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The Senior Lawyer

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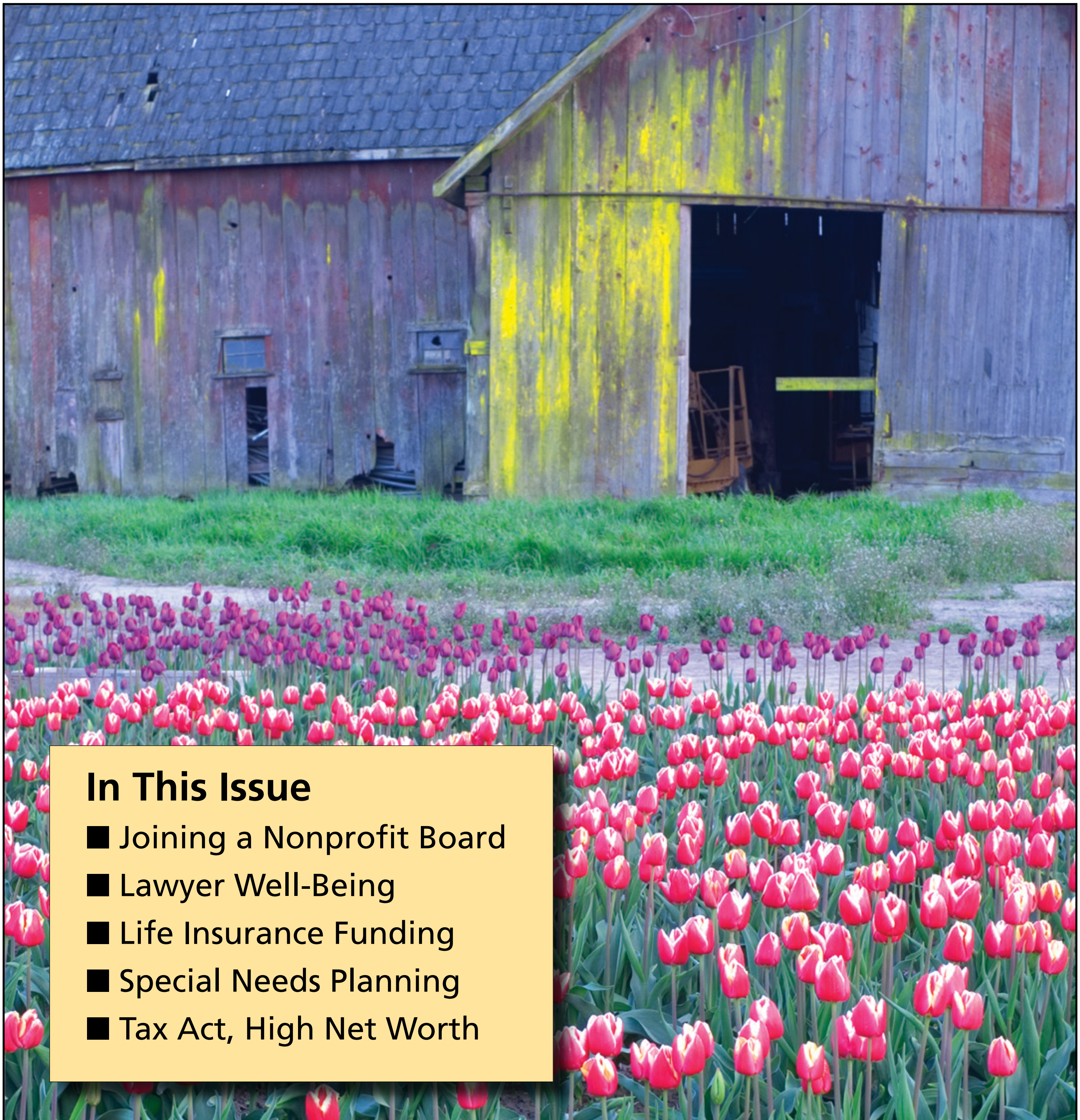
of the New York State Bar Association



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Message from the Chair

Is There a Transition in Your Future?

Dear Section Members:

As I have written here before, the Senior Lawyer Section struggles with its role. We're a big Section, the fourth largest with around 3,000 paid members. The only thing we have in common is age, being 55 or older. There is another Section that is very similar to us with 3,700 paid members, the Young Lawyers Section, and their most common trait is also their age. We have been thinking about what other characteristics the two Sections have in common. YLS members are transitioning from being students into practicing law. SLS members are transitioning from practicing law to a lot of diverse things. So our Section is starting to look at whether SLS members should be talking to YLS members, in a community. A few years ago NYSBA created electronic communities where we could post comments and carry on dialogues. That hasn't been such a hit in the SLS. Our people aren't talking to each other on that platform. Nor are they particularly into Twitter, Instagram or Facebook chats. So now we're wondering about forming in-person communities, where people share common geographic locations and could actually sit down together.

Stephen Gallagher has been talking to me about the SLS forming such communities (he was NYSBA's first Director of Law Office Economics and Management, 1990-2003, and is now coaching "Lawyers Through Transition." You will want to read his article in this edition, "Senior Lawyers Section: Exploring Lawyer Well-Being." In it he writes: "Senior Lawyer Section member, Leonard E. Sienko, Jr. and I wrote an article for the NYSBA's *Bar Journal* (September 2017) where we challenged readers to start a dialogue about how the legal profession can better utilize the skills of the older attorneys age 55 and up currently in the workforce. We also wrote about finding ways to convince bar associations to create forums that would enable younger lawyers to meet with experienced lawyers for support in finding their place in the profession." His article in this issue discusses the report of the National Task Force on Lawyer Well-Being, which found that the highest level of distress among lawyers is in the first 10 years of practice.

So now the SLS is exploring how we could bring younger lawyers and senior lawyers together. We propose to form our first community in Rochester as a partnership between the SLS and the Monroe County Bar's YLS. Some YLSs are struggling, but the MCBA's is thriving. We would invite regional SLS members and also MCBA's Senior Lawyers Committee members to join this community. MCBA Executive Director Kevin Ryan is enthused to see where this might go. Gallagher envisions starting with a half-day CLE that would be followed by regular conference calls, and other future in-person events. He also sees a role for involving NYSBA's General Practice Section, which works with small firms and solos and has an active blog. This is not SLS members trying to help YLS members find jobs. Rather, that we can share with each other experiences we have had that brought meaning to what we do. YLS members could help demystify technologies that stress seniors. SLS members can share their passion for the rule of law.

The legal profession is known to be one of high stress. Both the state bar and local bars have multiple programs and services to help members cope (Lawyer Assistance, Health and Well-Being, Lawyers Concerned for Lawyers). Senior lawyers may seek coaching on how to transition and what to transition to. Some are ready to hang the shingle up, but want guidance on what to do with the rest of their lives. There are attorneys in firms where the firm wants them to retire and make room for younger attorneys with growing practices. They may want help in setting up a part-time practice. This time can be an opportunity for them to give back to the profession and increase access to justice. Community service boards are always looking for new volunteers. Or maybe more time to travel and learn, or just spend time with your grandchildren. The community we are talking about creating "needs to be a support system and practical advice for transition/succession planning," counsels Gallagher.

Hopefully we can next expand this first community to also cover Buffalo and Syracuse. These Western New York State communities have a similar culture, and the Erie County, Onondaga County, and Monroe County bars have a history of working together, and NYSBA could be the umbrella. If this works we could then try groups for Albany-Binghamton and Nassau-Suffolk-Westchester counties.

C. Bruce Lawrence
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Message from the Editor

As our Chair, C. Bruce Lawrence, comments in his Message from the Chair, "The only thing [our Section members] have in common is age, being 55 or older." That fact, and the resultant wide diversity of practice areas among our membership, challenges our Section to create for itself a meaningful role within NYSBA. That challenge has been taken up by Stephen P. Gallagher in his insightful and thought-provoking article, "Senior Lawyers Section: Exploring Lawyer Well-Being." I encourage you to join this discussion and provide Bruce (cblawrence@boylancode.com) and/or Stephen (sgallagher@leadershipcoach.us) with your reaction to Stephen's "action plan" and any additional suggestions you may have.

Our Fall/Winter 2017 issue of *The Senior Lawyer* included the first installment in James LaPiedra's and Jeffrey A. Kerman's three-part article on identity theft and identified the many forms of identity theft and the methods used by thieves to commit fraud. The second installment, "Measures for Risk Reduction and Detection" is part of this issue and provides detailed information as to how to reduce the risk of identity theft and how to be proactive in detecting this fraud, information which not only you but also your clients may find very timely and relevant.

Recognizing that some of our Section members may be considering membership on a nonprofit board, now or at some point in the future, Courtney Darts, Legal Director at the Pro Bono Partnership, has contributed to this issue, "Three Critical Steps for Lawyers Before Joining a Nonprofit Board." This article not only provides tips for lawyers considering joining a nonprofit board, but also practical and ethical considerations for the lawyer who has been asked to provide legal advice to the nonprofit on whose board she or he sits.

Continuing in the quest to provide articles on a wide variety of subjects, this issue also addresses technology ("I've Fallen, but My Watch Can Call for Help"), insurance practice and law ("What Your Clients Wish You Told Them About the Life Insurance Funding Their Personal, Corporate Trusts and Business Agreements"), special needs planning ("Special Needs Planning: More Than a Special Needs Trust"), and taxes ("How Tax Reform Helps Partnership Issues in 1031's" and "How the 2017 Tax Reform Act Affects Estate Planning for High-Net Worth Individuals"), and medical aid in dying ("The Clinical, Ethical and Legislative Case for Medical Aid in Dying in New York").

I would encourage you to send me any requests/suggestions you may have for articles to be included in future issues. I also urge you to write for this journal; the more articles we have from our Section members, the more relevant the journal will be to all of us. The deadline for our Fall/Winter issue is October 10, 2018.

Carole Burns

"I've Fallen but My Watch Can Call For Help!"

By Leonard E. Sienko Jr.

Over the past 20 years during which I have blogged and edited an e-newsletter for the NYSBA General Practice Section, I have received some questions about my discussions of Apple products. One recent correspondent even insisted that I stop shilling for Apple and write about other topics. That's easier said than done.

I bought and used my first MacPlus in my law office in 1985. I have used Apple products exclusively in my office since that time, down to today's iMacs, iPad Power Plus, and iPhone. When I responded to my correspondent, while not admitting that I was an Apple "fanboy," I pointed out the latest numbers on Apple product use by lawyers:

> "…Overall, 93 percent of lawyers use a smartphone for law-related tasks outside the office. The percentage varies slightly by firm size, from 90 percent for solos to 96 percent for lawyers in firms of 100 or more.
>
> For operating system, the iPhone is the most popular by a wide margin, with 73 percent of lawyers who have a smartphone saying they have an iPhone. Android is next most popular, used by 23 percent of lawyers, then come BlackBerry (3 percent) and Windows Mobile (2 percent)…" according to the 2016 ABA Legal Technology Survey Report as quoted by Robert Ambrogi, Law Sites (November 8, 2016) .

Apple iPhones are relevant to today's lawyers. However, one problem I have found with my iPhones is that their size seemed to increase proportionately to their usefulness. My current iPhone 6 Plus, even though a couple of years old, seems enormous. The increased screen size is a boon for these old eyes; but the extra size and weight makes carrying the iPhone a bane. Many shirt pockets are too small. Most jeans and other men's pants front pockets are too small. You can never put an expensive gadget in a back pocket for fear of "forgetting" and sitting on it.

My larger iPhone is put on a stand to charge whilst I'm sleeping, in the shower, moving up and down stairs, or engaged in other activities of daily living. It's hard to find a spot for the iPhone in your pajamas. What do you do if you should keep your iPhone within arm's reach; but it's too large to carry conveniently?

Why do you want or need to keep your iPhone within arm's reach? If you live alone and have already fallen, you know the need for a connection to the outside world. We laugh at the TV commercials crying "I've fallen and I can't get up," but the reality can be life threatening. Even if you don't live alone; but are working late at the office or walking to the car or subway after dark, it is reassuring to be able to call for help. What do you do when your iPhone is on its charger stand and you can't reach it because you really can't get up?

Those of us who have been caregivers may be familiar with the type of alert "button" one wears as a necklace. Hold and push the button to call for help. Unfortunately, such alerts are limited by their technology to their immediate surroundings. They'll work in a limited location, in your home or office if wired into an alarm system, but step outside and you are out of range and out of luck. The "panic button" version tends to get lost in a pocket or left on a dresser top or counter. Many seniors (not present company, of course) are too vain to wear such a clunky accessory as a necklace.

For me, at least technologically, with apologies to Shakespeare, "…Past is prologue…." I turn to Apple and its newest innovation, its Apple Watch Series 3 Cellular. You may have seen the Apple Watch in its earlier incarnations and wondered what the fuss was about. Even if you opted for the "rose gold" version, the Apple Watch was not going to replace your Rolex or similar "lawyer's watch." Even the contrarian Timex wearers were unconvinced.

While the Apple Watch sported some neat Apple apps, which helped monitor your walking, breathing, heart rate, so did other wrist-worn devices. Apps were available to manage your exercise. Of course, when my doctor said "exercise," I heard "extra fries." The earlier versions of the Apple Watch required being near, virtually tethered to your iPhone, a type of new era extension phone.

Series 3 is the first available cellular Apple Watch. No longer do you need to have your iPhone nearby for the Series 3 calling features to work. Now the Apple Watch Series 3, with its own optional cellular connection, can operate independently of the iPhone. You can leave the iPhone behind, either intentionally or inadvertently, and still make calls or send texts with just your Apple Watch Series 3 Cellular.

Leonard E. Sienko Jr. is a solo practitioner in Hancock, NY. A general practice lawyer for 40 years, he is well-known for his pioneering use of the internet in legal practice and love of gadgets. He graduated from Boston College, received a master's in divinity from Andover-Newton Theological School, and a J.D. from Boston College Law School. He is reachable via email: lennyesq@hancock.net.

