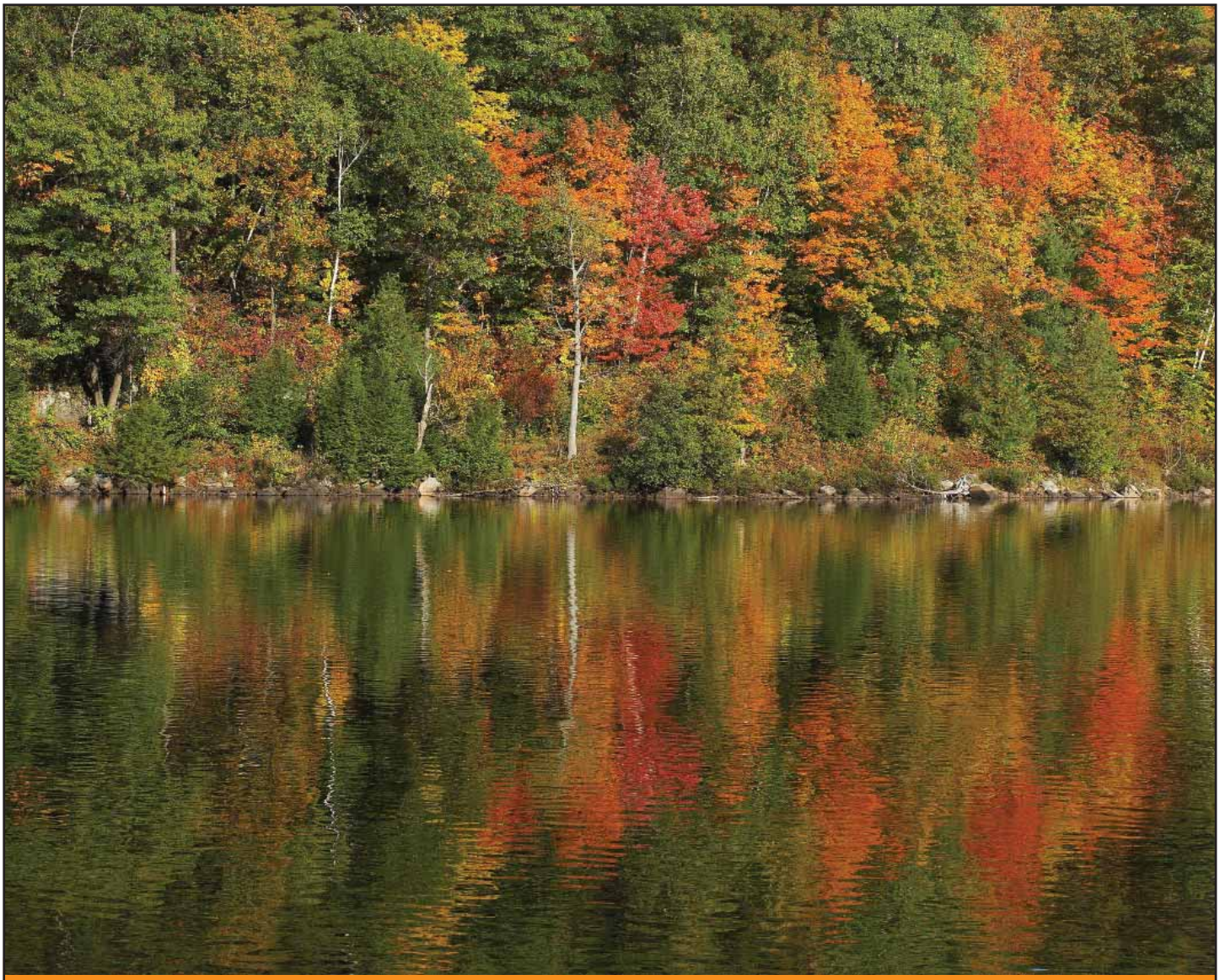
NYSBA FALL 2009 | VOL.1 | NO.1

The Senior Lawyer

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



Premiere Issue

TO JOIN THIS NEW NYSBA SECTION GO TO WWW.NYSBA.ORG/SLS
OR SEE PAGE 79 OF THIS ISSUE

About the Senior Lawyers Section

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

Profile

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

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

Scope of Activities

The Senior Lawyers Section seeks to address such issues as:

- Career continuity
- Career changes
- The desire and opportunity to:
  - Render pro bono service
  - Serve on boards
  - Mentor other attorneys
  - Take CLE courses relevant to seniors
- Social activities for seniors

Section Officers

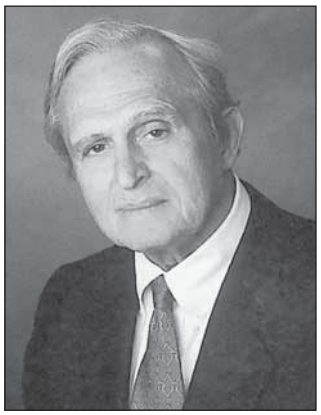
Chair: Justin L. Vigdor
Chair-Elect: Walter T. Burke
Vice-Chair: Susan B. Lindenauer
Secretary: Charles E. Lapp, III
Treasurer: Richard Long

WWW.NYSBA.ORG/SLS

Table of Contents

A Message from the Section Chair

Greetings:



This first edition of *The Senior Lawyer* represents another significant step on our road to maturity as a Section. Organized in January of this year, we have already grown to over 1,200 members, all of whom share the desire to remain professionally involved and productive. Some may be "out the door," but none of us are "over the hill" (which, by the way, was the title of a program we co-sponsored last year as a Senior Lawyers Committee before we achieved Section status). The subjects dealt with at that program were arrangements for Seniors to continue in private practice (e.g., of-counsel arrangements), new career options (e.g., teaching, consulting, mediating) and public interest and pro bono opportunities during a "Second Season" of service.

Some of you may recall having participated in the survey of 16,000 attorneys age 50 and over, in which we solicited the views of senior lawyers regarding retirement, retirement planning, community services, pro bono work, relevant CLE and senior travel and socializing. We found that interest in a section for seniors devoted to such issues was highly desired, with a projected enrollment of more than 3,400 members, which would make us one of the largest sections of the State Bar. In only nine or ten months, we are already a third of the way there.

Given the fact that our survey indicated that 24% of the respondents do not plan on retiring until after age 70, and 12% say they will never retire and 22% are uncertain about whether they will retire, it is clear we will always have a large pool of energetic seniors to draw on for worthwhile Section activities. This publication will regularly highlight these activities.

I urge you to visit the Senior Lawyers Section Web site at www.nysba.org/sls . This will get you to the Senior Lawyers Section home page and from there you can access each of its 11 committee pages. Each of the 11 would enthusiastically welcome new members and new ideas. While visiting the Senior Lawyers Section of the Web site, you can access "Upcoming Events" on the right side of the home page or click on "Materials of Interest" on the left. Take another moment to join the Senior Lawyers group on www.linkedin.com, which will enable you to establish or expand your network, connect to others and announce news.

At this time, we are excited about our first fall meeting scheduled for the weekend of October 29 to October 31, 2009 at The Sagamore Resort in Bolton Landing, New York. Surrounded by the brilliant fall foliage of the Lake George area, we will have an opportunity to meet one another for the first time and benefit from valuable CLE programs to be held jointly with the Elder Law Section. For one of our sessions, we have scheduled a professional "Life Coach" who will, among other things, undoubtedly bless the recreational opportunities the meeting will afford. Watch for the formal announcement that will be arriving shortly.

Preliminary planning is also under way for our Section CLE Program and cocktail reception on Friday, January 29, 2010, during the Association's Annual Meeting at the New York Hilton.

Please get involved! Together we will learn a lot and have some fun in the process!

Justin L. Vigdor

An Important Message from the Editors

Willard H. DaSilva

Donald J. Snyder

This edition of *The Senior Lawyer* marks the beginning of a new era for many of us. I never thought of myself as a "senior," at least not since I left high school and then college. But now I have once again achieved the title of "senior" merely by joining this Section of the New York State Bar Association.

This is a new Section and, as such, we are free to explore new fields and sponsor innovative thoughts and activities, especially now that we can be called "seniors." To be a "senior" in the Senior Lawyers Section, all that I needed was, first, be an attorney (that was not so easy, but I was able to accomplish that requisite a number of years ago); second, be a member of the New York State Bar Association (which was really easy and most rewarding); and, third, be over 55 years of age (that, too, was an accomplishment, considering all of the trials, tribulations and other life hazards to reach that age). But at least I made it—and then some.

I now realize that being "senior" is not a question of age, but really a matter of knowledge and experience. At age 55 no one these days is considered "old" (just ask any 55-year-old), but one can be a "Senior Lawyer" at even that relatively young age. Why? Simply because life experience (including its pain, suffering and joys) has given us the advantage of insight and knowledge that has caused us to be somewhat settled in our ways, yet young enough to be insightful to help guide others as well as ourselves.

And so, this new Section is here to give all of us members the imagination, outlook and mental stimulation to continue the excitement of life, whether it may be in continuing the practice of law or looking forward to less professional activity and more leisure pursuits (the things we say we never had time for before now).

Consequently, this magazine is designed to appeal to all of our members of this Section, regardless of what stage of professional endeavor or leisure activities may be our goals and/or activities (I dislike the "and/or" but it fits). Hopefully, there will be articles of interest for every member of the Section. As in most instances, not all articles will appeal to all, but at least some of them should appeal to all of us.

To make this magazine most helpful to you, your input is needed. Comments, good or bad, are earnestly solicited to help make this link between the Section and you a two-way street with feedback from you. If there is something you like, say so—so that we may provide more of that kind of articles. Conversely, if you have negative criticism, please speak up so that we may make this magazine what you want it to be. We would like you to look forward to each issue. We can make that happen—but only with your help!

If you have penchant for writing, submit your articles and comments to us. This is *your* magazine, and you have the opportunity to have your thoughts published, not just for your sake but for the benefit of the rest of us.

So let us hear from you. I have written this column for my co-editor, Don Snyder, and myself. The next issue will be his turn to write his thoughts for himself and me.

Willard H. DaSilva on behalf of my Co-Editor, Donald J. Snyder, and myself

MARK YOUR CALENDARS NOW!!

SENIOR LAWYERS SECTION

FALL MEETING

OCTOBER 29-31, 2009

THE SAGAMORE

BOLTON LANDING, NY

Age Discrimination Committee

The Age Discrimination Committee expects to hold its initial meeting in September. It has established contact with the New York office of the Equal Employment Opportunity Commission, and representatives of that office are planning to attend Committee meetings on a regular basis.

Preliminary discussions have taken place with regard to the *Report and Recommendations on Mandatory Retirement Practices in the Profession*, issued in January, 2007 by the NYSBA's Special Committee on Age Discrimination in the Profession and later approved by the Association's Executive Committee and House of Delegates, and how best to continue the excellent work of that Special Committee, including:

(a) inviting members of that Special Committee to join in the Age Discrimination Committee of the Senior Lawyers Section;

(b) determining how best to support and promote the "best practices" set forth in the *Report and Recommendations*, such as the law firm survey on retirement practices that was conducted by the Association a year or so ago;

(c) determining how best to continue the work of the Special Committee, particularly with respect to the issues it decided not to address because of time constraints; and

(d) promoting and publicizing the *Report and Recommendations*, including providing a link to it (and to the results of the survey referred to in (b) above) on the Section's Web page.

Discussions on these subjects will continue at future Committee meetings.

Gilson Gray

* * *

Law Practice Continuity Committee

Background Information

As of June 1, 2009, the former NYSBA Law Practice Continuity Committee (NYSBA LPCC) was discharged and its mission was assigned to a new LPCC Subcommittee within the NYSBA's Law Practice Management Committee (NYSBA LPM), Chaired by Gary Muenneke (gmunneke@law.pace.edu). All former members of the NYSBA (LPCC) agreed to serve on the new Subcommittee, but as of this writing, the new Subcommittee does not have a Chair. Prior to the reallocation of the work of the NYSBA LPCC, the NYSBA Senior Lawyers Section (SLS) established its own Law Practice Continuity Committee to pursue objectives similar to those of the former NYSBA LPCC and now those of the new Subcommittee within LPM. The SLS LPCC wishes to coordinate its activities and efforts with those of the new LPCC Subcommittee within the NYSBA LPM, which held a 2009-2010 organizational meeting in New York City in September 2008.

A major work-product of the former Special Committee prepared over a five-year period, and published in 2005, was a volume entitled *Planning Ahead: Establish an Advance Exit Plan to Protect Your Client's Interests in the Event of Your Disability, Retirement or Death*. This *Planning Ahead Guide* contains a broad range of checklists and forms to be used in preparing for and implementing various phases or transitions in the practice of law. The *Guide* continues to be available as a professional courtesy to all lawyers, members and non-members of the NYSBA, at www.nysba.org/planningahead. The *Guide* may also be located at the NYSBA Web site under "Sections/Committees," and then clicking on Senior Lawyers Section or in the Solo or General Practice Section. **WARNING: It is recognized that the *Guide* must be updated from time to time and plans are currently being made to incorporate the New Rules of Professional Conduct that were adopted in New York on April 1, 2009, and to remove existing references to the former Disciplinary Rules mentioned in the *Guide*.**

Another major product of the former NYSBA LPCC was the drafting of proposed Uniform Court Rules outlining procedures for "Caretaker Attorneys" to address situations involving lawyer absence or unavailability in unplanned situations or where there has been no or inadequate advance planning for transition or succession. The proposed Uniform Court Rules were approved by the NYSBA House of Delegates in June 2005, with some minor changes, and were referred to the Administrative Board for consideration. We are informed that no action has been taken to adopt the proposed Uniform Court Rules by the Board or any Appellate Division, although the subject continues to be evaluated by each Judicial Department.

Immediate Past NYSBA President Bernice Leber and current NYSBA President Michael Getnick have been and continue to be actively engaged in efforts with the Administrative Board concerning these matters.

In August, 2007, the Senior Lawyers Division (SLD) of the American Bar Association (ABA), with the co-sponsorship of the NYSBA and the Monroe County Bar Association (MCBA), succeeded in gaining approval of Recommendation #105 which established an ABA policy urging courts and Bar Associations to develop, adopt, promote and implement programs and procedures to encourage lawyers to plan for law practice contingencies by voluntarily designating in advance another lawyer who would be willing and able to assume the lawyer's practice or assist in the transfer of client matters, papers and electronic files in the event of mental or physical disability, death, disappearance or suspensions, or other inability to practice law.

Recently, the Board of Trustees of the MCBA approved a pilot project to establish a Confidential Law Practice Registry that will enable lawyers, members and non-members to designate in advance, at any age, the name of a lawyer who has agreed to assist client's in the transfer of legal files and matters if and when the client's lawyer becomes unable to practice law for whatever reason. Details as to the implementation of the MCBA Law Practice Registry program are expected to be published in the near future. They will most likely be available at the MCBA Web site, www.mcba.org, or by contacting Mary Corbitt, MCBA Executive Director, at mcorbitt@mcba.org.

Law Practice Continuity Committee Membership Involvement Needed

We continue to invite and welcome participation from any member of the NYSBA SLS LPCC as we plan ahead. The LPCC will conduct its affairs, primarily, by using electronic means of communication. We will meet in person only locally and informally, other than at Section-wide activities, such as the NYSBA Annual Meeting in New York City, or at the upcoming Fall Meeting in conjunction with the NYSBA Elder Law Section at the Sagamore Hotel on Lake George. The LPCC encourages and supports local Bar Association activities within the broad "Mission" encompassed within the Committee's charge, and urges all its more than 80 members to join forces with other interested lawyers at the local Bar level.

Please send me your suggestions for Committee projects, publications and activities. Also, please volunteer to identify and develop specific programs which address the purposes of the NYSBA SLS LPCC.

Anthony R. Palermo

* * *

Program and CLE Committee

The Program and CLE Committee is energized and excited by the prospect of creating programs interesting and relevant to the diverse membership of the Senior Lawyers Section.

Our first task is to work with the Elder Law Section on the program for the Fall Meeting to be held at The Sagamore Resort on October 29-31, 2009. During our Committee's first conference call, the participating members requested that a round table discussion led by a life coach be added to the program. After consultation with our Section's Executive Committee and the Elder Law Section's Program Chair, three such sessions have been added to the program, with the working title "Preparing for 'Senior Status'—Creating a New Worklife-Leisure Balance."

Rosemary C. Byrne, who has successfully transitioned from a lengthy career as an attorney to an NYU trained and certified Life and Personal Coach, will lead the sessions, which are designed to provide guidance in exploring and determining where you want to go on the next phase of your life journey and to highlight specific strategies to reach that destination.

Other topics at the Fall Meeting also are sure to be of interest to our Section members and include financial planning for the transitioning attorney, Medicare issues and practice management for a solo or small firm when an emergency strikes. Our Section member, Anthony R. Palermo, will be participating as a speaker in the practice management segment of the program. Full particulars of the Fall Meeting program will be forthcoming.

Our Committee's next focus is the Annual Meeting. Program ideas for that meeting, as well as future meetings, would be very much appreciated, as would be the participation of Section members as program speakers. This will be the subject of our next conference call, but your suggestions and participation in the work of our Committee will be welcome at any time.

