NYSBA SUMMER/FALL 2019 | VOL. 11 | NO. 1

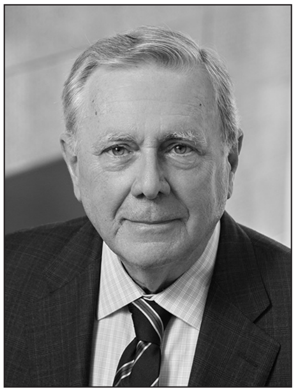
The Senior Lawyer

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

In This Issue

Message from the Chair

Vision of the Future



I took over as Chair from Carole Burns on June 1, 2017 and now I'm at the end of my two-year term. We have done some exciting new things, and the Section will continue to be active under the leadership of our new Chair, Anthony Enea of White Plains. Much of the activity surrounded getting senior lawyers together to talk to each other about their transitions. We developed the concept of ***Meeting of the Minds*** as a series of regional "Gatherings" created by the SLS in partnership with other bar associations around the state. The goal was to connect senior lawAyers looking to transition from full-time practice and whether there could be a connection with younger attorneys seeking personal growth in the profession. These gatherings are designed to bring lawyers together with a diverse group of speakers, coaches, medical professionals, and experienced attorneys to share their success in handling life transitions. The first Gathering was held in the fall with the Monroe County Bar Association. It got great reviews from attendees. Senior attorneys commented this was their first time to talk with contemporaries about transitioning.

The next Gathering was held during the 2019 Annual Meeting in New York City in January. A larger group spent the morning together, and it included a round table discussion about the importance of the Gatherings being co-sponsored with local bar associations, NYSBA's Young Lawyers Section and the General Practice Section. We reached out to the courts, the law school community, and health care providers who share our concerns about the aging legal workforce and the future of the profession. We want to continue these Gatherings around the state with local bars. If you're interested in hosting one, let me know.

We continue to work with our consultant Steve Gallagher in planning new initiatives. You will find Steve's contributions on the Section's On-line Discussion Board, and you should keep an eye out for his writings in *The Senior Lawyer* and *NYSBA Journal*.

We will continue our work with other Sections to conduct joint programming to promote Meeting of the Minds, to reduce a siloed approach to lawyer well-being. Steve will continue to work with program coordinating committees to find topics and speakers, and to explore new ways of promoting these programs. We will continue to find ways to connect senior lawyers with younger lawyers interested in growing their own business.

As we continue to hold Gatherings throughout the state, we will continue producing 10-minute Micro-Learning videos for the new website. We are planning on making several short videos based on the *New York State Bar Association Planning Ahead Guide*.

Be sure to read Stephen Gallagher and Leonard Sienko's provocative article on Elder Orphans in this edition of The Senior Lawyer.

We are working to establish a series of webinars called *Lawyer Well-Being* that will start in October 2019. This series will be open to all lawyers for the purpose of promoting lawyer well-being and resilience in the legal community, improve lives, nurture competence, and elevate the standing of the legal profession. We believe our members have the expertise to help other lawyers work their way through life's transitions. We also feel that we can attract a broad range of outside speakers in related areas to offer monthly webinars throughout the year.

These Zoom Video Webinars will be offered for free on a once-a-month basis on the second Tuesday of each month from noon to 12:30 p.m. No CLE credit will be offered, but all sessions will be recorded, and these on-demand webinars will be archived to begin building a library for *Lawyer Well-Being* materials. Other sections and committees have valuable content that can be brought into this central *Lawyer Well-Being* community.

Some of the early topics for our webinars suggested by our members include:

1. Social Security issues
2. Senior life planning beyond the financial plan
3. Medicaid issues
4. Planning for long-term care expenses
5. Valuation of a professional practice
6. Planning for unforeseen contingencies – death, illness or infirmity
7. Insurance coverage issues
8. End-of-life choices New York
9. Financial Strategies and Debt Management

My thanks to past Chair Carole Burns for all of the advice she has given to me. I wish Anthony Enea a great term and I will be ready to assist him in any way I can.

C. Bruce Lawrence
cblawrence@boylancode.com

Table of Contents

Message from the Editor

It is once again my pleasure to bring you articles on substantive law and on issues which may be of particular interest to our Section members.

As noted in the Message of our Section's Chair, C. Bruce Lawrence, Stephen P. Gallagher, a consultant working with our Section to implement the "Gatherings" concept, has again joined with Leonard E. Sienko, Jr., to author a very personal and thought-provoking article intended to start a dialogue about the dynamics of the aging process, with particular emphasis on those who are alone or, using their term, are "Elder Orphans." Personal reflections, such as those of Messrs. Gallagher and Sienko, can be helpful on several different levels to others dealing with the personal and professional challenges incident to life transitions. If you have experience with this, please consider sharing in an article for "The Senior Lawyer" so that the dialogue continues.

At the 2019 Annual Meeting our Section awarded our annual Jonathan Lippman Pro Bono award to Ronald Mayer and to Shirani Ponnambalam. Mr. Mayer was nominated by Caprice Jenerson of The New York Legal Assistance Group (NYLAG). Their article "Playing the Back Nine: Collaborating with Senior Lawyers in Closing the Justice Gap," describes the important work being done by NYLAG, volunteer opportunities and staff support, and Mr. Mayer's successful transition from being a banking lawyer to a volunteer at NYLAG concentrating in health care law. Ms. Pannambalam was nominated by Pace Women's Justice Center for her work on behalf of survivors of domestic violence, sexual abuse and elder abuse. More on Pace Women's Justice Center and Ms. Ponnambalam to come.

The 2016 Spring/Summer issue of "The Senior Lawyer" contained "Ethical and Professional Considerations for the Retiring Attorney" by Matthew Lee-Renert. Mr. Lee-Renert recently had occasion to update that material in connection with his presentation at our Section's 2018 Fall Program and that material is reproduced in this issue. For those of our Section members who are or may be contemplating retirement, this article should be required reading.

In this issue you will also find:

- "The Little Known and Understood Living Benefits of Life Insurance" by Henry Montag and Bill Boersma;
- "Highlights of New York's Medicaid Law" by Sara Meyers, Esq.;
- "A Brief Primer on Discharging Tax Debt Through Bankruptcy" by Leo Gabovich;
- "Attorneys: Will Yours Be a Future by Chance or a Future by Design?" by Lawrence J. Ganim;
- "The Student Loan Crisis: How It's Affecting New Lawyers and the Firms Hiring Them" by Leslie Tayne; and
- "Married Couples Should/A Surviving Spouse Should," a checklist prepared by Kathleen M. Rehl, something that all, regardless of age, should take advantage of.

Please send me any requests/suggestions you may have for articles to be included in future issues and consider writing 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 November 1, 2019.

Carole A. Burns

Elizabeth J. McDonald

Elizabeth J. McDonald passed away on August 2, 2019, after a courageous battle with cancer.

Beth was an extremely accomplished attorney who had a distinguished career spanning 40 years. A graduate of Elmira College, where she was class valedictorian, and Albany Law School, Beth began her legal career at the NY Court of Appeals and has served for the last 8 years as Principal Court Attorney, Trial Part, for Rochester City Court.

She previously served as General Counsel to PSC Corp., Choice One Communications and the Rochester City School District, as NYS Assistant Attorney General, in private practice with Harter, Secrest and Emery, and as an Adjunct Professor of Business Law at Monroe Community College.

Beth was a true professional who was widely respected for her strong legal skills, high standards of integrity and work ethic.

She was involved in numerous professional organizations devoted to improving the legal profession, including service as a Member of the House of Delegates of the NYS Bar Association and the American Bar Association, Chair-Elect and Secretary of our Senior Lawyers Section, Director of the NY Bar Foundation, Trustee of the Monroe County Bar Association and Dean of its Academy of Law, Director of the Legal Aid Society of Rochester, and Director of the Volunteer Legal Services Project.

Beth also served the community as a volunteer for Meals on Wheels, Supreme Court Settlement Week Mediator, Girl Scout leader and guest lecturer at local schools.

Beth was born in Rome, NY and is survived by her life partner, Kurt Pfeiffer of Pittsford, NY, two sisters, Kathleen MacDonald and Laurel Lange, along with nieces, nephews, great-nieces and great nephews.

Beth was a kind, caring person who was devoted to family, friends, and the legal profession. She never said “no” to a worthy cause and she touched many lives. She will long be remembered.

Contributions in her memory may be made to the Volunteer Legal Services Project, 1 W. Main St. #500, Rochester, NY 14614 or to the NY Bar Foundation, One Elk Street, Albany, NY 12207.

Message from the President

Diversifying the Legal Profession: A Moral Imperative

By Hank Greenberg

Hank Greenberg

No state in the nation is more diverse than New York. From our inception, we have welcomed immigrants from across the world. Hundreds of languages are spoken here, and over 30 percent of New York residents speak a second language.

Our clients reflect the gorgeous mosaic of diversity that is New York. They are women and men, straight and gay, of every race, color, ethnicity, national origin, and religion. Yet, the law is one of the least diverse professions in the nation.

Indeed, a diversity imbalance plagues law firms, the judiciary, and other spheres where lawyers work. As members of NYSBA's Senior Lawyers Section, you have surely seen this disparity over the course of your law practices.

Consider these facts:

- According to a recent survey, only 5 percent of active attorneys self-identified as black or African American and 5 percent identified as Hispanic or Latino, notwithstanding that 13.3 percent of the total U.S. population is black or African American and 17.8 percent Hispanic or Latino.
- Minority attorneys made up just 16 percent of law firms in 2017, with only 9 percent of the partners being people of color.
- Men comprise 47 percent of all law firm associates, yet only 20 percent of partners in law firms are women.
- Women make up only 25 percent of firm governance roles, 22 percent of firm-wide managing partners, 20 percent of office-level managing partners, and 22 percent of practice group leaders.
- Less than one-third of state judges in the country are women and only about 20 percent are people of color.

This state of affairs is unacceptable. It is a moral imperative that our profession better reflects the diversity of our clients and communities, and we can no longer accept empty rhetoric or half-measures to realize that goal. As Stanford Law Professor Deborah Rhode has aptly observed, "Leaders must not simply acknowledge the importance of diversity, but also hold individuals accountable for the results." It's the right thing to do, it's the smart thing to do, and clients are increasingly demanding it.

NYSBA Leads On Diversity

On diversity, the New York State Bar Association is now leading by example.

This year, through the presidential appointment process, all 59 NYSBA standing committees will have a chair, co-chair or vice-chair who is a woman, person of color, or otherwise represents diversity. To illustrate the magnitude of this initiative, we have celebrated it on the cover of the June-July *Journal*. [www.nysba.org/diversitychairs]

Among the faces on the cover are the new co-chairs of our Leadership Development Committee: Albany City Court Judge Helena Heath and Richmond County Public Administrator Edwina Frances Martin. They are highly accomplished lawyers and distinguished NYSBA leaders, who also happen to be women of color.

Another face on the cover is Hyun Suk Choi, who co-chaired NYSBA's International Section regional meeting in Seoul, Korea last year, the first time that annual event was held in Asia. He will now serve as co-chair of our Membership Committee, signaling NYSBA's commitment to reaching out to diverse communities around the world.

This coming year as well we will develop and implement an association-wide diversity and inclusion plan.

In short, NYSBA is walking the walk on diversity. For us, it is no mere aspiration, but rather, a living working reality. Let our example be one that the entire legal profession takes pride in and seeks to emulate.

Hank Greenberg can be reached at hmgreenberg@nysba.org.

Highlights of New York's Medicaid Law

By Sara Meyers

In 1965 the Medicaid Assistance Program, commonly known as Medicaid, was created as part of the same legislation that created the Medicare program. Medicaid was created as a health insurance program for the poor. It is a "means tested" entitlement program wherein individuals are entitled to benefits if they are financially categorically eligible. It is a jointly financed federal-state program.

Categories of Medicaid Coverage

1. Community Medicaid - Physicians, dentists, and other professional services provided to individuals in a hospital, clinic or outpatient; and Home Care Services, including, home health services, such as personal care services, nursing and home health aide.
2. Institutional Medicaid - nursing homes.

Eligibility for Medicaid

To be eligible for Medicaid, the applicant must be:

(a) A U.S. citizen or permanent lawful resident; and

(b) Age 65 or older, blind or disabled as defined by the State's Medicaid provisions; and

(c) Resident of the state and county where the application is made. Residency requires a physical presence within the state and the intent to remain.

Additionally, Medicaid is a "means tested" program; thus, there are both resource and income eligibility requirements.

For a Single Individual

Income: $859 per month (plus a $20 "disregard") for senior citizen residing in the community; a nursing home resident is only allowed a $50 per month "personal incidental allowance."

Resources: $15,450

For a Couple in the Community

Income: $1,267/month per couple plus $20 disregard

Resources: $22,800 Assets per couple

Surplus Income Program

A community/home care Medicaid's income which exceeds the Medicaid income level of $879 per month must use the income which exceeds $879 to pay some of their medical expenses or enroll in the Medicaid "surplus income" program and pay Medicaid the amount of the income above $879.

As an alternative to enrolling with the surplus income program, a Medicaid applicant/recipient may enrolled in a pooled income-only trust. Such enrollment will enable them to shelter the "excess income" or "surplus income" while remaining eligible for Medicaid. Said trust receives "excess monthly income" that in turn can be used to pay monthly expenses for the individual enrolled, such as utility expenses, rent and groceries.

For the Community Spouse of an Institutional Medicaid Recipient

Income: $3,160.50 per Month

Resources: Minimum Federal Community Spouse Resource Allowance (CSRA) is $74,820 Maximum CSRA is $126,420

Resources are any assets of the individual and/or couple, other than exempt resources, including jointly held assets. Exempt resources are defined for example to be retirement account (IRA, qualified annuity) in pay-out status, burial space, the home in which the applicant/recipient resides or if away to which he or she intends to return, household and personal effects, automobile, jewelry furniture, paintings, silverware and china.

Nursing Home Regional Rates for 2019

Region	Monthly Regional Rates
Long Island	$13,407
New York City	$12,419
Northern Metropolitan	$12,636
Northeastern	$11,280
Rochester	$12,342
Western	$10,556
Central	$10,068

The Deficit Reduction Act of 2005 – Effective February 8, 2006

On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 (DRA) legislation into law. New York State Department of Health on July 20, 2006 issued Administrative Transmittal #060MM/ADM-5, which implemented the provisions of the DRA in New York effective August 1, 2006.

The DRA affects Medicaid eligibility and the transfer of asset rules in three significant ways:

1. Creation of a 60-month look back period for all transfers of assets, irrespective of whether they are outright transfers or transfers to certain trusts.

2. The penalty period (period of disqualification for Medicaid) created by a non-exempt transfer of assets will commence on the later of (a) the first day of the month after assets have been transferred, or (b) the date on which an individual is both receiving institutional level of care (i.e., is in a nursing home) and whose application for Medicaid would be approved, but for the imposition of a penalty period at that time. Multiple transfers made during the look back period are accumulated into one total amount to determine the penalty period.

   In the event that the imposition of a transfer penalty would create an undue hardship for an applicant, an exception may be made to the application of the penalty.

   Thus, the penalty period for a non-exempt transfer of assets made within the 60-month look back period will commence when the applicant has $15,450 or less, is receiving institutional care (in a nursing home), has applied to Medicaid for assistance, and the application would be approved, but for the penalty period imposed.

   It should be noted that no penalty period is imposed for transfers made by an applicant applying for community/home care Medicaid.

3. An applicant's Homestead (house, condo, co-op) with equity above $878,000 in New York for 2019 will render an applicant ineligible for Medicaid. This provision does not apply if a spouse, child under age of 21, or a blind or disabled child resides in the house. Federally the amount is $500,000; however, each state is given the ability to increase the amount of permitted home equity to an amount not in excess of $878,000. Additionally, homeowners have the ability to reduce their equity through a reverse mortgage or home equity loan.