The cellular capable Apple Watch 3 uses your existing iPhone number for making and receiving calls, with what amounts to a more sophisticated type of call forwarding. This means that you can forget your iPhone in the charger and not panic. If you fall, without your iPhone at hand, you can still use the Apple Watch Series 3 Cellular to call for help.

The Apple Watch Series 3 Cellular has an easy to use emergency feature. "Press and hold the side button until the sliders appear, then drag the Emergency SOS slider to the right. Apple Watch 3 calls the emergency services in your region—for example, 911. (In some countries, you may be required to press a keypad number to complete the call.) After the call ends, Apple Watch alerts your emergency contacts that you made a call and sends them your current location (if available)."[1]

> You can also press and keep holding the side button until Apple Watch beeps and starts a countdown. When the countdown ends, Apple Watch calls emergency services. Apple Watch beeps even if it's in Silent Mode, so if you're in an emergency situation where you don't want to make noise, use the Emergency SOS slider to call emergency services without a countdown.[2]

Unlike the "panic button" or "alert-type necklace," the Apple Watch 3 Cellular is not limited to one location. It's not even limited to the indoors. It is truly as portable as any cellular phone and its size and comfort in being wearable encourages its use.

The Apple Watch Series 3 Cellular has even better health apps than earlier versions. I'm enjoying the gentle liberating reminders to stop and breathe for a minute or to get up from my desk and walk around. The heart rate monitor alerts me if my rate exceeds a preset limit, a helpful feature if one wants to avoid one's second heart attack.

Unlike most watches, which measure case size horizontally, Apple measures the Apple Watch vertically. The smaller of the two watch sizes has a height of 38mm; the larger, 42mm. I found the larger easier for me to see. I imagine most seniors would agree.

What, you may ask, does all this cost? The Series 3 Cellular with Space Gray Aluminum case with Black Sport Band, which I opted for, starts at $399. Various cellular carriers have "deals" available, so YMMV (your mileage may vary). You can indulge yourself up to Rolex prices with Hermes, Nike, and Ceramic variations if you care to, but I'm pleasantly surprised by the fit, finish, and comfort of my basic black version, which seems more than adequate to help keep me healthy and safe.

Endnotes

1. Excerpt from: Apple Inc. "Apple Watch User Guide," iBooks, https://itunes.apple.com/us/book/apple-watch-user-guide/id985786488?mt=11.
2. *Id*.

Senior Lawyers Section: Exploring Lawyer Well-Being

By Stephen P. Gallagher

I first joined the staff of the New York State Bar Association in 1990 as the Director of Law Office Economics and Management, shortly before Bob Ostertag started his year as NYSBA President. As I recall there was no Senior Lawyers Section back then. It does seem like that was a long time ago until I look at the current Senior Lawyer Section roster, and I see so many familiar names.

During my 13 years at NYSBA, I primarily worked to develop Law Practice Management programs for solo and small firm practitioners, young lawyers looking to get started, and individuals looking for career transition. I also remember working with the fledgling Electronic Communication Task Force (ECTF), which was tasked with developing a plan to begin using emerging technologies, including shaping the bar association's internet offerings.

In 2003, after moving from my life's work with the NYSBA community, I took time to help a family member who was struggling with early-onset Alzheimer's, a serious life transition if ever there was such. I returned to teaching at a local university, while completing a second master's degree in coaching. I stayed active in bar activities through my writings about the aging workforce and its impact on the legal profession.

As one of the early baby boomers myself, I already knew that my generation was in the process of changing the traditional demographic shape of our entire society. After leaving the bar world, I began to realize that aging is not just about people 50 and older; it affects people of all generations, who need to rethink everything—how we live, work, and play, and especially how we organize our family and community life, i.e., how we take care of each other across the generations. The aging process should be an era of continual growth and renewal, rather than a period of decline. My own journey for personal growth and renewal allows me to see what works in my own transitions.

Lawyer Well-Being

In August, 2017, the National Task Force on Lawyer Well-Being released its report, "The Path to Lawyer Well-Being: Practical Recommendations for Positive Change."[1] This report incorporates research findings from the 2016 ABA CoLAP and Hazelden Betty Ford Foundation's study of mental health and substance use disorders among lawyers, and also research of the 2016 Survey of Law Student Well-Being. The Hazelden Betty Ford Foundation survey had found that between 21 percent and 36 percent of lawyers drink alcohol at levels consistent with alcohol use disorder.[2] This rate of alcohol use disorder as reported was three to five times higher than government estimates for the general population. If that were not enough, they also found that the highest incidence of distress among lawyers was reported to be in the first 10 years of practice, not among the more experienced practitioners as previously thought.

Earlier this year, Jordan Yocim, Kansas Bar Association Executive Director, added interesting insights to the conversation on lawyer well-being in an article, "Climate Change in the Profession,"[3] for *ABA BarLeaders* magazine. Jordan suggested that we must "develop a profession of not just problem solvers but problem preventers. The world desperately needs people working within every facet of the human endeavor who understand, deeply, what it means to preserve the rule of law." He went on to say that we need to find ways to regain public confidence in the profession and increase access to justice in order to better serve the needs of the public. I believe that we need to find new and better ways to serve the needs of lawyers as well.

We can predict that change will be particularly difficult for people and a work culture that believes change should be slow, risks avoided, stability is best, and the past is a good source of information about how to approach the future. We also know that lawyers are particularly susceptible to looking to the past to predict the future.

Senior Lawyer Section Challenge—Renewing Sense of Purpose

Senior Lawyers Section member Leonard E. Sienko, Jr., and I wrote an article for the NYSBA's *Bar Journal* (September 2017) where we challenged readers to "start a dialogue about how the legal profession can better utilize the skills of the older attorneys age 55 and up currently in the workforce." We also wrote about "finding ways to convince bar associations to create forums that would enable younger lawyers to meet with experienced lawyers for support in finding their place in the profession." Our final challenge was, "to convince law firms to allow transition planning to begin much earlier than previously thought."

We felt that whether you are planning on winding down your law practice, selling it to a partner or third party, or bringing in a protégé to transition the practice

Stephen P. Gallagher (Sgallagher@leadershipcoach.us) was the first Director of Law Office Economics and Management for NYSBA from 1990 thru 2003. He now spends his time in coaching lawyers through transition, teaching marketing strategy to MBA students; and commiting time each day to moving his personal journey through growth and renewal forward. He remains eternally grateful to the NYSBA community and staff for the time he spends with them.

over time, bar associations could do more to help members transfer their life works. Lenny and I also believe that everyone who holds a license to practice law needs to be involved in this dialogue, because senior lawyers cannot solve this on their own. I want to thank the leadership of the Senior Lawyers Section for inviting me to keep the conversation alive.

The Senior Lawyers Section is made up of lawyers who are age 55 or older. Today, it is one of NYSBA's most rapidly growing Sections, but with only age as a qualification, it may be difficult to determine what such a diverse group of lawyers want for value in their membership. Recent research conducted by Adam Grant,[4] a Wharton School professor who specializes in making workplaces more collaborative, creative, and productive, may be helpful. Grant worked with Facebook personnel to find out what their employees value most, beyond fulfilling basic needs.

Facebook surveyed its workforce twice a year, asking what employees value most. After examining hundreds of thousands of answers, the research team identified three motivators: career, community, and cause. Facebook employees rated all three as equally important, but people aged 55 and above were the only group at Facebook who cared significantly more about cause than about career and community.

Career Is About Work

The Facebook study shows that having a job provides autonomy, allows individuals to use their strengths, and promotes learning and development. We may assume that Senior Lawyers Section members share these same career aspirations. Many are trying to determine whether to continue to pursue their full-time legal careers or transition to a new position, a reduced time commitment at their current position, and/or retirement from a full-time legal career.

At this same time, the profession is losing market share as the public turns to more accessible, affordable alternative legal service providers. This suggests that the legal profession's "well-being," or existence as we currently know, it may be at risk, so the senior lawyer has a vested interest in making meaningful changes in the profession to help the profession continue to survive and thrive. So, career interests should clearly remain at the heart of the Section's motivation and program.

Community Is About People

Feeling respected, cared about, and caring for others is key for building communities. Our sense of well-being is connected to the broader community. We don't live our lives in silos. Lawyers looking to move away from full-time law practice will need a broader range of communities and networks to make this transition. Senior lawyers looking to transition away from full-time law practice may need to explore new types of relationships, e.g., with young lawyers who may, themselves be interested in moving into full-time law practice.

In my experience, bar associations, as legacy institutions, have a particularly low tolerance for risk, even an intense bias against change—of any kind. In decades past, the core value of such legacy institutions was isolation—closed systems. Their actions were closed off from outside influence, all interactions and knowledge transmitted within these closed systems. One of the major shifts in the digital age has been pervasive connectivity—to each other and to what seems like every piece of information ever created.

In the early days of the Task Force on Electronic Communications (now the Electronic Communications Committee), I remember a meeting held at Cornell Law School where we met with co-directors Thomas R. Bruce and Peter W. Martin of The Legal Information Institute (LII). I refer to this meeting because it stands out in my mind as an excellent example of how powerful open communities have become. It was 1992 when LII was just beginning to build its online community of collaborators whose mission was to promote open access to law, worldwide. They brought together publishers, legal scholars, computer scientists, government agencies, engineers, and editorial teams housed at the Cornell Law School in Ithaca, NY. I remember they had just started offering the opinions of the Supreme Court ten years before the Court had its own website. Today, their extensive legal collections are used by more than 32 million people from more than 240 countries and territories.

Bar associations, like much of society, are increasingly complex, filled with so many intertwining and diverging interests, personalities, and issues, that no one can confidently represent everybody else's point of view. Bar associations need to set priorities to provide services as solutions to address the needs of lawyers at every stage along their career paths.

Today, bar associations, with countless overlapping constituents, can be where real value is found at the intersection of spontaneous encounters and collaboration. Lawyer well-being is seen as far more complex than in the past, requiring support by a broader range of communities beyond the profession's former boundaries. Expanding the range of community initiatives for the aging workforce and lawyer well-being should be at the heart of the Senior Lawyers Section.

Cause Is About Purpose

Feeling that you can make a meaningful impact on other people, identifying with the organization's mission, and believing that it does some good in the world is key for meaning and cause. Most of the lawyers I have worked with over the years have never had a problem finding meaningful causes. When transitioning from full-time law practice, finding a new cause or purpose can prove to be a challenge.

In 2012, the Senior Lawyer Division (SLD) of the North Carolina Bar Association identified an important "cause" for their members. They were interested in finding out how other professionals handled what they termed "retirement with dignity." They convened outside authorities, from beyond the legal profession, to study this issue. SLD brought together members of the medical profession, their own professional liability carrier, the Chief Justice's Commission on Professionalism and three ancillary groups that control lawyers' licenses to practice law; those who advise lawyers on standards of practices, competency and professionalism; and those who assist lawyers in recognizing that they are all humans and subject to frailties to devise a plan to address this concern.

The resulting program they identified is a multi-faceted approach to assist three groups of people: (1) lawyers who need to retire but will not; (2) lawyers who want to retire, but they are not certain how to do so; and (3) caregivers—be they lawyers, paralegals, staff or families who are looking for resources to assist in their role as caregivers.

Today, their Transitioning Lawyer Commission (TLC) leads the country in having supports in place for any lawyer showing signs of cognitive impairment, process addictions, burnout, depression and chronic stress. In addition, supports are in place for retirement/succession planning and sale of a law practice. They also provide CLEs, general training programs, how-to guides, check lists, etc.

It's difficult, of course, to measure a concept like meaning or cause, so I was pleased to find a definition of lawyer well-being included in "The Path to Lawyer Well-Being" report. Lawyer well-being was defined as "a continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others." The report highlights that complete health is not defined solely by the absence of illness; it also includes a positive state of wellness. I see such positive wellness … well-being … as being at the heart of what the Senior Lawyers Section must do to address the needs of its members.

Senior Lawyers Section—Action Plan

I believe the Senior Lawyers Section is in a unique position to bring people together in new ways. The complexity and density of associations require that the whole system be engaged in order to harvest the invisible intelligence that exists throughout all Sections and Committees. Who better than senior lawyers to step forward? Every change, every burst of creativity, begins with the identification of a problem or opportunity that somebody finds meaningful. Until and unless you invite people to participate in problem solving, the demand for change will remain unresolved.

When I suggest that the Section bring people together in new ways, I am not limiting this to online communities. I like the idea of expanding local or regional programs or joint programming with local bar associations. That would be an easy way to broaden communities who share common concerns. If lawyers, paralegals, staff or families are looking for resources to assist in their role as caregivers, why shouldn't they look toward their professional associations for help? I believe taking care of each other will take place on the local level. If the Senior Lawyers Section were to begin losing members, it will be to local bar associations who will be listening better.

We know that the Senior Lawyers Section has a particularly large number of sole practitioners, each of whom has invested a lifetime into making his or her business a success. Many are only lately starting to think about life's next steps—both in business and in life. If this Section wants to add value to its membership, we must find ways to engage our members in meaningful issues such as lawyer well-being.

We can't force anybody to change. No two people see the world the same way, so we can only begin by engaging individuals in a change process. If the issue is meaningful to them, they will become enthusiastic and advocates for change. If the Senior Lawyers Section wants members' broad support for a cause, the Section must welcome the entire community of lawyers in as co-creators, much as our colleagues in North Carolina have done. We will only support what we have a hand in creating, so if you agree that the legal profession's "well-being" or existence may be at risk, the Senior Lawyers Section has a vested interest in building alliances with a broader range of outside interest groups to make meaningful changes in the profession that better serve senior lawyers.