Carole A. Burns
Willard H. DaSilva

* * *

Membership Committee

The Section Membership is now 1,225 and compares very favorably with other Sections that have been in existence for considerably longer. Incentives for increased membership and member retention include personal, direct contacts through the Section Web site, including the link to www.linkedin.com, Materials of Interest and other features of the site.

The gender demographic of the Section is 80% male and 20% female, which is generally similar to the ratio in the State Bar. The preponderance of the members are in solo practice or in firms of nine persons or under. A letter from Michael Getnick, President of the New York Bar Association, has challenged us to increase our membership by 10% in the coming year. With your help we can reach that goal.

Charles A. Goldberger
John S. Marwell

* * *

Pro Bono Committee

Over 50 Senior Lawyers Section members have already volunteered to serve on the Pro Bono Committee. We would welcome additional participation from others as the Committee tackles various issues touching upon pro bono matters.

The Committee meets via conference call, as needed. An initial introductory call took place in April. Another substantive call took place in July. During that call, Gloria Herron Arthur, Director, Pro Bono Affairs for the New York State Bar Association, discussed various pro bono opportunities, in general, and answered questions regarding the best methods to promote and coordinate such opportunities. The Committee anticipates working closely with Ms. Herron Arthur to ensure that pro bono initiatives for senior lawyers are readily identified, coordinated and promoted.

The Committee expects to not only focus on the support and encouragement of senior lawyers' participation in pro bono service, but also anticipates exploring other topics, including emeritus rules, appropriate training for certain pro bono programs, possible opportunities for free or reduced rate CLEs in exchange for pro bono service, how to best advertise and promote pro bono initiatives without duplicating the efforts of other organizations, and how to make it easier to find pro bono opportunities in various locations throughout the state.

In future newsletters, we hope to identify and highlight specific pro bono initiatives that might interest you. In the meantime, please contact the New York State Bar Association if you would like to participate in the Committee. We would welcome your input.

Elizabeth McDonald

* * *

Senior Lawyer Services Committee

The Services Committee has undertaken to explore various areas of interest. Those under consideration are, among others:

(a) Career Management Assistance;

(b) Paid Teaching Opportunities;

(c) Social Events and Educational Programs;

(d) Linking Pre-Retiring Solo Practitioners with Law Firms;

(e) Local Social Events for Single Seniors; and

(f) Mentoring and Diet/Exercise.

The Committee invites your suggestions and participation.

M. Barry Levy

* * *

Technology Committee

There are two things you will need to participate more fully in the life of your Senior Lawyers Section: the ability to send and receive e-mails and the ability to access the Section's Web-based services, such as the Section's Web site and the Section's group on LinkedIn. For those who are technically challenged, this may sound like an overwhelming problem. You may already be asking, "What do I have to do to send and receive e-mail?" "How do you access a Web site?" "What's a Web site anyway?" This brief article will try to help answer these and similar questions for you.

There is some good news and bad news. First, the bad news. You will need to have access to a basic computer that is connected to the Internet. You may already have this through a family member who resides with you or a club or library to which you belong that is easy for you to visit on a regular basis. If not, you may have to purchase a basic computer and subscribe to an Internet service provider.

Happily, buying a basic computer is quite easy, and the costs these days are relatively low and still coming down. You should probably consider a basic laptop computer, because it almost always works right out of the box with minimal setup and usually comes preloaded with all the software you are going to need. Plan to spend around $400 for your laptop.

Now, you need to have an Internet connection to get you access to the Internet. Most telephone companies and cable companies offer Internet connections as part of the services you can purchase from them. Since you probably already have a telephone and may also have cable television service, you need to decide whether you want to get your Internet service from your telephone company or your cable company. Either will work satisfactorily for you. It will mainly be a question of cost and convenience. Plan to spend about $30 a month for your Internet service. Once your Internet service is up and running, you will need to connect your laptop to the Internet by plugging the cable that your telephone or cable company will provide into the jack on the laptop. Usually, the installer for the Internet service will do this for you. OK, so you now have a laptop that is connected to the Internet! What happens next?

Your laptop usually comes with two useful programs already installed. The first is called Outlook Express, and the second is called Internet Explorer. Outlook Express is an e-mail program that the installer of your Internet service can usually configure for you so that you can start using that program for sending and receiving e-mails using an e-mail account provided by your Internet service provider. There is a lot written about using Outlook Express, and the online instructions included with Outlook Express are rather good. So, we are not going to say too much more about Outlook Express in this article.

Outlook Express is not your only e-mail option, however. There are Web-based e-mail providers that are free and most people think are rather good. Google, Yahoo, Microsoft, and many others provide free e-mail accounts. To sign up for one of these free accounts, you need to use the second mentioned program called Internet Explorer. All you need to do is start Internet Explorer and then go to the Web site of your choice to sign up. Here is a link to sign up for a Google G-mail account: http://mail.google.com/mail/signup. Google, Yahoo, Microsoft, and many others make it very easy to sign up for a free e-mail account as you will see once you get to the sign-up page with Internet Explorer.

The advantage of Web-based e-mail is that you can read and send your mail from any computer that is connected to the Internet and that has a Web browser such as Internet Explorer. Outlook Express is specific to your computer. You can configure Outlook Express on more than one computer, but you will need that program properly configured to read and send e-mail if you use Outlook Express as your primary e-mail program. If you do not travel much, this will not be a problem, because you will have your laptop at home (or the office) connected to the Internet.

You have already seen one use for Internet Explorer, but there are many more. Internet Explorer allows you to go to other Web sites using the Internet. Here is a link to the Section's Web site, which is actually a portion of the larger Web site for the New York State Bar Association: http://www.nysba.org/AM/Template.cfm?Section=Senior_Lawyers_Home&Template=/CustomSource/SectionHome.cfm&Sec=SLS. Don't be daunted by its length or complexity. After you learn more about Internet Explorer, you can "bookmark" the sites you visit often; "bookmarking" is simply a way of storing that address on the computer for later use. So, you do not need to remember long, cumbersome Web site addresses. Perhaps the easiest way to get to the Section's Web site the first time is to go the Association's home page and navigate to it using the navigation buttons you will see on the left-hand side of the page. The link to the Association's Web site is much simpler: http://www.nysba.org. Go there and then click on the button "Sections and Committees"and select our Section on the next page. You should now be looking at your Section's Web site. Another option is to type http://www.nysba.org/SLS. This is called a short URL and by typing this address in it will send you directly to the Senior Lawyers Section home page. Don't forget to bookmark the page.

You should practice a bit on Internet Explorer, because it is how you can make better use of the Web for obtaining knowledge and information. Once you feel comfortable you should then go to www.linkedin.com and open an account and join your Section's Group. This is another place where you can learn about what is going on in your Section and interact with your fellow Section members. We will have more to say about LinkedIn and other Web-based activities in future articles.

Charles E. Lapp, III
James P. Duffy, III

Half a Century as a Divorce Lawyer

By Joseph N. DuCanto

I never wanted to be a lawyer until I became one. Admittedly, a rather startling statement for one who has clung tenaciously to the practice for more than 50 years; something in the mix mesmerizes the mind to make the initial bond indestructible.

And so it is that I have witnessed a large swath of the development of the legal practice in Chicago since 1955, the year of my admission.

Then, a "large" firm had as many as 16 lawyers, very few of whom were women. And Jews and Gentiles did not mix, with social club structures and memberships so restrictive that Western (German) Jews belonged to the Standard Club and Eastern Jews to the Covenant Club, and all the Gentiles had a dozen clubs that sorted them out.

New lawyers with strange-sounding last names were unwelcome at most law firms, as corporate counsel, or by financial institutions. These lawyers gravitated to solo practice or, like me, to divorce or criminal law. Much of this, thanks to the upwelling of the civil rights movement, has passed.

In my early years, "divorce" was an ugly word, and those who confessed to being a divorce lawyer were untouchables of the Bar, much like proctologists in medicine. No one thought much of or about them until they were really needed. And then they hopefully became, if briefly, your best friend with warm hands.

I, as true social coward, covered my unfortunate selection by explaining to people that "I do social work among the rich."

Grounds for divorce and the necessity for imposition upon two friends to testify in support of inflated marital transgressions did little to enhance the majesty of the law in the eyes of the public.

The appearance of "no-fault"—often called "divorce with remorse"—was providential. Indeed, with no-fault taking over in the 1970s, the social and legal climate respecting divorce and divorce lawyers changed from hostility to acceptance, as nice people began to get divorced and their lawyers were no longer schmoes.

The climate and process surrounding divorce has improved immensely, drawing to divorce law many very able young people—consisting increasingly of women—who seek to engage in "people law."

Gone, too, are the days in which all judges were randomly assigned divorce "prove ups," did not like them, and often made their displeasure known to counsel and their clients. From an orphan of the court system, "Domestic Relations" now has 43 full-time judges who often request the assignment and, just as frequently, spend a large part of their judicial careers as dedicated family law judges.

Pervasive understanding now exists that a competent divorce practice involves substantial knowledge of many areas of law: real estate, contracts, trusts and estates, creditors' rights, insurance, taxation, pension rights, and so on.

Those who concentrate in the practice of divorce law have a solid footing in many areas that would have, in the past, done justice to the most knowledgeable general practice lawyer.

But let's back-throttle to what I like about the law and why I stayed so long while others, wisely or not, elected to do other things.

It's not the law's symmetry, for there is little; fairness also is often hard to find; and the exercise of "good" judgment is just as rare as ephemeral.

It's the people who have made it for me.

As a group, lawyers constitute the finest examples of dedicated, honorable, and service-oriented people anywhere, and I have enjoyed my acquaintanceship and work with virtually all of them, even those who vexed me by challenging my desire to make peace, as opposed to war—to build bridges and not to erect walls.

The level of honor, integrity, and purity of spirit is found in greater and more intensive quantity in lawyers than in any other profession I know.

Over many years of practice, I also became aware that most lawyers could easily make a financially better and less tension-filled life in business or other lines of work, as opposed to serving the needs and requirements of individual clients.

Instead, we sell our lives in minutes and hours in the hope that we are doing good as we do well. Resolving matters successfully and with minimum harm to families brings a psychic reward far beyond financial compensation.

And that is the bottom line: doing good as we do well.

Joseph N. DuCanto is a founding partner of Schiller DuCanto & Fleck LLP, the nation's largest matrimonial law firm, with an office in Chicago, Illinois. A 1955 graduate of The University of Chicago Law School, Mr. DuCanto is a nationally recognized expert in tax, financial, and estate planning in family law matters. Practicing in Chicago, he is in demand nationally as a commentator for publications and a lecturer for law schools and Bar groups. The Illinois State Bar Association named him a Laureate for contributions to the public and the legal profession. This article is from his book, *All in the Family*, copyrighted by him in 2009, and is reprinted with his permission.

The Value of Important Papers

By Robert D. Bring

This short article, in the opinion of the author, has applicability both to the client and to the attorney, who, so often, is guilty of the "shoemaker's children without shoes" syndrome.

Are you able to prove that you are an American (whether born in this country or otherwise)? Or that your son or daughter was born on American soil? Or that he or she was vaccinated against smallpox in 1938?

Or, for that matter, are you able to prove that you paid for liability or life insurance premiums this year or were graduated from college in 1941 or served in the armed forces during World War II?

"With time," you say, "probably, of course I can."

Then, if you said that, you are among the millions of Americans who fail to keep track of vital records concerning their affairs and daily lives.

For example, the time required to locate armed service records may mean costly delay if you unexpectedly need hospitalization at a VA hospital.

Another example is the location of a cemetery deed, to be readily available when needed. The time to obtain a copy of your birth certificate may mean an unnecessary delay in issuing your passport. The time to trace insurance records—liability or otherwise—may mean a long delay in the settlement of claims. Time is money in the business of your own affairs as well as in the affairs of your business. It is vital that you be certain now that your family records and valuable papers will be available when you need them.

According to estate planners, family records can be divided into those relating to personal affairs, banking, insurance, real estate, personal property and bonds and investments.

Your "personal affairs" files should include: your marriage certificate, birth certificate, naturalization papers, armed service records, a "family tree," income tax returns (and evidence of payments), receipts for paid bills (and expense records), diplomas, licenses and family health records (vaccinations, etc., with dates).

Your banking records are of the utmost importance. Can you remember, without the help of records, the name of every bank in which you have ever had an account, and in whose names those accounts were opened? Few of us can, after heading a family for so many years, yet you or your spouse may need this information some day . . . for income tax or credit investigations or for a dozen other reasons.

Other important items under the heading of banking records are: canceled checks, bank statements, bank books, 1099 forms and vouchers. These should be kept at least six (6) years, in case you are called upon to prove that you did, in fact, pay $10,000 for that missing diamond bracelet . . . or that you did, in fact, pay that old electric bill.

"It is vital that you be certain now that your family records and valuable papers will be available when you need them."

As far as insurance policies are concerned, merely knowing where they are is not good enough. For instance, do your records indicate the last time your life insurance policies were reviewed? Was it before your second child was born? If before, you may want to contact your life insurance agent. You should also make sure that his or her name and address are easy to find.

"Real estate" files should contain: your deed (or lease), condominium (or cooperative) prospectus, copy of mortgage, title insurance policy, certificate(s) of occupancy and bills (with attached canceled checks) for improvements made by you to your home. These documents are also needed for any secondary (vacation) home.

"Personal property" files should contain: data on your automobile(s) and, ideally, an inventory of household goods, jewelry, and other valuables, together with dated photographs (or tapes) of each item. Distasteful as it is to talk of disaster ("if anything should happen. . ."), it is necessary that your spouse have enough knowledge at his or her disposal to take over the "business of the family." If you are unconscious, your spouse will have to provide the hospital admission clerk with information about your hospitalization policy, "living will," health care proxy and power of attorney. If you are out of town and discover that you have forgotten your checkbook or credit cards, your spouse had better know what they look like so that they may be sent to you.

No matter what happens to your savings bonds, investment bonds and securities, you are safe it you have recorded their serial numbers. You are even safer if those numbers are recorded in a few different places. The location of all your bonds and securities, and the name, address and telephone number of your stockbroker should also be recorded.

You should not only make a will, but also discuss its provisions with your spouse, as well as any trust agree-

ments which you may have executed. Finally, does your will name guardians for your minor children if they should lose both you and your spouse at the same time? This is a harsh prospect for a parent to contemplate, but who is better qualified to determine who will raise your children if you and your spouse are not fortunate enough to do so yourselves? Above all, do not depend on word-of-mouth agreements. If the insurance money comes with the children, even the most selfish relatives may become "loving" overnight and make attempts through the courts to be awarded custody.

Apply the same common-sense ideas to the "business of your family" that you do in your business or profession. Inventory the valuable papers that are your "assets." Know where they are. Be certain that someone—preferably more than one person—besides yourself also knows their location, and has a key for any locked cabinet or drawer. Finally, it is urged that you plan for the future of your family—considering all the possibilities, even the disagreeable ones.

Robert D. Bring is a sole practitioner in private practice, as well as the past Co-Chair of the Real Property Committee of the Rockland County Bar Association, and he is a Director of the Trust and Estate Planning Council of Rockland County.

This article originally appeared in the Fall 2004 issue of the NY Business Law Journal, *Vol. 8, No. 2, published by the Business Law Section of the New York State Bar Association.*

Obama HOPE Poster: Art, Copyright Infringement, or Both?

By Joel L. Hecker

Overview

Fair use is a concept in copyright which allows for a balancing act of rights granted to the creator under Article I, Section 8 of the U.S. Constitution,[1] and the protections afforded to the public under the First Amendment to our Constitution.[2] It is therefore an exception to the exclusive monopoly granted to copyright owners under the current copyright statute, the U.S. Copyright Act of 1976 (the "Copyright Act").[3]

The Copyright Act provides four non-exclusive factors to be considered in determining whether a use of copyrighted material falls within the fair use exception.[4] These four factors are:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose;
2. the nature of the copyright work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyright work.

There is no bright-line rule for weighing these four statutory factors against each other and no single factor is dispositive, although the transformative aspect, considered under the first factor, has now become paramount. The courts have stated that the ultimate test is whether the copyright law's goal of promoting the "Progress of Science and Useful Arts" as set forth in Article I, Section 8 of the U.S. Constitution would be better served by allowing the use than by preventing it.

Shepard Fairey v. The Associated Press, a case commenced on February 9, 2009 in the U.S. District Court for the Southern District of New York,[5] may very well redefine how the courts treat the important "transformative" aspect of fair use. The case concerns Fairey's creation of an illustration of Barack Obama that was reproduced on posters for President Obama's presidential campaign, the most widely known of which is the *HOPE* poster, and subsequently used on t-shirts.

The Parties

Shepard Fairey, a 39-year-old artist who lives and works in Los Angeles, began his art career in 1989 while a student. To a great extent, he copies all or significant portions of existing photographs or art and uses them as the basis of his work. He refers to this practice as a "visual reference." Others refer to it less generously as "appropriation art," and consider it to be blatant copyright infringement.