Some of the other significant changes contained in the DRA with respect to Medicaid are that: (a) annuities will be required to name the state as a remainder beneficiary, and annuities that have a balloon payment will be considered a countable asset; (b) multiple transfers in more than one month must be aggregated; (c) the "income first" rule will be mandatory in all states (already required in New York); (d) penalty periods will be imposed for partial months (rounding down will no longer be permitted); (e) Partnership long-term care insurance policies will be permitted in additional states other than the four presently permitted, including New York.

Transfer of Asset Rules

Because Nursing Home Medicaid is a "means tested" program, if assets are "transferred," e.g., given away without receipt of something of equivalent value in return ("uncompensated transfer"), this will usually trigger a period of ineligibility for Medicaid.

Assets that are transferred by gift within 60 months ("look back period") of the date of the application for Medicaid is made will cause the transferor to be ineligible for Medicaid for a period of time ("penalty period").

The penalty period is determined by taking the value of the gift and dividing it by the average cost of a nursing home per month in the county where the Medicaid applicant resides as determined by the Department of Social Services (average monthly rate for nursing home care for Westchester County is $12,636 as established by Department of Social Services for 2019). Thus, if a gift valued at $100,000 was made, the transferor residing in Westchester County would be ineligible for Medicaid for approximately 7.91 months.

"Assets that are transferred by gift within 60 months ("look back period") of the date of the application for Medicaid is made will cause the transferor to be ineligible for Medicaid for a period of time ("penalty period")."

Transfers of assets by the spouse of a Medicaid applicant made within 60 months of the Medicaid application will also disqualify the applicant for the appropriate penalty period. Furthermore, the spouse of a Medicaid applicant who sets up a trust may well be making a transfer which could result in a period of ineligibility for the applicant. If a spouse makes a non-exempt transfer after the applicant has been approved for Medicaid and has been in a nursing home for 30 days, the transfer would not trigger a period of ineligibility for the spouse that has been approved. However, the spouse making the transfer has created a period of ineligibility for him or herself.

For a transfer made within the 60-month look back period, the penalty period will not commence on said transfer until the applicant is "otherwise eligible" for Medicaid.

Utilizing a Medicaid Crisis Plan

After keeping up to $15,450 in separate bank account and paying for a pre-need irrevocable burial agreement, if the Medicaid applicant so chooses, the Medicaid applicant would gift approximately 40-45% of his or her assets. Simultaneously, the applicant will lend to a family member/friend his or her remaining excess resources to be returned monthly pursuant to the terms of a Deficit Reduction Act of 2005 (DRA) compliant promissory note. The Promissory Note will be treated as an uncompensated transfer (gift) of assets unless it satisfies the following criteria:

(a) the repayment term is actuarially sound;

(b) payments made in equal amounts during term of loan, with no deferral and no balloon payments made; and

(c) prohibits cancellation of the balance upon the death of the applicant/recipient.

The gift of assets made by the Medicaid applicant will trigger a period of ineligibility for Medicaid-covered nursing home care. The monthly promissory note payments will pay for the cost of nursing home care during the period of ineligibility. The monthly payments are made to the Medicaid applicant as the "payee" under the promissory note from the "maker," the person to whom the Medicaid applicant loaned the money, pursuant to the DRA compliant promissory note. In turn the payee will pay the nursing home.

Once the Medicaid applicant's resources are below $15,450, he or she should then be eligible for Medicaid in all respects, other than for the uncompensated gift made. A Medicaid application can then be filed with the local Department of Social Services (DSS). The application should be denied on the sole basis of the gift. The denial serves as formal notification that the Medicaid penalty period has commenced.

The notice will state the length of the period of ineligibility for Medicaid-covered nursing home care. When the penalty period expires, a second Medicaid application is filed with DSS, which should be approved.

The monthly promissory note payments paid by the maker coupled with the applicant's monthly Social Security and other income, such as a pension, will provide an income stream from which he or she will pay the nursing home during the Medicaid period of ineligibility. The total monthly income—the promissory note payment, Social Security income and pension, if you receive one—must total less than the private pay rate of the nursing home, amounting to a monthly shortfall. This shortfall amount should not be paid to the nursing home until the Medicaid application has been approved by Medicaid.

Medicaid Home Care and Managed Long-Term Care

Medicaid recipients and applicants who are eligible for both Medicare and Medicaid (known as dual eligible), who are over the age of 21 and are in receipt of or are in need of home care services for more than 120 days in a calendar year, will be required to enroll with a Medicaid Managed Long Term Care (MLTC) provider.

A home care Medicaid applicant files her Medicaid application with DSS. Once Medicaid is approved, the applicant applies for home care services through the MTLC provider. Prior to enrollment with an MLTC, an evaluation must be performed by New York Medicaid Choice (Maximus) and a determination will be made whether personal home care services will be deemed appropriate. Maximus must complete its evaluation before an applicant is evaluated by and enrolled with an MLTC.

MLTC providers only authorize home care services for a period of six months. Before the conclusion of the six-month period, the MLTCs must perform a reassessment of home care services. If the MLTC determines that the recipient requires fewer home care hours, or that she is no longer appropriate for home care services, the person must appeal first through the provider. Only after exhausting all internal appeals, the recipient may request a Fair Hearing through the Department of Health (the New York State agency that oversees the local Departments of Social Services) to challenge the reduction or termination. During the pendency of the appeal process, there are no aid continuing rights. As such, the change in service will go into effect. If the appellant should win at any level, only then will services revert back to the prior amount of home care hours.

Sara Meyers is a member of the firm of Enea, Scanlan & Sirignano, LLP, and concentrates her practice on Elder Law, Estate Planning, Special Needs Planning, Guardianships, and long-term care planning strategies, with a focus on Medicaid home care and nursing home. She has been named to the 2013-2018 New York Metro Super Lawyers list in Elder Law.

Ms. Meyers is a frequent lecturer for Elder Law programs sponsored by the New York State and Westchester County Bar Associations. She is a member of the New York State Bar Association, the Elder Law and Special Needs Section (Executive Committee, vice-chair Guardianship Committee and 9th District Delegate; Editor, *Elder Law and Special Needs Journal*) and Trust and Estates Section, and a member of the Westchester County Bar Association (Co-Chair Guardianship Committee, past Co-Chair of the Elder Law Committee) and is an editor of the *Westchester County Bar Journal*.

This material first appeared in the Senior Lawyers Section's Fall 2018 CLE program, *Retirement Planning 101: The Top Six Things Both Clients and Attorneys Planning for Retirement Must Understand and Do*. The Medicaid numbers have been updated for 2019.

Highlights of New York's Medicaid Law—PowerPoint

By Sara Meyers

This PowerPoint was part of the Senior Lawyers Section's Fall 2018 CLE program, "*Retirement Planning 101: The Top Six Things Both Clients and Attorneys Planning for Retirement Must Understand and Do.*" The Medicaid numbers have been updated for 2019.

The Cost of Long Term Care

Cost of Nursing Home Care

- NY:
  - Westchester: Approx. $177,000/year
  - NYC: $191,000/year
  - Long Island: $191,000/year

Cost of Home Care

- Approx. $21/hour
- If receiving 8 hours of care per day, seven days a week
  - $61,320/year

Categories of Medicaid Coverage

- Community/Home Care Medicaid – Physicians, dentists, hospital, pharmaceutical, home care services
- Institution Medicaid – nursing homes services

Medicaid Eligibility

Federal Requirements

- Must be a U.S. citizen or permanent lawful resident
- Must be 65 or older or disabled as defined by state's Medicaid provision
- Must be a resident of the state and county where the application is filed

Medicaid Eligibility Example

New York State Resource/Income Requirements

Single Individual

- Income: $859/month + $20 "disregard If Nursing Home: $50
- Resources: $15,450.00 + Irrevocable Burial Trust Account

Couple in community

- Income: $1,267/month per couple +$20 disregard
- Resources: $22,800.00/couple

Community Spouse

- Income: $3,160.50/month
- Resources:
  1. Minimum CSRA: $74,820.00
  2. Maximum CSRA: $126,420.00

Surplus Income/ Pooled Trust

- The Medicaid monthly income level for an individual is $879.
- For Medicaid Home Care recipients, the monthly income which exceeds the Medicaid income level of $879 per month must be used to pay some of the medical expenses.
- As an alternative to the spend-down, enrollment with a pooled income-only trust.
  - Shelter the "surplus income" from Medicaid.
  - The trust receives "excess monthly income" that in turn can be used to pay monthly expenses for the individual enrolled – utilities, rent, groceries.

Medicaid Eligibility

Spousal Refusal

- Creates Medicaid eligibility in an individual needing nursing home services where they have a spouse in the community.
- Allows community spouse to retain resources and income above the levels ordinarily permitted to an unmarried individual without impacting eligibility of the spouse applying for Medicaid.

Enea, Scanlan & Sirignano, LLP
Attorneys at Law

Medicaid Eligibility

Look Back Period

- Medicaid Home Care: No look back period
- Medicaid Nursing Home: 60-month look back period (5 years)
  - Penalty period created by non-exempt and uncompensated transfers of assets
  - Triggers ineligibility period
    - Period is determined by dividing value of gift by the average cost of nursing home care per month in county where Medicaid applicant resides
    - No application should be made during 60-month look back

Enea, Scanlan & Sirignano, LLP
Attorneys at Law

The Deficit Reduction Act of 2005 – Effective February 8, 2006

- On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 (“DRA”).
- New York State Department of Health on July 20, 2006, issued Administrative Transmittal #06OMM/ADM-5 which implemented the provisions of the DRA in New York effective August 1, 2006.

The DRA Affects Medicaid Eligibility and the Transfer of Asset Rules in Three Significant Ways

- 1. Creation of a 60-month look back period for all transfers of assets.
- 2. The penalty period will commence on the later of
- (a) the first day of the month after assets have been transferred, or
- (b) the date on which an individual is receiving institutional level of care and whose application for Medicaid has been filed.

Cont.

- 3. An applicant's Homestead (house, condo, co-op) with equity above $878,000 in New York for 2018 will render an applicant ineligible for Medicaid.
- Not applicable if a spouse, child under age of 21, or a blind or disabled child resides in the house.
- Homeowners have the ability to reduce their equity through a reverse mortgage or home equity loan.

Other Significant DRA Changes

- (a) annuities will be required to name the state as a remainder beneficiary, and annuities that have a balloon payment will be considered a countable asset.
- (b) multiple transfers in more than one month must be aggregated.

Utilizing a Medicaid Crisis Plan

- Overview --
  - The gift of assets made by the Medicaid applicant will trigger a period of ineligibility for Medicaid covered nursing home care.
  - The monthly promissory note payments will pay for the cost of nursing home care during the period of ineligibility.
  - The monthly payments are made to the Medicaid applicant as the "payee" under the promissory note from the "maker," the person to whom the Medicaid applicant loaned the money. In turn, the payee will pay the nursing home.

Gift/Loan

- After keeping up to $15,450 in separate bank account the Medicaid applicant would gift approximately 40-45% of his or her assets.
- Simultaneously, the applicant will lend to a family member/friend, his or her remaining excess resources, to be returned monthly pursuant to the terms of a DRA compliant promissory note.

The Promissory Note

- The Promissory Note will be treated as an uncompensated transfer (gift) of assets unless it satisfies the following criteria:
- (a) the repayment term is actuarially sound;
- (b) payments made in equal amounts during term of loan, with no deferral and no balloon payments made; and
- (c) prohibits cancellation of the balance upon the death of the applicant/recipient.

Nursing Home Regional Rates for 2019

Region	Monthly Regional Rates
Long Island	$13,407
New York City	$12,419
Northern Metropolitan	$12,636
Northeastern	$11,280
Rochester	$12,342
Western	$10,556
Central	$10,068

Medicaid Home Care

- Need assistance with activities of daily living (ADLs), being, walking, dressing, feeding, toileting, and bathing.
- Required to enroll with a Medicaid Managed Long Term Care (MLTC) provider.
- A home care Medicaid file the Medicaid application with the Department of Social Services (DSS) / Human Resources Administration (HRA).
- Apply for home care services through the MTLC provider.

Managed Long-Term Care

- Process
  - Medicaid application (financial eligibility) approved
  - An evaluation by New York Medicaid Choice (Maximus) with a determination whether personal home care services are appropriate
  - Apply for home care services through the MLTC
  - Home care evaluation by the MLTC with a determination regarding the nature and extent of home care needs

Home Care Hours

- The number of home care hours one can receive is contingent upon the applicant's ability / inability to perform ADLs.
- The more ADLs the applicant needs assistance with, the more hours of care received.
- MLTCs can approved from four hours per day to round the clock care seven days per week.

Attorneys: Will Yours Be a Future by Chance or a Future by Design? Insights for Practicing Attorneys and Equity Partners on Succession Planning

By Lawrence J. Ganim

Is your name on the door at your law firm? For many of you, the answer is yes. Congratulations on your accomplishments and your career because as all attorneys know, this is the ultimate goal you work towards from the minute you pass the Bar exam. A question you may be asking yourself today is, how long do you want your name to remain on the door? Do you want to keep that title and ownership forever or do you dream about the day you will successfully sell or transition your practice and retire? Either way, the decisions you make (or fail to make) today could mean hundreds of thousands, if not millions, of dollars in tax savings, for you, your family, your partners and your employees. And whether you desire to completely walk away from your practice in your 60s, 70s or 80s or just take a step back, the tax savings can make the difference between dreams and dreams realized.

As a financial professional I have collaborated with many practicing attorneys over the years. This experience has confirmed that far too many business owners, including founders and equity partners of professional firms, lack sufficient business planning. Most assume that their partners, colleagues or heirs will take over the business. Unfortunately, most lack a well thought-out Ownership Conversion Plan (OCP) to make this happen. The U.S. Census Bureau shows that a huge wave of baby boomers has been pushing through the workforce and is now at or within sight of retirement age. ABA data confirms that this is certainly true of the legal profession, estimating that as much as 40% of the U.S. lawyer population is at or nearing retirement age and making transition planning of vital importance.

Conscious Design Can Help You Realize Your Legacy

To better illustrate the importance of planning, the following example contrasts the difference between a future by chance (Attorney F.B. Chance) and a future by design (Attorney F.B. Design).

Chance Looks Like This:

- No clear plan for stepping aside from the practice—may work until the end;
- No documented plan for the financial future;
- No documented or implemented plan for practice succession;
- Has a 401k Profit Sharing plan and is funding that at whatever level he/she can each year;
- Insufficient liquid or income producing assets outside of the practice to meet his/her personal financial needs.

Design Looks Like This:

- Knows when he/she would like to be Financially Independent (Retire-able);
- Knows what after-tax inflation proof cash flow will be needed;
- Knows the pool of assets which will be required to fulfill this need;
- Design implemented a "Personal Hedge" plan to meet these needs that includes:
    - ◇ A pool that will provide tax free income equal to approximately 30-40% of his/her income requirement;
    - ◇ A pool where contributions are tax deductible to the practice and grow tax deferred—income will be taxable upon distribution;
        - Greater than 90% of the contributions accrue to the owner/partner;
        - Contributions are over six figures per year to the benefit of the owner/partner.
- Design has a documented succession plan in place that incentivizes younger associates to become equity owners and carry the practice forward when Design steps aside.
- Design has created a plan to address the Empty Chair possibilities prior to the plan being completed.
    - ◇ Ensuring the practice continues if Design does not or cannot;
    - ◇ Provides the liquidity to ensure this and that Design's family receives the appropriate value.