Endnotes

1. The task force was formed by the ABA Commission on Lawyer Assistance Programs (CoLAP), the National Organization of Bar Counsel (NOBC), and the Association of Professional Responsibility Lawyers (APRL).
2. Alcohol Use Disorder is defined as a pattern of alcohol use that involves problems controlling your drinking, being preoccupied with alcohol, continuing to use alcohol even when it causes problems, having to drink more to get the same effect, or having withdrawal symptoms when you rapidly decrease or stop drinking.
3. Yocim, Jordan, C*limate Change in the Profession*, ABA *BarLeaders*, February, 2018.
4. Lori Goler, Janelle Gale, Brynn Harrington and Adam Grant, *The 3 Things Employees Really Want: Career, Community, Cause*, Harvard Business Review, digital article, Feb. 20, 2018.

What Your Clients Wish You Told Them About the Life Insurance Funding Their Personal, Corporate Trusts and Business Agreements

By Henry Montag

Attorneys establish trusts and business agreements for their clients for a variety of reasons. Perhaps an irrevocable life insurance trust (ILIT), to provide liquidity for estate taxes. A grantor trust for a parent or grandparent wanting to provide family income, professional management, or guidance for an inheritance earmarked for the next generation. A special needs trust (SNT) to provide for the welfare of a child even after their parents are no longer here to take care of them. A buy-sell agreement to assure the orderly transfer or disposition of their business interest for the benefit of their family, and business partners. Since more than 90 percent of the Fortune 500 corporate clients have a deferred compensation plan (DCP) many of their small business owner clients have similarly requested to establish a deferred compensation plan to supplement their retirement income, or perhaps to allow a class of employees the ability to defer a portion of their income as a perk at their place of employment.

The Role of a Life Insurance Policy

What do all of these trusts and agreements have in common? There's a life insurance policy used to fund each of the situations mentioned above. It's therefore important for the grantor as well as the amateur trustee, usually the eldest sibling, to become more knowledgeable regarding their responsibilities associated with managing the various types of life insurance policies funding their trusts and agreements. The purpose of this article is to familiarize the reader with information that can be used to better understand the opportunities that exist, and identify the proper strategy required to provide guidance to your clients' children acting as "amateur trustees."

Trustees may have received very little guidance regarding the consequences of their actions and inactions when it comes to dealing with the current mismanagement of many of their existing life insurance portfolios. Life insurance has two purposes that can be used individually or combined:

1. To provide an immediate leveraged tax-free death benefit.
2. To provide a tax-deferred accumulation vehicle as an asset class.

Regardless of the use or purpose it's essential that a client understand that life insurance policies do not come with an automatic management function and that each of the policies funding their respective trusts and agreements requires an ongoing review process because personal events and economic situations can and do change. How would you as an amateur trustee or an advisor to an amateur trustee of an ILIT react to receiving a notice from the insurer stating that the $1,700,000 life insurance policy in the trust is going to lapse in the next 12 months unless a significantly higher premium is paid? The insured is age 81, in good health and so far has paid more than $400,000 in premium. Your action is needed immediately. What would you advise? The point is if you or your amateur trustee client do not have the necessary skills, it's your responsibility to retain the services of someone who does.

How Did That Happen?

All too often a person will accept the title of trustee but won't fully understand the ramifications, the responsibility, or the fiduciary liabilities that come along with that title. One of the prime responsibilities of a trustee using any type of a life insurance policy is to make certain that the policy will be in force when the grantor dies.

Let's look at a typical situation occurring today. In 1990-2000 if a client purchased a $1 million life policy it would have been suggested that the policy be owned by a trustee of an ILIT to keep the death benefit out of the grantor's taxable estate. In 10 percent of the situations the grantor would have chosen to use an institutional or corporate trustee. However, in the other 90 percent it was usually the grantor's eldest child that was made a trustee—a trustee that had the responsibility, but not the necessary knowledge, experience or guidance to properly manage the life insurance policy, to prevent it from expiring prematurely. Nor did the trustee realize that he or she assumed 100 percent of the performance risk for the life insurance policy that he or she didn't know was not guaranteed.

What Happened?

As a result of 25 years of reduced sustained interest rates and neglect on the part of the amateur trustee, usually an eldest child who wasn't aware that the life insur-

Henry Montag, an independent certified financial planner, has been in practice since 1976 with offices located on Long Island, NY. He is a principal of The TOLI Center East, providing independent consultative fee-based, individually or trust owned life insurance performance evaluations for high net worth clientele, their trustees, advisors and family offices.

ance premium he or she was paying should have been increased, the duration of the death benefit of that policy was shortened. The problem compounded itself over the years to the point where many 80-year-olds are now learning that their life insurance coverage is only going to last for a few more years unless a significantly higher premium is paid to make up the insufficiency created over the last 25 years.

How can that be, they ask? They've paid all premiums on time and never borrowed any cash value. What neither they nor their amateur trustees understand is that 45 percent of the life insurance contracts they and many others purchased over the last 25 years were universal life insurance policies that were not guaranteed to last for the rest of an individual's life. The duration of the policy was based on an anticipated interest rate in the 1980s that didn't materialize. This situation changed in 2003 when insurers began offering guaranteed universal life policies. The difference between a non-guaranteed universal and a guaranteed universal or a whole life policy is that the latter has a higher premium that's used to build up a sufficient amount of cash value designed to guarantee the policy will last for the rest of an individual's life.

However, insofar as any universal life policies purchased prior to 2003, it was the owner/trustees' responsibility to make certain that any shortfalls, between the assumed interest rate when the policy was first taken out and the actual interest rate that was credited to the policy in each of the last 20-30 years, be made up by increasing the premium paid to the insurer.

The Role of the Trustee

Unfortunately, neither most amateur trustees nor their advisers realized that a non-guaranteed life policy required this type of active management, and as a result 23 to 25 percent of these non-guaranteed universal life insurance policies are now expiring prematurely.[1] This situation has grown increasingly worse because just as people are living longer,[2] their non-guaranteed life policies are expiring earlier.

It's important for clients to understand that 45 percent of the current life insurance policies in force today are non-guaranteed life insurance policies. These policies require active management and the sooner they find out if they require adjustments the better it will be for them and their beneficiaries. Most life insurance policies, even whole life policies, require some form of active management and should be considered a "buy and manage" asset rather than the "buy and hold" asset they are often erroneously considered.

Once a problem is discovered, trustees and beneficiaries alike often begin looking at who is at fault and who can be blamed. "Isn't it the agents' responsibility to make sure I'm billed properly?" or "Shouldn't the insurance company have billed me correctly?"or "Shouldn't my attorney that drafted the trust or my CPA who is involved in all my financial decisions have advised or informed me?" Despite the fact that 90 percent of the trustees who serve in the capacity as an amateur trustee have no skills, and receive very little guidance when it comes to dealing with maintaining a non-guaranteed life insurance policy, the answer to all of the above questions is "no."

Neither the agent nor the company is responsible. It's the trustee who has 100 percent of the responsibility to manage the policy and only the owner/trustee can make a decision to increase or decrease the billed premium of the policy funding the trust.

Judicial Decisions

Going one step further, the courts in *UBS Financial Services Inc. v. Thompson* have held that the agent/broker has no post-sales responsibility at all.[3] It is solely up to the owner of the policy to make those management decisions. Further, in the absence of these management decisions, the court in *Rafter v. Meyer*[4] held that a trustee has a non-waivable duty to keep beneficiaries informed about the status of life insurance policies held in trusts for which they are trustees. The point, according to Steve Leimberg's executive summary, was that the trustee should treat a life insurance policy as it would any other trust asset.

In August 2012, the Office of the Comptroller of the Currency (OCC) issued revised guidelines that direct financial institutions serving as trustee of an insurance trust to treat life insurance as they would any other asset. This means life insurance, just like stocks, bonds and real estate, needs to be actively managed.

Providing a policy performance evaluation and then monitoring it every one to three years, depending upon product, would be a good idea for all amateur trustees. As would be the directive given to corporate trustees under the Uniform Prudent Investor Act (UPIA) that they treat life insurance as they would any other trust asset.

Impact of COIs

Why is all of this attention suddenly being paid to this topic? Very simply life insurance companies, more so than many other financial organizations, have been adversely affected by the sustained reduced interest rates and are currently seeking to do whatever they can to return to profitability. Unfortunately, the way they've chosen to respond has taken a toll on many families.

Please inform your clients that the life insurance company has no obligation to the insured or the beneficiaries. Clearly their obligation is to their stock or shareholders. When a life insurance policy lapses, it means the insurer gets to keep all of the premiums that were paid and will never have to pay out a death benefit. A very profitable situation for the insurers as, all they're required to do is send out the annual statements, which most people don't read, and by virtue of inertia individual life policies are expiring on their own. However, to make matters even better for the insurers and worse for their insureds, several years ago the *Wall Street Journal*[5] reported that insurer's began to exercise a right they've always considered as taboo, raising the internal cost of insurance (COI). An increasing number of insurance companies are now exercising their contractual right to increase the internal COI for the 45 percent of the existing non-guaranteed universal life insurance policies. This action, in addition to 25 years of reduced interest rates and neglect, has caused a perfect storm that is now further exacerbating an already deteriorating situation, causing more life policies to expire even sooner.

Do I Still Need That Policy?

Now that estate taxes have virtually been eliminated for much of the population, or at least put on hold till 2025, many of your clients are now pondering what to do with the life insurance they had previously purchased with the intent to pay their federal and state estate taxes. While that topic is a subject to be discussed in a separate article, the question for many becomes, "Should I continue to pay an increasing premium for insurance I may no longer need? Or should I give up my coverage? If I decide to give it up, exactly what should I do? Should I surrender the policy back to the insurer in exchange for the cash value? Should I merely reduce the death benefit and pay less premium?" Depending on an individual's health and age, a smarter but less well known option is an alternate exit strategy known as a "life settlement." This is a process where the insured sells all or a portion of their existing life insurance portfolio, just as they would a car or a house. Such a sale is transacted on the secondary market in which a hedge fund acts as a purchaser, and the seller usually receives a significantly higher payout than if they would have surrendered the policy back to the insurer.

Do I Need a Guarantee?

Going forward, today a client can obtain a guaranteed universal life insurance policy that can be designed to last for as long as they choose. Naturally the longer a person wishes to guarantee that their life policy will remain in force, the more it would cost and vice versa.

Guaranteed duration is especially important for a family setting up a special needs trust (SNT) when they want to make 100 percent certain that the life insurance policy they purchase remains in force for the duration of their lives to support their child after they're gone, or to provide an inheritance for their children.

Term or Permanent Life Insurance?

A buy-sell agreement between business partners can either be funded with a less expensive term life insurance policy, which is guaranteed to last anywhere from 5 to 30 years, or up to age 83, or it can be funded with a permanent life insurance policy that costs significantly more but lasts a lifetime because it builds up cash value. This cash value can later be used to supplement their retirement income. If a business is first starting out, or if cash flow is an issue, they should use a term policy to provide the maximum death benefit for the longest period of time, for the least amount of premium outlay. But if your client is involved in a well-established company where cash flow is plentiful, they may consider utilizing a permanent life insurance policy for its tax-deferred accumulation benefits which, in addition to providing life insurance, can later be used as an asset class to supplement their income at retirement.

Life Insurance as an Asset Class

Sometimes life insurance is not used for its death benefit, and is instead used for its favorable tax-deferred accumulation build-up and tax-free distributions. Such would be the case if a client involved in a C-corp decided to use life insurance as an asset class via a deferred compensation plan (DCP). In this manner a key employee or the owner of the business itself , depending on certain restrictions, can reduce their current income and place the reduced amount of salary in a life insurance policy with just enough life insurance to still be able to utilize the life insurance policy's tax-deferred accumulation status. Doing so would not only build up a tax deferred accumulation fund, but can also years later distribute the income from this cash value on a favorable income tax basis to supplement their otherwise taxable retirement income.

Mechanically, this can be done through the use of a series of withdrawals up to basis, and then loans that never have to be paid back as long as the death benefit survives the insured. A split dollar arrangement can also be used to make certain that the corporation gets back 100 percent of its initial outlay from the death benefit. A similar arrangement, called a supplemental executive retirement plan (SERP), may be used in an S-corp or LLC for an employer, based on various percentage ownership rules, or an employee, but only on an after tax basis.

To Clarify Matters

Recognizing that the often spoken about Fiduciary Rule is still not here, don't rely on that piece of legislation to protect your client. Although various states have taken the lead in attempting to protect the consumer from new purchases.[6] It's solely up to you, the one who drafted your client's documents and trusts, to protect your client's current life insurance portfolios. A useful tool I use in my practice to record all available options, including the life insurance, is a letter of intent statement (LOIS) where I have the grantor meet with the trustee on an informal basis to discuss in plain, simple language the grantor's intent and to assure the trustee's understanding of what needs to be done under various circumstances. I then turn this into an informal letter given to the trustee by the grantor. This letter along with an adequate funding statement (AFS) obtained from a client's CPA or retained independent life insurance consultant, is used to insure that the life insurance policy chosen is sufficiently funded to meet the grantor's objectives, and that they are periodically updated and reviewed to keep current with the grantor's wishes as to beneficiaries, duties and allocated percentage distributions.

In Summary

In summary, someone needs to advocate for the grantor's beneficiaries and coordinate all of the above to make certain that the next generation's future inheritance and well-being are not endangered as a result of outside economic conditions or neglect. There is perhaps no better way to meet and engage your next generation clients than to initiate a conversation with them regarding the consequences of the current mismanagement of their existing life insurance policies and to let them know that you're interested in discussing the best way for them to preserve the life insurance inheritance left by your client, their parents, for them and their kids. While it may be easier to draft an exculpatory clause in your trust than to provide guidance to an amateur trustee, the rewards of that guidance will be far greater and appreciated by your next generation client. The estate planning attorney is the logical choice as the professional advisor in the best position to arrange, invite, and manage such an initial meeting. The outcome of that meeting can generate additional appropriate options to enable the attorney to provide the amateur trustees with the guidance needed to maximize their life insurance premium dollars. It can also make certain that their individually owned or trust-owned life insurance policies funding their parents' or child's trust, or business partners agreements are updated and do not join the increasing ranks of life insurance policies expiring years earlier than anticipated.