The Associated Press (AP), a not-for-profit membership cooperative corporation, was founded in 1846. It gathers and distributes news and information worldwide and is one of the largest such organizations in the world. Fairey's marketing and distributing companies, Obey Giant Art, Inc., Obey Giant LLC and Studio Number One, Inc., are also parties to the original actions.

Which Is the Underlying Photograph?

One unusual aspect of the case is that the underlying photograph used by Fairey to create his illustration used in the Obama posters is in dispute. Manny Garcia, a professional photographer, created a series of images at a 2006 National Press Club event about the humanitarian crisis in the Darfur region of Africa. The actor George Clooney was sitting at a table beside then-Senator Obama. However, the parties do not agree which photograph created by Garcia was used by Fairey.

Fairey, after initially refusing to identify any particular photo as the one he used for his visual reference, now claims in the litigation that it is a cropped version of a photo of both Clooney and Obama taken by Garcia, with Clooney deleted from the photo, and the angle of Obama's head and neck altered.

AP, on the other hand, claims that a different photo taken by Garcia at the same time and event, in which only Obama appears, is the underlying photo. This other photo, claims AP, when overlayed onto Fairey's illustration, demonstrates that the two are exactly the same (which appears to be the case).

After some initial confusion as to what rights, if any, AP had to the photos (since Garcia was the photographer), it became clear that AP claimed Garcia was a staff photographer for AP. As a salaried employee, all of his photographs were works made for hire under the Copyright Act. Therefore, AP claims it owns the copyright to all of Garcia's photos created as part of his employment for AP.

In a February 2008 interview, Fairey admitted he used an AP photo as a visual reference but refused to identify which photo he used. Bloggers eventually became curious and began looking into the situation. As a result, various bloggers identified several possible sources for the underlying photo, some more credible than others. Fairey eventually took the position that, in fact, the Garcia photo of Clooney and Obama was the one. AP later determined that it was Garcia's tightly cropped photo of only Obama. The differences in the underlying photos, as discussed below, help shape the content of each party's legal arguments. These contesting claims will have to be sorted out as the case proceeds toward trial.

The Posters

Fairey claims that his posters were part of a series of iconic works he created to support the presidential candidacy of Obama. All of these works used the same illustration he created of Obama based upon a Garcia photo.

He called the first one *Obama PROGRESS*, and identified it as an abstract graphic rendition of Obama gazing up and to the viewer's right, colored in a palette of red, white and blue, with the word "Progress" in capital letters beneath the image of Obama. Days later, Fairey created a second poster utilizing his same illustration, which became known as *Obama HOPE* since the word "Hope" replaced "Progress" beneath his illustration of Obama.

By the summer of 2008, *Obama HOPE* had become, at least according to Fairey, a "ubiquitous symbol" of Obama's candidacy and pervasive presence across America.

His third poster, *Obama Hope Mural*, was created by Fairey for an art exhibition held in Denver during the Democratic National Convention, in conjunction with Obama's nomination for President.

Following the election, the Presidential Inaugural Committee asked Fairey to create an official poster to commemorate the inauguration of President Obama. This resulted in Fairey's fourth poster, which was entitled *BE THE CHANGE*. This poster also used the same Obama illustration, but this time it was flanked by images of the U.S. Capitol building and White House, with a cheering crowd beneath the illustration.

Immediately following the election, Fairey created a fifth image, which he entitled *YES WE DID*. This poster also features the same Obama illustration, but has additional visual elements in the upper center.

Finally, on January 17, 2009, a large-format, hand stenciled collage created by Fairey and incorporating the *HOPE* poster with other visual material, was unveiled at the Smithsonian Institution's National Portrait Gallery in Washington, D.C.

"Fairey's lawsuit seeks a declaratory judgment that Fairey's illustration and posters of Obama constitute fair use under the Copyright Act and do not infringe any AP copyright."

Why Fairey Filed His Complaint

On January 29, 2009, an attorney for AP first contacted Fairey's production studio, claiming that Fairey's illustration of Obama constituted infringement of AP's copyright in its Garcia photo. During the following week, discussions were held between the two sides concerning the possibility of resolving the issue by AP's granting a retroactive license to Fairey to use the Garcia photo as reference material for the illustration. This was followed by Fairey's preemptive filing of the lawsuit on February 9, 2009 (one day before AP's stated deadline by which AP said it would file its own copyright infringement lawsuit). Fairey's lawsuit seeks a declaratory judgment that Fairey's illustration and posters of Obama constitute fair use under the Copyright Act and do not infringe any AP copyright. Lead attorneys for Fairey are the Stanford Law School Center for Interest and Society, who are believed to be interested in this case because of their desire to broaden the scope of the fair use exception to the Copyright Act as it has been applied by the courts.

On March 11, 2009 AP filed its answer to the complaint which, as expected, denied all of the material allegations continued in the complaint. AP also filed counterclaims for direct and contributory copyright infringement.

The gist of the counterclaims is that Fairey was fully aware that the Garcia photo used, as alleged by AP (although the theory applies equally to both Garcia photos), was copyrighted, and that Fairey's illustration of Obama copied all the distinctive and unequivocally recognizable elements of the photo in their entire detail (including the heart and essence of it), as well as its patriotic theme.

Fairey's Position—Transformative Use

Fairey claims that he used the Garcia photo of both Obama and Clooney solely as a visual reference, and that he transformed the literal depiction contained in the photo into a "stunning, abstracted and idealized visual image that creates powerful new meaning and conveys a radically different message that has no analogue in the original photograph."[6]

Fairey further claims that the original Garcia photo was previously published to depict a factual occurrence, while his image was a fictional and highly creative work. As to the amount of the taking, Fairey claims only a portion of the photo was used (with Clooney cropped out) and that the amount of the taking was reasonable in light of his expressive purpose.

Finally, Fairey claims that his use of the photo imposed no significant or recognizable harm to the Garcia photo, or any market for, or derivative of, it. In fact, Fairey claims his posters have greatly enhanced the value of the Garcia photo.

"This case has the potential for a far-reaching clarification, expansion, or even narrowing of the concept of fair use in copyright as it applies to appropriation art and how far an artist can go when using the copyrighted creation of others in the name of art."

AP's Position—Blatant Copyright Infringement

AP presents a side-by-side comparison of the Garcia head shot photo of Obama and Fairey's illustration, and concludes that the striking similarity between them is patently obvious. In fact, an overlay of one over the other shows, according to AP, that they are exactly the same (which seems to be an accurate conclusion). This includes the angle and slant of Obama's head, his gaze and expression, the contrast, focus, and depth of field, as well as the shadow lines created by the lighting in the photo. In addition, the illustration uses the red, white and blue flag imagery that is captured in the background of the photo.

AP also claims that Fairey's profits on his illustrations already exceed $400,000, with a great deal more profit expected to be made as a result of the publicity generated by this lawsuit. (After commencement of the lawsuit, and independent of it, a photograph appearing on the front page of the *New York Times*, April 27, 2009, concerning a different topic, shows a woman wearing a t-shirt with Fairey's Obama illustration over the word "Change." This merchandising use, presumably licensed by Fairey, is in addition to those referred to in the initial pleadings.)

As part of its counterclaims, AP sets forth a narrative of what it is and what it does. In summary, AP employs approximately 3,800 people in approximately 240 locations worldwide. It depends in great part on licensing fees to support its news-gathering efforts and business, and to compensate its photographers and other talent for their efforts.

AP also goes into great detail with regard to Fairey's prior history as an artist, including what is alleged to be a pattern of willful disregard for the property rights of others and numerous instances of misappropriating works from other artists. AP claims that these acts (where Fairey did not give any attribution to the original creator) constitute a consistent pattern of copyright infringement by Fairey. AP also argues that these, and other stated acts, constitute "bad faith" conduct by Fairey.

In juxtaposition to these "bad acts," AP claims that Fairey has a highly sophisticated understanding of licensing and a copyright protection program that is highly protective of his copyrights and trademarks, as well as his own work. AP alleges specific examples to support this contention.

Simply put, AP's claim that Fairey's use of the Garcia photo constitutes copyright infringement, and not fair use, can be summarized as being an entire taking of the photo, with minimal changes which add nothing to the distinctive character of the photo, and which do not serve a different purpose than the photo nor transform the photo into a new expression (since it was exactly the distinctive character of the photo that lead Fairey to copy it in the first place). Furthermore, AP claims that it cannot be said to be a comment or a criticism of any Garcia photo, since the identity of the photo and its creator was initially intentionally hidden by Fairey. (Obviously, a comment or critique about something must necessarily refer to the "thing" being commented upon or critiqued!)

AP also contends that Fairey's copyright registration certificates for his various Obama works constitute a fraud upon the Copyright Office, since he fails to acknowledge anywhere in the registration process that his illustrations are derived from a pre-existing work by Garcia. Therefore, AP claims that these registrations should be cancelled.

Summary

At the time the lawsuit was filed by Fairey, Garcia himself had not made any claims concerning his photographs nor did he challenge AP's assertion that it owned the copyrights to the two photographs at issue. He had been previously quoted as saying to the effect that he was staying on the sidelines because he was not going to do anything to subvert Obama's presidency.

However, he subsequently changed his position, and on July 8, 2009, Garcia filed a motion with the court to

intervene in the action which was granted by the court. He now claims that in fact he was always the copyright owner of both photographs, that he was never an employee of AP, and that he never agreed to transfer his copyright to AP. Specifically Garcia states that he never signed AP's freelancer contract because he did not agree to its terms.

He therefore now contends that, unless he is permitted to join the lawsuit as a party, he will be prejudiced whatever the outcome. His rationale is that if Fairey wins, Garcia will be denied his right to pursue separate claims against Fairey, and if AP wins, then AP will be the beneficiary of the copyright damages Garcia would otherwise claim.

While it is unclear at this point whether Garcia or AP is the rightful copyright owner of the two photographs in question, it is clear both contend that Fairey's actions constitute copyright infringement of whichever photograph Fairey based his posters upon. Garcia's intervention makes it more complicated, however, since the court would need to first determine who has the right, or standing, under copyright law to pursue the infringement claims in the first place.

This case has the potential for a far-reaching clarification, expansion, or even narrowing of the concept of fair use in copyright as it applies to appropriation art and how far an artist can go when using the copyrighted creation of others in the name of art. The court is being asked, in effect, to determine whether art appropriation is, or should be, a special category for fair use purposes.

From a lay person's perspective, Fairey's Obama illustration may be considered as having a transformative effect on either Garcia photo. However, that is not the legal test which, as set forth above, considers the four factors of the purpose and character of the use including transformative effect, the nature of the taking, the amount taken, and the effect on the market by the original work.

It is, of course, possible that all uses of the Obama posters will not be treated equally, since the elements added to the later ones may lead the court to reach different determinations on the fair use analysis.

Clearly, some, if not all, interested photographers believe that if a direct taking such as Fairey's appropriation of Garcia's photo does not constitute copyright infringement, then what would? In any event the case will be watched closely by the photography and artistic community because it may determine how far someone who is, or claims to be, an artist can use an existing copyrighted photograph or other work of art, as reference for new art without crossing the line into copyright infringement.

Endnotes

1. "The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings . . ."
2. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."
3. The Copyright Act of 1976 is contained in Title 17 of the United States Code, 17 U.S.C. §§ 101, *et seq.*
4. 17 U.S.C. § 107 Limitations on Exclusive Rights: Fair Use.
5. *Shepard Fairey and Obey Giant Art, Inc., Plaintiffs v. The Associated Press, Defendant and Counterclaim Plaintiff v. Shepherd Fairey, Obey Giant Art, Inc., Obey Giant LLC and Studio Number One, Inc., Counterclaim Defendants.* S.D.N.Y., Civil Action No. 09-01123 (AKH).
6. Fairey Complaint, paragraph 18.

Joel L. Hecker, Of Counsel to Russo & Burke, 600 Third Avenue, NY, NY 10016, practices in every aspect of photography and visual arts law, including copyright, licensing, publishing contracts, privacy rights, and other intellectual property issues. He acts as general counsel to the hundreds of professional photographers, stock photo agencies, graphic artists and other photography and content-related businesses he represents nationwide and abroad. He also lectures and writes extensively on issues of concern to these industries, including his monthly column "YOU AND THE LAW" in *PhotoStockNotes* and his column "The Law" in *The Picture Professional* magazine, and articles in the NYSBA *Journal*, and The New York State Bar Association's *Entertainment, Arts and Sports Law Journal*. He is Chair of the Copyright and Literary Property Committee of the New York City Bar Association, a longtime member and past Trustee of the Copyright Society of the U.S.A., and a member of the Entertainment, Arts and Sports Law Section of the New York State Bar Association. He can be reached at (212) 557-9600, fax (212) 557-9610, Web site www.RussoandBurke.com, or via e-mail: HeckerEsq@aol.com. Specific references to his articles and lectures may be located through Internet search engines under the keywords "Joel L. Hecker."

This article originally appeared in the Summer 2009 issue of the Entertainment, Arts and Sports Law Journal, *Vol. 20, No. 2, published by the Entertainment, Arts and Sports Law Section of the New York State Bar Association.*

New York's Information Security Breach and Notification Act: A First Step in Protecting Individuals from Identity Theft

By Marc David Hiller

I. Introduction

In an effort to address identity theft, New York State has enacted the Information Security Breach and Notification Act (Chapter 442 of the Laws of 2005; as amended by Chapter 491 of the Laws of 2005) ("the Act") to "guarantee state residents the right to know what information was exposed during a breach, so that they can take the necessary steps to both prevent and repair any damage that may occur because of a public or private sector entity's failure to make proper notification."[1] The Act adds section 208 to the State Technology Law (STL) to address a breach of private information held by a public sector entity, and it adds article 39-F (§ 899-aa) to the General Business Law (GBL) to address a breach of private information held by a business or person. If a system's security is breached, state entities and businesses or persons that own or license personal information are obligated to notify the subject of the information that results in, or that they have reason to believe results in, an unauthorized person obtaining such information. The Act took effect on December 7, 2005.

The statutes are a step in the right direction to protect people from identity theft. However, while they address what to do in the event of a breach, they do not address how to prevent a breach. To this extent, the statutes assume the existence of internal controls for identifying, cataloging, and protecting personal and private information in computerized data. Without these controls, the efficacy of any notice is substantially compromised. For purposes of this article, it is assumed that such comprehensive internal controls do not exist.

As noted, the statutes discuss what actions a state entity or business is required to take in the event a system is breached, but they do not address how to secure the system. For state entities a number of these issues are addressed outside the scope of STL § 208: STL § 203[2] requires any state agency website to have a privacy policy, and the Office of Cyber Security and Critical Infrastructure Coordination's (OCSCIC) Information Policy (P03-002 V. 2.0 Apr. 4, 2005) (http://www.cscic.state.ny.us/policies.htm#cs) contains internal controls relating to identifying, cataloging, and securing computerized data. However, for businesses there are no comparable generic requirements at either the state or federal level. At the federal level there are industry-specific statutes such as Gramm-Leach-Bliley[3] for the financial industry and the Health Insurance Privacy and Portability Act[4] for the health care industry. Accordingly, for most businesses this is an unregulated area that places the onus on individual businesses to make risk assessments, to the extent that they are aware of the issues. Therefore, for the majority of businesses, recognizing and addressing these issues is in its infancy and probably will not be addressed unless—and until—the individual business, or a business sector collectively, sustains a financial loss as a result of a breach, either by means of legal action or loss of revenue.

II. Definitions

The following definitions are used in both STL § 208 and GBL § 899-a:

> **"Personal information"** shall mean any information concerning a natural person, which, because of name, number, personal mark, or other identifier, can be used to identify such natural person;
>
> **"Private information"** shall mean personal information consisting of any information in combination with any one or more of the following data elements, when either the personal information or the data element is not encrypted, or encrypted with an encryption key that has also been acquired:
>
> (1) social security number;
>
> (2) driver's license number or non-driver identification card number; or
>
> (3) account number, credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.
>
> **"Private information"** does not include publicly available information which is lawfully made available to the general public from federal, state, or local government records.
>
> **"Breach of the security of the system"** shall mean unauthorized acquisition or acquisition without valid authorization of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by

a business. Good faith acquisition of personal information by an employee or agent of the business for the purposes of the business is not a breach of the security of the system, provided that the private information is not used or subject to unauthorized disclosure.

In determining whether information has been acquired, or is reasonably believed to have been acquired, by an unauthorized person or a person without valid authorization, such business may consider the following factors, among others:

(1) indications that the information is in the physical possession and control of an unauthorized person, such as a lost or stolen computer or other device containing information; or

(2) indications that the information has been downloaded or copied; or

(3) indications that the information was used by an unauthorized person, such as fraudulent accounts opened or instances of identity theft reported.

"Consumer reporting agency" shall mean any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and who uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. A list of consumer reporting agencies shall be compiled by the state attorney general and furnished upon request to any person or business required to make a notification under subdivision two of this section.