Preparing Your Firm to Transition into the Future

When you're an owner or equity partner of a law firm, there is much more than finances to consider. You must contemplate your trusted relationships with clients and the preparedness of the legal teams responsible for serving and retaining those clients. To ensure the future of the organization, firm leaders often face a structure that places short-term profits for individuals ahead of long-term strategic planning and stability for the firm. A failure to plan for the stewardship of the firm and its transition to the next generation can put the future of the firm at great risk.

Experience teaches that firms without solid succession plans are often unprepared to deal with a wide range of issues. A shortage of junior and mid-level attorneys, increasing life spans of baby boomer senior partners, and the increasingly volatile business and economic environment that all businesses face are just a few of these concerns.

One additional concern, unique to professional service firms, is that most law clients place a higher value on the relationship they have with "their attorney" than they do the "firm" that employs the attorney. In contrast to manufacturers or distributors who sell a tangible product that will be available long after their sales representative is gone, the attorney-client relationship is a very personal one, built on trust between two individuals.

One of the keys in the legal profession is realizing that the future of your firm depends on your ability to transition clients from one generation to the next, successfully. This is a major challenge for many law practices, and one that requires teamwork. Rather than harboring the client, founding or senior partners must learn to delegate in order for the client to become comfortable with others in the firm doing their legal work. This requires involving younger attorneys in meetings with clients over a substantial period of time. It's the only way to make other lawyers in the firm knowledgeable about the clients' business and to determine if the attorney-client chemistry will be healthy over the long term.

These may seem like elementary steps, but the two must build a rapport and a trusted relationship. Building the required level of confidence takes time. And while there are circumstances that are somewhat unique to succession in the legal profession, every business owner, including owners of private practices and equity partners in professional firms, needs to plan for the future. Having an Ownership Conversion Plan (OCP) is the only way to ensure that the current owner's legacy will be realized while preventing partners and younger colleagues from being pulled apart by a lack of knowing what the future may hold.

With a well thought out OCP, equity partners, associates and their families will not be left to wonder what to do in the case of an unexpected death or disability. Equally important, clients can receive an even more in-depth level of service as senior partners lead legal teams dedicated to meeting their specific needs. Major elements of an Ownership Conversion Plan typically include the following:

1. Cement Your Future Vision – Determine the ideal future for you, your family and your firm. Consider how involved you want to stay in your practice, the resources you have available for retirement and your level of protection against the unexpected.

2. Size of the Pot – Do you know the value of your firm in cash? What other income do you have outside of your practice what is and your ability to handle "gap shock" – the difference between what you feel your firm is worth and what a buyer knows it is worth.

3. *The Butterfly –* A buyer will be attracted to a business that is thriving and showing potential growth in the future. Working with experienced advisors can help you correct problems, create value and make your firm more attractive to a potential buyer.

4. The Empty Chair – Protecting your OCP can ensure that your firm has enough liquidity to overcome the sudden loss of a key partner or contributor. Incentivizing key colleagues to stay, leveraging financial instruments, and tax planning are possible options.

5. Your Personal Hedge – Growing non-business assets enhances your ability to negotiate for ownership conversion, and current laws provide many opportunities to create assets outside of the firm, with favorable taxation.

6. The Intersection – When your estate plan and Ownership Conversion Plan are coordinated, your wealth will be preserved and more value will be created for you, your equity partners and a qualified buyer, inside or outside the firm.

7. The Harvest – Preparing your OCP and protecting it with a well-documented and communicated succession plan helps you reap what your efforts have achieved, decreases business and personal risks, motivates key personnel and allows for timing on your terms.

While planning for transition will require a tremendous commitment on your part, and perhaps that of your fellow partners, you must have other professionals on your team. You should have a core OCP planning team that, at a minimum, includes a qualified experienced OCP/Succession planning professional, your CPA, and perhaps outside legal counsel experienced in succession planning, all working as a team. Their expertise can

Legacy begins from the bottom up and not from the top down. Founding and senior partners will have lasting success as they prepare for the ownership conversion with the future generation in mind.

prevent future problems and prescribe solutions for any present conflicts. Clear communication will help you and your partners create a 'Future by Design' vs. a 'Future by Chance'—the future everyone desires, allowing each person the ability to grow professionally according to their own respective goals.

Legacy begins from the bottom up and not from the top down. Founding and senior partners will have lasting success as they prepare for the ownership conversion with the future generation in mind. You cannot be the owner(s) forever, and your main focus is the firm's success, which needs to continue supporting clients, colleagues and the greater community long after your leadership ends.

Larry Ganim is the founder and President of Ganim Financial, which has the aim of adding value to each client's life and business. His areas of expertise include business and estate planning, employee benefit planning, executive benefits, insurance planning, and pension planning. In addition to Ganim Financial, he is the founder and President of GFS Wealth Management Advisors, Inc., a registered Investment Advisory firm in the State of Connecticut. He is registered as an Investment Advisory Representative with GFS, is a Registered Representative with Kestra Investment Services, LLC, and has been a licensed insurance broker since 1981.

Larry is also the author of *Designed Destinations*, published in 2017, which provides guidance to entrepreneurs on how to prepare for the successful sale or transfer of their business and avoid the unnecessary tax burden and family conflicts that often occur when a lack of planning exists. Larry can be reached at (203) 335-0851 and lganim@ganimfinancial.com.

Are You an "Elder Orphan"?

By Stephen P. Gallagher and Leonard E. Sienko, Jr.

In November 2017 and again in November 2018, co-author Leonard E. Sienko, Jr. and I wrote about how the legal profession could no longer ignore the phenomenon of aging in the workforce. We thought the profession needed to start a dialogue about the need for change. Over the past 30 to 40 years, the number of solo and small firms have expanded to meet market demands, and today many of these same practitioners find themselves unable to retire if they want to maintain anything close to their current standard of living.

Today, there are 109 million Americans, or 45% of the adult population, who are "fending for themselves." Being ill and alone requires far more advance planning than is required of those of us who live with family. To be sure, a spouse or grown children are no insurance policy against suffering or mortality, but people who live alone without the obvious next of kin must rely on a patchwork of support from professionals and friends.

Elder Orphans

The term "elder orphan" refers to the increasing number of people who may have never married or whose spouses have predeceased them. He/she has no children and friends are fewer each day. Even though the health care industry still works under the assumption that everyone has a family caregiver to help with at least the most basic chores, research is showing that one in five Americans older than 65 are—or are at risk of becoming—"elder orphans," and 23% of boomers will eventually be without family caretakers.[1]

According to an AARP Public Policy Institute report on *The Growing Care Gap*,[2] today the majority of long-term services and supports are provided by family members. However, the supply of family caregivers is unlikely to keep pace with future demand.[3] As more of us join the ranks of elder orphans, we will need to better understand why maintaining a community of support is so important for each of us as we age.

We would like to focus today's writings on senior lawyers who find themselves aging alone. We are informed by the work of Dr. Maria Torroella Carney, chief of geriatric and palliative medicine at Northwell Health of Great Neck, NY. and her colleagues who have been studying how elder orphans are hiding in plain sight. They report that "adults are increasingly aging alone with multiple chronic diseases and are geographically distant from family or friends."

Dr. Carney's research team found that "the complex medical and psychosocial issues for elder orphans significantly impact the individual person, communities, and health-care expenditures. They are therefore *hoping to encourage professionals across disciplines to work cooperatively* to screen elders and implement policies to prevent elder orphans from hiding in plain sight."[4] This got us thinking about what role, if any, bar associations might play in helping to prevent elder lawyers from hiding in plain sight.

We would like to share some of our personal experiences. Our views may be quite different because we come from two very different life experiences, but they illustrate the ends of the spectrum of how we Americans age.

Stephen P. Gallagher – The Family Perspective

I have been married for 47 years, and my wife is a registered nurse who works with the elderly as a Health Care Coordinator for an assisted living facility. She is well versed in health care systems and quite comfortable with the aging process. I am indeed blessed to have such a partner.

I grew up in a large Irish Catholic family, so there always seemed to be someone who would step forward when a family member needed care. However, the more I have looked into caregiving trends and practices, the more concerned I have become about availability of caregivers in my own future. My mother was one of seven children, and as the only female child in the area, mom moved our family back into our grandparent's house, to help Pop better manage Mema's advanced Parkinson's disease. Thinking back on this experience, it was a valuable learning experience for the children, but only later did I realize that my parents faced quite different challenges. Nobody ever questioned my mother's role in taking care of her parents.

Years later, after marrying and having our own family, history seemed to repeat itself. We moved our five boys back into that same house, because my wife and I were fortunate to be in a position to help my aging parents, so they could stay in their home while we coordinated

---

Stephen P. Gallagher (Sgallagher@leadershipcoach.us) was the first Director of Law Office Economics and Management for NYSBA from 1990 through 2003. He now spends his time in coaching lawyers through transition, teaching marketing strategy to MBA students, and committing 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.

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.

doctor's visits, nursing care, and I was still able to coach youth baseball and basketball. Times have changed, so we have no expectations that our children will be in a position to provide this same level of care. We understand that greater planning and savings are needed on our behalf, because it is clear that we both need to be thinking as potential elder orphans.

I recently met with a friend who I had not seen in quite a while. She told me that she and her husband had just sold their house and they were moving into a continuing care retirement community. I knew my friend has been battling metastatic breast cancer, but I did not know that her husband was fighting his own prostate cancer. They do not have any children as they married later in life. Neither could negotiate the stairs any longer. She did tell me that "they should have made this move years ago."

I never thought of myself as ever aging alone as an "elder orphan," but I am now looking at this under a whole new light. Our research has convinced me that the rules governing family caregiving have changed, and I have a great deal of homework still to do.

although I may have lain down on my bed, I couldn't get up. I could reach my iPhone and called for "help." The mechanics of remotely letting the emergency personnel into my house with the alarm system and directing them to the bedroom on the second floor were complicated, especially when I most resembled a turtle flipped over on its back. The EMTs got me up and it was later discovered that I had broken ribs, which took two months of sleeping upright in a recliner to resolve, but that's another orphan's tale of woe.

For me it is hard to find a more vivid example of just how alone I am. The cat is a great comfort to me, but he can't call for help and I admit I am concerned about who will care for him and his counterpart at the office. My best legal efforts resulted in a testamentary pet trust.

I try to compensate for my solitary state with technology; e.g., the iPhone and/or the cellular Apple Watch 3.0, which can call for "help" are always with me. I'm looking forward to my new cellular contract and an updated Apple Watch 4.0, with "fall detection" and an EKG sensor.

Working past "normal" retirement age is one of the fastest growing trends in America. Many boomers don't want to slow down, and many can't afford to do so.

Leonard E. Sienko Jr. – Home Alone

I check the box on the form that says "Single-Never Married." I have no spouse, no significant other, no partner(s), no siblings. My meaningful relationship in my life was as an only child, who was cared for by his parents and who cared for them—literally.

I was the caregiver for my father who passed away at age 95 and my mother, who died in her 89th year. Mom died a year and a half after Dad, so there were a couple of very busy years, with doctors, hospitals, nursing facilities, and hospice. The result of my experience is that I have no illusions about who and what I am and what I can expect as an "elder orphan."

If I needed confirmation of my isolation, I received it this Fall, the day before Halloween. I was hurrying to put out the garbage and failed to notice the wet leaves on the porch steps. I fell and, embarrassingly close to the cliche, "…I couldn't get up…". I always have my iPhone or my Apple Watch version 3.0 on my person, so I was able to call 911 from my prone position and direct the rescue squad personnel to where I lay out of sight. They got me on my feet and "signed off" with a promise to see my doctor the next day. My medical nonchalance was rewarded at about 3:00 a.m. when I discovered that,

Understanding the Aging Process: By the Numbers

Working past "normal" retirement age is one of the fastest growing trends in America. Many boomers don't want to slow down, and many can't afford to do so. In a word, they want to *rewire, not retire.* For those with children and the arrival of grandchildren, it is often a time to refine your babysitting skills and begin celebrating your children's accomplishments.

Research shows that on the health front, the share of individuals who have difficulty performing basic activities of daily living (e.g., bathing or eating) or more complex instrumental activities of daily ;iving (e.g., cooking or shopping) increases dramatically after age 75. These conditions can require professional in-home care or even long-term care at an institutional facility, both of which are often prohibitively expensive.[5]

Routine activities for daily living may become more challenging as we age due to lack of mobility, strength, balance, or other physical or mental infirmities. People of any age may temporarily or permanently lose the ability to care for themselves, but the odds go up dramatically as we get older, so putting a network of support in place before you need one is today's challenge whether you have family or not.

After the age of 85, the likelihood of needing assistance with one or more activities of daily living increases dramatically. In a 2009 study by the Institute on Aging,[6] 40% of men and 53% of women age 85 or over reported needing help with at least one of the basic self-care tasks essential to maintaining grooming standards and good health.

Nobody wants to think about the prospect of failing mental capability in later years, but it's another issue we all have to think about and address. An estimated 10 million Americans have dementia or cognitive impairment with 2 million new cases reported every year.[7] "The incidence of cognitive decline begins rising after age 75, with the rate of dementia growing quickly from 7 percent for people in their early 70s to roughly a quarter for those in their early 80s, raising the risk of financial mistakes or fraud.[8]

As we grow into our 80s and 90s most of us will begin to face more life-limiting challenges. The big question for us now is how best to prepare for these challenges? Even if you have no adult children around to serve as a safety net, the sensible path for all of us is to make some decisions now while we can get around and our brains are still sharp. By the year 2050, the over-85 age group will triple as a percentage of the population. and they estimate that close to one-third of those who reach age 85 will experience some level of dementia.

We are all living longer, so that means more people will be aging with debilitating, age-related chronic conditions like Alzheimer's disease, Parkinson's, arthritis, diabetes, etc. The "Boomer" generation is now at caregiving age, and soon many of "us" will need care ourselves. It stands to reason that people who are aging alone, or will be aging alone, need to make plans when they are independent and functional. We just cannot wait for that misstep on black ice to take action. We all need to start now to learn more about the resources in each of our communities and the appropriate time to start using them.

Susan B. Garland wrote a piece for *The New York Times—Retiring Section* where she reported, "the caregiver support ratio is expected to plummet as boomers' transition from caregivers into old age. The decades of the 2010s and 2020s will be a period of transition, as boomers age out of the peak caregiving years and the oldest boomers age into the 80-plus high-risk years. The departure of the boomers from the peak caregiving years will mean that the population aged 45–64 is projected to increase by only 1 percent between 2010 and 2030. During the same period, the 80-plus population is projected to increase by a whopping 79 percent.[9]

The number of potential caregivers per person aged 80-plus is expected to accelerate during the 2020s—from 6.1 to 4.1 in 2030—especially when the oldest boomers start turning 80 years old in 2026."[10] That ratio could sink to 3 to 1 by 2050, when all boomers will be in the high-risk years of late life.[11]

Consider Where—and How—You Might Like to Age

While you're still healthy, you need to begin exploring where the best place might be for you to live. Should you move closer to family or is it time to seek a warmer climate? How close to doctors and hospitals are you? How accessible are your network of friends? Is public transportation available in your area?

This is the time to explore options for moving into a senior community or an assisted living facility—often an ideal option for some who can afford it. Take time to investigate continuous care retirement communities (CCRCs) and life-care communities. These are wonderful living options for people without family support systems. They are also the most expensive options with amenities beyond what you would find in an assisted living community. You must be prepared to move in while you are still independent.