Endnotes

1. The Life Insurance Policy Crisis, ABA Jan 2017.
2. Society of Actuaries Report, Nov. 2014.
3. *UBS Financial Services Inc. v. Thompson*, No 0352 (Court of Special Appeals of MD, June 25, 2014).
4. *Rafert v. Meyer*, 227 the Nebraska Supreme Court, 290 Neb 219.
5. Scism, Leslie, *Life Insurance Rates Are Going up for Many*, The Wall Street Journal, Dec. 5 2015.
6. Baldwin, Ben, *Between a Rock and a Hard Place*, CCH, April 2018.

How Tax Reform Helps Partnership Issues in 1031s

By James Miller

Partnership Issues in 1031s Benefit with Tax Reform

A partnership continues to exist until it is terminated. Before the Job Cuts and Tax Act, there were two ways that a partnership could be terminated. First, if no part of the business was carried on by any of its partners and second, if there was a transfer of 50 percent or more of its ownership within a 12-month period. The second way was commonly referred to as a "technical termination" of the partnership.

The recent tax reform, which became effective on January 1, 2018, eliminated the "technical termination" provision from the statute. As a result, situations where the partners do not want to stay together and do a 1031 exchange as the partnership may be easier to resolve. There still are two requirements. After the organizational change there must be at least two partners (to be a partnership) and at least one of the partners must have been in the partnership before the ownership change.

The effect is that partners who do not want to exchange can have their partnership interest purchased irrespective of the fact that they may have owned 50 percent or more of the old partnership. Another application might be where an investment property is owned 50/50 by two married couples. For whatever reason, "Couple A" wants to receive their cash and pay the taxes but "Couple B" wants to do a 1031 exchange. Prior to January 1, 2018, this would have been a problem, but not now.

Couple A can receive an undivided interest in the partnership's real property in full redemption of their partnership interest. The property will be sold with Couple A receiving cash and Couple B completing a 1031 exchange as the partnership. If Couple B lives in a community property state, they will want to continue to file taxes as a partnership.

In summary, the percentage of transfer is not relevant. Just ask two questions:

1. Are there at least two partners?
2. Was at least one of them in the partnership prior to the change of ownership?

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Three Critical Steps for Lawyers Before Joining a Nonprofit Board

By Courtney Darts

Lawyers can make terrific candidates for nonprofit board service. Lawyers think analytically, are good at identifying risk, and often have experience with business considerations. For a lawyer, serving on a nonprofit board can be a wonderful way to get more involved in the local community or contribute to a cause that is personally meaningful.

Not surprisingly, lawyers who serve on nonprofit boards are often asked to give legal advice to their organizations. Doing so is not ethically prohibited, but there are some complexities that need to be considered when serving in a dual role.

This article will provide some tips for any lawyer thinking about joining a nonprofit board, as well as some practical and ethical considerations for the lawyer who has been asked to provide legal advice to the nonprofit on whose board she or he sits.

1. Do Your Homework

Any lawyer thinking about joining a nonprofit board should consider doing the following before committing:

- Do a self-assessment. Do you have sufficient availability and interest to undertake this role? Serving on a nonprofit board brings fiduciary and legal obligations and requires a meaningful commitment of time and energy.
- Review key corporate documents to learn about the organization's mission and activities and the policies applicable to directors. What do the certificate of incorporation, bylaws, and corporate governance policies say regarding liability, indemnification, and conflicts of interest?
- Review key financial documents. Is the organization up to date on all required regulatory filings, tax filings, and associated payments? If the organization has an outside auditor, are the auditor's reports unqualified? Has the auditor sent a management letter identifying issues of concern?
- Ask for information about the insurance coverage available to directors under the nonprofit's directors and officers (D&O) liability insurance policy, including employment practices liability insurance if the organization has employees.
- Verify financial expectations for board members. Most nonprofits ask their board members to donate and/or solicit funds to support their work. Some boards have an explicit expectation, while others just ask that each board member give an amount that is meaningful to him or her.
- Try to meet as many of the other directors as possible—ideally, attend a board meeting.
- Clarify what type of legal assistance, if any, the nonprofit is expecting from you or your firm. Some nonprofits may assume that a lawyer's presence on the board automatically means that she or he will act as the organization's legal counsel. The lawyer-director may or may not be comfortable with serving in this dual role. If it's anticipated the lawyer-director will be regularly providing legal services, consider whether serving as pro bono legal counsel would be more appropriate than serving on the board.

2. Understand Your Responsibilities

All nonprofit board members have fiduciary duties under the law. They include the duty of care, the duty of loyalty, and the duty of obedience.

The **duty of care** is a reasonable person standard, requiring all directors to act in good faith and with the degree of diligence, care, and skill that an ordinarily prudent person in a like position would exercise in similar circumstances.[1] In practice, this requires each board member to be well informed about the organization's mission, activities, finances, and personnel, and to regularly attend and participate in board meetings.

The **duty of loyalty** requires all directors to act in good faith and in the best interests of the nonprofit, even when there is a conflict between the nonprofit's interests and a director's personal or professional interests. This duty is particularly relevant if a nonprofit is considering hiring a lawyer on its board (or the lawyer's firm) to provide legal counsel to the organization. New York law requires all nonprofits to have a written policy that dictates the appropriate procedures for disclosing and vetting conflicts of interest.[2]

The **duty of obedience** requires all directors to ensure that the nonprofit complies with applicable laws and regulations and that its activities and resources are

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appropriately directed to the furtherance of its stated mission.[3]

3. Define Your Role—Director, Lawyer, or Both?

Many lawyers join nonprofit boards without the intention of serving as their legal counsel. But in the course of board service, the lawyer-director may be tapped to provide legal assistance to the organization. In such situations, the lawyer-director's role can become blurred, and it can be difficult to determine whether and when the lawyer-director is acting as legal counsel to the organization.

> *"The lawyer who sits on a nonprofit board and wishes to provide legal advice to the nonprofit needs to think carefully about his/her role and discuss the pros and cons of the engagement with board colleagues before undertaking the representation."*

The lawyer who sits on a nonprofit board and wishes to provide legal advice to the nonprofit needs to think carefully about his/her role and discuss the pros and cons of the engagement with board colleagues before undertaking the representation. Below are some of the practical and ethical considerations for the lawyer-director who is considering serving as legal counsel for the board on which she or he sits.

- *Competency*. As a starting point, the lawyer-director should consider whether she or he can provide competent representation for the matter in question. Some matters may require an expertise that the lawyer-director does not have, although ethical guidance notes that a lawyer can achieve competency in a particular area by learning the necessary material or skills or by associating with another lawyer who has established expertise in that area.[4]
- *Conflicts of interest*. A lawyer-director who is being asked to act as the nonprofit's legal counsel should determine whether the responsibilities of the two roles may conflict. Consideration should be given to: (1) the frequency with which such situations may arise; (2) the potential intensity of the conflict; (3) the effect of the lawyer's resignation from the board; and (4) the possibility of the organization's obtaining legal advice from another lawyer in such situations.[5] A lawyer also may not use the position of director as a feeder for his or her private practice.[6] In addition to the ethical guidance, the lawyer-director and his or her fellow board members should consult and comply with the nonprofit's bylaws and conflicts of interest policy.
- *Attorney-client privilege*. The lawyer-director who has been asked to serve as legal counsel to the nonprofit should disclose to the board that serving as a director as well as legal counsel for the organization may jeopardize attorney-client privilege.[7] Maintaining attorney-client privilege in these circumstances can be extremely challenging; once the lawyer-director undertakes the representation, it may not always be clear when the lawyer is acting as a board member and when the lawyer is acting as legal counsel. To minimize the risk of confusion, when the lawyer is speaking to the board as a director and providing business advice, she or he should communicate that to the board. Similarly, when she or he is speaking to the board as a lawyer, she or he should communicate that fact and remind the board of methods of preserving attorney-client privilege, and in particular, the importance of confidentiality. These communications should be noted in the minutes (though the minutes should not summarize the substance of any legal advice provided).
- *Professional liability coverage*. The lawyer-director should review his or her own malpractice policy and verify its scope. Will it cover legal services provided to a nonprofit on a pro bono basis? Are there limitations in the coverage if the lawyer is also serving on the board? Insurance coverage can be tricky in these circumstances—if it's unclear whether the lawyer-director was acting as a director or as legal counsel to the organization, both the D&O carrier and the malpractice carrier may deny coverage.
- *Terms of the representation*. If the lawyer-director agrees to provide legal counsel to the organization, a written engagement letter clearly defining the scope and terms of the lawyer's services is recommended, even if the services will be provided pro bono.

Lawyers can be tremendous assets to nonprofit boards, and serving on a nonprofit board can be one of the most rewarding experiences of a lawyer's career. A lawyer-director may also choose to provide legal assistance to the nonprofit on whose board she or he sits, but undertaking that representation successfully requires careful forethought and clear communication.

Endnotes

1. Section 717, New York Not-for-Profit Corporation Law.
2. Section 715-a, New York Not-for-Profit Corporation Law.
3. For a fuller overview of the responsibilities of all nonprofit board members, see the New York State Charities Bureau's excellent guide *Right from the Start: Responsibilities of Directors of Not-for-Profit Corporations*, available at https://www.charitiesnys.com/pdfs/Right-From-the-Start.pdf.
4. *See* New York Rules of Professional Conduct, Rule 1.1, and related comments by the New York State Bar Association, http://www.nysba.org/professionalstandards/.
5. *See* New York State Bar Association Comment 35 to Rule 1.7 of the New York Rules of Professional Conduct. The comment continues: "If there is material risk that the dual role will compromise the lawyer's professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter." *See also* ABA Formal Ethics Opinion 98-410, which discusses four possible conflict situations for the lawyer-director: (1) lawyer asked to pursue objectives of the organization that as a director she opposed; (2) lawyer asked to opine on board actions in which the lawyer participated; (3) board takes action affecting the lawyer's firm (such as whether to retain the firm); and (4) lawyer is representing the organization in a matter (usually, a lawsuit) which the both the organization and board members are parties.
6. Opinion No. 589, New York State Bar Association Committee on Professional Ethics, March 18, 1988.
7. *Id*. ABA Formal Ethics Opinion 98-410 suggests laying out the issues in a memorandum to the board.

The Very Real Threat of Identity Theft: Measures for Risk Reduction and Detection—Part II

By James LaPiedra and Jeffrey A. Kerman

In the first article of our three-part series, we identified the many forms of identity theft and the methods used by thieves to commit fraud. In this second article, we discuss several measures to reduce the risk of identity theft, and how to be proactive in detecting this fraud. With this deeper understanding of the threat, people should be compelled to act. Unfortunately many don't. The reality is you cannot eliminate the risk of becoming a victim. However, you can greatly reduce your risk by taking the following simple preventive measures.

Risk Reduction Measures

Secure Your Sensitive Information

Inventory all your important legal, medical and financial documents and secure them in a fireproof safe. Secure certain original documents such as wills, trusts, life insurance policies, deeds, and titles in a safe deposit box at your bank and maintain back-up copies in your home safe. Far too often these documents are left unsecured, and anyone with access to your home would have access to them and the valuable information they contain.

Shred

Develop the habit of shredding all documents that contain personal information, as well as unsolicited credit offers and convenience checks you won't be using. Place your shredder where you normally open your mail, since the tendency is to just throw out the item if the shredder is located elsewhere in the house or office. Thieves definitely target paper in recyclable bags because of this known tendency.

Reduce What You Carry

Most people carry more than what they normally need in their wallet or purse thereby increasing their risk. Carry only the items you will need for the day. Limit your credit cards to one or two, and never carry your Social Security or Medicare card unless there is a specific need that day. Make photocopies of the items you carry in the event they are lost or stolen.

Opt-Out

Opting out of receiving unwanted solicitations is an empowering and proactive measure. It will greatly reduce the number of times your information is shared, which decreases your odds of becoming a victim. Since you're not expecting these unsolicited offerings, you won't notice them missing if they were stolen from your mailbox.

To opt-out visit: www.optoutprescreen.com.

Financial Statements

Contrary to common belief, electronic delivery of financial statements is safer then mail delivery. Going paperless will reduce your risk of mail theft. Also, companies that maintain your personal information (P.I.) are required to annually provide you with their privacy policy and how they share your information. You can opt-out of some forms of sharing similar to the opting out of prescreened offers. Refer to the privacy policy, or contact the company for their specific opt-out directions.

Social Security Number and Card

Always use an abundance of caution when providing your Social Security number or card. When asked to provide your Social Security number ask the following questions:

- Why do you need my Social Security number?
- How will my Social Security number be used?
- How do you protect my Social Security number from being stolen?
- What will happen if I don't give you my Social Security number?