III. Applicability

STL § 208 applies to a "state entity," which is defined as "any state board, bureau, division, committee, commission, council, department, public authority, public benefit corporation, office or other governmental entity performing a governmental or proprietary function for the state."[5] STL § 208 does not apply to the judiciary or to "cities, counties, municipalities, villages, towns, and other local agencies."[6]

GBL § 899-aa applies to "any person or business which conducts business in New York State, and which owns or licenses computerized data which includes private information."[7] For jurisdictional purposes, the use of the phrase "conducts business in New York State" does not seem to require a physical presence in New York, either for the business transaction, or with respect to the location of the "computerized data."

IV. Breach of the Security of a System

The statutes are triggered by a breach of the security of a system that contains personal or private information. The definition of a breach employs a reasonableness standard as to whether personal or private information was acquired without authorization. The statute does not, however, define what constitutes a "system," and it assumes the existence of a security protocol for the system to enable the discovery of the breach. Under the definition, the determination as to the existence and scope of a breach is subjective. Moreover, the statutes are silent as to who is responsible for determining whether there has been a breach—the computer technician or a member of the executive staff. As discussed below, to ensure that a determination as to the existence and scope of a breach is an objective one that follows defined procedures requires developing, implementing, and monitoring internal controls.

V. Notification

The Act declares that state residents "deserve the right to know when they have been exposed to identity theft."[8] The mechanism for providing this right is notification to the individual in the event of a "breach of the security of the system." The statutes establish different notification requirements depending on whether the state entity or business "owns or licenses computerized data which includes private information"[9] or whether it "maintains computerized data which includes private information"[10] the state entity or business does not own.

A. Notification by the Owner/Licensor of the Computerized Data

If a breach of a system's security is discovered, the owner or licensor of the computerized data must notify all New York residents who may be affected.[11] The disclosure must be done quickly, in accordance with the legitimate needs of law enforcement[12] and "any measures necessary to determine the scope of the breach and restore the reasonable integrity of the system."[13]

The statutes employ a reasonableness standard for the discovery of the breach; however, the core issue is not the discovery of the breach, but, rather, how quickly the discovery is made. Time is the critical element in defeating the harm caused by identity theft; the more time an unauthorized individual has access to, and use of, someone's private information, the greater the potential harm. Because the statutes do not impose any performance standards on discovery of a breach, a discovery within a day, a week, a month, or a year of the actual breach all

could be reasonable and, therefore, in compliance with the statutes. The statutes do not address the mechanism or means for discovering a breach, which are internal controls regarding the establishment and monitoring of a security system. Without these types of performance standards, the protection offered by the statutes is not as strong as it could and should be to protect against identity theft.

Both statutes provide that notifications "may be delayed if a law enforcement agency determines that such notification impedes a criminal investigation." But the notification "shall be made after such law enforcement agency determines that such notification does not compromise such investigation."[14] Section 899-aa does not require a person or business to notify law enforcement of a breach, but the statute seems to assume notification to law enforcement will occur when assessing the breach. In addition, state entities are required to consult with the OCSCIC to determine the scope of the breach and appropriate restoration measures.[15] However, it is not clear whether OCSCIC or the state entity is responsible for notifying law enforcement.

B. Notification by a State Entity of Business That Only Maintains the Computerized Data

Where the breach is discovered by a state entity or a business that only "maintains computerized data which includes private information,"[16] and the state entity or business does not own such computerized data, the state entity or business shall immediately notify the owner or licensee of the information[17] upon discovery of the breach if "the private information was, or is reasonably believed to have been acquired by a person without valid authorization."[18] The statutes list the following factors for a state entity or a business to evaluate in order to determine whether "the private information was, or is reasonably believed to have been acquired by a person without valid authorization":[19]

1. indications that the information is in the physical possession and control of an unauthorized person, such as a list or stolen computer or other device containing the information;
2. indications that the information has been downloaded or copied; or
3. indications that the information was used by an unauthorized person, such as fraudulent accounts opened or instances of identity theft being reported.[20]

C. Notification to Affected Individuals

The statutes contain identical provisions regarding the methods for providing notice. The notice must be provided by one of the following means:

1. written notification;
2. telephone notification; or
3. electronic notification.[21]

The notice may be provided telephonically only if the state entity or business keeps a log of such notification.[22] The notice may be provided by electronic means only if the person receiving the notice has expressly consented to receiving such notice, and a log of each such notification is kept.[23] The statutes prohibit, however, requiring consent to accept electronic notice "as a condition of establishing any business relationship or engaging in any transaction."[24]

A substitute method of providing notice may be used if the state entity or business demonstrates to the Attorney General that the cost of providing the notice would exceed $250,000; that the affected class of subject persons to be notified exceeds 500,000; or that the state entity or business does not have sufficient contact information.[25] If the Attorney General determines that the state entity or business has met the requirements for providing substitute notice, the Attorney General can authorize the state entity or business to provide substitute notice that consists of the following:

1. e-mail notice when the state entity or business has an e-mail address for the subject persons;
2. conspicuous posting of the notice on the state entity's or business's website page, if it has a website; and
3. notification to major statewide media.[26]

The statutes are silent as to whether major statewide media refers to print, broadcast or cable television, radio, or all three.

The existence of internal controls would provide information sufficient either to obviate the necessity of providing notice by a substitute method or to justify the necessity of providing notice by substitute method.

D. Contents of the Notice

The notice required by the statutes is the same regardless of the medium and must contain the following information:

1. contact information for the state entity or business making the notification; and
2. a description of the categories of information that were, or are reasonably believed to have been, acquired by a person without valid authorization, including specification of which of the elements of personal information and private information were, or are reasonably believed to have been, acquired.[27]

The statutes employ a reasonableness standard for determining the nature and extent of the personal and/or

private information that was or may have been disclosed. The deployment of internal controls for cataloging the personal and/or private information that is retained not only raises the standard for the retention of the records but also ensures more complete discovery of the personal and/or private information that was disclosed. The requirement of internal controls thereby would enhance the efficacy of the statutes.

E. Notice to the Attorney General, the Consumer Protection Board, and the Office of Cyber Security and Critical Infrastructure Coordination

If New York residents are to be notified, the statutes require that the Attorney General (AG), the Consumer Protection Board (CPB), and the Office of Cyber Security and Critical Infrastructure Coordination (OCSCIC) be notified as well. The notice to the above entities cannot delay the notice to the affected New York residents, and it must contain the following information regarding such notice: timing, content, and distribution of the notices, and the approximate number of affected persons.[28] The statutes do not address the coordination between or among these state entities or the coordination between these state entities and the state entity or business providing the required notification.

If more than 500,000 New York residents must be notified at one time, in addition to notifying the AG, CPB, and OCSCIC, the state entity or business issuing the notice must notify consumer reporting agencies in the same manner as the AG, CPB, and OCSCIC and without delaying the notice to the affected New York residents.[29]

The statutes do not specify what constitutes a delay in providing notice to the affected persons. Moreover, because the discovery of the breach is governed by a reasonableness standard, the imposition of these additional notice requirements without delaying the notice to affected persons appears incongruous. To require expediency in providing the notice but not in discovering the breach, which is the core issue in addressing the damage from identity theft, puts the focus on the cure and not on prevention. The deployment and monitoring of internal controls, by contrast, properly puts the emphasis on prevention.

VI. Applicability to Local Entities

At the same time that they are exempted from the requirements of STL § 208, "all cities, counties, municipalities, villages, towns, and other local agencies" (hereinafter "local entities") are required to adopt a notification policy, or alternatively a local law, within 120 days of the effective date (December 7, 2005),[30] which is consistent with STL § 208.[31] To ensure that local entities adopt provisions consistent with STL § 208, GBL § 899-aa(9) provides that the provisions of GBL § 899-aa are "exclusive and shall preempt any provision of local law, ordinance or code, and no locality shall impose requirements that are inconsistent with or more restrictive than those set forth in this section." Accordingly, despite specific language to the contrary in STL § 208, these two provisions effectively require local entities to comply with the provisions in STL § 208 and GBL § 899-aa. This raises the issue of whether they have sufficient internal controls in place, such as those required for state entities under the OCSCIC policy. It also raises the question of an unfunded mandate.

The Westchester County Board of Legislators has proposed a local law prohibiting commercial businesses within the county from providing public Internet access without installing a firewall to secure and prevent unauthorized access to all private information the commercial business may store, utilize, or otherwise maintain in the regular course of its business.[32] The definition of "private information" in the proposed local law is in sum and substance the same as the definition in GBL § 899-aa. The proposed local law does not, however, address the commercial business's responsibilities in the event of a breach of the firewall. The proposed local law highlights both the concern of multiple levels of government to address identity theft, as well as the potential for conflict between local laws and state statutes.

VII. Actions by the Attorney General Under GBL § 899-aa

GBL § 899-aa(6)[33] authorizes the Attorney General to bring an action to seek an injunction whenever the Attorney General believes that the article has been violated. In such an action, the court may award damages for actual costs or losses incurred by a person entitled to notice, including consequential financial losses. In addition to any other lawful remedy, if the court finds that the business knowingly or recklessly violated the article, the court can impose a civil penalty of the greater of $5,000 or up to $10 per instance of failed notification, provided that the latter amount shall not exceed $150,000. The statute of limitations for an action under GBL § 899-aa(6) is two years from the date of the act complained of or the date of discovery of the act.

In light of the reasonableness standard for discovery of a breach of the system, it is not clear what would constitute a violation of article 39-F of the GBL. However, if businesses were required to develop, implement, and monitor internal controls to prevent and identify a breach, establishing a violation would be substantially easier, being either a failure to establish or monitor the required internal controls. Requiring such internal controls would have enhanced the level of protection offered by the statute on both the front and the back end, and people would have been provided with better protection for the information by the business as well as by the AG in the event the business does not comply with article 39-F.

VIII. Recommendations

The statutes are a step in the right direction because providing notice of a breach can help fight identity theft. Unfortunately, notice only occurs after a breach; it is not designed to prevent a breach. The key to preventing a breach is identifying the pro-active steps a state entity or business can take to secure its computerized data. The statutes assume the existence of the internal controls necessary to secure such information and determine the existence of a breach. Fundamentally, the efficacy of the statutes is a matter of internal controls, and assessing the internal controls requires addressing the following questions, among others:

1. Does the entity receive personal information?
2. Does that personal information contain private information?
3. Does the entity have a security policy?
4. If so, how does it monitor and ensure the effectiveness of and compliance with its security policy?
5. Does it have the means to determine that there has been a breach, the extent of the breach, and the information that may have been compromised by the data?
6. Does it have a privacy policy?
7. If so, how does it monitor and ensure the effectiveness of and compliance with its privacy policy?

To comply with the statutes, a state entity or business must be able to determine if the triggering events under the statutes have occurred: that they have personal information that contains private information or that there has been, or may have been, a breach of the security of the system to an unauthorized individual. They also must determine to whom and how they need to provide the notification required by the statutes. A state entity or business also should ask these questions of any third party to whom they are entrusting their computerized data.

Developing, implementing, and complying with internal controls also may serve as a means by which a business can demonstrate that it did not act "recklessly" in the event the AG is evaluating whether to pursue an action under GBL § 899-aa(6).

IX. Pending Federal Legislation

There are a number of federal legislative efforts to address the issues of securing personal and private information and identity theft.[34] One such effort is S.1789, the "Personal Data Privacy and Security Act of 2005" (hereinafter the "Security Act"), sponsored by Senators Specter, Leahy, Feinstein, and Feingold to better protect the privacy of consumers' personal information. The Security Act establishes standards for business entities, data brokers, and government agencies to protect personally identifiable information. The Security Act also addresses methods for notifying individuals of a breach of the security system involving their personal information, as well as methods of enforcement by both the Attorney General and state attorneys general. The Security Act preempts state laws to the extent they are inconsistent with its provisions. Among the Security Act's findings is that "security breaches are a serious threat to consumer confidence, homeland security, e-commerce, and economic stability."[35]

Notification of security breaches is addressed in subtitle B of title IV of the Security Act. The Security Act defines a security breach as a "compromise of the security, confidentiality, or integrity of computerized data through misrepresentation or actions that result in, or there is a reasonable basis to conclude has resulted in, the unauthorized acquisition of and access to sensitive personally identifiable information."[36] As with the New York statutes, the Security Act addresses the right to the notice in section 421[37] (GBL § 899-aa(2); STL § 208(2)), the methods of notice in section 423[38] (GBL § 899-aa(5); STL § 208(5)), and the content of the notice in section 424[39] (GBL § 899-aa(7); STL § 208(6)).

Unlike the New York statutes the Security Act does not make an assumption about securing computerized data; it requires it. The Security Act, building off the experience of the Gramm-Leach-Bliley Act[40] and the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[41] addresses internal controls, both their establishment and required testing.[42]

The Security Act will preempt any state law relating to notification of a security breach.[43] Therefore, if enacted, the Security Act would preempt GBL § 899-aa. The National Association of Attorneys General (NAAG), in an October 27, 2005, letter[44] signed by forty-seven state attorneys general addressed to Congressional leaders, called on Congress to enact a national security breach notification and urged Congress not to preempt the states from enacting and enforcing security breach laws because the states have been quicker to address concerns about privacy and identity theft than the federal government. The attorneys general requested that to the extent Congress seeks to preempt state laws, Congress narrowly tailor the preemption to only those laws that are inconsistent with the federal law and only to the extent of the inconsistency. The state attorneys general also asked that Congress enact a federal statute only if it could provide meaningful information to consumers; if not, the attorneys general asked that Congress leave the issue to the states because the states are responding strongly. Accordingly, it would appear that NAAG would oppose the blanket preemption contained in the Security Act as over-broad and as defeating the progressive efforts of the states to protect consumers.

New York is now among twenty-one states[45] to have adopted security breach notification statutes. The business community will argue that it is impractical, if not impossible, to comply with fifty different statutes, and that the only way to help the individual in the event of a breach is federal legislation. The push for federal legislation in this area will continue to gain force; and it is quite probable that some form of this legislation will pass in the next several sessions of Congress.

X. Conclusion

The New York information security breach statutes, while a step in the right direction, presume that state entities and businesses have created and comply with internal controls in the areas of privacy and security for computerized data. Notifying affected persons of a breach is only part of the solution to addressing identity theft. The core issue is examining how personal and private information is collected, stored, and protected, which requires developing, implementing, and monitoring internal controls. With respect to state entities, STL § 208 complements the requirement for privacy policies in article 2 of the State Technology Law, Internet and Security Privacy Act[46] and is more the ounce of prevention than the pound of cure. With respect to businesses, GBL § 899-aa is closer to the pound of cure than to the ounce of prevention because it does not address how the businesses identify and protect the personal information.

The issue and cost of identity theft, both to the individual and society, will continue to grow. The only way to prevent this is for individuals, as well as businesses, to establish internal controls as to whom and how they share personal information, whether their own or that of the customers, and the expectations of the businesses that retain this information. Businesses that take this next step, which is not required under GBL § 899-aa, not only put themselves in a better position to protect the personal information they presently have or license, but they also may be taking steps toward complying with potential federal requirements.

Endnotes

1. Section 2, Legislative Intent, of Chapter 442 of the Laws of 2005.
2. STL § 203.

   Model Internet privacy policy.

   1. The office shall adopt rules and regulations in conformity with the provisions of this article, and specify a model Internet privacy policy for state agencies that maintain state agency websites. Such model privacy policy shall include, but not be limited to, the following elements:

      1. a statement of any information, including personal information, the state agency website will collect with respect to the user and the use of the information;
      2. the circumstances under which information, including personal information, collected may be disclosed;
      3. whether any information collected will be retained by the state agency, and, if so, the period of time that such information will be retained;
      4. the procedures by which a user may gain access to the collected information pertaining to that user;
      5. the means by which information is collected and whether such collection occurs actively or passively;
      6. whether the collection of information is voluntary or required, and the consequences, if any, of a refusal to provide the required information; and
      7. the steps being taken by the state agency to protect the confidentiality and integrity of the information.

   2. Each state agency that maintains a state agency website shall adopt an Internet privacy policy which shall, at a minimum, include the information required by the model Internet privacy policy. Each state agency shall post its Internet privacy policy on its website. Such posting shall include a conspicuous and direct link to such privacy policy.
   3. The model Internet privacy policy specified by the office shall also be made available at no charge to other public and private entities.

3. Pub. L. No. 106–102 (1999).
4. Pub. L. No. 104–191 (1996).
5. STL § 208(c).

   "State entity" shall mean any state board, bureau, division, committee, commission, council, department, public authority, public benefit corporation, office or other governmental entity performing a governmental or proprietary function for the state of New York, except:

   (1) the judiciary; and

   (2) all cities, counties, municipalities, villages, towns, and other local agencies.

6. STL § 208(c)(1) and (2).
7. GBL § 899-aa(2).

   Any person or business which conducts business in New York state, and which owns or licenses computerized data which includes private information shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the system to any resident of New York state whose private information was, or is reasonably believed to have been, acquired by a person without valid authorization. The disclosure shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subdivision four of this section, or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the system.

8. Section 2 of Chapter 442 of the Laws of 2005.

Legislative Intent. The legislature finds that identity theft and security breaches have affected thousands statewide and millions of people nationwide. The legislature also finds that affected persons are hindered by a lack of information regarding breaches, and that the impact of exposing information that should be held private can be far-reaching. In addition, the legislature finds that state residents deserve a right to know when they have been exposed to identity theft.

