, the intentionalities of the patient, evaluation of the patient's pain and suffering, and processes of engagement with the patient that involve an ethical stance of non-neutrality and surrendering of authority in order to respond responsibly to the call of the patient as the suffering other. It envisions the full integration of ethics into a palliative approach to care, which seeks to relieve pain and suffering through provision of both appropriate medical care and social support to the patient and family as the unit of care. This view is also grounded in the notion that ethics is accessible to all persons who participate in the social world, and is not a property of the elite.

On the professional side, integration of bioethics education in medical and graduate school curricula, as well as in mandated continuing professional education for physicians and all health care practitioners, is imperative. Such education is consistent with goals of the Affordable Care Act to strengthen the generalist level workforce. Equally important, however, is diffusion of bioethics content into education and end-of-life decision counseling for seriously ill persons and their family caregivers.

Conclusion: The Integration of Bioethical and Legal Paradigms in Formulating Future Health Law Policy

As this discussion has suggested, applying a bioethical perspective has enabled policymakers to address numerous challenging legal issues emerging from advances in medicine and biotechnology. Whether the topic is clinical care, human subject research, the implications of genetic knowledge, the role of the professional in treating illness and the alleviation of suffering, organ donation and transplantation, or the controversies surrounding medical interventions at the beginning and the end of life, in each instance bioethical principles have offered an indispensable framework for developing laws and policies grounded in individual autonomy, equity and human rights. As medical and scientific knowledge moves inexorably forward, it is likely that the union of bioethics and law will continue to serve as a touchstone in the evolution of health law policy.

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The Reverse Exchange

By Marie C. Flavin

The tax-deferred exchange under Section 1031 of the Internal Revenue Code is one of the last great investment opportunities to save on the sale of investment property. Section1031 provides a valuable technique for increasing and preserving profit, and serves as an exception to the general rule requiring the recognition of gain or loss on the sale of property. By reinvesting 100% of the property owner's cash equity into a like-kind replacement property of equal or greater value, the property owner can effectively lock in his appreciation and defer a taxable event.

Two requirements must be met to defer the capital gain tax: (a) the Exchanger must acquire "like-kind" replacement property and (b) the Exchanger cannot receive cash or other benefits (unless they pay capital gains taxes on this money). The most common exchange variation, the delayed exchange, begins when the Exchanger's first Relinquished property is sold and is completed when the last Replacement Property is acquired within the prescribed period of time. Timing is crucial when conducting a like-kind exchange. What happens if our taxpayer is in the position of needing to close on a Replacement Property prior to the sale of a Relinquished Property?

What Is a Reverse Exchange?

A reverse exchange is the "flip side" of a deferred exchange, where the Exchanger directly or indirectly acquires a like kind replacement property before disposing of a relinquished property. The Code and regulations do not expressly permit a reverse exchange. On September 15, 2000 the IRS issued Rev. Proc. 2000-37. This ruling stated that the IRS will not challenge the tax deferred status of any reverse exchange that is structured as a "qualified exchange accommodation arrangement" ("QEAA").

The safe harbor guidance outlines a tax deferred approach for reversing the order of the steps of a typical delayed exchange of like kind properties. Most delayed exchanges are accomplished today by transferring a relinquished property to a qualified intermediary ("QI") in the first leg of a transaction. The QI completes the tax deferred transaction in the second leg of the deal by acquiring a replacement property that is "direct deeded" from the seller of the replacement property to the Exchanger. The safe harbor guidance for reverse exchanges removes any priority or "ordering rule" as an artificial impediment to successfully completing a tax deferred exchange.

What Does Rev. Proc. 2000-37?

Rev. Proc. 2000-37 introduced a new lexicon of terms and phrases for safe harbor reverse exchanges. An Exchanger, who will be the ultimate owner of the parked property, must enter into a "qualified exchange accommodation arrangement" ("QEAA"). An Exchanger also must engage the services of an "exchange accommodation titleholder" (an "AT") under a written "qualified exchange accommodation agreement" (a "QEA agreement"). The QEA agreement must provide that the AT is holding the property for the benefit of the Exchanger in order to facilitate a tax deferred exchange under Section 1031 and Rev. Proc. 2000-37. The QEA agreement must state that AT agrees to report the acquisition, holding, and disposition of the parked property as provided in Rev. Proc. 2000-37 and that the AT will be treated as the beneficial owner of the property for all federal income tax purposes.