Continued on page 22

James LaPiedra is the President and CEO of ID360°, an identity theft risk management and recovery provider. He holds the Certified Identity Theft Risk Management Specialist (CITRMS®) designation, and frequently speaks at identity theft seminars and workshops. Jim is the author of IDENTITY LOCKDOWN: Your Step-by-Step Guide to Identity Theft Protection. He is also a CERTIFIED FINANCIAL PLANNER™ concentrating in retirement and distribution strategies. Jim earned a BBA in accounting from St. John's University and holds general securities and investment adviser representative licenses, as well as life, accident, and health insurance licenses. He is a highly decorated veteran of the New York City Police Department, where he served as the commander of several investigative and patrol units before retiring as a deputy inspector. **Jeffrey A. Kerman, JD, CWS** is an independent financial advisor who enjoys working with his clients and listening to their unique stories. As the Senior Managing Director of Wealth Partners Advisors LLC, Jeff focuses on combining the estate planning, financial, investments, insurance, tax and the business planning processes for people who want more confidence and satisfaction in their financial matters. He helps clients align their values and goals into a rational financial and life plan. Jeff has spoken and published articles on various financial, investment, and retirement planning topics for the New York State Bar Association. He recently presented on "The Financial Elements of Retirement Income Planning" to the Senior Lawyers Section at the 2017 NYSBA Annual Meeting, and he holds the Certified Identity Theft Risk Management Specialist (CITRMS®) designation.

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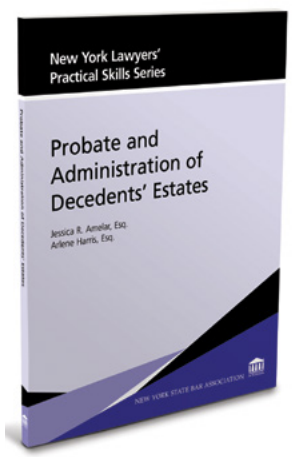

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Probate and Administration of Decedents' Estates is a practical guide for an attorney who represents a petitioner in a probate or administration proceeding. Although other subjects are discussed, this publication focuses on the administration of an estate that is not subject to federal estate taxation.

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Hon. Jonathan Lippman presents the award to Prof. Anthony H. Szczygiel for outstanding and inspirational pro bono service to underserved members of the community.

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Hon. Jonathan Lippman of Latham & Watkins in New York City presents the award to Joan L. Levy.

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Jonathan Lippman *Pro Bono Awards*

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Joan L. Levy of Sleepy Hollow receives the Jonathan Lippman Pro Bono Award for outstanding and inspirational pro bono service to underserved members of the community.

Identity Theft

Continued from page 18

Answers to these questions will help you decide if you want to share your Social Security number. Also, be aware that no government agency or legitimate business will contact you and request you to provide your Social Security number.

Protect your Mailbox

Identity thieves love mailboxes. This cannot be overstated. They know the mail you receive contains enormous opportunities to commit fraud: pre-approved credit offers, convenience checks, account statements, annuity and insurance documents, and other forms of personal identity. This is why we strongly recommend receiving your correspondence via email, or online business sites. Discontinuing hard mail greatly reduces your risk.

These additional measures will help protect your mailbox:

- If you continue to receive sensitive items by mail, purchase a locking mailbox with limited space for mail deposit.
- Discontinue use of roadside mailboxes, if possible. Have a secured mailbox at your front door instead.
- Retrieve your mail as close to delivery as possible each day.
- Have personal checks delivered to your bank and pick them up there.
- Have sensitive documents sent via FedEx or UPS, and requiring a signature.
- Mail sensitive documents at the post office during business hours. Do not use street mailboxes—not even the one in front of the post office. These mailboxes have been, and will continue to be, looted by identity thieves.
- Consider opening a Post Office Box to receive sensitive mailings.
- Monitor your mail. If expected statements and bills don't arrive, contact the sender to ascertain if fraud may be involved. If fraud is suspected, you will be able to take more timely remedial steps.

Protect Your Computer

- Keep your firewall turned on. A firewall is the first line of defense between your computer (and all the information stored on it), and the bad guys.
- Install and update antivirus software.
- Install and update your antispyware.
- Keep your operating system current. Computer operating systems routinely update their technology, and often include solutions to newly discovered security vulnerabilities. Updating to the latest version of your operating system is in your best interest.
- Be aware of what you download. Even the best antivirus protection software can be circumvented by malware embedded in email attachments, pop-ups, and music or video links. Before opening this kind of content, make sure that it's coming from a trusted site. Never open email attachments from someone you don't know.
- Turn off your computer when not in use.
- Back up the contents of your computer to an external hard drive regularly.
- Use a secure browser. You can determine whether or not you're using a secure browser by looking for the small lock icon next to the URL, or at the bottom of the webpage. Another way to determine if your communication is being securely transmitted is to check the URL scheme located in front of the web address—https:// is secure; http:// is not.
- Encrypt financial and personal information.
- Securely dispose of computers, printers, copiers, and fax machines. To securely dispose of these devices, be sure to wipe their hard drives of all information. You can purchase software, or bring the device to a trusted professional to perform this service. If you're not planning to donate the device, remove the hard drive and destroy it with a hammer before disposing. Destroy CDs, disks, and flash drives before disposing as well.
- Use strong passwords. Here are some dos and don'ts regarding passwords:
    - Don't underestimate the power of your passwords. Since most thieves can easily access and authenticate the more traditional forms of identification—Social Security numbers, account numbers, dates of birth, addresses, and most commonly used security questions—a strong password really raises the bar of effort required on their part. We liken using weak passwords to using a knotted rope to secure the front door of your home— it's neither wise, nor effective!
    - Do make passwords strong and unique for each account. They should be at least eight to 10 characters long and contain multiple character types (lowercase, uppercase, numbers, and special characters).
    - Don't store your passwords on a list under your keyboard or blotter, inside your top desk drawer, or on a sticky note stuck to your monitor.

- Don't create passwords using familiar or personal information like your date of birth, the last four digits of your Social Security number, nicknames, addresses, phone numbers, or the names of your children.
- Do change your passwords every 60 to 90 days.
- Don't use the auto-memory features of a Web browser to remember your username and password.

- Secure your wireless network. Enable Wi-Fi Protected Access 2 (WPA2) instead of Wired Encryption Privacy (WEP).
- Exercise caution when using public wireless hotspots or kiosks. Always use a private VPN to ensure your protection.
- Use security questions and dual authentication if available for additional access control.
- Be alert for phishing and pharming scams.

Protecting What You Know: Social Engineering

Some thieves are bold enough to steal your information right out in the open, employing tactics like charm, impersonation, flattery, and intimidation to manipulate you into revealing information you'd normally keep under lock and key. The most common types of social engineering are in-person, phone, email, and website. Here are some precautions to note:

- Be suspicious of unsolicited phone calls, visits, or email messages from individuals asking for or trying to verify your personal information. If an unknown individual claims to be from a legitimate organization—such as the IRS, the Social Security Administration, or a company you do business with—try to verify his or her identity directly with the company.
- Don't enter information or use links embedded within an unsolicited email. Be aware of whom you are communicating with, and always verify.
- Never be pressured into releasing your personal information.
- With companies you do business with, have the representative confirm information that only legitimate employees of that company would know, such as the date of your last purchase, the type of account you have, or when it was opened. You can even lie about certain activity such as purchase and payment activity to see if the unsolicited caller falls for it.

In summary:

- If you didn't initiate the call, get their information and call or email them back.
- Stay in control of the phone call.
- Know whom you're talking to, and ask questions if you're unsure.
- Don't be paranoid; be aware!

Protecting the Deceased

If you're a relative of a recently deceased person, or the executor of an estate, the following steps will reduce the risk of your loved one's identity being used to commit fraud:

- Protect the Certificate of Death as if it were a Social Security card.
- Request at least 12 original copies of the Certificates of Death to show proof of death when closing down accounts.
- Request a credit report from each of the three credit reporting agencies. This will give you a list of accounts that may need to be closed.
- Request a flag to be placed on the deceased's file. It should read, "Deceased: do not issue credit."
- Indicate the person to be notified in the event someone attempts to open an account. This could be a surviving spouse, a family member, or the Executor of the estate.
- Notify the following institutions:
    - Social Security Administration
    - Insurance companies—auto, health, life, etc.
    - Veterans Administration—if the person was formerly a member of the military
    - Immigration Services—if the deceased was not a U.S. citizen
    - Department of Motor Vehicles—if the person had a driver's license or state ID card
    - Professional licensing agencies—bar association, trade certifications, medical associations, union affiliations, etc.
    - Membership programs—video rental, public library, fitness club, etc.

Credit Inquiries, Fraud Alerts, and Credit Freezes

Credit inquiries list all parties who have accessed your credit report within the past two years. There are two types of inquiries: hard inquiries and soft inquiries. Hard inquiries are those made by lenders who evaluate your information when you apply for credit. Soft inquiries are those made by lenders for promotional purposes. There are two types of fraud alerts: an initial alert and an extended alert.

Initial Fraud Alerts

- An initial fraud alert can be placed on your credit report if you're a victim of identity theft, or if you suspect you may become one (e.g., you've received collection notices for accounts you didn't open, or you've provided your Social Security number or other personal information to someone you now believe to be fraudulent).
- An initial fraud alert remains on your credit report for ninety (90) days, unless you request to remove it before that period.
- When an initial fraud alert is placed on your credit file, you're automatically "opted out" of pre-approved credit and insurance offers for a period of two years.
- You're also entitled to one free credit report from each of the three (3) major bureaus *in addition to* the standard one available every twelve months.
- Once the initial fraud alert is in place, creditors must use "reasonable policies and procedures" to verify your identity before issuing credit in your name (though these vary from creditor to creditor).

Extended Fraud Alerts

- You're allowed to place an extended fraud alert on your credit report if you are a victim of identity theft, and can provide an Identity Theft Report—the Identity Theft Complaint Report filed with the Federal Trade Commission, along with a police report.
- An extended fraud alert remains on your credit report for seven years unless you request removal during that period.
- Creditors are required to contact you when you have an extended fraud alert. Be sure to include your cell number in your contact information.
- With an extended fraud alert, you're entitled to two additional free credit reports within twelve months from all three major credit bureaus.
- The credit reporting agencies will remove your name from pre-screened credit offers for five years, unless you request to remain on their marketing lists.

What Is a Credit Freeze?

Most states have laws allowing you to restrict access to your credit report, also known as a credit freeze. This measure greatly reduces the chances of a thief opening a new account in your name.

- A credit freeze is something you can do *before* an identity thief strikes.
- When you freeze your credit reports, you are telling the three major consumer reporting companies to block access to your credit report and credit score.
- A freeze works because most businesses won't open new credit accounts without first checking the prospective consumer's credit history. So, once you place a freeze on your credit, new creditors will not be allowed access to your credit report. If your credit files are frozen, even someone who has stolen your Social Security number (or other personal identifying information) will have a hard time getting credit in your name.
- Companies you already do business with, and the collection agencies working with them, are still allowed access to your credit report so they can check your credit until your loan or business with them is resolved. Non-lenders like potential employers, insurance carriers, and landlords are also allowed access to your credit report in some states.
- Placing a freeze on your credit report does not prevent you from getting your free annual report, or obtaining your credit score.
- Most states allow identity theft victims to place credit freezes on their credit reports for free, and only charge a fee for unfreezing the report.
- Most states require a filing fee for non-victims to freeze and unfreeze their credit reports.
- You are allowed to temporarily or permanently unfreeze your credit report at any time. For example: Before applying for a credit card or a loan, unfreeze your credit report by providing each credit bureau with the PIN given to you at the time of the initial freeze. A fee is normally required for each agency to lift the credit freeze. There's also a fee to reactivate the freeze once you've completed the credit application process.

What Are the Limitations of Fraud Alerts and Credit Freezes?

Fraud alerts and credit freezes are valuable measures of protection, but they do have limitations:

- They can help keep an identity thief from opening new accounts in your name, but they won't stop a thief opening new accounts that don't require a credit check—a telephone, wireless, or bank account.
- They will not protect you against nonfinancial fraud—driver's license, criminal, and medical identity fraud.
- They will not protect you from someone compromising an existing account.

Detection of Identity Theft

As with most things, being your own advocate is the most powerful form of protection. Proactive self-detection is the most effective method of detecting fraud. Self-detection is the process by which consumers actively monitor their own financial and personal accounts. Those who engaged in this process are usually able to detect fraud faster than any external source. Early detection reduces the chance of further fraud and economic loss, in addition to reducing the time and expense needed to recover.

Individuals are afforded certain rights under the Fair Credit Reporting Act (FCRA) and the Fair and Accurate Transaction Act (FACTA). These laws provide you with the ability to receive a free copy of your credit file from credit bureaus and specialty consumer agencies that collect, store and sell your personal information.

Below you'll find information regarding various aspects of self-detection, and the most effective ways to monitor and detect irregularities and fraudulent activity. Consider taking these measures and monitoring your free credit reports as your annual "ID checkup."

Review Your Credit Report

Credit bureaus are companies that collect and compile detailed financial activities, credit ratings, and credit-related payment histories for every consumer in the country.

There are three main credit bureaus in the United States:

- Experian
- Equifax
- TransUnion

You are allowed one free copy of your credit report every 12 months.

To order your free report visit: www.annualcreditreport.com.

- **Innovis** is a fourth credit bureau that functions as more of a data broker, but due to the amount of data they collect, any requests made to the three main credit bureaus should be made to them as well.

To order your free Innovis credit report visit: www.innovis.com/personal/creditReport.

Monitor Your Monthly Account Statements

- At least once per month, review your bank, credit card, utility, brokerage, and annuity statements. As we've mentioned, electronic statements are the safest, most effective, and most efficient way to view activity and detect fraud. They also eliminate the threat of mail theft.
- Review each transaction and verify the legitimacy of all recoded activity. If you're receiving hard copies in the mail, consider scanning paper statements, storing them in encrypted files on your computer, and then shredding the paper statement.
- Account alerts have proven to be very effective in detecting fraudulent activity in real time. Most credit card companies provide alert services—via phone, email, text, or all three—to notify you when certain predetermined conditions are met. Alert conditions may include purchases above a certain amount, change requests, activity within certain time periods, or even general transactions. Utilize this feature on credit cards, checking accounts, and debit accounts. Some even offer the service for free—a sensible alternative to paying for credit monitoring on just one card.