You may wish to explore how you can join other elder orphans in your own shared living space, where the household jointly benefits from shared care. To be sure, older cohabitors are still rare, totaling just 2% of adults 65 and older. But their numbers are expected to keep rising because baby boomers are more likely than prior generations to be never married or divorced as they enter older adulthood.[12]

The University of Southern Illinois is experimenting with new 600 square foot "tiny" houses on campus to try to address some big issues associated with aging. They are hoping to find out if elders can live independently—and with better quality of life—in a compact house equipped with smart home technology? Could college students live alongside elders in communities of tiny houses, benefitting both young and old? USI researchers want to turn the perception of growing old on its head, unlocking new strategies to help seniors "age in place."[13]

Stephen P. Gallagher – Moving Home

After retiring from my full-time position with the bar association, my wife and I decided to move back to our family home in Pennsylvania. We explored moving to a warmer climate, but we decided to update the kitchen and install handrails in the bathrooms, so we were able to stay put. The mortgage was paid and we could walk to the train and be in Center City in 30 minutes. If navigating stairs became a problem, we knew we could convert our den back into a bedroom as it was in the past. We also knew we wanted to keep a bedroom for the children and grandchildren when they came to visit.

Leonard E. Sienko Jr. – Home Alone

I am convinced that a smaller, more compact living area is one answer to my aging, leading to reduced mobility. My doctor thinks exercise is the answer, but what does he know? Stairs are the main enemy. Not only do they require effort, the danger of falls is ever present. I find the tiny houses attractive. I'll gladly trade space for no stairs.

My future abode will have to consist of one floor with "no stairs" living quarters, equipped with every possible piece of "intelligent house" gear. Ideally, this residence would be within a "continuum of care" setting, in which services are provided by people who are available 24/7. I'm assuming some major medical catastrophe (stroke or heart failure) will trigger my need to move. Let's hope the real estate market will let me sell my home and office before the increased costs are needed.

The irony would be my living with a lot of technology to make life easier; but being subject to dementia, rendering all of my gadgets useless junk.

Now I have what I refer to as the "light bulb problem." My heart and diabetes medications do an excellent job of keeping my blood pressure and blood sugar readings within bounds, but not without side effects. One of the side effects may be dizziness upon rising or while elevated. I no longer can climb the step stool to change a light bulb, but must rely on my cleaning service.

If I can sell the family house and my small office building, then, like most folks with vague plans, I'd prefer "…someplace where it's warm all the time…". Visions of sunny beaches are what one imagines when thinking of retirement. If I can't liquidate my major assets, then I may have to hibernate for a few more upstate New York winters.

Meal delivery services were one of my first coping methods after my parents died. I had assumed the last several years of menu planning, marketing, and cooking, just starting to use Blue Apron in Mom's last year. It was a convenience to me in the bad weather months when it was difficult to get out to market. When I found myself truly on my own, I kept up with occasional deliveries, trying other services. My rationale was to address my need to sit down to eat a main meal each day. I did not want to gulp something down from a carton standing at the sink with the TV going. The meal delivery services assist in my meal planning and prep. The photos I take of my cooking results have become a source of amusement for my FaceBook friends. An unintended consequence of my culinary efforts is increased social contact about my cooking. Many people in my small town stop me to ask "What's for dinner tonight?"

Embrace the Joys and Complexities of Aging

You may not be able to rely on friends or family for serious, long-term care, but they can help you—and you them—in many ways, such as bringing meals when you're ill or recovering, and doing errands such as picking up prescriptions or groceries. Keep in mind that it may be harder to make new friends later in life, so it makes better sense to start by reaching out to your lifelong friends. This is where we began thinking that you may want to start with your local bar connections. Rather than dropping out of the profession, you will probably find old friends who may be dealing with their own health concerns, so you may start building your own network of support by helping others.

Ai–Jen Poo, director of the National Domestic Workers Alliance (NDWA) and co-director of the Caring Across Generations Campaign wrote a powerful book, *The Age of Dignity: Preparing for the Elder Boom in a Changing America,* where she raises consciousness about this epic national crisis in care that may in fact be one of our greatest opportunities for positive transformation at every level. *Age of Dignity* calls for more innovative approaches to care rooted in our homes and communities that brings us all together and offers greater support to everyone involved.

Ai–Jen Poo writes about creating a culture that "embraces the joys and complexities of aging, celebrates inter-generational relationships, and values care work at the critical issue of caring for seniors and the need to 'care about' those who do the caregiving." Should the bar association assume a greater role in promoting the value and benefits of "caregiving" for the legal community? If so, we need to figure out a way to celebrate better inter-generational relationships between newly minted lawyers and those of us who have miles on our meters.

Scholars who study the obstacles confronting young people argue that one of the most important ingredients of their future success is the steady presence of caring adults with the time and inclination to support their development. Shared housing may be a way to harness the natural affinity between young and old, particularly as a way that can narrow the opportunity gap facing so many young people. On this last point, Stanford psychologist Laura Carstensen has shown that the emphasis on relationships and the very skills needed to nurture and develop close bonds grow stronger as we age.[14]

Stephen P. Gallagher – Building a Network

Raising five boys in Upstate New York. allowed us to travel to every basketball court, aquatics facility, and rowing venue from the Hudson River to Lake Ontario. My wife and I built a large network of friends drawn from our children's sports teams, but I have never felt comfortable in sharing health or retirement concerns with any of these friends. I have kept in contact with local bar connections throughout the state and country, but it would appear that I have to work on building a network of friends who would be available to bring me a meal or visit with me in an emergency situation if my family were not around.

I was surprised to find out that when people get married, they can become more insular. They become less connected to their siblings and parents than they were when they were single, and less attentive to friends and neighbors. Compared to those never or previously married, married couples disengage from neighbors and friends. They are less likely to socialize with neighbors and less likely to hang out with friends. And the never married are more likely than the married to offer a hand or an ear—to give either practical help or emotional support.[15] In theory older single people could potentially have more people involved in their lives than older married people. I have homework to do.

Long before you get to the point where you can no longer care for yourself, you should be able to explore creative ways to live their lives in defiance of the elder-orphan risk. Talk with people about living in multigenerational or extended family households. I have a friend who downsized by moving into a newly renovated space built onto her child's family home. They now live with three grandchildren, which allows the busy professional couple to travel for business. This is a win-win for everyone.

> *Long before you get to the point where you can no longer care for yourself, you should be able to explore creative ways to live lives in defiance of the elder-orphan risk.*

It should go without saying that you need to update your will, your advance directive for medical care, your durable power of attorney for finances. Share your plan with your doctors, your friends, and any living relatives who will likely be called in an emergency. As you build your network of caregivers, take on the responsibility of helping friends do the same thing.

Finally, through my work with the bar association I see many lawyers who wish to retain a stake in the profession as a whole. In the fall of 2018, the Senior Lawyer Section partnered with the Monroe County Bar Association to bring together senior lawyers with younger lawyers to explore opportunities for succession planning for aging law firms in the area. In essence, these "Gatherings" should help to develop the profession's next generation of leaders, while at the same time, helping the profession's elder orphans stay connected.

Leonard S. Sienko Jr. – Building a Network and a Profession

I have found it useful to seek out opportunities for social contact; e.g., I enjoy dining out on "the Liturgical Calendar" as I call it. Local houses of worship have many fetes involving food, conversation, and good fellowship. I'm currently enjoying Lenten Suppers each Friday with the Roman Catholics at St. Paul's. Last week was the United Methodists' turn. The food is made that day from scratch, with fresh soups and salads predominating. It's a vegetarian delight, with a free will offering. Best of all is the chance to reconnect with community members of all ages and stations.

Is there a role for the bar community in dealing with elder orphans? Last month I was speaking to the real estate paralegal at the sole practice of an attorney I've known and worked with for more than 30 years. In the conversation about scheduling a closing, the paralegal mentioned that another lawyer would have to handle the closing. When I asked "why"? I was told that my colleague had passed away a few days earlier. The other lawyer did not do the closing. The paralegal, who had been hired for a new job, was cleaning up the deceased attorney's cases in her after hours from her new job. There was a very sketchy feeling about the experience.

Doubtless there is a role for the courts and for the bar association in helping close a practice, whose sole practitioner has died unexpectedly. The sole practitioner may be considered the "elder orphan" of the legal profession.

As a graduate of Boston College and Boston College Law School, I am proud to be called a "Double Eagle." As a sole practitioner, I am also a "Double Elder Orphan."

The numbers cited heretofore apply to lawyers as well as non-lawyers. There will be an increasing number of sole practitioners with need of a professional support system as they age. I am an orphan both at home and at work.

I do enjoy the limited opportunities I have to interact with younger people, especially newly minted sole practitioners. When I opened my own office, I was fortunate to be invited to lunch by one of the established attorneys. It was lunch on Monday with all the other lawyers who had come to appear at motion term and to search title in the county seat. (This was well before the individual assignment changeover.) We closed several restaurants with our enthusiastic discussions down the years; but we certainly got a lot of questions asked and answered. When the District Attorney attended, we did plea bargains. We discussed the motions we had just seen argued. Every new procedure was vetted. It was amazing how much the older lawyers learned during the years. Our luncheons ceased after the first 20 years as attrition lowered our numbers; but recently, with a new wave of young lawyers, we have revived the "Monday Lunch Club." It is again a success with excellent attendance and some spirited discussion.

I can remember looking out for solo practitioners who may have been having problems as they aged. There was an informal understanding with the local courts and attorneys that we "… take care of our own …". Someone who had practiced law for 50 years by him or herself was entitled to a "Mulligan" now and then. Papers could be resubmitted, corrected … matters settled on reasonable terms. Corrections could be pointed out to secretarial staff. Those informal days are long since past, but the New York State Bar Association has an active Lawyers Assistance Program. The Senior Lawyers Section is currently engaged in sponsoring intergenerational "Gatherings" to bridge the gap between Young Lawyers and Seniors. There is hope for building in programs which equal and surpass the informal caring of the past.

Endnotes

1. DePaulo, Bella, *What Has Changed for Single Americans in the Past Decade*, *The Washington Post*, September 20, 2016. https://www.washingtonpost.com/news/soloish/wp/2016/09/20/what-has-changed-for-single-americans-in-the-past-decade/?utm_term=.833216f35b4f
2. Donald Redfoot, Lynn Feinberg, Ari Houser, *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family Caregivers*, Public Policy Institute, August, 2013.
3. Susan C. Reinhard, Lynn Friss Feinberg, Rita Choula, and Ari Houser, *Valuing the Invaluable: 2015 Update Undeniable Progress, but Big Gaps Remain Undeniable Progress, but Big Gaps Remain*, AARP Insight on the Issues, July 2015.
4. Schoenberg, N., 2016, Aug 19, *Elderly with no nearby family to help them need safety net*, experts say. TCA Regional News, retrieved from https://ezproxy.sju.edu/login?url=https://search-proquest-com.ezproxy.sju.edu/docview/1812546990?accountid=14071.
5. Matthew S. Rutledge and Geoffrey T. Sanzenbacher, *What Financial Risks Do Retirees Face in Late Life*, The Center for Retirement Research of Boston College, January 2019, No 19-1, https://crr.bc.edu/wp-content/uploads/2018/12/IB_19-1.pdf.
6. Institute on Aging is an organization that works to enhance the quality of life for adults as they age by enabling them to maintain their health, well-being, independence and participation in the community. https://www.ioaging.org/aging-in-america.
7. Correia, Margarida, *Dementia: The New Retirement Risk*, Bank Investment Consultant, vol. 22, no. 07, 2014, pp. 18-n/a. ProQuest, https://ezproxy.sju.edu/login?url=https://search-proquest-com.ezproxy.sju.edu/docview/1559211096?accountid=14071.
8. Belbase, Anek and Geoffrey T. Sanzenbacher. 2017b. *Cognitive Aging and the Capacity to Manage Money*, Issues in Brief 17-1. Chestnut Hill, MA: Center for Retirement Research at Boston College. https://crr.bc.edu/wp-content/uploads/2018/12/IB_19-1.pdf.
9. Susan B. Garland, *Single? No Kids? Don't Fret: How to Plan Care in Your Later Years?* New York Times – Retiring, March 23, 2018, https://www.nytimes.com/2018/03/23/business/elder-orphans-care.html.
10. Donald Redfoot, Lynn Feinberg, and Ari Houser, *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family Caregivers*, AARP Public Policy Institute, Insight on the Issues 85, August 2013, https://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/baby-boom-and-the-growing-care-gap-insight-AARP-ppi-ltc.pdf.
11. Donald Redfoot, Lynn Feinberg, and Ari Houser, *The Aging of the Baby Boom and the Growing Care Gap: A Look at Future Declines in the Availability of Family Caregivers*, AARP Public Policy Institute, Insight on the Issues 85, August 2013, https://www.aarp.org/content/dam/aarp/research/public_policy_institute/ltc/2013/baby-boom-and-the-growing-care-gap-insight-AARP-ppi-ltc.pdf.
12. Jonathan Vespa and Emily Schondelmyer, *A Gray Revolution in Living Arrangements*, U.S. Census Blog, Jul. 14 2015.
13. Kylie Veleta, *USI Tiny House to Develop 'Aging in Place' Technology*, Inside Indiana Business, Business of Health Reporter & Special Projects Editor, Feb 28, 2019, http://www.insideindianabusiness.com/story/40045141/usi-tiny-house-to-develop-aging-in-place-technology?fbclid=IwAR0Mf3s-od_9mj_T9GQmrcMmWAPFMW4pjkcwaBQVjjHzAK6v8C0L8Fe64pQ.
14. Marc Freedman, *Let's Make the Most of the Intergenerational Opportunity*, NextAvenue, https://www.nextavenue.org/lets-make-intergenerational-opportunity/, Jul. 5, 2016.
15. Naomi Gerstel and Natalia Sarkisian, *Marriage: The Good, the Bad, and the Greedy*, American Sociological Association Sage Journal, Volume: 5 issue: 4, page(s): 16-21, Nov. 1, 2006.

NYSBA
GALA DINNER

Special Guest of Honor & Keynote Speaker
to be announced

THE NEW YORK STATE COURT OF APPEALS
and other state court appellate judges
will also be honored

THURSDAY, JANUARY THIRTIETH
two thousand and twenty

SIX THIRTY IN THE EVENING

AMERICAN MUSEUM OF NATURAL HISTORY
Central Park West at 79th Street, NYC

FOR MORE INFORMATION, VISIT
nysba.org/galadinner

NYSBA

Hon. Jonathan Lippman, Ron Mayer, Bruce Lawrence, and Hank Greenberg

Ron Mayer and wife, Linda Lipitz-Mayer

Jonathan Lippman Pro Bono Award Recipients

Presented at Annual Meeting 2019

Hon. Jonathan Lippman, Ron Mayer and colleagues

The 2019 Jonathan Lippman Pro Bono Award honorees were:

Ronald C. Mayer
The New York Legal Assistance Group (NYLAG), Evelyn Frank Legal Resources Program, New York, NY

and

Shirani Ponnambalam
Pace Women's Justice Center, White Plains, NY

Hon. Jonathan Lippman, Shirani Ponnambalam, Bruce Lawrence, and Hank Greenberg

Shirani Ponnambalam and sons Arvind and Arjun

Shirani Ponnambalam and colleagues

A Brief Primer on Discharging Tax Debt Through Bankruptcy

By Leo Gabovich

It is not uncommon for people struggling with debt to consider their options for getting back on track. While determining the best course of action is not always simple, there are options available. In particular, income tax liabilities may be eligible for discharge under various chapters of the bankruptcy code. Individuals looking to file bankruptcy most commonly file under either Chapter 7 or Chapter 13 of the bankruptcy code.

Types of Bankruptcy

Chapter 7 bankruptcy is sometimes referred to as a "straight" bankruptcy because it allows for a full discharge of allowable debts. A bankruptcy trustee gathers and sells the debtor's non-exempt assets and the proceeds are used to pay creditors. The debtor is allowed to keep certain exempt property. If the debtor lacks sufficient non-exempt assets to cover their debts, they will no longer be responsible for the remaining balances on any allowable debts.