The legislature further finds that affected state residents deserve an advocate who can speak and take action on their behalf because recovering from identity theft can, and sometimes does, take many years.

Therefore, the legislature enacts the information security breach and notification act which will guarantee state residents the right to know what information was exposed during a breach, so that they can take the necessary steps to both prevent and repair any damage they may incur because of a public or private sector entity's failure to make proper notification.

9. GBL § 899-aa(2).

10. GBL § 899-aa(3).

Any person or business which maintains computerized data which includes private information which such person or business does not own shall notify the owner or licensee of the information of any breach of the security of the system immediately following discovery, if the private information was, or is reasonably believed to have been, acquired by a person without valid authorization.

11. GBL § 899-aa(2); STL § 208(2).

Any state entity that owns or licenses computerized data that includes private information shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the system to any resident of New York state whose private information was, or is reasonably believed to have been, acquired by a person without valid authorization. The disclosure shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subdivision four of this section, or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.

The state entity shall consult with the state office of cyber security and critical infrastructure coordination to determine the scope of the breach and restoration measures.

12. GBL § 899-aa(4) and STL § 208(4).

The notification required by this section may be delayed if a law enforcement agency determines that such notification impedes a criminal investigation. The notification required by this section shall be made after such law enforcement agency determines that such notification does not compromise such investigation.

13. GBL § 899-aa(2); STL § 208(2).

2. Any state entity that owns or licenses computerized data that includes private information shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the system to any resident of New York state whose private information was, or is reasonably believed to have been, acquired by a person without valid authorization. The disclosure shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subdivision four of this section, or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system. The state entity shall consult with the state office of cyber security and critical infrastructure coordination to determine the scope of the breach and restoration measures.

14. GBL § 899-aa(4); STL § 208(4).

15. STL § 208(2).

16. GBL § 899-aa(3).

Any person or business which maintains computerized data which includes private information which such person or business does not own shall notify the owner or licensee of the information of any breach of the security of the system immediately following discovery, if the private information was, or is reasonably believed to have been, acquired by a person without valid authorization.

STL § 208(3). Any state entity that maintains computerized data that includes private information which such agency does not own shall notify the owner or licensee of the information of any breach of the security of the system immediately following discovery, if the private information was, or is reasonably believed to have been, acquired by a person without valid authorization.

17. GBL § 899-aa(3).

18. GBL § 899-aa(3); STL § 208(3).

19. STL § 208(3).

20. GBL § 899-aa(1).

"Breach of the security of the system" shall mean unauthorized acquisition or acquisition without valid authorization of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by a business. Good faith acquisition of personal information by an employee or agent of the business for the purposes of the business is not a breach of the security of the system, provided that the private information is not used or subject to unauthorized disclosure.

In determining whether information has been acquired, or is reasonably believed to have been acquired, by an unauthorized person or a person without valid authorization, such business may consider the following factors, among others:

(1) indications that the information is in the physical possession and control of an unauthorized person, such as a lost or stolen computer or other device containing information; or

(2) indications that the information has been downloaded or copied; or

(3) indications that the information was used by an unauthorized person, such as fraudulent accounts opened or instances of identity theft reported.

STL § 208(1)(b).

"Breach of the security of the system" shall mean unauthorized acquisition or acquisition without valid authorization of computerized data which compromises the security, confidentiality, or integrity of personal information maintained by a state entity. Good faith acquisition of personal information by an employee or agent of a state entity for the purposes of the agency is not a breach of the security of the system, provided that the private information is not used or subject to unauthorized disclosure.

In determining whether information has been acquired, or is reasonably believed to have been acquired, by an unauthorized person or a person without valid authorization, such state entity may consider the following factors, among others:

(1) indications that the information is in the physical possession and control of an unauthorized person, such as a lost or stolen computer or other device containing information; or

(2) indications that the information has been downloaded or copied; or

(3) indications that the information was used by an unauthorized person, such as fraudulent accounts opened or instances of identity theft reported.

21. GBL § 899-aa(5).

The notice required by this section shall be directly provided to the affected persons by one of the following methods:

(a) written notice;

(b) electronic notice, provided that the person to whom notice is required has expressly consented to receiving said notice in electronic form and a log of each such notification is kept by the person or business who notifies affected persons in such form; provided further, however, that in no case shall any person or business require a person to consent to accepting said notice in said form as a condition of establishing any business relationship or engaging in any transaction.

(c) telephone notification provided that a log of each such notification is kept by the person or business who notifies affected persons; or

(d) Substitute notice, if a business demonstrates to the state attorney general that the cost of providing notice would exceed two hundred fifty thousand dollars, or that the affected class of subject persons to be notified exceeds five hundred thousand, or such business does not have sufficient contact information. Substitute notice shall consist of all of the following:

(1) e-mail notice when such business has an e-mail address for the subject persons;

(2) conspicuous posting of the notice on such business's web site page, if such business maintains one; and

(3) notification to major statewide media.

STL § 208(5).

The notice required by this section shall be directly provided to the affected persons by one of the following methods:

(a) written notice;

(b) electronic notice, provided that the person to whom notice is required has expressly consented to receiving said notice in electronic form and a log of each such notification is kept by the state entity who notifies affected persons in such form; provided further, however, that in no case shall any person or business require a person to consent to accepting said notice in said form as a condition of establishing any business relationship or engaging in any transaction;

(c) telephone notification provided that a log of each such notification is kept by the state entity who notifies affected persons; or

(d) Substitute notice, if a state entity demonstrates to the state attorney general that the cost of providing notice would exceed two hundred fifty thousand dollars, or that the affected class of subject persons to be notified exceeds five hundred thousand, or such agency does not have sufficient contact information. Substitute notice shall consist of all of the following:

(1) e-mail notice when such state entity has an e-mail address for the subject persons;

(2) conspicuous posting of the notice on such state entity's web site page, if such agency maintains one; and

(3) notification to major statewide media.

22. GBL § 899-aa(5)(c); STL § 208(5)(c).

23. GBL § 899-aa(5)(b); STL § 208(5)(b).

24. *Id.*

25. GBL § 899-aa(5)(d); STL § 208(5)(d).

26. *Id.*

27. GBL § 899-aa(7).

Regardless of the method by which notice is provided, such notice shall include contact information for the person or business making the notification and a description of the categories of information that were, or are reasonably believed to have been, acquired by a person without valid authorization, including specification of which of the elements of personal information and private information were, or are reasonably believed to have been, so acquired.

STL § 208(6).

Regardless of the method by which notice is provided, such notice shall include contact information for the state entity making the notification and a description of the categories of information that were, or are reasonably believed to have been, acquired by a person without valid authorization, including specification of which of the elements of personal information and private information were, or are reasonably believed to have been, so acquired.

28. GBL § 899-aa(8).

(a) In the event that any New York residents are to be notified, the person or business shall notify the state attorney general, the con-

sumer protection board, and the state office of cyber security and critical infrastructure coordination as to the timing, content and distribution of the notices and approximate number of affected persons. Such notice shall be made without delaying notice to affected New York residents.

(b) In the event that more than five thousand New York residents are to be notified at one time, the person or business shall also notify consumer reporting agencies as to the timing, content and distribution of the notices and approximate number of affected persons. Such notice shall be made without delaying notice to affected New York residents.

STL § 208(8).

Any entity listed in subparagraph two of paragraph (c) of subdivision one of this section shall adopt a notification policy no more than one hundred twenty days after the effective date of this section. Such entity may develop a notification policy which is consistent with this section or alternatively shall adopt a local law which is consistent with this section.

29. GBL § 899-aa(8)(b); STL § 208(7) (b).

30. STL § 208(8).

31. STL § 208(8).

32. http://www.westchestergov.com/currentnews/2005pr/Wireless%20law.htm. Oct. 2005:

BOARD OF LEGISLATORS
COUNTY OF WESTCHESTER

Your Committee is in receipt of a communication from the County Executive urging the adoption of a Local Law adding Article XV to Chapter 863 of the Laws of Westchester County with respect to requiring all commercial businesses in Westchester County utilizing electronic means of maintaining personal information to have a secure network to protect the public from potential identity theft and other potential threats such as computer viruses and data corruption.

Your Committee notes that ever-evolving wireless communication technology has spawned various concerns with respect to the security of personal information such as Social Security numbers and credit card and bank accounts. One of the fastest growing areas in this regard is wireless fidelity or "Wi-Fi" which offers wireless Internet access to local area networks.

Your Committee also notes that Wi-Fi has traditionally been used in airports and hotels to assist business travelers. However, the trend has caught on and there are a growing number of commercial businesses using or offering Wi-Fi communication, colloquially known as "Internet cafes."

Your Committee is aware that the creation of these "hotspots" wherein Wi-Fi is provided offers an increased opportunity for identity thieves to prey on Internet users who might otherwise believe their personal information is secure. It is not only the Wi-Fi user who is at risk of identity theft. Identity theft may also occur where the business entity offering Wi-Fi utilizes the same network to conduct their day-to-day business. This practice could place a customer, who has made a credit card purchase with the business at risk for identity theft, computer viruses and data corruption from persons with rudimentary computer skills absent the appropriate security measures.

Your Committee is further aware that any entity which collects personal information could be vulnerable to threats of identity theft even if they do not offer Internet access to the public. A local retail store maintains personal information from your credit card and unless that store has taken the appropriate security measures such as installing a firewall, your personal information is at risk.

Your Committee is informed that while Wi-Fi communication offers opportunity for identity theft, so too does the use of traditional wired land area networks (LANs). Commercial entities that offer Internet connections through LANs expose themselves to electronic predators if such entities utilize the same LAN without appropriate security precautions.

Your Committee is also aware that while this Local Law is designed to help protect residents from certain cyber threats it does not provide a guarantee of such security. Therefore, the County will provide ongoing public education, through the distribution of pamphlets and postings on the County's website, outlining steps that residents should take to help protect themselves from the threat of identity theft through the use of computers and other electronic devices. The public education effort will track the latest technological advances in order to provide up-to-date and meaningful assistance.

Your Committee, in order to protect the residents of Westchester County and other users of wired and wireless networks from crimes such as identity theft and other consumer fraud, recommends adoption of this Local Law.

Dated: , 2005

RESOLUTION NO. - 2005

RESOLVED, that this Board hold a public hearing pursuant to Section 209.141(4) of the Laws of Westchester County on Local Law Intro. No. -2005 entitled "A Local Law amending the Laws of Westchester County requiring any entity offering or utilizing public Internet access to have a secure network to protect the public from potential identity theft and other risks related to computer use." The public hearing will be held at m. on the day of , 2005 in the Chambers of the Board of Legislators, 8th Floor, Michaelian Office Building, White Plains, New York. The Clerk of the Board shall cause notice of the time and date of such hearing to be published at least once in one or more newspapers published in the County of Westchester and selected by the Clerk of the Board for that purpose in the manner and time required by law.

LOCAL LAW 2005

A Local Law amending the Laws of Westchester County requiring any entity offering or utilizing public Internet access to have a secure network to protect the public from potential identity theft and other risks related to computer use.

BE IT ENACTED by the County Board of the County of Westchester as follows:

Section 1. A new Article XV shall be added to Chapter 863 of the Laws of Westchester County to read as follows:

ARTICLE XV. PUBLIC INTERNET PROTECTION ACT.

Sec. 863.1201. Definitions.

1. "Public Internet access" shall mean any commercial business that offers Internet access to the general public.

2. "Commercial business" shall mean any entity physically located in Westchester County that, for profit, offers goods or services for sale.

3. "Private information" shall mean personal information in combination with any one or more of the following data elements, when either the personal information or the data element is not encrypted (translated into private code) or encrypted with an encryption key that has also been acquired:

   (a) Social Security number;

   (b) driver's license number or non-driver identification card number; or

   (c) account number, credit card or debit card number, in combination with any required security code, access code, or password which would permit access to an individual's financial account.

4. "Firewall" shall mean a set of related programs or hardware, located at a network gateway server that protects the resources of a private network from users of other networks.

Sec. 863.1202. Security of Personal Information.

1. Public Internet access shall not be made available unless the commercial business providing such public access has installed a firewall to secure and prevent unauthorized access to all private information that such entity may store, utilize or otherwise maintain in the regular course of its business. Any commercial business providing public Internet access shall conspicuously post a sign stating:

   YOU ARE ACCESSING A NETWORK WHICH HAS BEEN SECURED WITH FIREWALL PROTECTION. SINCE SUCH PROTECTION DOES NOT GUARANTEE THE SECURITY OF YOUR PERSONAL INFORMATION, USE YOUR OWN DISCRETION.

2. Any commercial business that stores, utilizes or otherwise maintains private information electronically shall install a firewall to secure and prevent unauthorized access to all such information.

Sec. 863.1203. Notice of Compliance.

Any commercial business providing public Internet access shall, within 90 days of the enactment of this Local Law, file a notice of compliance with the provisions of this Article stating that such entity has installed a firewall as required by Section 863.1202 herein. Such notice of compliance shall be made available by the Westchester County Department of Weights and Measures.

Sec. 863.1204. Public education effort.

The Westchester County Department of Weights and Measures, in conjunction with the Westchester County Department of Information Technology, shall prepare and make available a pamphlet which shall inform and educate both the general public and the providers of public Internet access regarding the implications of this Local Law, including the need for network security measures in places of public accommodations. Such pamphlet shall also include information to assist the general public in protecting themselves from the potential of identity theft through the use of wireless Internet connections regardless of where such connections originate. Such information shall also be made available through the official Westchester County government web site at www.westchestergov.com.

Sec. 863.1205. Enforcement and Penalties.

1. The provisions of this article shall be enforced by the Westchester County Department of Weights and Measures.

2. A first violation for failure to file a notice of compliance shall result in a warning by the Westchester County Department of Weights and Measures which shall state that the offender has thirty (30) days to complete and file a notice of compliance. Failure to file a completed notice of compliance within the thirty day period shall constitute a first violation.

3. For a second violation of this Article, a civil penalty not exceeding two hundred and fifty dollars ($250.00) shall be imposed. For the third and succeeding violations, a civil penalty not exceeding five hundred dollars ($500.00) shall be imposed for each single violation. No civil penalty shall be imposed as provided for herein unless the alleged violator has received notice of the charge against him or her and has had an opportunity to be heard.

Sec. 863.1206. Severability.

If any section, subsection, sentence, clause, phrase or other portion of this local law is, for any reason, declared unconstitutional or invalid, in whole or in part, by any court of competent jurisdiction such portion shall be deemed severable, and such unconstitutionality or invalidity shall not affect the validity of the remaining portions of this law, which remaining portions shall continue in full force and effect.

Section 2. This Local Law shall take effect one hundred and eighty (180) days following its enactment.

33. GBL § 899-aa(6) 6.

(a) whenever the attorney general shall believe from evidence satisfactory to him that there is a violation of this article he may bring an action in the name and on behalf of the people of the state of New York, in a court of justice having jurisdiction to issue an injunction, to enjoin and restrain the continuation of such violation.

In such action, preliminary relief may be granted under article sixty-three of the civil practice law and rules. In such action the court may award damages for actual costs or losses incurred by a person entitled to notice pursuant to this article, if notification was not provided to such person pursuant to this article, including consequential financial losses. Whenever the court shall determine in

such action that a person or business violated this article knowingly or recklessly, the court may impose a civil penalty of the greater of five thousand dollars or up to ten dollars per instance of failed notification, provided that the latter amount shall not exceed one hundred fifty thousand dollars.

(b) the remedies provided by this section shall be in addition to any other lawful remedy available.

(c) no action may be brought under the provisions of this section unless such action is commenced within two years immediately after the date of the act complained of or the date of discovery of such act.

34. S.1408, A bill to strengthen data protection and safeguards, require data breach notification, and further prevent identity theft, http://thomas.loc.gov/cgi-bin/bdquery/?&Db=d109&querybd=@FIELD(FLD003+@4((@1(Sen+Smith++Gordon+H.))+01549))" [OR];

H.R.1745, To amend the Social Security Act to enhance Social Security account number privacy protections, to prevent fraudulent misuse of the Social Security account number, and to otherwise enhance protection against identity theft, and for other purposes; [FL-22]

35. S.1789, Sec. 2. FINDINGS.

Congress finds that:

(1) databases of personally identifiable information are increasingly prime targets of hackers, identity thieves, rogue employees, and other criminals, including organized and sophisticated criminal operations;

(2) identity theft is a serious threat to the nation's economic stability, homeland security, the development of e-commerce, and the privacy rights of Americans;

(3) over 9,300,000 individuals were victims of identity theft in America last year;

(4) security breaches are a serious threat to consumer confidence, homeland security, e-commerce, and economic stability;

(5) it is important for business entities that own, use, or license personally identifiable information to adopt reasonable procedures to ensure the security, privacy, and confidentially of that personally identifiable information;

(6) individuals whose personal information has been compromised or who have been victims of identity theft should receive the necessary information and assistance to mitigate their damages and to restore the integrity of their personal information and identities;

(7) data brokers have assumed a significant role in providing identification, authentication, and screening services, and related data collection and analyses for commercial, nonprofit, and government operations;

(8) data misuse and use of inaccurate data have the potential to cause serious or irreparable harm to an individual's livelihood, privacy, and liberty and undermine efficient and effective business and government operations;

(9) there is a need to ensure that data brokers conduct their operations in a manner that prioritizes fairness, transparency, accuracy, and respect for the privacy of consumers;

(10) government access to commercial data can potentially improve safety, law enforcement, and national security; and

(11) because government use of commercial data containing personal information potentially affects individual privacy, and law enforcement and national security operations, there is a need for Congress to exercise oversight over government use of commercial data.