Monitor Your Social Security Statements

- You should review your Social Security account statement every year to verify its accuracy. It provides your record of yearly earnings and your expected retirement and disability benefits. The Social Security Administration mails paper statements to workers age 60 and older three months before their birthday, and if they don't yet receive benefits and don't yet have a *my Social Security* Account.
- You should open an account with the Social Security Administration online so that you can access your information anytime. Visit: www.ssa.gov or call (800-772-1213).

Monitor Your Medical Reports

- For early detection of fraud, actively monitor your medical, insurance, and financial records. Unlike credit information that has a central repository with the credit bureaus, medical information is dispersed and maintained within many file systems and stored on numerous computers. This makes it extremely difficult, if not impossible, to locate and correct errors or fraudulent entries.
- According to the Federal Trade Commission (FTC), the following may be warning signs of medical identity theft:
    - You are contacted or receive bills for medical services you never got.
    - You see medical collection notices you don't recognize on your credit report.
    - You find unexplained office visits and treatments on the explanation of benefits statement from your health insurance company.

- You try to make a legitimate insurance claim and your health plan says you've reached your benefit limit.
- You're denied insurance because your medical records show a condition you don't have.

Monitor Your Explanation of Benefits (EOB) Statement

- Carefully read the Explanation of Benefits (EOB) statement sent by your health insurance company after treatment.
- Verify that the claims paid, names of providers, dates of service, and itemized list of treatments match what you or your family members received.

Monitor Your Medical Records

The Health Insurance Portability and Accountability Act's (HIPAA) Privacy, Security, and Breach Notification Rules help protect the privacy of your health information held by doctors, nurses, pharmacies, hospitals, clinics, nursing homes, health insurance companies, health maintenance organizations (HMOs), employer group health plans, and certain government programs that pay for health care, including Medicare and Medicaid.

- The provisions in the Act give you the right to obtain copies of your medical records maintained by health insurance companies and medical providers. Generally, once you submit your request, these providers are required to comply within 30 days.

Monitor Your Driver's License Record

- Although advanced security measures are taken to detect fraudulent driver's license applications, identity thieves are still able to obtain them with stolen identities. Becoming a victim could result in mounting tickets and even outstanding arrest warrants in your name.
- Monitor your driving record with your state's DMV. Links to each state's DMV can be found by visiting www.dmv.org. Be aware that states do charge a minimal fee for this request.

Monitor Specialty Consumer Reports

- A specialty consumer report is a non-credit report available to anyone inquiring about a consumer's background for decision-making purposes.
- These reports are compiled from thousands of public record databases across the country. These databases apply advanced algorithms to observe, record, and make inferences about your behavior. They contain the detailed personal information you've essentially generated since birth—insurance claims, residential and tenant history, criminal background, employment history, checking account history, email accounts, online purchases, credit applications, and employment and education history.
- Reviewing these reports annually is critical given all that they cover. You're entitled to one free copy every 12 months, just like your credit report. You also have the right to dispute inaccurate information.

LexisNexis is the largest private sector data warehouse in the United States, maintaining approximately 37 billion public and proprietary records. These records are compiled into specialty reports, and sold to businesses making decisions relative to background screening, employment and tenant history, and insurance underwriting. FACTA allows you one free copy of each report every 12 months. LexisNexis provides two specific reports containing personal information gathered from many different sources.

The first is the LexisNexis Accurint Person Report.

- It provides both public and non-public information—real estate title records, liens, death records, and motor vehicle registrations.
- Publicly available information is gathered from general public and non-government sources, such as newspapers, magazine articles, and telephone directories.
- Non-public information includes current and former addresses, Social Security numbers, previous names used—aliases, maiden names, and previous married names—as well as dates of birth and telephone numbers.

For instructions on how to order your report, visit www.lexisnexis.com/en-us/privacy/for-consumers/request-personal-information.page.

The second report is the LexisNexis Full File Disclosure Report.

- It contains your consumer file and a public records search that includes information available via county, state, and federal public records—real estate transactions and ownership information, liens, judgments, bankruptcy records, professional licenses, and previous addresses.
- Additional detailed information contained within your full file disclosure report are auto and personal property insurance claims history, current insurance carriers, pre-employment background checks, and criminal records.

For instructions on how to order your Full File Disclosure report visit https://personalreports.lexisnexis.com/index.jsp.

Check Verification and Checking Account Reports

To review information stored within the checking and deposit account databases, submit requests to the following two companies. Be prepared to provide your name, address, driver's license, and checking account numbers to view a sample checking account history report. This will allow you to check underwriting history and possibly uncover fraud.

- Certegy Check Services, Inc. Visit https://www.askcertegy.com/FACT.jsp.
- Chex Systems, Inc. Visit www.chexsystems.com.

Insurance Claims Reports

- These databases contain information on a consumer's five-year claims and payment history for auto, personal property, burglary, credit card theft, worker's compensation, and medical insurance. Knowing what's in these reports will help protect you against fraud as well as inaccuracies that could negatively impact your financial reputation.
- Insurance Services Offices, Inc. (ISO) is a Verisk-owned company that provides insurance claims information to insurance underwriters. Their report is called the Automobile-Property Loss Underwriting Service, or A-PLUS.
- Request a copy of your A-PLUS loss-history report and review its contents. Even if you haven't made any insurance claims in the past five years, a thief may have made claims with your identity. Your report will be mailed within 15 days. Visit ISO online at www.verisk.com or call 800-627-3487 to find the office serving your geographic area.

Resident History Reports

- Even if you don't rent or haven't rented in years, you should still review your resident history reports. Criminals use stolen identities to rent properties, resulting in fraudulent claims of vandalism, eviction, and unpaid rent. It may be some time before it shows up in your credit report, or before debt collection agencies show up at your door.
- Your LexisNexis residential history report is included in the Full File Disclosure report outlined above in the LexisNexis section of this article.
- CoreLogic SafeRent can also supply you with a copy of your tenant and rental history report.

To get your CoreLogic SafeRent report visit www.corelogic.com.

Medical Information Reports

The Medical Information Bureau (MIB) provides information to insurance underwriters about member companies requesting information on consumers, including the specific information requested and a consumer's insurance application history.

- The report discloses usage codes (related to medical conditions or treatments), not specific medical details. This information is maintained for seven years.
- Again, even if you haven't applied for insurance underwriting in the past seven years, you should not bypass this review. If you haven't applied and a record exists, it may be an indication of fraud.
- Request your report at the MIB website—www.mib.com/request_your_record.html or by calling 866-692-6901.

Take Next Steps Now

In the coming months we will share our third and final article on identity theft covering identity theft recovery and instructions for disputing fraudulent claims. In the meantime, in this article we have identified proven measures that you can use to greatly reduce your risk of becoming a victim, and several measures you can take for timely detection of suspicious activity. We encourage you to review both articles and take proactive action.

Special Needs Planning: More than a Special Needs Trust

By Beth Polner Abrahams

Special needs planning for persons with disabilities is a complex area of law. Often the buzz words of this legal subject seem to take priority over a closer examination and resolution of potential underlying conflicts and future conflicts when there is a divorce, or a couple is contemplating divorce or separation. For those couples who have a special needs child or adult child, the issues and the potential for conflicts are often dragged into the courtroom arena. Instead, using alternative methods for resolving conflicts or potential conflicts when there is a special needs child or adult child can and should be as important as the actual legal special needs plan.

This article summarizes the basics of special needs plans and introduces mediation and conflict resolution coaching as methods of resolving and settling conflicts that may arise in a divorce or separation when there is a special needs child or adult child. Also introduced is the use of the special needs attorney consultant in matrimonial proceedings and within alternative dispute resolution processes.

The Vocabulary of Special Needs

To begin with, special needs means more than just the supplemental needs trust. The vocabulary of special needs means trusts, guardianship and myriad acronyms used to identify services for persons who are disabled and/or with special needs.

First, what is the legal definition of a person with special needs? It means a person with impaired functioning in at least three areas including, but not limited to, communication, learning, self-care, mobility, capacity for independent living, self -direction or economic self-sufficiency when adulthood is reached. The nature of impairments ranges from developmental disability or intellectual disability, to physical disabilities (with and without cognitive deficits), to disabling mental illness.

When a person—typically at age 18—with developmental or intellectual disability requires personal and/or financial oversight and assistance with care or personal management, the 17A guardianship proceeding in Surrogate's Court[1] is used to appoint one or both parents as legal guardians for their child.[2]

Once judicially appointed, the 17-A guardians make all health care decisions and, in the increasingly complex world of planning for persons with special needs, decisions about housing, adult programming, and service assistance generally referred to as self-direction. These and other programs are administered through local agencies by a state agency referred to by its acronym, OPWDD.[3]

Under the current 17-A statute, co-guardians must make joint and cooperative decisions about all aspects of their ward's life. But what happens if there is no agreement between the co-guardians on health care or programming or selection of a residential option? The current 17A statutory framework has no built-in mechanism for resolving any of these disputes and disagreements between guardians.

Most practitioners also associate special needs planning with the Special Needs Trust (SNT). This state and federal statutory trust is used to provide for the child's or adult's future life needs, while preserving eligibility for government entitlement programs such as SSI and Medicaid. If funded with monies or property that belong to the child (including child support) it is called a First Party or pay-back SNT.[4] If funded through gifts or a future inheritance, it is called a Third Party SNT or Escher Trust.[5] A more recent additional option is called the ABLE Act account.[6] This account, managed through a third party designated by each state and similar in structure to 529 tuition accounts, permits a person who becomes disabled before age 26 to have an ABLE account up to $100,000 and retain eligibility for both Medicaid and SSI. Annual contributions may not be more than $14,000. Funds remaining in the ABLE account on the death of the beneficiary are paid back to the state(s) which provided Medicaid.

Ripe for conflict are issues of which parent, in a divorce, will create the SNT when the disabled person lacks the capacity to do so; whether the trust will receive child support payments until the child is age 21; who will serve as trustee or co-trustees; and who will pay the legal fee to draft the trust and for ongoing legal counsel during the administration of the trust. Conflicts may also arise over who will serve as successor trustee when both parents are dead. As well, there are may be conflict over the use of the trust funds for special needs items not paid for by Medicaid.

And consider that if divorce occurs when the special needs individual is over age 21 (and child support obliga-

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tions and other provisions for a minor child have ended), and a 17A guardianship may have been in place for years, the conflict issues that may need to be addressed "as if" the special needs adult child were a minor, including the method for decision-making as co-guardians, are equally significant.

Other matters that can and should be addressed in the context of divorce with a special needs child are the day-to-day details which are typically negotiated for minors without special needs. That is, visitation, religious observance, vacations, birthdays/parent birthdays, etc. This is particularly important because these terms may no longer apply once the child is over age 21. And if both parents had agreed to serve or are serving as 17A guardians, the current SCPA 17A statute has no method to address these types of conflicts.

logue, reflect and help frame the positions and interests of the parties in mediation, and promote the exchange of their ideas. Ideally, the mediation results in a written mediation agreement.

With the mediator's assistance, the parties also determine who the necessary participants to the mediation will be. While this will certainly include divorce counsel, another important participant to provide legal counsel and information is the special needs consulting attorney. This attorney serves as the neutral expert to answer questions of law about government benefits, including Medicaid and SSI, the treatment of child support within special needs trusts, and the practicalities of 17A guardianship. The special needs consulting attorney may also be asked to offer a legal opinion on the practicality of aspects of a mediation proposal in terms of the special needs child or adult.

"Unlike mediation which needs all parties to voluntarily participate, conflict coaching is a one-on-one process—the coach and the individual who retains the coach."

What alternative tools are there to resolve these types of conflicts and issues? How can these alternative tools resolve "issues" so the solution is outside of the constraints or limits of statutes and judge-led determinations? And, what is the special needs attorney consultant and how can he or she help to identify the child's or adult's special needs issues, provide neutral legal counsel and proposals, and assist with framing issues that may need to be addressed in the divorce?

Alternative Dispute Resolution

One tool is alternative dispute resolution, an alternative to court litigation for settling conflicts, disputes and disagreements. Mediation is one form of ADR.[7] Mediation is a voluntary, confidential process. If divorce or guardianship litigation has already begun, mediation gives the parties the chance to step back, outside the restrictions of court, to create a balanced, negotiated resolution to all or some of their issues, and, if successful, to bring that settlement back to the court. If litigation has not begun, mediation helps parties to address the potential issues of disagreement, narrow those issues and resolve the issues prior to court filings.

In both instances, mediation offers a more creative, often less costly and less time-consuming process, for resolution of disagreements and conflicts.

The mediator serves as the impartial neutral, facilitating conversations between the parties in the disagreement. Generally, the mediator does not judge or assess the case. Instead, the mediator's goal is to encourage dia-

Conflict Coaching

What if both parties in a divorce will not agree to mediate their disagreements or disputes? Or, having divorced after their special need child is over age 21, one parent/guardian refuses to use mediation for resolution of the dispute regarding the special needs adult child?

A newer tool is called conflict resolution coaching.[8] Unlike mediation which needs all parties to voluntarily participate, conflict coaching is a one-on-one process—the coach and the individual who retains the coach (i.e., one parent or guardian). The goal of conflict resolution coaching is to help that parent develop their own understanding of the conflict, strategies for creating opportunities for resolution of the conflict, and the approach for that resolution. It is not therapy.[9] The coaching process enables the individual to examine their role in a dispute or disagreement, their emotions and power levels or roles which may be influencing the dispute, and helps the individual to craft a "best" resolution for accomplishing their objectives. As in mediation, the process is self-determined and finite. It is not unusual for some divorced parents to use separate conflict coaches and thereafter attempt to resolve their disagreements themselves, or together with a mediator.

Coaching may have the long-term benefit of helping at least one parent—or both parents when handled by separate coaches—develop methods for recognizing and addressing conflict as it happens rather than letting it fester into costly litigation.