Chapter 13 bankruptcy involves a multiyear, court-approved payment plan to repay debts to the greatest extent possible. The plan requires the debtor to make payments to a trustee who then distributes money to the creditors. Chapter 13 bankruptcy is a good alternative for individuals who can repay some of their debts but need modified payment terms.

Rules for Tax Debt to Be Dischargeable in Bankruptcy

Tax debts are normally classified as "priority" debts in Chapter 7 and Chapter 13 bankruptcies. Priority debts need to be addressed and paid first when assets are liquidated in Chapter 7 and must be included and paid in full in a Chapter 13 payment plan. However, the bankruptcy code lays out specific criteria under which tax liabilities may become dischargeable in bankruptcy:

1. Three years must have elapsed from the due date for filing the tax return for the year in question.[1]
2. The tax return for the year in question must have been actually filed at least two years prior to the bankruptcy petition.[2]
3. At least 240 days must have passed since the date the liability was assessed.[3]
4. Finally, the return for the tax at issue must not have been fraudulent, nor can the taxpayer have been found guilty of attempting to evade or defeat the tax.[4] Any tax periods for which all of these conditions are met may be eligible for discharge.

Regarding the due date rule, this date includes any extensions. For example, if a taxpayer were looking to discharge a tax liability stemming from the 2014 tax year, normally the return would have been due in April 2015, and they would have to wait until at least April of 2018 until the liability could become eligible for discharge. However, if the taxpayer filed for an extension for their 2014 tax return, the due date would have been extended to October 2015 and, therefore, any resultant liabilities would not be dischargeable in bankruptcy until at least October 2018.

Regarding the filing rule, this time is measured from the date the return was actually filed. If a return is filed late, the 240 day period only begins to run on the date of actual filing. Furthermore, a return must be filed by the taxpayer in order for the 240 day period to begin to run. If the IRS has prepared "substitute returns" for the taxpayer for non-filed returns, tax liabilities stemming from those returns cannot be discharged in bankruptcy.[5]

Regarding the 240-day assessment rule, there are also situations which toll the period. If the liability was put in an Offer in Compromise status within the 240 days, the amount of time the liability was in Offer status plus 30 days is added to the calculation.[6] If there is a hold on collections, due to, for example, prior bankruptcy proceedings, the amount of time the liability is not collectible plus 90 days is added to the calculation.[7]

If the taxpayer enters an installment agreement and begins paying off the tax debt on a monthly basis, this will not toll the time for bankruptcy dischargeability under any of the rules. In fact, establishing an installment agreement is a valid strategy to buy the taxpayer the time necessary for the debt to become dischargeable while avoiding the filing of liens or imposition of levies.

Planning Considerations

When determining whether it would be advisable for a client to file for bankruptcy to discharge tax debt, a professional should make sure to fully understand the rules involved and the interplay between the Internal Revenue and Bankruptcy codes. Aside from ensuring that the liabilities have met the time requirements to be dischargeable, there are other important considerations.

Leo Gabovich, Esq., is a tax attorney at Tenenbaum Law, P.C. (www.litaxattorney.com), a tax law firm in Melville, N.Y., which focuses its practice on the resolution of IRS and New York State tax controversies. He can be reached at lgabovich@litaxattorney.com and at 631-465-5000.

Disclaimer: The information contained in this article does not constitute tax advice and is for informational purposes only.

For example, when considering an Offer in Compromise, the IRS will take into account the potential for some or all of the debt to be discharged in bankruptcy, which may lead to a better result for the taxpayer.[8] Therefore, a valid strategy is waiting until at least 240 days have lapsed since the assessment was issued and then filing for an Offer in Compromise, while continuing to weigh the benefits of filing bankruptcy. It is also important to consider which tax debts are and are not dischargeable in bankruptcy, thereby allowing the taxpayer to selectively pay down the liabilities which will not be discharged in bankruptcy, while still allowing for time to run on debts which will be dischargeable in the future. Additionally, only income taxes are dischargeable in bankruptcy—payroll taxes, the Trust Fund Recovery Penalty, and most state sales and excise taxes are not dischargeable.

Non-Bankruptcy Alternatives

While bankruptcy may be a useful tool for taxpayers to eliminate certain debts, it is not always the best course of action. There are some serious drawbacks to bankruptcy, including the forced liquidation of non-exempt assets and the mark left on your credit history, which can make future loans difficult to secure.

When back taxes make up a significant portion of a client's debts, they should consider whether applying for an Installment Agreement or an Offer in Compromise might be a better alternative to filing for bankruptcy. An Installment Agreement allows a taxpayer to pay down a liability over time. Under certain circumstances, the taxpayer may even qualify for a Partial Payment Installment Agreement, where the IRS will accept less than the full liability to be repaid over the term of the payment plan. Through an Offer in Compromise, a taxpayer may be able to satisfy their tax liabilities for a reduced amount based upon their financial circumstances; the offer process can require considerable time and documentation, but it may often be a better alternative. If your clients are considering their options for managing escalating tax debt, they should speak to a qualified tax advisor to determine their best course of action.

Endnotes

1. 11 U.S.C. § 507(a)(8)(A)(i).
2. 11 U.S.C. § 523(a)(1)(B).
3. 11 U.S.C. § 507(a)(8)(A)(ii).
4. 11 U.S.C. § 523(a)(1)(C).
5. 26 U.S. Code § 6020(b).
6. 11 U.S.C. § 507(a)(8)(A)(ii)(I).
7. 11 U.S.C. § 507(a)(8)(A)(ii)(II).
8. Internal Revenue Manual 5.8.10.2.2.

Playing the Back Nine: Collaborating with Senior Lawyers in Closing the Justice Gap

By Caprice Jenerson and Ronald Mayer

Let's start with the opening premise that a robust volunteer program is essential to expanding the service capacity of a legal services organization. Both skilled and unskilled volunteers add tremendous value to the delivery of services to those whose unwanted bout with poverty has landed them in the crosshairs of the legal system. Legal services organizations tap into a variety of sources—the private bar, law schools, bar associations, community-based organizations, etc.—to engage potential volunteers. Depending on the needs of the community, one type of volunteer may be a better match than another type of volunteer. Finding the right match involves assessing the transferable skill set of the volunteer, volunteer interest, time commitment, and cultural sensitivity. *All* types of volunteers can donate their time, talent, and resources to assist legal services organizations to achieve their mission.

The New York Legal Assistance Group (NYLAG) uses the power of the law to fight social and economic injustice. NYLAG is a legal services provider that provides direct services to individual and families facing civil legal crises. Last year, NYLAG served 88,000 people. As a nonprofit organization, NYLAG is constantly faced with the challenge of managing scarce resources in the face of institutional and structural oppression that maintain poverty and destabilize entire communities. Through policy work, advocacy, and impact litigation, NYLAG strives to combat structural inequalities in the legal system across a breadth of practice areas, including housing, immigration, matrimonial and family law, veterans' rights, special education, consumer protection, foreclosure, and disaster relief.

To expand capacity, NYLAG engages more than 2,200 skills-based volunteers each year. These volunteers serve in both short-and long-term capacities. They help us serve a greater number of women, children, survivors of domestic violence, veterans, elders, immigrants, children with disabilities, and so many others. NYLAG strategically engages pro bono attorneys and other volunteers in a robust, nationally recognized volunteer program model. NYLAG's volunteer program is certified as a Service Enterprise by Points of Light. Over the past five years, an average of 2,000 volunteers donated more than 100,000 hours to support NYLAG's work and client populations impacted by poverty. Volunteers at NYLAG are pro bono attorneys from New York City law firms, retired or seasoned attorneys, law students and graduates, college students and graduates, and other skilled volunteers. This multifaceted cadre of volunteers extends NYLAG's reach and helps to bring life-changing legal services to communities in the five boroughs. NYLAG recruits pro bono attorneys and volunteers on a rolling basis and these volunteers fill internal or external roles. Internal volunteers are provided an initial orientation, office tour, introduction to office systems, a workspace in our office, technology, training on how to navigate our case management system, a NYLAG e-mail address, and appropriate substantive training.

To support volunteers, NYLAG's dedicated staff members serve as mentors and supervisors for each and every volunteer. Mentorship and supervision is an integral component of the volunteer program. Regardless of experience, skill, or level expertise, every volunteer has access to a mentor who will follow the assigned cases or assignments until resolution. Volunteers also receive training toolkits, substantive webinars, written samples and other instructive materials to provide a meaningful experience.

In addition to law firms, corporations, and law schools, NYLAG taps into the Attorney Emeritus Program (AEP) in search of volunteer support. The AEP was founded in 2010 by former Chief Judge Honorable Jonathan Lippman. Retired attorneys or near-retiring attorneys who are age 55 and older in practice for at least 10 years are matched with legal services organizations or court-sponsored program serving New Yorkers in need of legal representation but without the means to afford such representation. Retired attorneys are exempt from the biennial registration fee and CLE requirements. Approved organizations, like NYLAG, provide malpractice insurance. The Feerick Center for Social Justice at Fordham University's School of Law provides programmatic and administrative support for the program.

AEP attorneys and other seasoned attorneys come to NYLAG after many years of employment in a variety of roles. NYLAG currently hosts 20 AEP and other retired attorneys. They are former commercial litigators, corporate executives, trust and estates attorneys, among other things. They join NYLAG after a long and successful career full of accolades and accomplishments both personally and professionally. They also bring a depth of real life experience and skills that adds a necessary voice to the services we provide and how we deliver those services. Retired or near retiring attorneys have practiced many years, held leadership roles, been honored by their peers, have had many professional successes. They are not seeking to fulfill pro bono hours at a law firm, building a resume, or trying to satisfy school requirements. They have plenty to give and are often less transient. Once most senior lawyers find a "fit" with a legal services organization, they tend to volunteer over a long period of time. There is no accurate measure of the dollar value that senior lawyers bring to legal services organizations. Albert Einstein is attributed with saying, "Not everything that counts can be counted. And not everything that can be counted counts."

NYLAG regularly nominates its long-term volunteer attorneys to various service awards to acknowledge the impact they have on the organization. Ronald Mayer is a long-term volunteer. NYLAG defines a long-term volunteer as one who has served for a period of one year or more. Ron was nominated for the 2019 Jonathan Lippman Pro Bono Award by NYLAG and his direct supervisor, Valerie Bogart. In January, Ron received the award at the New York State Bar Association's Annual Meeting.

Ron was a banking lawyer during his pre-volunteer days. He worked for the Federal Reserve Bank of New York for six years after graduating from NYU Law School in 1974. He then spent 25 years at Chase Manhattan/JPMorgan Chase. He was head of the Bank Regulatory Group and was also Corporate Secretary of Chase Manhattan for four years prior to Chase's merger with Chemical. The week after his retirement from Chase, he began volunteering with the Evelyn Frank Legal Resources Program, then part of Selfhelp Community Services. The Evelyn Frank Program joined NYLAG in 2013. Ron and his colleagues in the Evelyn Frank Program focus on obtaining health insurance, particularly Medicaid home care services, for the elderly with limited resources and income. Ron comes into the office twice a week and is available by email every day. Ron began thinking about getting involved in health care law well before his retirement when members of his and his wife's family had complicated medical issues. He realized that although he was an experienced lawyer who dealt with complex technical issues, he did not have a clue as to how to deal with the hospital, insurance and public benefits bureaucracies. As he approached retirement, Ron felt that his temperament required that he keep busy with work that would continue to stimulate him while also leaving time for other activities. Ron met the head of the Evelyn Frank Program, Valerie Bogart, when he attended a PLI seminar on elder law a few months before his scheduled retirement date. He spoke with Valerie during a break in the program and they decided that they would give it a try. According to Ron, the issues involved in trying to save his clients a few thousand dollars are at least as complex as those he encountered in the billion dollar deals of his earlier professional life. Ron feels that many more effective advocates are need to assist consumers to navigate our unnecessarily complex health care system. Attorneys contemplating retirement should consider this area of law as a rewarding and demanding second act.

Ron is a perfect example of an attorney who was armed with an arsenal of transferable skills that have enabled him to help more than 400 clients over the past five years in a completely different practice area. Ron's clients consistently remark that his ability to listen, professionalism, reliable follow through, and compassion give hope to many who have felt marginalized and invisible.

NYLAG welcomes the AEP and other senior lawyers into our multigenerational workspace. The collection of voices, ideas, and perspectives allows NYLAG to better serve diverse communities more effectively. As NYLAG looks to the future, we will continue to engage AEP attorneys and other senior lawyers throughout our many practice areas. We also hope to engage senior lawyers in three pilot initiatives:

- Mentor Project—As part of NYLAG's three-year strategic plan, the organization sees mentorship as a vital aspect of attorney retention. Many of NYLAG's staff have joined the organization directly from law school and 100 or more law students intern in our office each fiscal year. AEP and other senior lawyers can choose to share experiences and career trajectory with junior attorneys through structured luncheons or on their own. AEP and senior lawyers with so many varied backgrounds can play a role in the mentoring initiative.
- Volunteers in Supervisory Roles—Long-term volunteers at NYLAG have the capacity to take on leadership roles if they choose and without expanding their part-time work schedules. NYLAG is exploding opportunities to enable long-term volunteers to supervise a limited number of pro bono attorneys in appropriate practice areas. Volunteers can attend mentor/supervisor workshops to assess if they would like to pursue this opportunity.
- Recruitment/Retention Ambassadors—The Pro Bono and Volunteer Unit often participates in external events to recruit new volunteers and internal events to promote retention among current volunteers. All internal volunteers can participate in our Ambassador project and assist the volunteer management team develop useful project evaluation tools.

The future is bright on the back nine of the course. NYLAG looks forward to engaging in meaningful opportunities with new volunteers interested in working together to close the justice gap. To learn more about NYLAG, visit www.nylag.org or to get involved e-mail Caprice Jenerson at cjenerson@nylag.org.

Caprice Jenerson is NYLAG's Director of the Pro Bono and Volunteer Unit, responsible for coordinating the agency's extensive pro bono and volunteer program. Prior to joining NYLAG, Caprice was Senior Resource Counsel with the Clemency Project 2014, where she was responsible for the recruitment and training of nearly 4,000 lawyers to provide pro bono assistance to federal inmates seeking to have their sentences commuted or reduced by the President of the United States. She has 21 years of experience as a criminal defense lawyer. She received her undergraduate degree from Rutgers University and her J.D. from Georgia State University College of Law.

Ronald Mayer is a long-term volunteer attorney at NYLAG, having served as a volunteer for that past six years. He worked for the Federal Reserve Bank of New York for six years after graduating from NYU Law School in 1974 and spent 25 years at Chase Manhattan/JPMorgan Chase. He was head of the Bank Regulatory Group and was also Corporate Secretary of Chase Manhattan.

The Student Loan Crisis: How It's Affecting New Lawyers and the Firms Hiring Them

By Leslie Tayne

The student loan crisis is real. Tuition costs continue to rise nationwide, and as a result students continue to borrow more than ever before. The result: students entering the workforce with mountains of debt that will take them years—or even decades—to pay off.

While law is often thought of as a lucrative profession, new lawyers are not exempt from the student loan crisis. In fact, not only has obtaining a law degree become even more expensive than it has been in years past, but also high-paying legal jobs are becoming fewer and farther between.

What does this mean for the legal profession as a whole? New lawyers are looking for high salaries to help offset their massive debt. But can firms afford to meet these requirements when hiring at entry level?