The AT must have "qualified indicia of ownership" of the parked property, which means legal title to the parked property or other indicia of ownership, e.g., a contract for deed or the ownership of all of the outstanding ownership interests in disregarded entity that holds legal title to the parked property.

The property held by the AT is referred to as the "parked property. The QEA agreement must be entered into no later than five (5) business days after the AT first acquires qualified indicia of ownership of the parked property. An AT must meet the same qualifications as those of a qualified intermediary, as established in the deferred exchange regulations. The AT cannot be the Exchanger, a legal entity related to the Exchanger or a "disqualified person," such as the Exchanger's attorney, accountant, employee, real estate broker, partner or spouse.

An exchange agreement with a QI establishes the essential interdependence between the transfer of the relinquished property by the Exchanger and the acquisition by the Exchanger of a replacement property. The QI serves as the common "link" for transforming through the use of a tax deferred exchange what would otherwise be a taxable sale of the relinquished property and the purchase of a replacement property. The exchange agreement with a QI also creates the required barrier to the Exchanger's constructive receipt of the exchange proceeds while the proceeds are held by the QI.

Why Would a Taxpayer Need to Do a Reverse Exchange?

Allowing reverse exchanges significantly aids Exchangers whose transfer of a relinquished property is delayed or whose acquisition of a replacement property is accelerated by events beyond the Exchanger's control. In a fast paced real estate market, owners of real property often face the prospect of losing the opportunity to acquire a desirable replacement property, if the current owner of the property is unwilling to wait while the Exchanger completes the disposition of a relinquished property. This reverse exchange ruling gives Exchangers a useful tool to side step such timing

problems and complete legitimate business and investment exchanges on a tax deferred basis.

What Is the Duration of the Parking Period?

A safe harbor reverse exchange must be completed within 180 days after the parked property is first acquired by the AT. The durational limit on safe harbor transactions reflects an apparent effort by the IRS to maintain the symmetry between a safe harbor parking transaction and a deferred or "forward" exchange, which by statute must be completed within the lesser of 180 days and the due date of the Exchanger's return for the year in which the relinquished property is transferred.

What Are the Phases of a Reverse Exchange?

The typical reverse improvement exchange involves two phases. *In Phase I,* the Holding Entity acquires title to the Replacement Property: The process begins with the Exchanger assigning its rights to acquire the replacement property under the purchase agreement to the Holding Entity. Since the Holding Entity does not have the capital to acquire the replacement property, it must borrow the funds necessary for the acquisition. The financing can be provided from several sources: the Exchanger, an affiliate of the Exchanger, or a third-party lender (a bank, credit union or the seller). The Holding Entity will give its lender(s) a promissory note(s) for the amount of funds borrowed. This note(s) will be secured by a deed of trust or mortgage on the replacement property.

The Holding Entity will enter into a Qualified Exchange Accommodation Agreement with the Exchanger under which the Holding Entity agrees to hold the Replacement Property for a period of time not to exceed 180 days. Upon closing the title to the replacement property is taken in the name of the Holding Entity.

Phase II deals with a Simultaneous or Delayed Exchange. At some point in the process the Exchanger will prepare to close on the relinquished property, and a Qualified Intermediary will enter the transaction under an Exchange Agreement with the Exchanger. The Qualified Intermediary assigns into the Exchanger's rights as the seller of the relinquished property and instructs the settlement agent to transfer the relinquished property from the Exchanger to the buyer through direct deeding. The exchange proceeds from the sale of the relinquished property will be held by the Qualified Intermediary in an exchange account until the exchange is concluded. When the Exchanger is ready to take title to the replacement property, the Qualified Intermediary will be assigned into the Exchanger's position under the Qualified Exchange Accommodation Agreement with the Holding Entity. The Qualified Intermediary will wire the exchange funds to the settlement agent to close the transaction. The Exchanger may need to assume the balance of any outstanding loans. The Holding Entity will use the exchange proceeds to pay down or pay off the loans it received to acquire the replacement property. The settlement agent will be instructed to record a deed to the replacement property (generally a quit claim or bargain and sale deed) directly from the Holding Entity to the Exchanger. If the combination of exchange funds and any assumed third-party loans are not sufficient to equal the total consideration due to the Holding Entity, the Exchanger will be required to either deposit sufficient additional cash into the closing or assume the remaining debt. In a reverse exchange intended to obtain the protection of Revenue Procedure 2000-37, the Holding Entity must transfer the replacement property to the Exchanger within 180-days of the Holding Entity's acquisition of title.