36. S.1785, Sec. 3(10).

SECURITY BREACH

(A) IN GENERAL—The term `security breach' means compromise of the security, confidentiality, or integrity of computerized data through misrepresentation or actions that result in, or there is a reasonable basis to conclude has resulted in, the unauthorized acquisition of and access to sensitive personally identifiable information.

(B) EXCLUSION—The term `security breach' does not include:

(i) a good faith acquisition of sensitive personally identifiable information by a business entity or agency, or an employee or agent of a business entity or agency, if the sensitive personally identifiable information is not subject to further unauthorized disclosure; or

(ii) the release of a public record not otherwise subject to confidentiality or nondisclosure requirements.

37. S.1789, Sec. 421.

NOTICE TO INDIVIDUALS

(a) In General—Any agency, or business entity engaged in interstate commerce, that uses, accesses, transmits, stores, disposes of or collects sensitive personally identifiable information shall, following the discovery of a security breach maintained by the agency or business entity that contains such information, notify any resident of the United States whose sensitive personally identifiable information was subject to the security breach.

(b) Obligation of Owner or Licensee

(1) NOTICE TO OWNER OR LICENSEE—Any agency, or business entity engaged in interstate commerce, that uses, accesses, transmits, stores, disposes of, or collects sensitive personally identifiable information that the agency or business entity does not own or license shall notify the owner or licensee of the information following the discovery of a security breach containing such information.

(2) NOTICE BY OWNER, LICENSEE OR OTHER DESIGNATED THIRD PARTY—Nothing in this subtitle shall prevent or abrogate an agreement between an agency or business entity required to give notice under this section and a designated third party, including an owner or licensee of the sensitive personally identifiable information subject to the security breach, to provide the notifications required under subsection (a).

(3) BUSINESS ENTITY RELIEVED FROM GIVING NOTICE—A business entity obligated to give notice under subsection (a) shall be relieved of such obligation if an owner or licensee of the sensitive personally identifiable information subject to the security breach, or other designated third party, provides such notification.

(c) Timeliness of Notification

(1) IN GENERAL—All notifications required under this section shall be made without unreasonable delay following:

(A) the discovery by the agency or business entity of a security breach; and

(B) any measures necessary to determine the scope of the breach, prevent further disclosures, and restore the reasonable integrity of the data system.

(2) BURDEN OF PROOF—The agency, business entity, owner, or licensee required to provide notification under this section shall have the burden of demonstrating that all notifications were made as required under this subtitle, including evidence demonstrating the necessity of any delay.

(d) Delay of Notification Authorized for Law Enforcement Purposes

(1) IN GENERAL—If a law enforcement agency determines that the notification required under this section would impede a criminal investigation, such notification may be delayed upon the written request of the law enforcement agency.

(2) EXTENDED DELAY OF NOTIFICATION—If the notification required under subsection (a) is delayed pursuant to paragraph (1), an agency or business entity shall give notice 30 days after the day such law enforcement delay was invoked unless a law enforcement agency provides written notification that further delay is necessary.

38. S.1789, Sec. 423.

METHODS OF NOTICE.

An agency, or business entity shall be in compliance with section 421 if it provides:

(1) INDIVIDUAL NOTICE

(A) Written notification to the last known home mailing address of the individual in the records of the agency or business entity; or

(B) E-mail notice, if the individual has consented to receive such notice and the notice is consistent with the provisions permitting electronic transmission of notices under section 101 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. 7001).

(2) MEDIA NOTICE—If more than 5,000 residents of a State or jurisdiction are impacted, notice to major media outlets serving that State or jurisdiction.

39. S.1789, Sec. 424.

CONTENT OF NOTIFICATION.

(a) In General—Regardless of the method by which notice is provided to individuals under section 423, such notice shall include, to the extent possible:

(1) a description of the categories of sensitive personally identifiable information that was, or is reasonably believed to have been, acquired by an unauthorized person;

(2) a toll-free number

(A) that the individual may use to contact the agency or business entity, or the agent of the agency or business entity; and

(B) from which the individual may learn

(i) what types of sensitive personally identifiable information the agency or business entity maintained about that individual or about individuals in general; and

(ii) whether or not the agency or business entity maintained sensitive personally identifiable information about that individual; and

(3) the toll-free contact telephone numbers and addresses for the major credit reporting agencies.

(b) Additional Content—Notwithstanding section 429, a state may require that a notice under subsection (a) shall also include information regarding victim protection assistance provided for by that State.

40. Pub. L. No. 106–102 (1999).

41. Pub. L. No. 104–191 (1996).

42. S.1785, Sec. 401.

PURPOSE AND APPLICABILITY OF DATA PRIVACY AND SECURITY PROGRAM.

(a) Purpose—The purpose of this subtitle is to ensure standards for developing and implementing administrative, technical, and physical safeguards to protect the privacy, security, confidentiality, integrity, storage, and disposal of sensitive personally identifiable information.

(b) In General—A business entity engaging in interstate commerce that involves collecting, accessing, transmitting, using, storing, or disposing of sensitive personally identifiable information in electronic or digital form on 10,000 or more United States persons is subject to the requirements for a data privacy and security program under section 402 for protecting sensitive personally identifiable information.

(c) Limitations— Notwithstanding any other obligation under this subtitle, this subtitle does not apply to:

(1) financial institutions

(A) subject to the data security requirements and implementing regulations under the

Gramm-Leach-Bliley Act (15 U.S.C. 6801 et seq.);

and

(B) subject to

(i) examinations for compliance with the requirements of this Act by 1 or more federal or state functional regulators (as defined in section 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6809)); or

(ii) compliance with part 314 of title 16, Code of Federal Regulations;

or

(2) "covered entities" subject to the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1301 et seq.), including the data security requirements and implementing regulations of that Act.

(d) Safe Harbor—A business entity shall be deemed in compliance with the privacy and security program requirements under section 402 if the business entity complies with or provides protection equal to industry standards, as identified by the Federal Trade Commission, that are applicable to the type of sensitive personally identifiable information involved in the ordinary course of business of such business entity.

Sec. 402.

REQUIREMENTS FOR A PERSONAL DATA PRIVACY AND SECURITY PROGRAM.

(a) Personal Data Privacy and Security Program—Unless otherwise limited under section 401(c), a business entity subject to this subtitle shall comply with the following safeguards and any others identified by the Federal Trade Commission in a rulemaking process pursuant to section 553 of title 5, United States Code, to protect the privacy and security of sensitive personally identifiable information:

(1) SCOPE—A business entity shall implement a comprehensive personal data privacy and security program that includes administrative, technical, and physical safeguards appropriate to the size and complexity of the business entity and the nature and scope of its activities.

(2) DESIGN—The personal data privacy and security program shall be designed to:

(A) ensure the privacy, security, and confidentiality of personal electronic records;

(B) protect against any anticipated vulnerabilities to the privacy, security, or integrity of personal electronic records; and

(C) protect against unauthorized access to use of personal electronic records that could result in substantial harm or inconvenience to any individual.

(3) RISK ASSESSMENT—A business entity shall:

(A) identify reasonably foreseeable internal and external vulnerabilities that could result in unauthorized access, disclosure, use, or alteration of sensitive personally identifiable information or systems containing sensitive personally identifiable information;

(B) assess the likelihood of and potential damage from unauthorized access, disclosure, use, or alteration of sensitive personally identifiable information; and

(C) assess the sufficiency of its policies, technologies, and safeguards in place to control and minimize risks from unauthorized access, disclosure, use, or alteration of sensitive personally identifiable information.

(4) RISK MANAGEMENT AND CONTROL—Each business entity shall:

(A) design its personal data privacy and security program to control the risks identified under paragraph (3); and

(B) adopt measures commensurate with the sensitivity of the data as well as the size, complexity, and scope of the activities of the business entity that:

(i) control access to systems and facilities containing sensitive personally identifiable information, including controls to authenticate and permit access only to authorized individuals;

(ii) detect actual and attempted fraudulent, unlawful, or unauthorized access, disclosure, use, or alteration of sensitive personally identifiable information, including by employees and other individuals otherwise authorized to have access; and

(iii) protect sensitive personally identifiable information during use, transmission, storage, and disposal by encryption or other reasonable means (including as directed for disposal of records under section 628 of the Fair Credit Reporting Act (15 U.S.C. 1681w) and the implementing regulations of such Act as set forth in section 682 of title 16, Code of Federal Regulations).

(b) Training—Each business entity subject to this subtitle shall take steps to ensure employee training and supervision for implementation of the data security program of the business entity.

(c) Vulnerability Testing

(1) IN GENERAL—Each business entity subject to this subtitle shall take steps to ensure regular testing of key controls, systems, and procedures of the personal data privacy and security program to detect, prevent, and respond to attacks or intrusions, or other system failures.

(2) FREQUENCY- The frequency and nature of the tests required under paragraph (1) shall

be determined by the risk assessment of the business entity under subsection (a)(3).

(d) Relationship to Service Providers—In the event a business entity subject to this subtitle engages service providers not subject to this subtitle, such business entity shall:

(1) exercise appropriate due diligence in selecting those service providers for responsibilities related to sensitive personally identifiable information, and take reasonable steps to select and retain service providers that are capable of maintaining appropriate safeguards for the security, privacy, and integrity of the sensitive personally identifiable information at issue; and

(2) require those service providers by contract to implement and maintain appropriate measures designed to meet the objectives and requirements governing entities subject to this section, section 401, and subtitle B.

(e) Periodic Assessment and Personal Data Privacy and Security Modernization—Each business entity subject to this subtitle shall on a regular basis monitor, evaluate, and adjust, as appropriate, its data privacy and security program in light of any relevant changes in:

(1) technology;

(2) the sensitivity of personally identifiable information;

(3) internal or external threats to personally identifiable information; and

(4) the changing business arrangements of the business entity, such as:

(A) mergers and acquisitions;

(B) alliances and joint ventures;

(C) outsourcing arrangements;

(D) bankruptcy; and

(E) changes to sensitive personally identifiable information systems.

(f) Implementation Time Line—Not later than 1 year after the date of enactment of this Act, a business entity subject to the provisions of this subtitle shall implement a data privacy and security program pursuant to this subtitle.

43. S.1789, Sec. 429.

EFFECT ON FEDERAL AND STATE LAW. The provisions of this subtitle shall supersede any other provision of federal law or any provision of law of any state relating to notification of a security breach, except as provided in section 424(b).

44. http://www.naag.org/news/pdf/20051028-signon-InfoSecurityIDTheftLetter.pdf.

45. Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Louisiana, Maine, Minnesota, Montana, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Rhode Island, Tennessee, Texas, and Washington.

46. STL §§ 201–207.

Marc David Hiller is an Associate Attorney with the New York State Office for Technology. The opinions expressed herein are those of the author and not necessarily those of the New York State Office for Technology.

This article originally appeared in the Winter 2005 issue of Bright Ideas, *Vol. 14, No. 3, published by the Intellectual Property Law Section of the New York State Bar Association.*

Changes for Powers of Attorney in New York

By Rose Mary Bailly and Barbara S. Hancock

On January 27, 2009, Governor David Paterson signed Chapter 644 of the Laws of 2008, amending the General Obligations Law to provide significant reforms to the use of powers of attorney in New York. Chapter 644 was the result of eight years of study by the New York State Law Revision Commission and was the subject of much debate and comment by several Sections of the New York State Bar Association.

The power of attorney is an effective tool for attorneys and the public at large for estate and financial planning and for avoiding the expense of guardianship. The power of attorney is also a simple document to create. It can be obtained from any number of Web sites on the Internet or in a stationery store, and its execution merely requires the principal's signature and its acknowledgment before a notary public. But this simplicity belies the extraordinary power that the instrument can convey, and its popularity has also led to its use for transactions far more complex than were originally contemplated by the law, particularly in the areas of gift giving and property transfers.

"Chapter 644 was the result of eight years of study by the New York State Law Revision Commission and was the subject of much debate and comment by several Sections of the New York State Bar Association."

The instrument's power is also demonstrated by the potential authority the agent can hold. This can include power to transfer assets that pass by will as well as those that usually pass outside a will, such as joint bank accounts, life insurance proceeds and retirement benefits.

The principal can delegate these sweeping powers to the agent without fully recognizing their scope (particularly if the principal executes the document without the benefit of legal counsel). The agent can act immediately, unless the instrument is a springing power of attorney, i.e., one that becomes effective upon the occurrence of a specified event such as the principal's incapacity. In all cases, the agent can act without notifying the principal. Under a durable power of attorney or springing durable power of attorney, which continues in effect after the principal's incapacity, the agent acts without oversight when an incapacitated principal is no longer able to control or review the agent's actions – a situation which under common law would have terminated the power of attorney.

Despite the broad authority associated with this important, popular and powerful tool for financial management, the N.Y. General Obligations Law (GOL), which governs powers of attorney, has been silent as to a number of matters. These omissions include descriptions of the agent's fiduciary obligations and accountability, the manner in which the agent should sign documents where a handwritten signature is required, the limits of the agent's authority to make gifts to third parties and to himself or herself, the manner in which the principal can revoke the document, the circumstances under which a third party may reasonably refuse to accept a power of attorney, and the effect on powers of attorney of the 2003 Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule regarding medical records. The statute's provisions have been ambiguous in other areas such as gift-giving authority and authority to make other property transfers.

Based on its study, the Commission concluded that while a power of attorney should remain an instrument flexible enough to allow an agent to carry out the principal's reasonable intentions, the combined effect of its potency and easy creation, the General Obligations Law's silence about several significant matters, and ambiguities about the authority to transfer assets can frustrate the proper use of the power of attorney, particularly when a principal is incapacitated and can no longer take steps to ensure its proper use. Chapter 644 addresses these statutory gaps and clarifies the ambiguities to assist parties creating powers of attorney and third parties asked to accept them.

The revised Power of Attorney Law has an original effective date of March 1, 2009. However, the effective date was delayed until September 1, 2009, after the extension was passed by the Senate (S.1728) on February 24 and by the Assembly (A.4392) on February 10. The bill was signed into law by the Governor as Chapter 4 of the Laws of 2009.

The New York State Bar Association supported this extension in order to provide practitioners with sufficient time to prepare for these significant changes.

For more information please visit our Web site, www.nysba.org.

This article is based on the New York State Law Revision Commission's *2008 Recommendation on Proposed Revisions to the General Obligations Law – Powers of Attorney*. The Commission's 2008 Recommendation, Chapter 644 and other material related to Chapter 644 can be found at the Commission's Web site: http://www.lawrevision.state.ny.us.

General Provisions

Chapter 644 creates a new statutory short form power of attorney. On or after the chapter's effective date, to qualify as a statutory short form power of attorney, an instrument must meet the requirements of GOL § 5-1513.[1] The statutory short form is not valid until it is signed by both the principal and agent, whose signatures are duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property.[2] The date on which an agent's signature is acknowledged is the effective date of the power of attorney as to that agent; if two or more agents are designated to act together, the power of attorney takes effect when all the agents so designated have signed the power of attorney and their signatures have been acknowledged.[3]

A power of attorney executed prior to the effective date of Chapter 644 will continue to be valid, provided that the power of attorney was valid in accordance with the laws in effect at the time of its execution.[4]

Major Gifts and Other Property Transfers

Chapter 644 requires that a grant of authority to make major gifts and other asset transfers must be set out in a major gifts rider to a statutory power of attorney, which contains the signature of the principal duly notarized and which is witnessed by two persons who are not named in the instrument as permissible recipients of gifts or other transfers, in the same manner as a will.[5] In the alternative, the principal may grant such authority to the agent in a nonstatutory power of attorney executed in the same manner as a major gifts rider.[6] The creation of a major gifts rider or its alternative nonstatutory power of attorney allows the principal to make an informed decision as to whether the agent may make gifts or other transfers of the principal's property to third parties as well as to the agent. The execution requirements alert the principal to the gravity of granting the agent this type of authority. An agent acting pursuant to authority granted in a major gifts rider or a nonstatutory power of attorney must act in accordance with the instructions of the principal or, in the absence of such instructions, in the principal's best interests.[7] All statutory provisions relating to major gifts and property transfers have been located in a new GOL § 5-1514, rather than spread throughout the statute.

Powers of attorney often serve two very different purposes: management of the principal's everyday financial affairs and reorganization or distribution of the principal's assets in connection with financial and estate planning. The General Obligations Law has allowed the use of the statutory short form power of attorney for both purposes.

The former statutory language and statutory form made it difficult for a principal to make an informed decision about what, if any, authority he or she wants to give the agent with respect to making gifts and transferring property interests in connection with financial and estate planning.