What Law School Debt Means for New Lawyers

The Cost of Law School

According to *Business Insider*, the cost of private law school in 2016 was an average of about $47,000 a year.[1] Overall, the cost of earning a J.D. has risen by 3 to 5 times over the past 30 years.[2] And this does not account for undergraduate education, during which students likely would have built up additional debt. And while federal student loans go into deferment when a student is enrolled in graduate school, unsubsidized student loans continue to accrue interest, even when in deferment. This means if the student was not making payments towards unsubsidized loans while enrolled in law school, the student will be paying more on their loan over the long run.

According to the American Bar Association, the average law student in 2012 graduated from a private law school with about $122,000 in debt.[3] Once again, this is simply from their law schooling, and this number is outdated. The ABA has not updated this number since, but with tuition costs continuing to rise it's safe to assume that the average student's debt has risen as well.

The Financial Situation of a Young Lawyer

Law tends to be lumped in with the medical profession as the most lucrative career fields to pursue. As a result, many young people attend law school with the idea that the high salary they'll make when they graduate will more than offset the debt they've racked up by attending law school. However, tuition rates and student indebtedness have continued to rise faster than wages across the board. Law is no exception.

Law students often go to law school assuming they'll make top dollar when they graduate, meaning paying off their debt will be less of a financial burden. However, many students base their salary expectations on what lawyers from the top of their class at a private law school will be making at a major big-city law firm. The reality is that this is not what the average lawyer just out of law school will be making.

In 2016 "Big Law" (the largest firms, with over 1,000 lawyers) significantly raised salaries for first-year lawyers, in an attempt to offset rising debt and cost of living.[4] This marked the first significant Big Law salary increase since 2007. Powerhouse New York law firm Cravath, Swaine & Moore was the first to implement the increase, raising base pay from $160,000 to $180,000. But once again, Cravath, Swaine & Moore is very much at the top end of the spectrum. The same year, law firms with 50 or fewer lawyers paid first-year associates a median salary of $90,000. Even at bigger firms with 700 or more lawyers, median salaries were around $155,000.[5] After the 2007 salary increase took place, it took several years for it to take hold across the entire industry. Therefore, it's possible that salaries are continuing to rise across the board following the precedent set by Big Law in 2016.

In addition to varying by size of the firm, salaries for first-year associates are dependent on the type of law and amount of responsibility being performed by the new lawyers. Commercial law, compliance, health care and litigation were areas that were in high demand and therefore paid a higher salary. Additionally, first-year lawyers who entered the workforce with strong credentials, including previous work experience and an excellent academic record, were often offered higher paying jobs to start.[6]

That salary hike in 2016 essentially separated Big Law from the rest of the profession. Lawyers in smaller sectors and smaller towns are making significantly less than those in Big Law. In a 2015 study the range between $40,000 and $65,000 accounted for more than half of reported first-year salaries.[7] Thus, although many students believe

Leslie H. Tayne, Esq., is an award-winning consumer and business debt-related attorney, advisor and founder of Tayne Law Group, P.C., one of the few in New York State concentrating solely in debt resolution and alternatives to filing bankruptcy for consumers, business owners and professionals. Leslie's mission is to reshape the debt relief industry by giving clients a supportive and reliable environment built on experience, trust and results that will not only relieve clients of the stress from debts but also the burden of the never-ending debt cycle.

their starting salary will allow them to pay their debt off relatively quickly, most recent graduates are making nowhere near the national median.

Law students should instead look at the regional and state employment data to get a better idea of what their salaries will actually be. Additionally, new lawyers may be miscalculating or neglecting to include their other expenses. In New York State in particular, cost of living is especially high. The state ranks above the national average for overall cost of living, groceries, utilities, transportation, housing, and health care. And, like the problem with tuition, cost of living continues to rise at a greater rate than wages. Therefore, even though a lawyer's income is likely to be higher in New York State, it may not be enough to completely compensate for the high cost of living.

In New York State, the average rent for a one-bedroom apartment is $1,291, significantly higher than the national average of $930.[8] In that case, if a young lawyer is living alone in New York State, they're looking at over $15,000 a year simply in rent—and that's only if you're looking at an average apartment. Young lawyers also have to account for food, health care, fitness, transportation and entertainment expenses, just to name a few. These expenses can add up quickly, particularly in a state like New York. Carrying a substantial amount of debt can certainly affect one's monthly budget, particularly if you were anticipating making more money.

Repaying Law School Debt

As with all student loan debt, a number of options exist to pay off law school debt, particularly if the loan is a federal student loan. For federal loans, you will be given an option for repayment when it comes time to begin making repayments (typically following a grace period after graduation). However, the repayment plan can change at any time over the course of the repayment period by request on the federal loan. Private student loan repayment plans, however, are set by the lender and often have less flexible repayment plans.

The standard federal student loan debt repayment plan is the 10-year plan, which calculates your monthly payment based on paying off your debt within 10 years. Ten years is a relatively quick amount of time to pay off student loan debt, which is one of the major benefits of this method. However, because of the exorbitant cost of law school, the 10-year plan most likely means monthly payments will be substantial. This may not be the most suitable option for young lawyers who are making lower salaries.

Another common path to take is the income-based repayment plan. Typically, with such a plan graduates will pay 15% of their salary until the debt is repaid or until 25 years have passed and the debt is forgiven. Payments change as income changes, meaning payments are lower when making a first-year salary and increase as salary increases. The benefit of an income-based repayment plan is that it's meant to keep your monthly payment at a level that is reasonable for your current financial situation. However, the major downsides are that it will take significantly longer to pay off the debt and, as a result, the debtor ends up paying significantly more in total because of the interest that will accrue over the years.

Another option is the Pay as You Earn (PAYE) method, which is another type of income-based repayment available to qualifying borrowers. This path includes paying 10% of your income for 20 years, with the remaining balance being forgiven as long as no payments were missed during the repayment period. This tends to result in lower monthly payments and a shorter repayment period than the traditional income-based repayment plan. Lawyers, however, are less likely to qualify for PAYE because you must demonstrate partial financial hardship.

Thus, although many students believe their starting salary will allow them to pay their debt off relatively quickly, most recent graduates are making nowhere near the national median.

If you opt to apply for any repayment plan other than the standard plan, you will need to reapply each year with your updated income and tax information. The terms of your repayment, then, may differ from year to year depending on your situation.

As a result, new lawyers need not only take their repayment options into account when searching for jobs after graduation, but also to seek a salary that suits their debt repayment goals. In general, the more quickly the debt is repaid, the better off financial health will be throughout adulthood. Of course, everyone wants to make the highest salary they possible can. New lawyers, however, are limited by the area of law they are practicing, the location in which they are looking for work, and the skill set they are able to bring to the table.

What Law School Debt Means for Established Firms

Hiring Young Lawyers with Debt

With the increasing cost of law school, and subsequently the rise in student loan debt among law school graduates, law firms are also put in a difficult position. As in every profession, hiring young people typically costs less than hiring more experienced employees. This often makes financial sense for firms that can use new talent to fill positions that are appropriate for those just entering the profession but, with new lawyers carrying so much debt, firms may struggle to offer salaries that are sufficient for these first-year associates.

As someone who may be hiring new lawyers, how do you balance the budget of your firm with the salary needs of young people seeking employment? One of the most important considerations when making these decisions is comparing skill and salary demands.

Hiring a lawyer straight out of law school does not always mean hiring someone completely inexperienced. Many recent graduates have gained a great amount of experience even before officially entering the workforce. Additionally, strong academic records can be an indication of a potentially valuable young employee. Therefore, weighing the potential upside of a prospective employee is important when deciding what salary to pay. Are you truly getting an entry-level employee, or are you hiring someone who is already very knowledgeable and who will be able to contribute on a higher level right away? In the case of the latter, you may then be able to offer a more competitive salary that will match the benefit of adding this person to your practice. This could be a win-win for all involved. The young lawyer will be able to pay off his or her loans more easily, and you will have a bright new employee who will have a positive impact on your firm. If you're not able to offer a competitive salary, you may lose them to a firm that can. Offering a lower salary may mean lowering the quality of your candidate pool as well, but that is not always the case.

Also, be aware that if an entry-level employee is asking for a higher salary, you should not automatically assume that it's coming from a place of arrogance, in that he or she believes they're worth more than you're offering. It may, instead, be coming from a place of worry, fearing that they'll be saddled with student loan debt that they're unable to pay or that will take them much of their adult life to get rid of. Of course, asking about student loan debt is too personal for a job interview, but simply noting what law school they listed on their resume should give you an idea of how much their education cost. There is nothing wrong in negotiating salary to include offers to pay down student loan debt.

However, not every firm has the budget to offer these more competitive salaries. If your practice doesn't have much wiggle room in terms of what it can offer strictly in salary, consider what other benefits can be offered to prospective employees. Perhaps your company offers reimbursement for fitness memberships, cell phones, or meals while in the office. Or maybe your company gets deals on tickets to sporting events or shows around town. While these benefits are not the same as offering a higher salary, they can result in savings which can free up funds to be put towards the student loan debt. If you have a prospective employee who is interested in negotiating a higher salary that you can't provide, emphasize the value of these benefits and how they can help him or her.

In general, tuition and the cost of living are going to continue to rise, and the industry is going to need to respond. If your firm hasn't raised salaries in quite some time, and you're in need of new attorneys, it may be time to consider options that could attract the best candidates with alternatives to salary that do not go beyond your company budget. The notion behind the 2016 salary increase in Big Law was to adapt to the changing landscape of student loan debt and the rise in cost of living. The change is taking hold across the industry, but firms at all levels will need to continue to keep up and that means being creative.

When Lawyers Need a Student Loan Debt Lawyer

Knowing When to Seek Help

You don't have to be fresh out of school to be struggling with student loan debt. Unfortunately, student loan debt is a problem that individuals deal with at all different ages and steps in their careers.

The biggest indicator that someone may want to seek professional help for their debt is a feeling of drowning. That feeling typically means that debt has become unmanageable or that it is creeping into other areas of the person's life. Debt has the ability to affect both mental and physical health—spawning the term "crippling debt." If this is the reality, it's time to enlist professional services. In the end, you want your staff with clear heads.

But the feelings surrounding debt don't necessarily need to be that extreme to warrant seeking help. Simply being confused or having questions about debt are also valid reasons to ask for the advice of a professional. Student loan debt is confusing—there are different types of loans and a variety of different options to tackle student loan debt. A debt attorney can simply help navigate through the confusing labyrinth of repaying student loans. A consultation with a student loan debt attorney is also a low-cost benefit to offer to attorneys and staff.

Using Your Connections

One of the benefits of being a lawyer is the ability to find a lawyer for yourself more easily than the general public. Often, lawyers are well connected to other lawyers, including those who practice other areas of law. Young lawyers may not have had as much time to develop these networks. However, they can turn to the more experienced lawyers in their firms for recommendations. If they are not comfortable asking for a debt lawyer for themselves, they can ask under the guise of recommending to a friend or family member.

The student loan debt crisis doesn't just affect recent graduates. The impact can be felt by all throughout the business world, as employers try to juggle paying new employees a competitive salary sufficient for paying off student debt. This issue has been especially apparent in law, as a result of the high cost of obtaining a law degree and the expectation of a high salary upon landing a job in a law firm. But the reality is that only the top percentage of new associates are earning at that high level, while others are making a much more modest salary. Firms have had to respond accordingly, and will likely have to continue to do so, adjusting salaries or offering other benefits to new employees, one of which is the connection to student loan debt attorneys, who can help their fellow lawyers effectively manage their loans.

As the student loan landscape continues to change, the industry's response will likely continue to shift as well. Quality candidates are becoming more expensive—both for the candidates themselves and the firms hiring them.

Endnotes

1. Hillary Hoffower, *The story of an orthodontist making 6 figures with $1 million in student-loan debt shows why doctors and lawyers are no longer the richest people you know* (2018), https://www.businessinsider.com/debt-vs-cost-vs-salary-medical-dental-law-school-2018-5.
2. Law School Transparency, *Law School Costs* (2018), https://data.lawschooltransparency.com/costs/tuition/.
3. Robert Farrington, *Law School and Student Loan Debt: Be Careful* (2014), https://www.forbes.com/sites/robertfarrington/2014/12/18/law-school-and-student-loan-debt-be-careful/#76ad337711f9.
4. Don Mcaulay, *How much will you earn as a lawyer?* (2017), http://www.nationaljurist.com/national-jurist-magazine/how-much-will-you-earn-lawyer.
5. *Id*.
6. *Id*.
7. *Id*.
8. Best Places, *Cost of Living in New York*, https://www.bestplaces.net/cost_of_living/state/new_york.

The Little Known and Understood Living Benefits of Life Insurance

By Henry Montag, CFP, and Bill Boersma, AEP

Life insurance is one of those things many people think they understand—you pay a premium, you die, and your beneficiaries collect a death benefit from the insurance company. But in reality most people understand very little about the subject. In fact, while gathering survey information regarding what consumers know about their own life insurance, we noticed that many respondents changed their initial answer to the first question, which asked for a self-evaluation of their insurance knowledge, once they completed the 10 questions we asked. "I guess I don't know as much as I thought" was a very common response. Another interesting response we found from our sampling of questions was how few people knew that they could withdraw dollars from the death benefit of a life insurance policy to pay for their long-term care costs. More on that and the results of our opinion survey later. First, let us frame the intent of this article as seen through the lenses of the two authors who, with more than 75 years of combined experience, will discuss the lesser known benefits of life insurance that the attorney and ultimately his or her clients could benefit from being aware of.

Most people know that the major reason people buy life insurance is so that when they die, their family, business partners, or other beneficiaries will receive a check from the insurer. Most are aware that the proceeds from a life policy can be received tax free. Unfortunately, however, most people view life insurance as a stodgy document that you buy and put in a file drawer, only to be looked at when the insured passes away. That thinking worked up to the early 1980s when there were only two types of life insurance: term and whole life, which were both guaranteed. However, in the early 1980s when E.F Hutton created non-guaranteed Universal Life Insurance, everything changed. This article will focus on the fact that life insurance is also an "asset class" that can provide significant living benefits to an insured, and the owner, in addition to a death benefit that, with proper attention, is payable to their beneficiaries.

There are three specific types of living benefits that can be enjoyed by those aware and able to take advantage of them. As long-time practitioners we speak with experience when we say that only a small minority of policy owners and their advisors are aware of and understand many of the benefits we will be discussing. To further document this point, we created a short opinion poll to determine what the average consumer knows and doesn't know about their own life insurance policies. The results were very interesting, though not necessarily surprising. Realizing just how little policy owners understood about the basics may make it more compelling for you, their advisor, to realize the opportunity to not just draft the Irrevocable Life Insurance Trust (ILIT) and the Special Needs Trust (SNT), but to advocate for, and provide guidance to, the owner/trustee or insured of a life policy that's funding those vehicles.

It became apparent that so few understand this often misused financial tool that, as we'll see, is capable of so much more than just providing a death benefit. One of the most significant findings in our survey was the high percentage of individuals who purchased Universal Life Insurance policies and didn't know that there was a guaranteed and non-guaranteed version. Further, that many weren't aware that those life insurance policies were now in the process of expiring prematurely, as a result of reduced interest rates. Nor were a high percentage aware that they should have been actively managing those policies by increasing the premium paid to the life insurance company over the years.

The three living benefits we'll discuss are:

a. Life insurance and long- term care benefits resulting from the Pension Protection Act of 2006.

b. Utilizing tax-deferred accumulation benefits and tax-free distribution strategies to supplement retirement.

c. Utilizing Life Settlement strategies to maximize the value of an existing life insurance policy's living value.