Which Property Does the Accommodator Take Title To?

In structuring a reverse exchange, it is generally preferable to park title to the Replacement Property; however, it may not always be possible or desirable to hold title to the Replacement Property, referred to as the "Exchange Last" format. There are three key elements to look at to help determine if an Accommodator will be comfortable taking the Replacement Property.

If the Exchanger is getting *new financing*, time constraints or lender requirements may not allow the Accommodator to hold title. This is a particular concern when the Replacement Property is residential in nature, as residential loans are typically sold on the secondary market. Because the loan is often required to be entirely non-recourse as to the holding entity and assumable by the Exchanger, the loans are not marketable, and most residential lenders will not wish to participate.

One way around this challenge for reverse exchanges done under the guidance of Rev. Proc. 2000-37 is to have the loan made to the Exchanger directly. The Exchanger would then simultaneously loan those funds to the Holding Entity. The Holding Entity would give the Exchanger a Promissory Note and a Deed of Trust or Mortgage. The Exchanger would then assign those documents to the lender for collateral on its loan. While this approach will help prevent the lender from having to take a non-recourse note, it will do nothing to appease the lender who is looking for a "cookie-cutter" deal, and the Exchanger should be made aware that there will probably be higher bank fees assessed for their troubles.

The second element is whether there a clean environmental report on the Replacement Property? Unless the Replacement Property is residential (under four units) or undeveloped residential land, most Accommodators will require a Phase I Environmental Site Assessment Report. They may be willing to accept a Transaction Screen on raw land or vacant lots. An Accommodator's interests are different than a bank's. They may require the environmental report even though the lender is comfortable without one.

The third key element is what is the nature and use of the parked property. If given the opportunity Accommo-

dators like to stay away from gas stations, corporate pig farms, dry cleaning facilities, meat packing plants, race tracks, properties under construction (if improvements are not necessary to the exchange) and any other type of facility that may expose them to environmental claims or greater than average liability. The nature of the property is very often taken into account by Accommodators when structuring and pricing the exchange.

If one of the above conditions prevents an Accommodator from holding title to the Replacement Property, or if the Exchanger has a preference for them not to hold title to the Replacement Property, they will look to the Relinquished Property, referred to as the "Exchange First" format. There are several considerations when determining if they can park the Relinquished Property.

The largest impediment to the Relinquished Property parked exchange is the requirement that the down payment in the Replacement Property be equivalent to the equity in the Relinquished Property upon closing. To have a complete tax deferral the Exchanger's down payment on the Replacement Property must equal or exceed the expected proceeds from the sale of the Relinquished Property. If the Exchanger does not have sufficient cash for the down payment, or if the Relinquished Property sells for more than anticipated the Exchanger will have boot.

As with the Replacement Property, unless the Relinquished Property is residential in nature and under four units the Accommodator will require an environmental report prior to taking title. This requirement can be especially troublesome for Relinquished Property that is not currently under contract. Most commercial contracts will call for a Phase I E.S.A. as part of the due diligence, but if there is no contract the Exchanger may not have completed any environmental reports.

Does the Exchanger Have Use of the Parked Property During the Exchange Period?

Rev. Proc. 2000-37 does not require the Exchanger and AT to deal with each other on an arm's length basis with respect to the parked property. In effect, the safe harbor rules allow the Exchanger to lease or manage the parked property during the safe harbor period on terms that would permit the Exchanger to enjoy most of the economic benefits of owning the parked property and bear the operating losses while title to the parked property remains in the AT. Rev. Proc. 2000-37 allows for the use of either a lease or a property management agreement.

Are There Any Identification Periods During a Reverse Exchange?

Rev. Proc. 2000-37 does not require the Exchanger to identify any specific property as the target relinquished property at the time the QEA agreement is signed. However, within 45 days after the replacement property is first acquired by the AT, the Exchanger is required to identify one or more relinquished properties. Rev. Proc. 2000-37 adopts the same identification rules that apply in deferred exchanges, which require written identification be delivered to another party to the exchange and limit the number of alternative and multiple properties that can be identified.