First, the gifting and transfer provisions were scattered among other arguably more routine provisions. The statutory gifting authority was listed 13th (M) of 16 powers, and authority over insurance transactions and retirement benefit transactions, which can include changing beneficiaries, were listed sixth (F) and 12th (L) respectively; all of these could easily be overlooked. Unlike the gifting power, the insurance and retirement benefit powers listed on the form gave no hint that their construction sections allow the agent to change beneficiary designations. In giving the agent authority over insurance policies and retirement benefits, the principal might have been thinking of more routine matters, such as the need for more insurance or a different type of insurance and might have been unaware that he or she had given the agent authority that could alter the estate plan or reduce his or her property.

Second, the statutory short form did not indicate that the agent may be able to engage in self-gifting or designate himself or herself as the beneficiary of the principal's insurance policies and retirement benefits.

The potential for confusion was compounded by a third factor, namely, the ambiguity of the law regarding these types of transactions. The statutory construction sections for the authority to open joint bank accounts, and to change beneficiaries of insurance policies and retirement plans, did not require on their face that in order to exercise such authority the agent also be granted authority to make gifts or vice versa. So it might appear from a reading of the statute, that the agent could open a joint bank account and make changes in beneficiary designations without having separate gifting authority. However, cases interpreting the statute appeared to hold that if the principal intends to authorize the agent to open joint bank accounts with the principal and change the beneficiaries of the principal's insurance policies and retirement benefits, the principal must grant gifting authority in addition to authority over joint bank accounts, and insurance and retirement benefits.

Finally, the statute permitted modifications to the statutory short form to authorize significant transfers; but, like the powers listed explicitly on the form, they could be buried amid masses of legal text and could fail to attract the principal's attention to the significance of these modifications.

HIPAA Privacy Rule

Chapter 644 adds the term "health care billing and payment matters" to the term "records, reports and statements" as those terms are explained in construction § 5-1502K,[8] so that an agent can examine, question, and pay medical bills in the event the principal intends to grant the agent power with respect to records, reports

and statements, without fear that the HIPAA Privacy Rule would prevent the agent's access to the records. This provision is applicable to all powers of attorney executed before, on or after the effective date of Chapter 644.[9] It does not change the law forbidding the agent from making health care decisions.[10]

The General Obligations Law has been silent as to the relationship between the power of attorney, an agent's authority to access medical records under New York law, and the Privacy Rule, a federal regulation regarding individual medical information promulgated in April 2003 pursuant to HIPAA. The ambiguity about an agent's authority to access medical records under New York law arose out of several factors. Neither subdivision K on the statutory short form (power to access records), nor § 5-1502K, which construed the term "records," contained an express reference to medical records. Moreover, § 18 of the Public Health Law, which identifies qualified persons who are entitled to access to a patient's health records, does not include all agents acting pursuant to a power of attorney.[11] As a result, health care providers have refused to make records available to an agent seeking clarification of a medical bill, without the express language in the power of attorney document authorizing such release.

The ambiguity thus created is exacerbated by the HIPAA Privacy Rule, which creates national standards limiting access to an individual's medical and billing records to the individual and the individual's "personal representative." Under the Privacy Rule, health information relating to billings and payments may be available to an agent if the agent can be characterized as the principal's "personal representative" as defined in the Privacy Rule. Under the regulations, the "personal representative" for an adult or emancipated minor is defined as "a person [who] has authority to act on behalf of a individual who is an adult or an emancipated minor in making decisions related to health care."[12]

The General Obligations Law has limited the authority of the agent to financial matters, and expressly prohibits the agent from making health care decisions for the principal. The Public Health Law defines a health care decision as "any decision to consent or refuse to consent to health care."[13] "Health care," in turn, is defined as "any treatment, service or procedure to diagnose or treat an individual's physical or mental condition."[14]

The principal may grant health care decision making authority to a third party only by executing a health care proxy pursuant to § 2981 of the Public Health Law. The health care proxy law makes clear that financial liability for health care decisions remains the obligation of the principal.[15] As a practical matter, payment issues are left to the principal or the principal's agent. The Privacy Rule regarding access to records does not take into account a statutory structure such as New York's, which permits the division of the responsibilities for health care decisions and bill paying between two representatives, the health care agent and the agent.

Agent

Chapter 644 includes a statutory explanation of the agent's fiduciary duties, codifying the common law recognition of an agent as a fiduciary.[16] A notice to the agent is added to the statutory short form explaining the agent's role, the agent's fiduciary obligations and the legal limitations on the agent's authority.[17] If the agent intends to accept the appointment, the agent must sign the power of attorney as an acknowledgment of the agent's fiduciary obligations.[18]

Chapter 644 also requires that, in transactions on behalf of the principal, the agent's legal relationship to the principal must be disclosed where a handwritten signature is required.[19] In all transactions (including electronic transactions) where the agent purports to act on the principal's behalf, the agent's actions constitute an attestation that the agent is acting under a valid power of attorney and within the scope of the authority conveyed by the instrument.[20] Chapter 644 allows for the principal to provide in the power of attorney that the agent receive reasonable compensation if the principal so desires.[21] Without this designation, the agent is not entitled to compensation.[22]

Both the durable and springing durable power of attorney permit the agent to continue to act after the principal has become incapacitated. The intent behind this change to the common law was laudable – to allow an agent to act for the principal precisely at a time when the principal needs assistance, to permit the principal to plan for possible incapacity, and to eliminate the need for expensive alternatives such as a trust or guardianship. However, the principal's incapacity leaves the principal unable to monitor the agent's actions and to revoke the power if he or she is not satisfied with the agent's conduct. Thus an agent could take actions on behalf of the principal for months or years, without any supervision and not always to the benefit of the principal. Recognizing that the potential for financial exploitation was inherent in the delegation of authority to an agent, public hearings in the early 1990s led to a two-pronged recommendation for reform—educating the principal and holding the agent accountable. Changes to the law regarding the principal's education were adopted but the statute was not revised to reflect the agent's accountability until now.

Principal

Chapter 644 adds a section to the statute that explains how the power of attorney can be revoked.[23] It expands the "Caution" to the principal so that the principal will be better informed about the serious nature of the document.[24] Chapter 644 also permits the principal to appoint

someone to monitor the agent's actions on behalf of the principal,[25] and gives the monitor the authority to request that the agent provide the monitor with a copy of the power of attorney and a copy of the documents that record the transactions the agent has carried out for the principal.[26] Such accountability is consistent with the common law requirement that where one assumes to act for another he or she should willingly account for such stewardship.

Third Parties

Chapter 644 provides that third parties have the ability to refuse to accept powers of attorney based on reasonable cause.[27] The basis for a reasonable refusal includes, but is not limited to, the agent's refusal to provide an original or certified copy of the power of attorney and questions about the validity of the power of attorney based on the third party's good faith referral of the principal and the agent to the local adult protective services unit, the third party's actual knowledge of a report to the local adult protective services unit by another person, actual knowledge of the principal's death, or actual knowledge of the principal's incapacity when he or she executed the document, or when acceptance of a nondurable power of attorney is sought on the principal's behalf.[28] When a third party unreasonably refuses to accept a power of attorney, the statute authorizes the agent to seek a court order compelling acceptance of the power of attorney.[29] Chapter 644 expands the definition of "financial institution" to include securities brokers, securities dealers, securities firms, and insurance companies[30] and provides that a financial institution must accept a validly executed power of attorney without requiring that the power of attorney be on the institution's own form.[31] The third party does not incur any liability in acting on a power of attorney unless the third party has actual notice that the power is revoked or otherwise terminated.[32] A financial institution is deemed to have actual notice of revocation after the financial institution receives written notice at the office where the account is located and has had a reasonable opportunity to take action.[33]

One of the goals of the original creation of a statutory short form was to encourage financial institutions to accept such documents. The anticipated results did not follow. Many institutions instead required that the principal execute a document prepared by the institution. The enactment of the durable power of attorney actually exacerbated the situation. If the financial institution would not accept a statutory short form durable power of attorney and the principal had already lost capacity, serious difficulties could ensue because the principal could not legally execute another document. In 1986, the General Obligations Law was amended to make it unlawful for a financial institution to refuse to accept a statutory short form. Notwithstanding this statutory provision, financial institutions apparently continue to refuse to accept statutory short form powers of attorney and continue to demand that the institution's own form be completed.

"An attorney can certify a copy of a power of attorney instead of having to record it to get certified copies from the county clerk, which result protects client's privacy and limits costly trips to the county clerk's office."

Other Major Provisions

Chapter 644 increases the amount of the gifting provision to that of the annual exclusion amount under the Internal Revenue Code.[34] It adds a provision allowing gifting to a "529" account, up to the annual gift tax exclusion amount.[35] These "529" accounts, authorized in the Internal Revenue Code at § 529, are popular tax-advantaged savings accounts for education expenses. Chapter 644 amends the provisions regarding gift splitting to allow the principal to authorize the agent to make gifts from the principal's assets to a defined list of relatives, up to twice the amount of the annual gift tax exclusions, with the consent of the principal's spouse.[36]

Other Provisions

An attorney who has been instructed by the principal not to disclose the document to the agent at the time of the agent's appointment may do so without concern that it is already a legally effective document because the instrument does not become effective until the agent signs.[37] An attorney can certify a copy of a power of attorney instead of having to record it to get certified copies from the county clerk, which result protects client's privacy and limits costly trips to the county clerk's office.[38] In addition, the default statutory provisions regarding annual exclusion gifting will always be up to date with federal law.[39]

Financial institutions may demand an affidavit that the power of attorney is in full force and effect when they are asked to accept it.[40]

Investigative agencies and law enforcement officials can request a copy of the power of attorney and the records of the agent[41] and bring a special proceeding to compel disclosure in the event of the agent's failure to comply.[42]

Additionally, the basis for termination and revocation of a power of attorney and resignation of an agent are described,[43] as are the relationships among co-agents and the initial and successor agents.[44]

Conclusion

With these changes, New York's law has been updated and refined to reflect the complexities that surround the use of powers of attorney in financial and estate planning matters.[45]

Endnotes

1. 2008 N.Y. Laws ch. 644, § 2, 5-1501B; § 19, 5-1513. All statutory references for amendments to the General Obligations Law are to the sections in Chapter 644.
2. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1).
3. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(3).
4. 2008 N.Y. Laws ch. 644, § 21.
5. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(2)(a), § 19, 5-1514.
6. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(2)(b), § 19, 5-1514.
7. 2008 N.Y. Laws ch. 644, § 19, 5-1514(5).
8. 2008 N.Y. Laws ch. 644, § 12.
9. 2008 N.Y. Laws ch. 644, § 21.
10. 2008 N.Y. Laws ch. 644, § 12, 5-1502K(1).
11. *See* N.Y. Public Health Law § 18(1)(g) (PHL) (refers only to attorneys who hold a power of attorney from an otherwise qualified person or the patient's estate specifically "authorizing the holder to execute a written request for patient information." An otherwise qualified person is the patient, Article 81 guardian, parent of an infant, guardian of an infant, or distributee of deceased patient's estate if no executor or administrator has been appointed).
12. 45 C.F.R. § 164.502(g)(2).
13. PHL § 2980(6).
14. PHL § 2980(4).
15. *See* PHL § 2987.
16. 2008 N.Y. Laws ch. 644, § 19, 5-1505.
17. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(d)(2); § 19, 5-1513(n).
18. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(c); § 19, 5-1513(o).
19. 2008 N.Y. Laws ch. 644, § 19, 5-1507(1).
20. 2008 N.Y. Laws ch. 644, § 19, 5-1507(2).
21. 2008 N.Y. Laws ch. 644, § 19, 5-1506(1).
22. *Id.*
23. 2008 N.Y. Laws ch. 644, § 19, 5-1511.
24. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(1)(d)(1); § 19, 5-1513(a).
25. 2008 N.Y. Laws ch. 644, § 19, 5-1509.
26. *Id.*
27. 2008 N.Y. Laws ch. 644, § 18, 5-1504.
28. *Id.*
29. 2008 N.Y. Laws ch. 644, § 19, 5-1510(2)(i).
30. 2008 N.Y. Laws ch. 644, § 2, 5-1501(5).
31. 2008 N.Y. Laws ch. 644, § 18, 5-1504(1)(b)(1).
32. 2008 N.Y. Laws ch. 644, § 18, 5-1504(3).
33. *Id.*
34. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(1).
35. *Id.*
36. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(2).
37. 2008 N.Y. Laws ch. 644, § 2, 5-1501B(3)(a).
38. 2008 N.Y. Laws ch. 644, § 18, 5-1504(1)(a)(1).
39. 2008 N.Y. Laws ch. 644, § 19, 5-1514(6)(1).
40. 2008 N.Y. Laws ch. 644, § 18, 5-1504(5).
41. 2008 N.Y. Laws ch. 644, § 19, 5-1505(2)(a)(3).
42. 2008 N.Y. Laws ch. 644, § 19, 5-1510(1).
43. 2008 N.Y. Laws ch. 644, § 19, 5-1511.
44. 2008 N.Y. Laws ch. 644, § 19, 5-1508.
45. In so doing, New York's law has come in line with the laws of many other jurisdictions and the recent amendments to the Uniform Power of Attorney Act, available at http://www.law.upenn.edu/bll/archives/ulc/dpoaa/2008_final.htm.

Rose Mary Bailly is the Executive Director of the New York State Law Revision Commission. Barbara S. Hancock is the Counsel to the Commission.

***This article originally appeared in the March/April 2009 issue of the NYSBA* Journal.**

Power of Attorney New York Statutory Short Form

(a) CAUTION TO THE PRINCIPAL: Your Power of Attorney is an important document. As the "principal," you give the person whom you choose (your "agent") authority to spend your money and sell or dispose of your property during your lifetime without telling you. You do not lose your authority to act even though you have given your agent similar authority.

When your agent exercises this authority, he or she must act according to any instructions you have provided or, where there are no specific instructions, in your best interest. "Important Information for the Agent" at the end of this document describes your agent's responsibilities.

Your agent can act on your behalf only after signing the Power of Attorney before a notary public.

You can request information from your agent at any time. If you are revoking a prior Power of Attorney by executing this Power of Attorney, you should provide written notice of the revocation to your prior agent(s) and to the financial institutions where your accounts are located.

You can revoke or terminate your Power of Attorney at any time for any reason as long as you are of sound mind. If you are no longer of sound mind, a court can remove an agent for acting improperly.

Your agent cannot make health care decisions for you. You may execute a "Health Care Proxy" to do this.

The law governing Powers of Attorney is contained in the New York General Obligations Law, Article 5, Title 15. This law is available at a law library, or online through the New York State Senate or Assembly websites, www.senate.state.ny.us or www.assembly.state.ny.us.

If there is anything about this document that you do not understand, you should ask a lawyer of your own choosing to explain it to you.

(b) DESIGNATION OF AGENT(S):

I, _____, hereby appoint:
[name and address of principal]

_____ as my agent(s)
[name(s) and address(es) of agent(s)]

If you designate more than one agent above, they must act together unless you initial the statement below.

(___) My agents may act SEPARATELY.

(c) DESIGNATION OF SUCCESSOR AGENT(S): (OPTIONAL)

If every agent designated above is unable or unwilling to serve, I appoint as my successor agent(s): _____

_____
[name(s) and address(es) of successor agent(s)]

Successor agents designated above must act together unless you initial the statement below.

(___) My successor agents may act SEPARATELY.

(d) This POWER OF ATTORNEY shall not be affected by my subsequent incapacity unless I have stated otherwise below, under "Modifications".

(e) This POWER OF ATTORNEY REVOKES any and all prior Powers of Attorney executed by me unless I have stated otherwise below, under "Modifications".

If you are NOT revoking your prior Powers of Attorney, and if you are granting the same authority in two or more Powers of Attorney, you must also indicate under "Modifications" whether the agents given these powers are to act together or separately.

(f) GRANT OF AUTHORITY:

To grant your agent some or all of the authority below, either (1) Initial the bracket at each authority you grant, or (2) Write or type the letters for each authority you grant on the blank line at (P), and initial the bracket at (P). If you initial (P), you do not need to initial the other lines.

I grant authority to my agent(s) with respect to the following subjects as defined in sections 5-1502A through 5-1502N of the New York General Obligations Law:

(___) (A) real estate transactions;
(___) (B) chattel and goods transactions;
(___) (C) bond, share, and commodity transactions;
(___) (D) banking transactions;
(___) (E) business operating transactions;
(___) (F) insurance transactions;
(___) (G) estate transactions;
(___) (H) claims and litigation;
(___) (I) personal and family maintenance;
(___) (J) benefits from governmental programs or civil or military service;
(___) (K) health care billing and payment matters; records, reports, and statements;
(___) (L) retirement benefit transactions;
(___) (M) tax matters;
(___) (N) all other matters;
(___) (O) full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) select;
(___) (P) EACH of the matters identified by the following letters: _____

_____

You need not initial the other lines if you initial line (P).

(g) MODIFICATIONS: (OPTIONAL)

In this section, you may make additional provisions, including language to limit or supplement authority granted to your agent. However, you cannot use this Modifications section to grant your agent authority to make major gifts or changes to interests in your property. If you wish to grant your agent such authority, you MUST complete the Statutory Major Gifts Rider.