Long-Term Care

The Pension Protection Act of 2006 (PPA), which was planned for in the early 2000s and first became effective in 2010, marked a change in public policy regarding paying for long-term care. Since the largest financial burden of paying for long-term care costs ultimately falls on state and federal governments, many governmental officials were seeking ways to increase the public's use of long-term care insurance, which had stalled out at a dismal 9-10% of market penetration. They were hoping to provide sufficient incentives to motivate their constituencies to procure private insurance themselves, rather than seek the counsel of an elder law attorney to help them shelter their own funds while going on the Medicaid rolls. In the early 2000s it was decided between the insurers and the federal and state governments that this would be accomplished by the creation of several new and significant tax benefits for those who purchased PPA-eligible hybrid, combo, or linked private long-term care, life insurance, and annuities.

The Pension Protection Act in 2010 allowed an individual to draw money from the death benefit of life insurance policies on a tax favorable basis for use in paying long-term care expenses. In addition, it allowed for the tax-free purchase of a long-term care insurance policy from the otherwise taxable gains of a life insurance policy's cash value, or an SPDA, single premium deferred annuity. The PPA also introduced a new crop of products that created significant leverage in creating a long-term care benefit that can turn $1 into three-five times greater than the initial lump sum deposited into one of these new classes of policies. These policies are referred to as asset based, combination, linked benefit or hybrid policies. In addition to the tax benefits and leverage, perhaps one of the most important benefits is that these products removed the 'use it or lose it' mentality normally associated with a traditional stand-alone long-term care insurance policy. Right up there with costs, the most popular reason for not purchasing long-term care coverage was the fact that if they never needed the coverage, they would have lost all of the premium dollars they had paid in over the years.

A hybrid LTC policy can be either a life insurance or annuity contract with a rider that offers long-term care benefits. For example, say a consumer buys a $500,000 life insurance policy with an LTC rider. When the insured individual qualifies for LTC benefits (typically when he or she is unable to perform two of six activities of daily living [ADL] or becomes cognitively impaired), a given percentage of death benefit, 2% in this example, is available each month for LTC needs. This means that 2% of $500,000, or $10,000, is paid out monthly. An annuity-based LTC hybrid policy would also have a ratcheted-up benefit for LTC purposes. Additionally, inflation protection and return of premium may be added.

Before the PPA the last-in, first-out nature of taxation for annuities meant that accessing cash value to pay for LTC expenses or LTC premiums was a taxable transaction for contracts with a gain. In some situations the cost of an LTC rider was considered a distribution and taxed as ordinary income. The PPA changes this. For example, if an annuity with significant gain is rolled into a new PPA-compliant annuity, the entire value of the annuity could be used to pay for LTC costs, and the taxes on the gain would forever be avoided. Annuities still can't be exchanged into life insurance contracts, though life insurance contracts can be exchanged into annuity contracts.

Another new aspect of the PPA is the ability to do a full or partial tax-free Section 1035 exchange into a stand-alone long-term care policy from a life insurance policy or annuity. This is another way to eliminate income tax on gain in the policies when pursuing long-term care solutions. For example, someone with a $50,000 gain in a $100,000 annuity would normally first have to pay taxes on the $50,000 gain. However, if the money was transferred via a 1035 tax-free exchange into a hybrid product, they could eliminate the entire tax on the $50,000 gain while leveraging the $100,000 principal into a much higher pool of dollars available to pay for long-term care costs, a very significant benefit.

Individuals today are able to place new money, or transfer existing annuities with an otherwise taxable gain, into a Single Premium Immediate Annuity (SPIA) and use the full proceeds of that otherwise taxable flow of income from the SPIA to pay for an individual's or couple's long-term care premium's. These single premium immediate annuity payments can also pay an existing long-term care policy's premiums on a tax advantaged basis, assuming the premiums are paid directly to the insurer from the annuity with no concern as to an individual's health or insurability. Another very important benefit has been the ability to lock in costs for long-term care premiums, and avoid the significant premium increases the purchasers of long-term care insurance have experienced over the last decade. These benefits, all the direct result of the PPA, have been responsible for an increasing number of requests from wealthy clients seeking information about these strategies, as well as a significant number of new life policies sold with these LTCI features and riders. How well have these combo plans been accepted by the consumer? According to the Life Insurance Marketing Research Association (LIMRA), in 2017 there were approximately 66,000 traditional stand-alone long-term care policies sold, and approximately 260,000 hybrid plans. The only downside is indeed ironic: that these combo plans cannot take advantage of the various tax credits that traditional stand-alone plans are entitled to.

Accumulation Planning

The second form of living benefit generically involves retirement cash flow. These are often referred to as private pensions, deferred compensation, salary continuation, supplemental executive retirement plans, 162 bonus plans and others. Fundamentally, each version is a form of richly funding a life insurance policy to build cash value over and above the expenses in the contract to grow tax free until a point in time where the cash value can be withdrawn and/or borrowed as a loan. Assuming the withdrawal strategies are structured correctly, the loans never have to be paid back, meaning the withdrawals can be 100% income tax free as long as a minimum $10,000 of the death benefit survives the insured. This concept can be implemented through a variety of contracts with varying risk profiles.

Fixed interest whole and universal life insurance to securities based variable life insurance to indexed life insurance, which is a bit of a hybrid product, can be used for accumulation purposes.

The benefits of using life insurance contracts for accumulation purposes include the fact that there aren't limits on contributions as there are in qualified plans; there is more flexibility in funding. Depending on product, plan design can be personalized and discriminatory; money can be accessed tax free and prior to age 59½ without penalties, and the death benefit itself is an obvious benefit. In many situations the policy's premium can be shared with the employer for a key person, or for the employer themselves through various cost sharing strategies such as a split dollar arrangement. In a split dollar arrangement a corporate dollar, usually in a lower tax bracket, can be used instead of the individual's higher tax bracket.

Potential downsides include the inherent expenses of a life insurance contract and the need for active management. There are clashing mentalities regarding the benefit of insurance funding accumulation planning with reasonable pros and cons on each side. Too often we see it presented as a panacea and over marketed with scant attention paid to properly choosing, building and managing programs and accessing money without professional guidance. However, when thoroughly understood and managed appropriately, well-constructed plans can provide much needed benefits, especially when the tax-free death benefit is a needed benefit.

Businesses often use life insurance as incentive plans to reward valuable and loyal employees on a discriminatory basis with the ability to maintain control if desired. It cannot be overstated how important it is to choose appropriate products, properly build individuals' contracts, fund them richly, and manage them actively. Realistic expectations of returns and benefits are crucial or both employees and employers can be left disillusioned. In worst-case situations, misunderstanding and mismanaged policies can result in catastrophic income tax consequences that will leave participants wishing they had never heard of the concept.

In the declining interest rate markets over the past decades, many insurance funded accumulation plans have failed to pan out. This is no different than a traditional retirement plan not panning out if returns do not meet original expectations; thus the need for management and a realignment of expectations. As opposed to traditional investments, where if returns and crediting rates are lower than expected there is still an account balance, with life insurance the entire contract may fail, wasting all monies that have been contributed.

None of this means the concept is bad, just that it is important to understand it thoroughly and work with skilled professionals to implement and manage strategies. Monies can be accessed through withdrawals as life insurance tax law allows basis to be extracted first, which is opposite to the rules regarding annuities. After basis is utilized, policy loans can be utilized to further access policy value and these loans, if in appropriate proportion to cash value, may not need to ever be paid back during life. While this is a major marketing feature of life insurance, great care must be taken to fully understand what this means, and the importance of modeling and managing the downside potential.

As with the long-term care options we discussed earlier, a life insurance policy that has outlived its purpose can also be exchanged tax free into an annuity product that may focus more directly on specific life insurance needs. Immediate annuities, deferred annuities, annuities with income riders, attractive death benefit features and long-term care options are all available. Furthermore, those not comfortable closely managing a life insurance policy to prevent some of the downsides from playing out can eliminate many of the risks through an annuity conversion.

College funding and any other potential need for asset accumulation where tax benefits and death benefit are advantageous could also be a consideration for the living benefits of a life insurance policy.

Life Settlements

Though our consulting practices, advisors are regularly asking us to analyze trust-owned life insurance for clients who previously purchased policies to provide liquidity to pay for their future estate tax liability. Many now feel that with the new federal tax law, which currently provides a $22,800,000 exemption for a couple, that their existing life insurance policies are no longer needed, although there are potential state estate issues to be considered. Whether that's a wise strategy or not is beyond the scope of this article and deserves careful consideration as the current law sunsets in only 5½ more years. Not to mention the current political climate that seems to favor a reduction in the current exemption levels. Nonetheless, we do the performance evaluations as we're requested.

Life insurance policies can advance through seasons of need and provide differing benefits that policy owners and insured individuals need over time.

Life settlements are an outgrowth of the viatical settlement market. A viatical settlement is a clause in a life insurance policy that allows an insured to collect a percentage of their death benefit while alive but only if they are certified to have less than six to twelve months to live. Unlike a viatical, life settlements are the sale of a life insurance policy to a third party on the life of an individual who does not have a terminal illness. Generally speaking, candidates must be in their seventies and beyond and offers are more attractive when the health of the insured has deteriorated.

Sometimes the policies are inadequately funded with severely declining cash values and may never pay a death benefit, and other times the cash value and premiums prove to be an un-duplicable use of money. Either way, policy owners and trustees need to ask the necessary questions to make the proper decisions regarding the best use of their life insurance assets, and the premiums that fund them. Sometimes the cash value from these policies is considered “found money” and redeployed into LTC protection. After all, the concept of risk shifting is still applicable to people with wealth.

When discussing life settlements the subject of legality needs to be clarified. Many consumers and advisors alike confuse Stranger Owned Life Insurance (STOLI), which is illegal, with a Life Settlement, which is legal. It’s just like the sale of any other asset you own, a car, a house or a boat, etc.

Most of our work with life settlements has been the sale of non–guaranteed, underfunded and underperforming universal life policies where substantially more premium is required to keep the policies going or the death benefits must be cut. Let’s say an older gentleman has a $1million policy that isn’t projected to go to normal life expectancy due to years of declining interest rates and neglect. Premiums may have to be doubled or more to have a decent chance of keeping the policy afloat through life expectancy. Whether or not the life insurance is still needed, it should always be in the mind of clients and advisors to manage assets as astutely and efficiently as possible. This policy may have $50,000 of remaining cash value and be continuously decreasing and on track to expire in a few years, well before the insured individual is expected to pass. If a third party offer is available, and obtained at an amount greater than the cash value, it should of course be considered as it will extract the greatest value from the disappointing contract. Depending on age, health, type of contract, premium load and other issues, such a policy may be salable for double or triple the cash value, or even more.

Recently we worked a case where the parents decided that the children and grandchildren could benefit from the cash value of the life insurance policy today more than they could from the death benefit years from now. They were about to cash in the policy for the cash surrender value when we were introduced by their attorney. The upshot of this was that we successfully sold the policy on the market for more than the cash value, which allowed the heirs to obtain a larger payout than the existing cash value. In this situation the policy was all paid for, was guaranteed for life and was an excellent use of money.

Whether or not a client wants to take advantage of such a strategy, bringing it to the table, when appropriate, is of paramount importance.

Even term insurance policies can be life settlement candidates on occasion. There is a narrow path to a successful term life settlement as in almost all situations the term policy will need to be convertible, which is usually up to age 70 and in rare occasions to age 75. For an individual to be a candidate at that age, it is pretty much mandatory for there to be a meaningful negative change in health. That being said, selling a term policy, with no residual value, for even a low percentage of face amount may be attractive. In some circumstances we have seen hundreds of thousands, or even seven figures, become available out of thin air for an expiring asset few thought had any value whatsoever. It is especially important for advisors to make their business owner clients aware of this concept regarding their corporate-owned policies. Too often an old key-person policy, or a forgotten buy-sell policy, is simply lapsed at the end of the term when substantial value could have been realized. When companies are being bought and sold this is another way to find buried value. It’s important to ask the questions, rather than discovering later that an opportunity was squandered.

In closing it should be noted that the authors highly approve of the implementation of Regulation 187 intended to protect the New York State life insurance consumer. In July of 2018 the New York State Department of Financial Services enacted legislation where for the first time the life insurance agent/broker will be required to not only do what is suitable for the consumer, but also do what’s in the consumer’s “best interest,” and will also require full written disclosure regarding the risks of the purchase. (Regulation 187 has been re-named “Suitability and Best Interests in Life Insurance and Annuity Transactions.”) The annuity provision becomes effective in August 2019, and the life insurance component becomes effective in February 2020. The authors feel it’s high time that these new rules be imposed as they will provide more safeguards for the general public. It should be noted that credentialed members of Society of Financial Service Professionals and CFP certificants already have an imposed commitment to place the client’s interest above their own, regardless of any recommendations or how they get paid. The CFP Board of Standards will begin enforcing a heightened fiduciary standard on its members effective October 1, 2019, which will then require the certificant to consider and analyze more than one potential course of action, and will require any suggestions to include the advantages and disadvantages of their recommendations. The new rules will now also apply to all advice and not just planning advice.

Bonus Idea

In most circumstances, when a life insurance policy is surrendered or lapsed, there is no ability to take a loss if the basis in the contract is greater than the surrender value. However, there are circumstances where that loss may be salvaged rather than wasted. Tax law allows a carryover of basis from a life insurance policy to an annuity. The ensuing annuity may grow tax free to the original basis. Alternatively, under the right circumstances, the annuity may be surrendered and the realized loss may be taken advantage of. These are strategies we will not discuss in depth here and warrant working closely with your tax counsel.

Life insurance is an interesting and very efficient yet complex financial tool. It is misunderstood by most people yet on a risk adjusted, leveraged and tax adjusted basis, no other financial tool can compare to its benefits. It is unfortunate that this lack of understanding too often translates into both lost, or at least not optimized, capital and missed opportunity through the living benefits we have discussed today. As the industry and market continues to evolve and competition drives innovation, the consumer benefit available through properly vetted, implemented, managed and divested life insurance will continue to grow and flourish. As mentioned the tools to properly manage and monitor these and other life policies to prevent their early expiration, and get the maximum value for one's premium dollars, are all available, they just have to be used. As good as life policies are, they don't come with a built in self-management mechanism, as that's the responsibility of the owner/trustee. All too often these individuals, usually the eldest son or daughter, have little to no knowledge of their responsibilities or liabilities. These amateur trustees, your next generation client, could certainly use your guidance and advocacy in these matters.

Henry Montag is an independent CFP in practice since 1984 and Managing Director of The TOLI Center East LLC, a firm that provides performance evaluations on individual and trust owned life insurance, located on Long Island, NY, and operating since 2012. He provides continuing education credits for various Bar Associations and State Societies of CPA's regarding various life insurance strategies. Mr. Montag co-authored an American Bar Association Flagship publication, Jan. 2017, titled *The Advisors' and Trustees' Guide to Managing Risk*. He also has authored articles for such publications as NYSBA's *Journal*, Bloomberg's *Estates Gift & Trust Journal*, *Trusts & Estates Magazine*, NYSCCPA's *Tax Stringer*, and *Accounting Today*. He is a source for The Wall Street Journal and other periodicals and has appeared as a guest on Wall Street Week and Fox Business.

Bill Boersma is the founder, owner and president of OC Consuling Group, a nationally operating life insurance consulting, audit, research and management practice in Grand Rapids, MI. Brought in by attorneys, CPAs, family offices, non-profits and financial professionals, OC offers expertise critical to proper procurement and ongoing management of life insurance assets as well as a track record of fixing problems. From mom and pop companies to billionaire families, engagements range from simple second opinions to in-depth, actuarial defensible analysis, building insurance portfolios to tearing them apart, independent modeling and stress testing, tax analysis, valuations, litigation support and expert witness work, life settlements…if it has to do with life insurance, OC has been there and delivered solutions.

Ethical and Professional Considerations for the Retiring Attorney

This material was prepared by Matthew Lee-Renert, with thanks to Thomas Leghorn, Esq., for his guidance on malpractice issues, in connection with Mr. Lee-Renert's presentation at the Senior Lawyers Section Fall 2018 Program, "Retirement Planning 101: The Top Six Things Both Clients and Attorneys Must Know and Do."