Conclusion

The complexity of special needs planning, including special needs trusts, public benefits, guardianship, and programs for minors through adulthood, means parties need to address current and potential future conflicts involving their special needs child. Alternative dispute resolution tools such as mediation and conflict coaching, with the use of a special needs consulting attorney, are important to understand so that our clients can have the opportunity for tailored resolutions of their disputes or conflicts in a creative, less time-consuming, and less costly manner than litigation.

Endnotes

1. Surrogate Court Procedures Act Article 17-A . The current statute permits the surrogate court to appoint a guardian based upon medical diagnosis certifications establishing either intellectual disability (formerly known as mental retardation) or developmental disability (a range of conditions including but not limited to autism, cerebral palsy, and traumatic brain injury). A court hearing is optional; there is no tailoring of powers or listing of powers once the guardian is appointed; there is limited court oversight—largely concentrating on financial matters—once the appointment is made and letters of guardianship issued.
2. In a significant step to challenge and overhaul the entirety of the 17-A statute, a federal class action was filed in September 2016 by Disability Rights New York Against NYS, the Unified Court System and others in their official capacity alleging that the 17-A statute is unconstitutional and discriminatory including being violative of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 because, *inter alia*, it is diagnosis driven and empowers a guardian with full control of the intellectually or developmentally disabled person's life. The complaint compares and contrasts the procedures used in Mental Hygiene Law Article 81 (adjudication of incapacity), which requires a court to impose the least restrictive form of intervention, with a guardian's powers tailored to the individual rather than based upon medical or mental condition or diagnosis.
3. Office for People with Developmental Disabilities is the New York State agency which oversees services and programs for persons with developmental disabilities.
4. 42 U.S.C. § 1396p (d)(4)(a).
5. EPTL § 7-1.12; *Estate of Escher*, 75 A.D.2d 531 (App. Division, 1st Dept., 1980), *aff'd*, 52 N.Y.2d 1006 (1981).
6. Stephen Beck, Jr. ABLE Act of 2014, 26 U.S.C. 529A (also known as 529A accounts). For an excellent summary see www.ablenrc.org, the website of the National Resource Center on the ABLE Act.
7. Another ADR tool is arbitration, which is not discussed in this article. At present, it is not typically used to resolve special needs/estate planning/guardianship disputes.
8. This section of my article is based upon "Conflict Coaching: Conflict Management Strategies and Skills for the Individual," by Tricia S. Jones, Ph.D., and Ross Brinkert and Ms. Jones' materials from Conflict Coaching Matters, LLC. (www.conflictcoachingmatters.com).
9. *See* The Relationship Protocol, by Debra Roberts, L.C.S.W. (Amazon.com). For families who do not have the financial resources to hire a conflict coach but acknowledge the need to develop a method of communication to address disagreements pre- or post-divorce, including when there is a special needs child, this book provides step by step guidance to develop those skills.

The Clinical, Ethical and Legislative Case for Medical Aid in Dying in New York

By David C. Leven and Timothy E. Quill

Introduction

Palliative care and hospice should be standards of care for seriously ill and dying patients.[1] Most, but not all, suffering can be adequately addressed with the skillful addition of palliative measures to a patient's treatment plan. Therefore, the first place to go if a patient makes a request for medical aid in dying is to ensure that his or her suffering is thoroughly understood and addressed with state of the art and science palliative care.[2] To be clear, medical aid in dying is not part of usual palliative care or hospice practice. It is the process by which an adult, mentally competent, terminally ill patient, who doctors determine is likely to die within six months, self-consumes prescribed medicines to end suffering and achieve a peaceful death.

Some patients making requests for medical aid in dying have witnessed bad deaths in their life experience, and are worried about going through a similar process in their own future. Such patients can benefit from a thorough exploration of what they have seen and are afraid of from their own lives, followed by a frank discussion about how one's doctor proposes to address such circumstances should they occur to the patient him or herself. In the vast majority of cases (but not 100 percent) such suffering can be addressed with the skillful provision of palliative treatments without resorting to treatments that intentionally hasten death. Experienced palliative care experts are increasingly available to help address the most challenging problems, making the need for direct assistance in dying because of immediate, intractable suffering relatively rare. However, if you happen to be one of those infrequent cases with intractable, unrelievable, severe suffering, you have a real problem that requires a direct medical response.

Of course, not all patients who request medical aid in dying do so because of severe immediate physical suffering that is refractory to treatment. The majority of patients making these requests do so because the dying process is going on too long for them to tolerate, and they are "tired of dying" or intolerant of the debility, which is so often a central part of the late stages of the experience.[3] Such patients may be used to being in control of their own lives and of their own bodies, so becoming extremely dependent upon others is not something they want to accept or to which they can adjust. As a society we tend to admire similarly situated patients who choose to stop life supports to maintain their independence, but should there be no life support to stop in the presence of a similarly debilitating illness, we sometimes accuse patients of having an excessive "need to control" their future.

Every dying person should have a right to excellent palliative care and hospice no matter what other choices they make—be it requesting long shot, aggressive, disease-directed treatment, or treatment devoted entirely to palliation delivered with the help of a hospice program, or, if they are mentally competent and fully informed, treatments that might hasten death. As much as possible, given constraints imposed by one's disease process as well as limitations imposed by the law, patients should be able to die in a way that is consistent with their values and beliefs. Clinicians who care for seriously ill patients should facilitate palliative care for the dying, and they should also become aware of the full range of legally available "last resort" options to help address severe and intractable suffering.[4] Ideally, in our opinion, medical aid in dying should be one of those legally available options of last resort.

Hastening death by medical aid in dying is ethically similar to other legal means of hastening death, including the withholding or withdrawal of life-sustaining treatment, voluntarily stopping eating and drinking, or palliative sedation to unconsciousness.[5] Each of these options will result in death, and each requires some form of physician participation. Health care professionals are arguably more actively involved in the resulting deaths of their patients when withdrawing life-sustaining treatment such as a ventilator than when providing a potentially lethal medication that a patient can take at a time of his or her own choosing. If a clinician took someone off a life support without the permission of the patient or her surrogate decision maker and the patient died, the clinician would potentially be subject to murder charges. Similarly, providing palliative sedation to unconsciousness while not simultaneously providing life-sustaining treatment without permission from the patient or his surrogate decision maker would be both unethical and illegal. The intent and consent of terminally ill patients matter much more than the intent and willingness of health care professionals.

Medical Aid in Dying Should Not Be Considered "Assisted Suicide"

Patients who choose medical aid in dying determine the manner of their deaths just as do many patients who choose other last resort options. They should be carefully evaluated for their decision-making capacity, but they are

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not by definition "suicidal" unless their decision is distorted by associated mental illness. Stark differences exist between dying patients who are making a life-ending decision in the context of a severe, irreversible terminal illness, and those with primarily mental illnesses who die by suicide.[6] Mental illness-related suicide is committed by those who usually do not have a terminal illness and could continue to live but choose not to, usually because of some distortion in their thinking based on potentially treatable mental illness. Such suicides are usually done in isolation, often impulsively and violently, and are tragic. We should do everything in our power, including potentially involuntary hospitalization, to prevent them. To the contrary, in the U.S. states where medical aid in dying has been legalized, it is available only to terminally ill patients who will soon die; it is the result of a carefully thought out process that usually takes several weeks; and it requires consultation from two physicians who must document their findings and almost always includes support of immediate family. The term "assisted suicide" is rejected by the American Public Health Association, American Academy of Hospice and Palliative Medicine, American Medical Women's Association, among others, and in state laws which permit aid in dying. Most recently, the American Association of Suicidology issued a comprehensive statement, "SUICIDE" IS NOT THE SAME AS "PHYSICIAN AID IN DYING" (http://www.suicidology.org/Portals/14/docs/Press%20Release/AAS%20PAD%20Statement%20Approved%2010.30.17%20ed%2010-30-17.pdf).

Medical Aid in Dying Laws Have Worked as Intended as an Ethical Practice in U.S. States Where It Has Been Legalized

There is a growing body of evidence, compiled over two decades from Oregon and Washington, which demonstrates that aid in dying is beneficial to some terminally ill patients by allowing them to escape unwanted suffering, and that it causes no significant harm to patients, families, or the medical profession. It has not undermined efforts to improve hospice and palliative care within these jurisdictions, and in some cases may even improve delivery of palliative care and hospice services.[7] No major problems have emerged as expected by opponents.

Medical aid in dying is thought about frequently but rarely used. In Oregon, one out of six terminally ill patients talk to their family members about the option, and one out of 50 talk to their doctors about it, but it accounts for only about one in 300 deaths.[8] Furthermore, one-third of patients who obtain the medications do not take them, but such dying patients are probably comforted knowing that this option is available.

In U.S. states where the practice is legal, there is no evidence of disproportionate impact on vulnerable populations, nor is there evidence of related coercion or abuse.[9]

There is evidence that family members of those who request aid in dying may feel better prepared and accepting of their loved one's death.[10] There is also evidence that patients who access aid in dying have at least as good, and in some cases better, deaths than others.[11] About 90 percent of those who end their lives by using aid in dying in Oregon are receiving hospice care, so the issue of more palliative care resolving the issue is irrelevant (https://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Documents/year19.pdf). Almost all patients who choose aid in dying have health insurance and most are college educated, as indicated in the above report.

There is no evidence of any slippery slope in the US. Medical aid in dying is only for the terminally ill, mentally competent adults. There is no serious or concerted movement to extend medical aid in dying to those who are not terminally ill. And, there is no evidence that where medical aid in dying is permitted the reputation of the medical profession has suffered in any way.

Seventy-seven percent of New Yorkers support aid in dying, according to a 2015 poll, including large majorities of Democrats, Republicans, Conservatives, and Catholics. Physicians support aid in dying by an almost 2 to 1 margin, 57 percent to 29 percent per a 2016 Medscape poll, though some of those physicians who support the practice in general terms would not want to provide medical aid in dying themselves. Where legal, physicians who do not want to participate are not required to do so.

Medical Aid in Dying Legislation in New York

Legislative efforts to establish medical aid in dying as a right began in New York in 2015. The current bills, A. 2383 (Paulin) and S. 3151 (Savino), also called the Medical Aid in Dying Act, are comprehensive and patterned after laws in other states which permit aid in dying and which have worked as intended.

Although there are no statutory safeguards and protections pertaining to other decisions by patients (or their agents or surrogates) where death results, such as withdrawing life-sustaining treatments, or voluntarily stopping eating and drinking, or palliative sedation, there are numerous safeguards and protections in the Medical Aid in Dying Act. Some of the key provisions are summarized below.

1. To legally request medical aid in dying (MAID), a patient must be at least 18 years of age and have a terminal illness as defined, confirmed by an attending physician and a consulting physician.
2. A patient must make an oral and a written request (on a form provided in the law) for MAID. The written request must be witnessed by 2 adults who attest that the patient: 1) has capacity; 2) is acting voluntarily; and 3) is not being coerced.

3. One witness shall NOT be: 1) a relative; 2) a person entitled to a portion of the patient's estate; 3) an owner, operator or employee of a health care facility where the patient resides or is being treated; or 4) the patient's attending physician, consulting physician or mental health professional, if applicable, who determines capacity.

4. If either the attending or consulting physician believes the patient lacks capacity, the physician must refer the patient for evaluation by a mental health professional. Only patients subsequently found to have capacity may proceed.

5. A patient may rescind his or her request for medication at any time without regard to capacity.

6. Patients must be able to self-administer the medication.

7. An attending physician must have primary responsibility for the care of the patient requesting MAID and the treatment of the patient's terminal illness.

8. Attending physician responsibilities: 1) determine that the patient has a terminal illness; 2) determine that the patient has capacity, made an informed decision, and made the request for aid in dying voluntarily and without coercion; 3) inform the patient of the need for a consulting physician's confirmation, and refer if requested; 4) refer the patient to a mental health professional for evaluation if the physician believes the patient lacks capacity; 5) provide information and counseling regarding palliative care; 6) ensure the patient is making an informed decision by discussing with the patient the patient's diagnosis and prognosis, the potential risks associated with taking the medication, the probable result of taking the medication, the possibility that the patient may choose to obtain the medication but not take it, the feasible alternatives or additional treatment options including hospice and palliative care; 7) discuss with the patient the importance of taking the medication with someone else present and not taking the medication in public; 8) inform the patient that he/she can rescind the request for medication at any time; 9) document in the patient's medical records all MAID actions as specified; 10) ensure that all appropriate steps have been carried out in accordance with the MAID act; 11) offer the patient an opportunity to rescind the patient's request prior to writing the MAID prescription.

9. The consulting physician must: 1) examine the patient and medical records; and 2) confirm in writing that the patient i) has a terminal illness, ii) has capacity, iii) is making an informed decision, and iv) is acting voluntarily and without coercion.

10. A mental health professional asked to determine the capacity of a patient must, in writing, report to the attending and consulting physicians his/her conclusions whether the patient has capacity. If the mental health professional determines that the patient lacks capacity, the patient may not receive MAID.

11. A patient requesting MAID shall not be considered "suicidal," and a patient who self-administers aid in dying medication shall not be deemed to have committed suicide.

Conclusion

The lessons from Oregon or Washington where medical aid in dying has now been legal for a combined total of almost 30 years are that their laws have functioned as intended, there have been no abuses, there is no evidence that such laws in any way undermine progress in promoting palliative care and hospice care as standards of care for seriously ill and dying patients, and there are currently no concerted efforts in those states to repeal or amend those laws. We are confident that the provisions, safeguards, protections and restrictions outlined above ensure that, if enacted, the Medical Aid in Dying Act will work well in New York and provide another needed, albeit infrequently used, last resort option for terminally ill New Yorkers.