What Are the Risks and Drawbacks of a Reverse Exchange?

Currently there are two main drawbacks to completing a Reverse exchange: Risk and Cost.

Revenue Procedure 2000-37 ("Rev. Proc. 2000-37") has gone a great distance towards removing the tax risk associated with reverse exchanges structured within its "safe harbor" guidelines. It did nothing, however, to relieve the inherent risk Exchangers face when engaging another party to hold title to property on its behalf. Exchangers must now, more than ever, do their homework on the exchange accommodation titleholder they choose to work with on reverse exchanges.

Just because real property cannot usually disappear as quickly as cash does not mean an Exchanger should not undertake an appropriate investigation into the security, service, and expertise offered by the accommodator. A prudent Exchanger will want to know as much, if not more, about the accommodator holding its property as it would want to know about the accommodator company holding its exchange funds. Who is the accommodator? Who backs them and what is their financial strength? Are they bonded and insured?

The importance of complying with the reverse exchange guidelines of Rev. Proc. 2000-37 is even more apparent in the light of Technical Advice Memorandum 200039005 (May 31, 2000) released by the IRS shortly after Rev. Proc. 2000-37 was published and in which the IRS denied an Exchanger non-recognition treatment by concluding that a pre-safe harbor "parking arrangement" was not an exchange, but rather a purchase by an agent of the Exchanger. As a result, for Exchangers who are not able to fit their reverse exchange into the safe harbor guidelines of Rev. Proc. 2000-37, the prospects of tax success must be evaluated.

When attempting to calculate the cost associated with completing a reverse exchange it is not sufficient for an Exchanger to look only at the fee being paid to the Holding Entity. While Accommodator's fees to hold title are substantially greater than the fees charged for direct deed simultaneous or delayed exchanges, it is not uncommon for the exchange fee to be dwarfed by the combined total of fees for transfer taxes, attorney's fees, lender's fees, title insurance, and environmental reports. The prudent Exchanger will review all potential costs involved in the transaction with his advisor prior to proceeding with a reverse exchange to insure a sufficient tax benefit will be received by completing a reverse exchange.

Are There Non-Safe Harbored Reverse Exchanges?

Under Section 3.02 of Rev. Proc. 2000-37 which specifically states, "the Service recognizes that "parking" transactions can be accomplished outside of the safe harbor provided in this revenue procedure," Rev. Proc. 2000-37 leaves open the option for Exchangers to structure a reverse exchange that does not comply with all of the provisions of the Revenue Procedure and, therefore, Exchangers may elect to pursue reverse exchange structures that will take longer than 180 days or which will not have identified relinquished property. Since there is no regulatory authority to assist in structuring a reverse exchange outside the parameters of the safe harbor there is a much higher risk associated with such exchanges, and therefore, a non-safe-harbor reverse exchange should be attempted only if there is an absolute need to proceed outside of Rev. Proc. 2000-37.

Do Many Taxpayers Utilize Section 1031 to Conduct Reverse Exchanges?

Prior to Rev. Proc. 2000-37 being released, taxpayers and their advisors were more conservative in their approach to Reverse Exchanges. Section 1031 did not address these type of parking transactions. Taxpayers had to look at case law to determine how the IRS viewed these types of exchanges. The existence of this safe harbor undoubtedly encourages many Exchangers to structure future deals to stay within the safe harbor parameters, if possible. For those investors who recognize the advantage of preserving their equity by deferring capital gain taxes in a 1031 exchange, but who fear they will not find replacement property within the 45/180-day time limit, the reverse exchange offers an attractive solution.