These materials and any statements made in the presentation of such are not official pronouncements of the Appellate Division, Second Judicial Department, and are not to be cited to a court or relied upon as official guidance.

Introduction

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

I. "Retirement" as an Attorney Registration Status

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

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

Retirement – when an attorney, other than the performance of legal services without compensation, does not practice law and does not intend ever to engage in acts that constitute the practice of law [22 NYCRR 118.1(g)].

Practice of Law – "the giving of legal advice or counsel to, or providing legal representation for, particular body or individual in a particular situation in either the public or private sector in the State of New York **or elsewhere**, it shall include the appearance as an attorney before any court or administrative agency" [22 NYCRR 118.1(g) (emphasis supplied)].

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

In consideration of the restrictions imposed by Part 118, the New York State Bar Association, in Ethics Opinion 1089 (2016), considered a retired attorney's use of the term "Esquire" on business cards and stationery in connection with a "non-legal business." Opinion 1089 sets forth that a retired attorney could do so, but must take care to avoid confusion regarding the capacity in which the retired attorney was acting. In situations where such confusion could arise, the retired lawyer should indicate retired status or limitations on the ability to practice.

B. Voluntary Resignation: For the retiring attorney who wants to dispense with all New York registration obligations, removal from the roll of attorneys is necessary. In turn, this voluntary process is administered through the Departments of the Appellate Division, which are vested with the authority to admit and remove attorneys in New York [Judiciary Law Section 90]. Prior to October 1, 2016, each of the four Judicial Departments had their own procedures for administering this process. Following that date, the joint Rules for Attorney Disciplinary Matters [22 NYCRR 1240] instituted a unified procedure for the "Resignation for Non-Disciplinary Reasons" [22 NYCRR 1240.22(a)]. Appendix E to those Rules provides a form affidavit for that application. The application is still submitted to the appropriate Judicial Department of the Appellate Division.

Any opinions expressed are solely those of the writer(s)/speaker(s) and this outline should not be considered a substitute for the direct reference and review of the statutes, rules, cases and ethics opinions that the outline cites and addresses.

The joint Rule also provides a more unified process and form affidavit for the application by the former New York attorney seeking to be reinstated following a resignation for non-disciplinary reasons [22 NYCRR 1240.22(b)]. However, the Rule specifically provides that the court may deny the application with leave to renew upon proof that the applicant has passed the Bar Examination and/or the MPRE. The court may also take such other action as it deems appropriate.

II. Ethical Issues Raised by Retirement

A. Withdrawal From Representation

An attorney seeking to retire in the midst of pending matters must withdraw from representation and, therefore, is subject to the requirements of Rule of Professional Conduct 1.16. That Rule includes the following provisions, which may be relevant to the retiring attorney:

Rule 1.16(b)(2): A lawyer **shall** withdraw from representation of a client when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client (emphasis supplied).

Rule 1.16(c)(1): A lawyer **may** withdraw from representing a client when . . . withdrawal can be accomplished without material adverse effect on the interests of the client (emphasis supplied).

Rule 1.16(c)(9): A lawyer **may** withdraw from representing a client when . . . the lawyer's physical or mental condition renders it difficult for the lawyer to carry out the representation effectively (emphasis supplied).

Rule 1.16(c)(10): A lawyer **may** withdraw from representing a client when . . . the client knowingly and freely assents to the termination of employment (emphasis supplied).

Rule 1.16(d): If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

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

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

B. Ongoing Ethical Obligations to Preserve Confidentiality

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

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

An attorney is prohibited, pursuant to Rule 1.6(a)(1), from knowingly revealing confidential information, without authorization (subject to certain exceptions specified in Rule 1.6(b)). Rule 1.6(c) further requires that a "lawyer make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to [protected information]."

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

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

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

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

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

Another possible arrangement for the transfer of client files by a retiring attorney is a "custodial" relationship when there is not an actual sale of the attorney's law practice. The New York State Bar Association discussed this arrangement in hypothetical example in Ethics Opinion 1133 (2017). The Opinion discussed the notice given by transferring attorney and confidentiality implications for the custodial attorney.

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

The Rules of Professional Conduct do not have formal guidelines for what may constitute "appropriate steps." Rather, NYSBA has explained that an attorney should take reasonable precautions and that burden to determine what is "reasonable" is "squarely" on the attorney [Ethics Opinion 1019 (2014)]. However, Comment 16 to Rule 1.6 has been updated to provide factors for consideration in that determination. They include, but are not limited to:

(i) The sensitivity of the information;

(ii) The likelihood of disclosure if additional safeguards are not employed;

(iii) The cost of employing additional safeguards;

(iv) The difficulty of employing additional safeguards; and

(v) The extent to which the safeguards adversely affect the lawyer's ability to represent clients.

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

However, NYSBA has also stated that "exercising reasonable care does not mean that the lawyer guarantees that the information is secure from any unauthorized access" [Ethics Opinion 842]. That consideration is also now reflected in Comment 16 to Rule of Professional Conduct 1.6, which states, essentially, that an inadvertent or unauthorized disclosure does not constitute a violation if the lawyer has made reasonable efforts to prevent such.

C. The Retention of Records and Files

• **Mandatory Retention – Bookkeeping Records**

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

Bookkeeping Entries

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

The records of all deposits in and withdrawals from the account which **shall specifically identify** -

Deposits – the date, source and description of each item.

Withdrawals – the date, payee and purpose of each disbursement.

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

Deposits – the source, the names of all persons for whom funds are or were held and the amounts.

Withdrawals – the description, amount and names of all persons to whom funds were disbursed.

Documents Generated During the Course of Representation

Rule 1.15(d)(1)(iii): Copies of all retainer and compensation agreements with clients.

Rule 1.15(d)(1)(iv): Copies of all statements to clients or other persons showing disbursements to them or on their behalf.

Rule 1.15(d)(1)(v): Copies of all bills rendered to clients.

Rule 1.15(d)(1)(vi): Copies of all records showing payments to lawyers, investigators or other persons "not in lawyer's regular employ" for services rendered.

Rule 1.15(d)(1)(vii): Copies of all retainer and closing statements filed with the Office of Court Administration.

Rule 1.15(d)(1)(viii): All checkbooks, check stubs, bank statements, prenumbered cancelled checks, and duplicate deposit slips.

NOTE: Rule 1.15(d)(viii), unlike other subsections does not refer to "copies." In turn, the Rule has been interpreted to require the retention of "original" records. As many banks, however, no longer provide original cancelled checks to account holders, it is suggested that an attorney maintain the records in the form in which they are received in the ordinary course of business [*See* NYSBA Ethics Opinion 758 (2002); Roy Simon, *New York Rules of Professional Conduct Annotated*, at 920-921 (2017 edition)].

Rule 1.15(d)(3): Provides that a "**copy**" for the records in this part can be one of the following: original records, photocopies, microfilm, optical imaging, or other medium that preserves image and cannot be altered without detection. In Ethics Opinion 680, the New York State Bar Association emphasized that the common thread with all of the record options listed above should be the inability for someone to alter the images without detection. NYSBA Ethics Opinion 1077 (2015) discusses the use of scanned copies of original documents to satisfy the retention requirements.

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

•Client Files and Documents

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

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

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

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

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

Another cautionary consideration is that however, once relinquished, the attorney's property interest may be diminished. NYSBA Opinion 1094 (2016) provides that a subsequent attorney who now has a client's file cannot provide the former attorney access to such if the client refuses consent.

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

- ❒ **Documents Belonging to the Lawyer vs. Documents Belonging to the Client:** Ethics Opinion 623 preceded the Court of Appeal's determination in *Sage Realty*. Pursuant to the *Sage Realty* decision, the documents belonging to the lawyer became a much narrower category, the definition of which is a question of law and fact. The *Sage Realty* decision discussed that this category may include assessments of the client and other documents intended solely for internal law office review and usage [*Sage Realty*, 91 NY2d at 37-38]. Documents belonging to the lawyer ordinarily can be destroyed by the lawyer without consultation or notice to the client.
- ❒ **Documents in Need of Salvaging (DINS) vs. Documents That Can Be Destroyed:** NYSBA defined a broad category of documents as needing to be salvaged, which include documents for which there is a legal duty for the lawyer and/or client to maintain and any documents that a client would foreseeably need to establish personal or property rights.
- ❒ **DINS that the Lawyer Is Obligated to Maintain vs. the Client's Own Obligation:** DINS identified by the lawyer as records that the lawyer is required to maintain should than be maintained as required by Rule or Statute. DINS that the client should maintain should be returned to the client. If the lawyer is unable to transfer them, the lawyer should continue to maintain those documents. Ethics Opinion 623 suggests that a lawyer may be able to charge the client for the cost of maintaining these documents provided the lawyer has given the client adequate notice of the intention to do so.
- ❒ **Communicating With the Client:** Consistent with the requirement to deliver all papers and property to which a client is entitled at the termination of representation [Rule 1.16(e)], the Association of the Bar of the City of New York has suggested that "it is good practice to discuss with the client the retention and disposition of the files at the time of the termination of the matter, or, in appropriate circumstances when there is a continuing client relationship, at the conclusion of the representation [NY City Ethics Opinion 1986-4]. However, that Opinion concluded that there is no "hard and fast rule as to when the client should be contacted, and good judgment should govern in making this decision." [*Id.*].

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

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

D. The Escrow Account

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

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

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

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

• When Other Signatories Will Actively Maintain the Account

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

A useful resource for a retiring attorney in the process of closing a law office is *Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death*. The 2016 edition of this publication, which was originally produced by NYSBA's Committee on Law Practice Continuity, is available on NYSBA's website, www.nysba.org, as a free download (currently in the "Law Practice Management" section under the "Practice Resources" heading on the homepage). In addition to covering many professional and ethical issue related to closing an office, it also includes checklists and sample forms to facilitate that task.

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

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

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

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

Checklists: What Married Couples Should Do

By Kathleen M. Rehl, Ph.D.

Kathleen M. Rehl, Ph.D., CFP®, CeFT®, is the author of *Moving Forward on Your Own: A Financial Guidebook for Widows*. Reprinted with permission from author.

Review accounts and assets

Take key steps

❏ Hire an estate attorney to draft or update wills and other estate-planning documents.

❏ Hire a financial adviser both spouses like.

❏ Make sure each spouse's will gives the executor permission to manage digital assets.

❏ Use an online service such as Intuit Inc.'s Mint or Personal Capital Corp.'s software to track all of their accounts and assets—and be sure both spouses have the password.

❏ Use an electronic password aggregator to keep track of log-in information for online accounts, including photo sites, and keep the password with their wills.

❏ Set up bank and other financial accounts a surviving spouse will need immediate access to in both spouses' names or as "transferable on death" from one spouse to the other. (Some types of accounts in one spouse's name alone typically go through probate and may not be immediately accessible.) Consult with an estate attorney before retitling accounts if you think you may owe federal or state estate tax.

❏ When the first spouse dies, his or her estate is required to use assets held in the deceased spouse's name alone to settle his or her individual debt. Assets that are jointly held or are held in the survivor's name alone are protected, unless the survivor co-signed or guaranteed the debts.

What a Surviving Spouse Should Do

Locate accounts and assets

❏ Call the deceased spouse's employer, if he or she was working, to ask about a 401(k), traditional pension, stock options, and life insurance and the cost to continue health coverage under the company plan.

❏ Check the most recently filed tax return for the names of the financial firms that house the household's accounts. Financial firms provide 1099s when bank, retirement and taxable accounts generate income, capital gains, dividends or interest.

❏ Present the death certificate and proof of identity to get their share of a spouse's IRAs, 401(k)s, and life insurance. (Be aware of the rules surrounding penalties before transferring money from a spouse's 401(k) or IRA to your own.)

❏ Look for statements in the mail for accounts that don't show up on the tax returns, including pensions, IRAs, annuities, and 401(k)s no one is contributing to or taking withdrawals from. Because companies can lose track of former employees, call your spouse's previous employers, too.

❏ Ask for free help if you believe your spouse was entitled to a pension from a company you cannot locate. Sources include the Labor Department and the Pension Benefit Guaranty Corp.

❏ Search for missing life insurance and annuity contracts in the "Life Insurance Policy Locator Service" sponsored by the National Association of Insurance Commissioners or in your state's unclaimed property fund.

Take key steps

- ❏ Order at least 15 copies of the death certificate to use to retitle financial accounts and settle the estate.
- ❏ Contact the estate attorney, accountant and financial adviser.
- ❏ Gather household bills and bank, brokerage, insurance, and credit-card statements.
- ❏ Retrieve electronic statements from the deceased spouse's email account or petition the email provider for access.
- ❏ Start the probate process by having the executor submit the death certificate and any will that exists to the court.
- ❏ File with Social Security for a $255 death benefit.
- ❏ Consult someone who knows the rules for claiming monthly Social Security survivor benefits, based on the amount your spouse would have received. A survivor can claim as early as age 60 (or 50 if disabled).
- ❏ Retitle household bills in your name.
- ❏ Change the beneficiaries on your retirement or other accounts or insurance policies if necessary.
- ❏ Update your will.
- ❏ Create a new financial plan once you understand what you own and owe and are able to make long-term decisions.

Section Committees and Chairs

The Seniors Lawyers Section encourages members to participate in its programs and to volunteer to serve on the Committees listed below. Please contact the Section Officers or Committee Chairs for information about these Committees.

Age Discrimination
Gilson B. Gray III
Duane Morris LLP
1540 Broadway
New York, NY 10036-4086
gbgray@duanemorris.com

Diversity
Susan B. Lindenauer
45 Gramercy Park North, Apt 8A
New York, NY 10010
alindenauer@nyc.rr.com

Financial and Quality of Life Planning
Rosemary C. Byrne
Step-by-Step Coaching LLC
319 Audubon Road
Englewood, NJ 07631
rcbcci@aol.com

To update your information, please contact the Member Resource Center at 1-800-582-2452.

Law Practice Continuity
Anthony Robert Palermo
Woods Oviatt Gilman LLP
1900 Bausch & Lomb Place
Rochester, NY 14604
apalermo@woodsoviatt.com

Robert L. Ostertag
Ostertag O'Leary Barrett & Faulkner
301 Manchester Road, Suite 201
Poughkeepsie, NY 12603
b.ostertag55@gmail.com

Legislation
A. Thomas Levin
Meyer, Suozzi, English & Klein P.C.
990 Stewart Avenue, Suite 300
P.O. Box 9194
Garden City, NY 11530-9194
atl@atlevin.com

Membership
George E. Riedel, Jr.
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue, Suite 120
Buffalo, NY 14202-3924
griedel@lglaw.com

Publications
Carole A. Burns
64 Twilight Road
Rocky Point, NY 11778-9790
cabb1@optonline.net

Technology
C. Bruce Lawrence
Boylan Code LLP
The Culver Road Armory
145 Culver Road, Suite 100
Rochester, NY 14620
cblawrence@boylancode.com

Jay Hollander
Hollander and Company LLC
5 Penn Plaza, 19th Floor
New York, NY 10001
jh@hollanderco.com

THE SENIOR LAWYER

Editor

Carole A. Burns
64 Twilight Road
Rocky Point, NY 11778
cabb1@optonline.net

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.

The Senior Lawyer is published for members of the Senior Lawyers Section of the New York State Bar Association.

ISSN 1949-8322 (print) ISSN 1949-8330 (online)

SENIOR LAWYERS SECTION

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at 518-463-3200.

NEW YORK STATE BAR ASSOCIATION
SENIOR LAWYERS SECTION
One Elk Street, Albany, New York 12207-1002

NON-PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155