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How the 2017 Tax Reform Act Affects Estate Planning for High-Net Worth Individuals

By Kevin Matz

On Dec. 20, 2017, Congress passed far-reaching changes to the IRC that were signed into law by the president on Dec. 22, 2017 as Public Law 115-97 (the "2017 Tax Reform Act," also informally known as the "Tax Cuts and Jobs Act"). The new tax law provides significant estate planning opportunities for high net worth individuals to take advantage of a temporary doubling from $5,000,000 to $10,000,000 (subject to indexing) of the estate, gift, and generation-skipping transfer ("GST") tax exemptions. This temporary doubling of the federal estate, gift, and GST tax exemptions (as indexed) from $5,490,000 in 2017 to approximately $11,180,000 per person (and to approximately $22,360,000 for a married couple) as of Jan. 1, 2018 creates both (1) a window of opportunity for gifting due to the significant expansion of federal gift and GST tax exemptions and (2) a need to review existing wills and other estate planning documents to ensure that they continue to carry out planning objectives. (The actual amounts of the new exemptions are subject to confirmation by the IRS.)

Sunset of the Expanded Exemptions in 2026 Back to Pre-2018 Exemption Levels

There is a significant wrinkle in the new law, however, as it "sunsets" its doubling of the federal estate, gift, and GST tax exemptions on Jan. 1, 2026, reverting to their pre-2018 exemption levels as indexed for inflation. This will create incentive for wealthy individuals to begin to use their increased exemptions at the risk of losing them come 2026.

That being said, there is some concern that the sunset provisions of the new law could potentially pose a "clawback risk" if an individual were to gift away his or her entire gift tax exemption during that person's lifetime and then die after Dec. 31, 2025—at a time at which the unified estate and gift tax exemption was less than the amount that the individual had gifted away during that person's lifetime. Congress has recognized the need to address this potential issue by authorizing the U.S. Department of the Treasury to issue guidance. Specifically, new IRC section 2001(g)(2) provides as follows:

> (g) Modifications to tax payable.—
>
> (2) MODIFICATIONS TO ESTATE TAX PAYABLE TO REFLECT DIFFERENT BASIC EXCLUSION AMOUNTS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out this section with respect to any difference between—
>
> (A) the basic exclusion amount under section 2010(c)(3) applicable at the time of the decedent's death, and
>
> (B) the basic exclusion amount under such section applicable with respect to any gifts made by the decedent.

It is anticipated that the U.S. Department of the Treasury, in accordance with Congress's mandate, will provide guidance to eliminate this clawback risk.

Estate Planning with an $11,180,000 Exemption ($22,360,000 for a Married Couple)

Under the new tax law, individuals are now able to transfer approximately $11,180,000 free of estate, gift, and GST tax during their lives or at death. A married couple will be able to transfer approximately $22,360,000 during their lives or at death. Due to the portability of the deceased spouse's unused exclusion amount, any unused federal estate tax (but not GST tax) exemption for the first spouse to die may be used by the surviving spouse for lifetime gifting or at death. (The new tax law did not change the 40% tax rate for estate, gift, and GST taxes, or modify the rules providing for a step-up in basis to fair market value at death that generally apply to most inherited property.)

Individuals who previously exhausted their $5,490,000 gift tax exemption now have the opportunity to gift another approximately $5,690,000—or approximately $11,380,000 in the case of a married couple who has previ-

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ously exhausted their gift tax exemptions—and can even make such gifts to grandchildren or more remote descendants (or to trusts for their benefit) without incurring a GST tax.

The annual exclusion-gifting amount was $14,000 (or $28,000 if spouses elect to split gifts) for gifts made in 2017. This amount is subject to indexing in future years and is expected to increase to $15,000 (or $30,000 if spouses elect to split gifts) for gifts made in 2018. (The amount of the gift tax annual exclusion awaits confirmation from the IRS.)

The increase of the exemptions gives individuals vast opportunities to leverage their gifting for multiple generations through the following techniques:

- topping off prior planning by making gifts to existing and/or new family trusts, including generation-skipping trusts, insurance trusts, spousal lifetime access trusts ("SLATs") and grantor retained annuity trusts ("GRATs")
- making new sales to intentionally defective grantor trusts ("IDGTs") or, where appropriate, making cash gifts to facilitate the prepayment of existing installment obligations to senior family members
- making new intra-family loans or, where appropriate, cash gifts to facilitate the prepayment of existing loans from senior family members.

Special Considerations for New York Residents: Expanded Federal Exemptions Give New Yorkers Greater Opportunities to Plan Ahead to Reduce Their New York Taxable Estates and to Avoid the New York Estate Tax Cliff

New York State enacted legislation in 2014 reforming its estate, gift, and GST tax laws. One of the major changes of the 2014 New York tax law was the gradual increase of the New York State estate tax exclusion from $1,000,000 to the federal level—anchored, however, to the exemptions provided under then-existing federal tax law. As of April 1, 2017, the New York estate tax exclusion amount increased from $4,187,500 to $5,250,000. The New York estate tax exclusion amount is scheduled to increase further on Jan. 1, 2019 to $5,000,000, as indexed for inflation with 2010 as the base year for this purpose (this amount will very likely exceed $5,600,000).

Planning to maximize the use of both spouses' New York exclusion amounts is a bit tricky because New York does not recognize portability of a deceased spouse's unused exclusion amount to the surviving spouse, as federal law does. As a result, many New Yorkers will continue to incorporate credit shelter trusts or disclaimer trusts in their wills to maximize the benefits of both New York and federal law exclusion amounts.

A dramatic consequence to New Yorkers of the doubling of the federal estate tax exemption under the 2017 Tax Reform Act is that there is now an approximately $5,930,000 spread between the federal and New York State estate tax exemptions. Furthermore, the benefits of an increase in the New York exclusion amount are effectively denied to wealthier New Yorkers. There is a cliff built into the tax calculation, which quickly phases out the benefits of the exclusion if the decedent's New York taxable estate (plus certain taxable gifts made within three years of death) is between 100% and 105% of the exclusion amount available on the date of death. The cliff completely wipes out the benefits of the exclusion if the decedent's New York taxable estate (and any such gifts added back) exceeds 105% of the exclusion amount available on the date of death. As a result, the increase in the New York estate tax exclusion amount only benefits individuals whose New York taxable estates (including taxable gifts made within three years of death) fall below the New York exclusion amount in effect on the date of death. The New York estate tax exemption is also not portable to spouses for lifetime gifting or for use on the survivor's New York estate tax return, in sharp contrast to the federal estate tax exemption.

A comparison of the "spread" between the federal and New York State estate tax exemptions under both prior law and the 2017 Tax Reform Act is set forth below.

Prior Law

Death of Death	Federal Exclusion	New York Exclusion	Spread
April 1, 2017 to Dec. 31, 2017	$5,490,000	$5,250,000	$240,000
Jan. 1, 2018 to Dec. 31, 2018	$5,600,000	$5,250,000	$350,000
Jan. 1, 2019 and beyond	Same	Same	$0

2017 Tax Reform Act

Date of Death	Federal Exclusion	New York Exclusion	Spread
Jan. 1, 2018 to Dec. 31, 2018	Approx. $11,180,000	$5,250,000	Approx. $5,930,000
Jan. 1, 2019 to Dec. 31, 2025	Approx. $11,180,000*	$5,600,000*	Approx. $5,580,000*
Jan. 1, 2026 and beyond	$5,600,000*	$5,600,000*	$0

* Based on 2018 inflation-adjusted amounts, but could be higher

As a result of the dramatic spread between the federal and New York estate tax exemptions, decedents whose estates are below the Federal estate tax exemption amount may still owe significant New York estate tax if their estates exceed the New York estate tax exemption amount. For example, if an unmarried New York resident dies in 2018 with an estate of $10,000,000 (assuming no lifetime gifts were made), he or she will owe no federal estate tax but will owe $1,067,600 in New York estate tax (based upon current rates).

New Yorkers whose estates are within the 100%-105% "cliff" range—or even whose estates only slightly exceed the New York estate tax exemption amount—may consider gifting such amount as would bring his or her taxable estate below the New York estate tax exemption amount. As an example, an unmarried New Yorker who has assets with a current value of $6,000,000 and is in relatively good health may wish to consider gifting $400,000 at this time to his or her children or other intended beneficiaries. If such person dies more than three years after making the gift (or after the three-year add back rule has expired—it is currently scheduled to expire for individuals who die on or after Jan.1, 2019), when the New York exclusion amount will be $5,600,000 or greater, with a taxable estate of $5,600,000, his or her estate will owe no New York or federal estate tax.

In contrast, if the gift is not made and the person dies on Jan. 1, 2021, with a taxable estate of $6,000,000, the estate will owe $510,800 in New York estate tax (based upon current rates). To summarize, by making a gift of $400,000 today, an individual can save his or her beneficiaries over $500,000 in New York estate tax if he or she survives three years after making the gift. This recommendation will not be affected by any subsequent changes to the federal estate, gift, and GST tax laws.

A further benefit to New York residents making lifetime gifts within the parameters of the expanded federal exemption is the ability to move assets out of the New York taxable estate without incurring any state-level gift tax. New York has no gift tax and adds back to the gross estate of New York resident decedents only certain gifts made within three years of death. As a result, New Yorkers have the ability to insulate gifted property from New York estate tax (provided that the donor survives for three years) and may have the added benefit of reducing their New York taxable estate below the applicable exclusion amount on the date of their death. This can avoid the confiscatory impact of the "New York Estate Tax Cliff."

For example, a gift of $11,180,000 by a New York resident who survives the gift by three years can potentially save $1,788,800 of New York State estate tax (and possibly even more than that if the New York Estate Tax Cliff would otherwise apply). The New York estate tax savings could potentially be doubled (to $3,577,600) if both spouses were to fully use their federal exemptions by making lifetime gifts and each spouse survives the gift by three years.

The potential tax savings of such a gifting program should also be considered in tandem with the temporary expansion of the federal estate, gift, and GST tax exemptions before the expanded federal exemptions revert to pre-2018 exemption levels on Jan. 1, 2026. If one were also to factor in the sunset of the doubling of the federal estate, gift, and GST tax exemptions on Jan. 1, 2026 back to pre-2018 exemption levels, the combined federal and New York State estate tax savings from such gifts at this time would be increased by another approximately $1,800,000 ($3,600,000 for a married couple) to more than $3,500,000 for an individual and to more than $7,000,000 for a married couple, as compared to persons who do not embark on a gifting program and allow their expanded federal exemptions to revert to pre-2018 exemption levels on Jan. 1, 2026.

"New York has no gift tax and adds back to the gross estate of New York resident decedents only certain gifts made within three years of death."

Popular Wealth-Transfer Techniques to Leverage Expanded Federal Gift and GST Tax Exemptions Remain Viable

In light of the significant increase to the federal estate, gift, and GST tax exemptions under the 2017 Tax Reform Act, individuals who wish to reduce or eliminate future estate taxes may consider maximizing their use of the increased gift tax exemption before the exemptions revert to pre-2018 levels on Jan. 1, 2026. Strategies that remain viable and attractive include dynasty (generation-skipping) trusts, SLATs, GRATs, intra-family loans, and sales to intentionally defective grantor trusts.

Dynasty (Generation-Skipping) Trusts

Through coordinated use of their federal gift and GST tax exemptions, individuals can create trusts with an aggregate value of up to approximately $11,180,000 (approximately $22,360,000 per married couple), which may benefit several generations of descendants while insulating the assets from gift, estate, and GST taxes. These are sometimes referred to as "dynasty trusts."

Dynasty trusts are generally structured as "intentionally defective grantor trusts" (or "IDGTs"). An IDGT provides two independent planning opportunities. First, the grantor will pay the income tax on the income generated by the trust, including capital gains tax, thereby allowing the trust to grow for the grantor's children and their issue while unencumbered by the income tax and while reducing the grantor's estate. Second, the grantor may engage in transactions with an IDGT without any income tax consequences. (See Revenue Ruling 85-13.)

Spousal Lifetime Access Trusts ("SLATs")

Dynasty trusts may also be structured to give the grantor's spouse access to the trust as a discretionary beneficiary of trust income and principal. Such trusts can provide comfort that transferred wealth would still be available for a married couple if needed down the road, and they can essentially serve as a "rainy day fund" while allowing one to take maximum advantage of the new tax laws. Such trusts with spousal access rights are sometimes referred to as "spousal lifetime access trusts," or "SLATs," and they will generally be grantor trusts for income tax purposes during the grantor's lifetime.

Taking Advantage of Extraordinary Planning Opportunities Now

Under the 2017 Tax Reform Act, the federal gift, estate, and GST tax exemptions increased to approximately $11,180,000 on Jan. 1, 2018 (approximately $22,360,000 for a married couple), allowing individuals extraordinary multi-generational estate planning opportunities to use these exemptions through lifetime gifting before the exemptions revert to their pre-2018 levels on Jan. 1, 2026. Selecting the optimal wealth transfer technique and the right assets to gift (taking into account the income tax basis of the assets to be gifted) are of paramount importance.

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Submission Guidelines

The Senior Lawyer welcomes the submission of articles of timely interest to members of the Section in addition to comments and suggestions for future issues. Articles should be submitted to the Editor whose name and address appears on this page.

For ease of publication, articles should be submitted via e-mail to the Editor, or if e-mail is not available, on a disk or CD, preferably in Microsoft Word or WordPerfect (pdfs are NOT acceptable). Accepted articles fall generally in the range of 7-18 typewritten, double-spaced pages. Please use endnotes in lieu of footnotes. The Editor requests that all submissions for consideration to be published in this journal use gender-neutral terms where appropriate or, alternatively, the masculine and feminine forms may both be used. Please contact the Editor regarding further requirements for the submission of articles.

Unless stated to the contrary, all published articles represent the viewpoint of the author and should not be regarded as representing the views of the Editor, Board of Editors or the Section or substantive approval of the contents therein.

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