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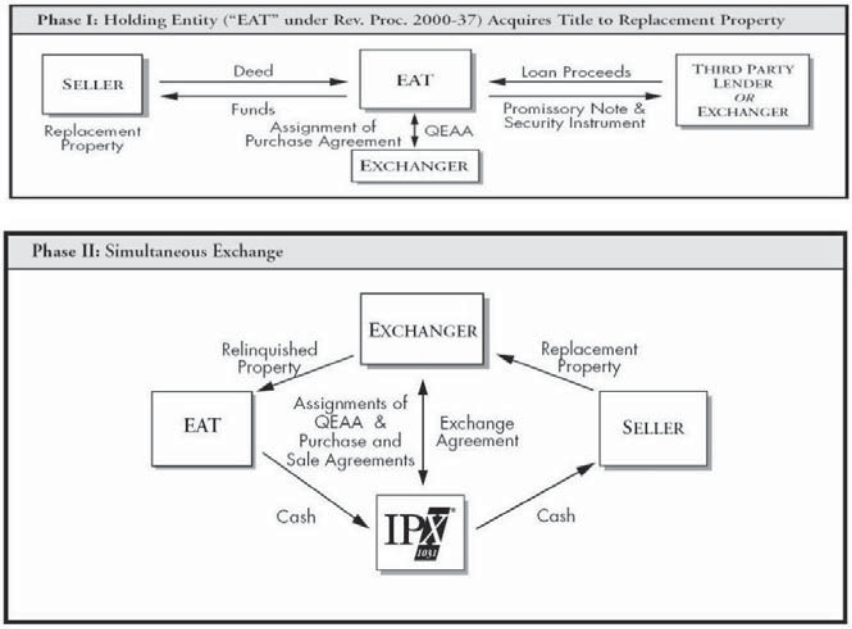
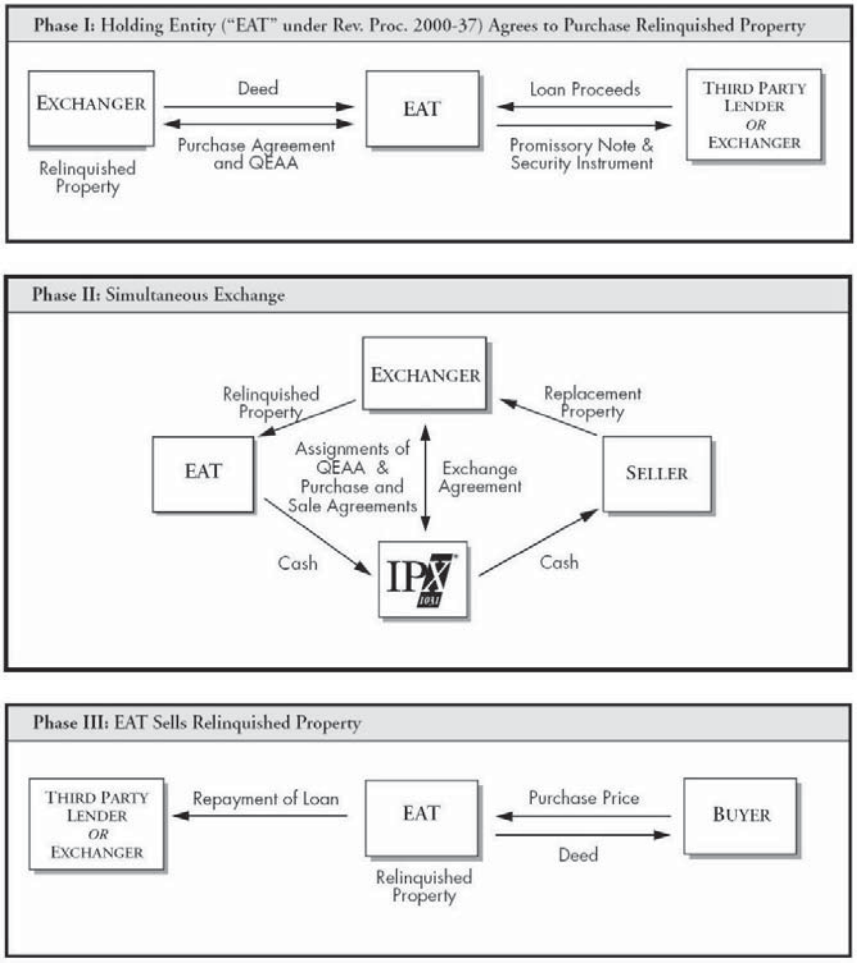
REPLACEMENT PROPERTY PARKED



RELINQUISHED PROPERTY PARKED



Bergman on Mortgage Foreclosures: When a Lender Is Sued (or Not) for Injury at the Mortgaged Premises

By Bruce J. Bergman

The title suggests what seems an anomalous notion. But mortgage lenders and servicers and their attorneys will know and can confirm that mortgage holders are sued on occasion by someone claiming either to have been injured at the mortgaged property or having suffered damage to an adjoining parcel resulting from conditions at the mortgaged property. That generally a mortgage lender or servicer need not worry about losing such a claim is tangentially confirmed by a recent case, *Koch v. Drayer Marine Corporation*, 118 A.D.3d 1300, 988 N.Y.S.2d 233 (4th Dept. 2014), although they might yet have to worry. So there is a dual lesson here.

Before highlighting the meaningful enlightenment that case offers, there is another branch of the equation which can readily create confusion which, in turn, should be addressed.

We speed then to the essence of the underlying concept. If a lender is not in control of the mortgaged premises—the buzzwords are "care, custody and control"—then it will not be liable for events at the property which may cause damage or injury. And, without having become a mortgagee-in-possession, the lender typically would not exercise control over the property and so liability would not be an issue. But then comes an artificial, relatively recently minted, forced obligation of care, custody and control upon mortgagees: the maintenance mandate which can be imposed upon the foreclosing party once the judgment of foreclosure and sale "issues." [For extensive review of this subject, see 3 *Bergman on New York Mortgage Foreclosures*, §27.12, LexisNexis Matthew Bender (rev. 2014).]

Effective as of 2010, and pursuant to RPAPL §1307, under certain (ambiguous) circumstances therein delineated, a foreclosing party of residential property (holding only a lien) can be obliged to maintain the mortgaged premises. If such is the case, then the requisite care, custody and control can emerge together with the unwanted liability which accompanies that dominion.

When the statute was passed, that foreclosing lenders could become liable in tort during the course of a foreclosure was easily predictable. A recent case where a lender may be answerable in damages for deaths by fire at the premises confirms this. [See, *Lezama v. Cedano*, 119 A.D.3d 479, 991 N.Y.S.2d 32 (1st Dept. 2014.]

Thus, an immediate distinction must be made between what might be seen as the "usual" situation—a lender sued where there is no foreclosure judgment—with the factors eliciting the maintenance obligation—and the perhaps less common circumstance of the maintenance obligation having been triggered. The analysis here proceeds regarding the former.

It should be emphasized that if a lender has become a mortgagee-in-possession, although that is a right rarely invoked, it then might indeed be liable for injuries at the property. That (and the mentioned maintenance obligation) aside, the law has always been clear (albeit somewhat obscure) that a lender would need to have exercised some degree of care, custody and control over the property to be liable for torts—generally not applicable to a mere mortgage holder. [For a more expansive review of this concept with case citations, attention is invited to 1 *Bergman on New York Mortgage Foreclosures*, §2.24[9], LexisNexis Matthew Bender (rev. 2014.]

While the first new case cited isn't the precise fact pattern, it nonetheless underscores the critical point. There, a man sued the borrower/owner of the property—a marina—claiming he was injured when a plank collapsed while he was fishing from the dock.

The owner, who was in foreclosure, argued that the judgment of foreclosure and sale in the foreclosure action extinguished ownership so it could not therefore be liable. No, said the court, a judgment does not divest title; only the foreclosure sale does. *But*, the borrower/owner showed that shortly after the foreclosure was begun, she and her staff put the boats in storage and thereafter never had any further contact with the premises. In addition, the foreclosing bank denied the owner's access to remove the boats from storage for the summer season, barred the owner from sending rental renewals to customers and hired another marina operator to take over. This thereby established that the borrower/owner no longer possessed, maintained or controlled the marina.

The applicable principle of law was that "an out-of possession title holder lacking control over the property is not liable for injuries occurring thereon."

It is this maxim which protects a lender who is merely the holder of a mortgage and not in possession. The surprise here, though, was that the injured party did not

sue the bank which, it might be argued, *was* in control of the premises through its possible agent, that other marina manager. It can be speculated that such a suit might yet arise.

So, the two lessons:

- A lender or servicer without care, custody and control of mortgaged premises is not liable for injuries occurring there.
- But watch out for consequences if the lender or servicer *does* exercise that care, custody and control—and at the very least, insurance will be needed to protect against such injury claims.

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About the Senior Lawyers Section

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

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

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

To join this NYSBA Section, go to www.nysba.org/SLS or call (518) 463-3200.

When Is a Crisis a Medicaid Crisis?

By Anthony J. Enea

Several years ago, after I had concluded an elder law presentation, an attorney in attendance approached me and recounted a conversation he had with the Director of Social Services for the nursing home where his mother was admitted (he was also a member of the Board of Directors for said nursing home). The Director explained to him that because his mother (a widow) had $500,000 in non-IRA/retirement savings, she needed to pay the nursing home privately ("spenddown") until she had no more than $14,000 in savings. He was further advised that only then would his mother be eligible for Medicaid. The attorney also told me that his mother had already expended $150,000 of the $500,000 on her care at the nursing home.

Sadly, even an attorney and his family can become victims of misinformation about the options available to a parent or loved one in a nursing home. This misinformation is often dispensed by non-attorneys, such as the Director of Social Services mentioned above, or those working in non-attorney firms that process Medicaid applications, who may be unfamiliar with all the planning options available.

The fact pattern above is a classic example of a case requiring the implementation of a Medicaid crisis plan by a highly experienced elder law attorney. If and when a single individual (no spouse, divorced or widowed) needs to enter a nursing home for long-term care, and he or she has assets or resources which are significantly greater than the amount permitted for Medicaid nursing home eligibility, the implementation of a Medicaid crisis plan is often the most logical and financially prudent option available.

In the simplest of terms, a crisis plan is a plan wherein, immediately prior to the filing of a Medicaid nursing home application, approximately 40-50 percent of one's assets are gifted to children and/or other loved ones. At the same time, the balance of one's assets are transferred to the same children and/or loved ones that received the gift of assets, in consideration of a promissory note or annuity agreement signed by the children or others in favor of the Medicaid applicant. The promissory note or annuity must comply with the requirements of the Deficit Reduction Act of 2005 (DRA). The transfer is a loan that will be repaid during the period of ineligibility for Medicaid described below.

Once the gift and loan have been made, the application for nursing home Medicaid is filed. Because a gift (uncompensated transfer) has been made, the application will be denied and Medicaid will calculate the period of ineligibility created based on the dollar value of the gift. For example, if the applicant has $500,000 of resources and makes a gift of $250,000, in Westchester County, said gift, utilizing the divisor of $11,768 per month (the Medicaid regional nursing home rate for the Northern Metropolitan region), would create a period of ineligibility for Medicaid nursing home of 21.24 months. Thus, the Medicaid applicant would have to privately pay for nursing home care for 21.24 months. Said payments will be made by using the applicant's monthly income, such as social security and/or pension along with the funds transferred pursuant to the promissory note being repaid to the applicant. This calculation requires a variety of factors to be considered, such as the private pay cost of the nursing home, the monthly income of the applicant and an actuarial calculation of the promissory note and/or annuity payment to be made during the period of ineligibility for Medicaid. The amount paid to the nursing home must always be less than the nursing home's private pay rate, pursuant to Medicaid regulations.

Once the ineligibility period imposed by Medicaid has expired, the Medicaid application is brought up to date and resubmitted, and the applicant will then be approved for nursing home Medicaid. Implementation of a Medicaid crisis plan allows the protection of approximately 40-50 percent of the Medicaid applicant's savings. In some cases, it can also protect significantly more, if the applicant for Medicaid does not survive the period of ineligibility created. If the potential applicant is married, spousal refusal is normally the best option.

Thus, as can be seen from the above, the implementation of a Medicaid crisis plan, when possible, is an extremely valuable tool in helping to prevent the unnecessary dissipation of all of one's life savings in the event nursing home care is required. However, if one has engaged in Medicaid asset protection planning significantly in advance of needing nursing home care, the ability to shelter and protect virtually all of one's life savings from the cost of care is even more likely. Planning well in advance of needing care is still the best course of action.

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This practice guide is designed to help the practitioner navigate the complex area of guardianship law. This title focuses on Article 81 of the Mental Hygiene Law, which sets out the procedure for the guardianship of an incapacitated person. Article 81 strives to accomplish the dual purposes of appointing someone to manage the personal and property management needs of an incapacitated person while preserving that person's rights and incorporating his or her wishes in the decision-making process.

This guide to the process of guardianship discusses topics such as the appointment of guardians, the duties and powers of guardians, accountability, and provisional remedies. All while highlighting important distinctions between this statute and Article 17-A of the Surrogate's Court Procedure Act.

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