_____

_____

(h) MAJOR GIFTS AND OTHER TRANSFERS: STATUTORY MAJOR GIFTS RIDER (OPTIONAL)

In order to authorize your agent to make major gifts and other transfers of your property, you must initial the statement below and execute a Statutory Major Gifts Rider at the same time as this instrument. Initialing the statement below by itself does not authorize your agent to make major gifts and other transfers. The preparation of the Statutory Major Gifts Rider should be supervised by a lawyer.

(___) (SMGR) I grant my agent authority to make major gifts and other transfers of my property, in accordance with the terms and conditions of the Statutory Major Gifts Rider that supplements this Power of Attorney.

(i) DESIGNATION OF MONITOR(S): (OPTIONAL)

I wish to designate _____, whose address(es) is (are) _____ as monitor(s). Upon the request of the monitor(s), my agent(s) must provide the monitor(s) with a copy of the power of attorney and a record of all transactions done or made on my behalf. Third parties holding records of such transactions shall provide the records to the monitor(s) upon request.

(j) COMPENSATION OF AGENT(S): (OPTIONAL)

Your agent is entitled to be reimbursed from your assets for reasonable expenses incurred on your behalf. If you ALSO wish your agent(s) to be compensated from your assets for services rendered on your behalf, initial the statement below. If you wish to define "reasonable compensation", you may do so above, under "Modifications".

(___) My agent(s) shall be entitled to reasonable compensation for services rendered.

(k) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Power of Attorney. I understand that any termination of this Power of Attorney, whether the result of my revocation of the Power of Attorney or otherwise, is not effective as to a third party until the third party has actual notice or knowledge of the termination.

(l) TERMINATION: This Power of Attorney continues until I revoke it or it is terminated by my death or other event described in section 5-1511 of the General Obligations Law.

Section 5-1511 of the General Obligations Law describes the manner in which you may revoke your Power of Attorney, and the events which terminate the Power of Attorney.

(m) SIGNATURE AND ACKNOWLEDGMENT: In Witness Whereof I have hereunto signed my name on _____ _____,20____.

PRINCIPAL signs here: ==>_____

(Acknowledgment)

[STATE OF)

) ss.:

COUNTY OF)

On the _____ day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public]

(n) IMPORTANT INFORMATION FOR THE AGENT:

When you accept the authority granted under this Power of Attorney, a special legal relationship is created between you and the principal. This relationship imposes on you legal responsibilities that continue until you resign or the Power of Attorney is terminated or revoked. You must:

(1) act according to any instructions from the principal, or, where there are no instructions, in the principal's best interest;

(2) avoid conflicts that would impair your ability to act in the principal's best interest;

(3) keep the principal's property separate and distinct from any assets you own or control, unless otherwise permitted by law;

(4) keep a record or all receipts, payments, and transactions conducted for the principal; and

(5) disclose your identity as an agent whenever you act for the principal by writing or printing the principal's name and signing your own name as "agent" in either of the following manner: (Principal's Name) by (Your Signature) as Agent, or (your signature) as Agent for (Principal's Name).

You may not use the principal's assets to benefit yourself or give major gifts to yourself or anyone else unless the principal has specifically granted you that authority in this Power of Attorney or in a Statutory Major Gifts Rider attached to this Power of Attorney. If you have that authority, you must act according to any instructions of the principal or, where there are no such instructions, in the principal's best interest. You may resign by giving written notice to the principal and to any co-agent, successor agent, monitor if one has been named in this document, or the principal's guardian if one has been appointed. If there is anything about this document or your responsibilities that you do not understand, you should seek legal advice.

Liability of agent:

The meaning of the authority given to you is defined in New York's General Obligations Law, Article 5, Title 15. If it is found that you have violated the law or acted outside the authority granted to you in the Power of Attorney, you may be liable under the law for your violation.

(o) AGENT'S SIGNATURE AND ACKNOWLEDGMENT OF APPOINTMENT: It is not required that the principal and the agent(s) sign at the same time, nor that multiple agents sign at the same time.

I / we _____, have read the foregoing Power of Attorney. I am / we are the person(s) identified therein as agent(s) for the principal named therein.

I / we acknowledge my / our legal responsibilities.

Agent(s) sign(s) here:==>_____

(acknowledgement(s))

[STATE OF NEW YORK)

) ss.:

COUNTY OF)

On the _____day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he / she executed the same in his / her capacity, and that by his / her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public

STATE OF NEW YORK)

) ss.:

COUNTY OF)

On the _____day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____ _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he / she executed the same in his / her capacity, and that by his / her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public]

2008 N.Y. Laws ch. 644, § 19, 5-1513; 2009 N.Y. Laws ch. 4 (amending effective date from March 1, 2009 to September 1, 2009).

Editor's Note: This form is a draft POA which is being distributed for comment/suggestions. If you have any comments/ suggestions, please e-mail them to Dan McMahon, NYSBA Publications Director at dmcmahon@nysba.org. A final version of the new POA form will be distributed once any necessary changes (if any) have been made. Final spacing has not been determined by the official publishers. Italics have been added to the portions of the new Statutory Short Form Power of Attorney and Major Gifts Rider that are instructional. Lines representing spaces and acknowledgments in brackets are lustrative only and have been added for clarity and convenience.

Power of Attorney New York Statutory Major Gifts Rider Authorization to Make Major Gifts or Other Transfers

CAUTION TO THE PRINCIPAL: This OPTIONAL rider allows you to authorize your agent to make major gifts or other transfers of your money or other property during your lifetime. Granting any of the following authority to your agent gives your agent the authority to take actions which could significantly reduce your property or change how your property is distributed at your death. "Major gifts or other transfers" are described in section 5-1514 of the General Obligations Law. This Major Gifts Rider does not require your agent to exercise granted authority, but when he or she exercises this authority, he or she must act according to any instructions you provide, or otherwise in your best interest.

This Major Gifts Rider and the Power of Attorney it supplements must be read together as a single instrument.

Before signing this document authorizing your agent to make major gifts and other transfers, you should seek legal advice to ensure that your intentions are clearly and properly expressed.

(a) GRANT OF LIMITED AUTHORITY TO MAKE GIFTS

Granting gifting authority to your agent gives your agent the authority to take actions which could significantly reduce your property. If you wish to allow your agent to make gifts to himself or herself, you must separately grant that authority in subdivision (c) below.

To grant your agent the gifting authority provided below, initial the bracket to the left of the authority.

(____) I grant authority to my agent to make gifts to my spouse, children and more remote descendants, and parents, not to exceed, for each donee, the annual federal gift tax exclusion amount pursuant to the Internal Revenue Code. For gifts to my children and more remote descendants, and parents, the maximum amount of the gift to each donee shall not exceed twice the gift tax exclusion amount, if my spouse agrees to split gift treatment pursuant to the Internal Revenue Code. This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(b) MODIFICATIONS:

Use this section if you wish to authorize gifts in excess of the above amount, gifts to other beneficiaries or other types of transfers. Granting such authority to your agent gives your agent the authority to take actions which could significantly reduce your property and/or change how your property is distributed at your death. If you wish to authorize your agent to make gifts or transfers to himself or herself, you must separately grant that authority in subdivision (c) below.

(____) I grant the following authority to my agent to make gifts or transfers pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest:

_____

_____

(c) GRANT OF SPECIFIC AUTHORITY FOR AN AGENT TO MAKE MAJOR GIFTS OR OTHER TRANSFERS TO HIMSELF OR HERSELF: (OPTIONAL)

If you wish to authorize your agent to make gifts or transfers to himself or herself, you must grant that authority in this section, indicating to which agent(s) the authorization is granted, and any limitations and guidelines.

(____) I grant specific authority for the following agent(s) to make the following major gifts or other transfers to himself or herself:

_____

_____

_____

This authority must be exercised pursuant to my instructions, or otherwise for purposes which the agent reasonably deems to be in my best interest.

(d) ACCEPTANCE BY THIRD PARTIES: I agree to indemnify the third party for any claims that may arise against the third party because of reliance on this Major Gifts Rider.

(e) SIGNATURE OF PRINCIPAL AND ACKNOWLEDGMENT:

In Witness Whereof I have hereunto signed my name on _____, 20____.

PRINCIPAL signs here:

_____

(acknowledgment)

[STATE OF NEW YORK)

) ss.:

COUNTY OF)

On the _____ day of _____, in the year _____, before me, the undersigned, a Notary Public in and for said state, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the person or the entity upon behalf of which the person acted, executed the instrument.

_____

Notary Public]

(f) SIGNATURES OF WITNESSES:

By signing as a witness, I acknowledge that the principal signed the Major Gifts Rider in my presence and the presence of the other witness, or that the principal acknowledged to me that the principal's signature was affixed by him or her or at his or her direction. I also acknowledge that the principal has stated that this Major Gifts Rider reflects his or her wishes and that he or she has signed it voluntarily. I am not named herein as a permissible recipient of major gifts.

_____	_____
Signature of witness 1	Signature of witness 2
_____	_____
Date	Date
_____	_____
Print name	Print name
_____	_____
Address	Address
_____	_____
City, State, Zip code	City, State, Zip code

(g) This document prepared by: _____

2008 N.Y. Laws ch. 644, § 19, 5-1514; 2009 N.Y. Laws ch. 4 (amending effective date from March 1, 2009 to September 1, 2009).

Editor's Note: This form is a draft POA which is being distributed for comment/suggestions. If you have any comments/suggestions, please e-mail them to Dan McMahon, NYSBA Publications Director at dmcmahon@nysba.org. A final version of the new POA form will be distributed once any necessary changes (if any) have been made. Final spacing has not been determined by the official publishers. Italics have been added to the portions of the new Statutory Short Form Power of Attorney and Major Gifts Rider that are instructional. Lines representing spaces and acknowledgments in brackets are illustrative only and have been added for clarity and convenience.

Retaining and Maintaining Closed Files: Professional Responsibilities, Ethical Considerations and Practice Suggestions

By Stuart B. Newman

The Collyer Brothers must have been members of our noble profession at some point in their lives: they shared the same packrat trait of holding on to every scrap of paper that came into their possession. Probably through a combination of lack of time and confusion about a lawyer's professional responsibility regarding closed files, the one expense line on a law firm's operating statement that is guaranteed to grow geometrically is its monthly storage fees for warehousing closed files.

This article will offer practical suggestions for reducing file storage fees by better management of closed files and will explore the ethical considerations and legal responsibilities of law firms regarding client documents and closed files.

File Management

Although this may seem so obvious as to hardly need mentioning, it is astonishing how common a practice it is to end a corporate matter or conclude a litigation without any thought given to organizing the firm's file on the matter after closing or settlement. Typically, a lawyer's interest in a matter which has reached closing or settlement quickly wanes, and usually doesn't survive beyond the final accounting and settling up with the client for fees and expenses.

Under most circumstances, corporate lawyers and their paralegals usually take the time to put together a closing binder of key documents. But what about those somewhat less than "key" documents, interim drafts (even multiple copies of interim drafts), handwritten notes, memoranda, client documents and exhibits. In a litigation, the firm is likely to have in its possession at the end of the case an extensive collection of client documents produced during pre-trial discovery. The same is true in a merger and acquisition transaction when extensive client documents and records are collected during due diligence for purposes of analyzing and complying with disclosure requirements pursuant to the agreement.

In both litigated and corporate matters, it is not uncommon for a firm to accumulate confidential documents and original records from both sides—produced by, or delivered to, the firm in fulfillment of disclosure requirements. These documents and records are usually governed by separate confidentiality agreements or even by orders of the court.

The need to take some time "the morning after" to review the state of the office's file after closing or settlement should be obvious. The matter is fresh in mind and the attorneys who worked on it are as knowledgeable as anyone in the firm will ever be again to decide what needs to be preserved, what should be returned to the appropriate party, and what can quite obviously be discarded before it becomes fossilized in the warehouse.

Return of client documents and records should be the first step. It is an unnecessary burden for a firm to perpetuate responsibility for a client's original documents and records.[1] By parallel example, it is increasingly more common for accountants and tax preparers to return to their clients the documents and records collected from the client during tax preparation or audits.

Copies of the client's original documents delivered to the firm by the client are probably unnecessary surplussage and usually can be destroyed, rather than shipped back, with the consent and agreement of the client.

Confidential documents may be under mandated order of destruction. Even if no court order exists, in this environment of computer-assisted fraud and identity theft, it is prudent for attorneys to consider destroying rather than simply discarding certain client and client-related information. Record and document destruction services are readily available. Most file storage companies will offer this service and provide the firm with a certificate of destruction.

Implementing the suggestions above, a closed file should now be reduced to its presumably minimum contents, ready for transfer to storage within a reasonable time after the closing of the matter. But how long must the contents remain in storage?

Professional Responsibilities and Ethical Considerations

What is a lawyer's professional responsibility with respect to retaining documents in the lawyer's possession relating to the representation of a client or former client? Is there an objective standard or prescribed time frame for maintenance of files and records? Do lawyers have a duty to give prior notice to clients or former clients of their intention to discard or destroy files and records?

With only a few exceptions, there are no specific, objective time requirements imposing legal obligations on

lawyers or their law firms for maintaining and preserving files and records. In fact, lawyers do not have a general duty to preserve all files permanently.[2] The American Bar Association's Committee on Ethics and Professional Responsibility has acknowledged that "mounting and substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services."[3]

This sentiment has been echoed for New York practitioners by the Committee on Professional Ethics of the New York State Bar Association: "The ethics of our profession do not cast upon lawyers the unreasonable burden of maintaining all files and records relating to their clients."[4]

General Rule

Instead of any hard-and-fast retention rule, except for certain specific categories of documents and records, the length of time for retention or disposition of a file is generally within the reasonable discretion of the lawyer and his firm.

> Those files and records that do not contain material for which the client . . . foreseeably will have a need [and which are not required by law to be further maintained], may be destroyed where they have been retained for a reasonable period of time after the lawyer has requested instructions for their disposition from his client, or his client's legal representative, and such instructions have not been received.[5]

In an effort to guide attorneys in exercising discretion regarding how long to retain files and when they may be disposed of, the ABA's Committee on Ethics observes:

> The nature and contents of some files may indicate a need for longer retention than do the nature and contents of other files, based upon their obvious relevance and materiality to matters that can be expected to arise.[6]

These general principles are endorsed by the American Law Institute's Restatement of the Law, which requires retention of documents "while there is a reasonable likelihood that the client will need the documents" but suggests destruction of documents that are "outdated or no longer of consequence."[7]

Examples of documents clearly imposing a higher duty of retention and preservation include releases, instruments of transfer of property or other assets (especially if not recorded) and agreements containing post-closing covenants or warranties.

Exceptions

For New York State practitioners, a notable exception to the broad discretion afforded generally regarding file retention is a firm's bookkeeping records. The Disciplinary Rules of the New York Supreme Court[8] require lawyers practicing in New York to maintain for seven years the following categories of bookkeeping records:

(1) records of all deposits in, and withdrawals from, all bank accounts through which the operations of the lawyer's practice are conducted, including check books, check stubs, bank statements, cancelled checks and deposit slips;

(2) copies of all retainer agreements with clients;

(3) copies of all bills rendered to clients and of all statements showing disbursement of funds to them or on their behalf;

(4) records of all payments to other lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered;

(5) copies of all retainer and closing statements filed with the Office of Court Administration.

Note that the requirement of preservation of banking records applies to all accounts, not just to attorney escrow accounts.[9]

Duty of Notice

The law does not provide that lawyers must give notice to their clients or former clients with respect to the disposition of client files. There is no general duty by lawyers to provide notice to clients or former clients with regard to such matters.

However, the American Bar Association's Committee on Ethics and Professional Responsibility, in the same informal opinion cited above, proposed that a lawyer should not destroy or dispose of a file without first screening it in order to determine that consideration has been given to significant documents or information, such as information the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired; or information that the client may need, that has not previously been given to the client, that is not otherwise readily available to the client, and that the client may reasonably expect will be preserved by the lawyer. Not inconceivably, in considering the duty of a lawyer to screen a file before disposing of it, a court could find that the giving of notice to the client of the lawyer's intention to dispose of the documents or information was a reasonable step in safeguarding the client's interests in the documents.

In New York, a distinction is made between file documents belonging to the lawyer, and documents that belong to the client:

> Where a file has been closed, except to the extent that the law may require otherwise, all documents belonging to the lawyer may be destroyed without consultation or notice to the client in the absence of extraordinary circumstances manifesting a client's clear and present need for such documents.[10]

With respect to documents belonging to the client, however, lawyers in New York should offer to make such documents available to the client. It is recommended that the offer be in writing, announcing the intention to dispose of the file. The lawyer may dispose of the documents if the client fails to respond after a reasonable period of time or cannot be contacted after reasonable efforts to do so.[11]

"Upon the dissolution of a firm the members of the firm are obligated to make appropriate arrangements for preservation of its files, especially its bookkeeping, banking and billing records."

In Opinion 623, New York's Committee on Professional Ethics cautioned, however, that determining whether certain documents "belong to the lawyer" may not always be easy and may involve some complex issues of both law and fact.

Dissolution of a Firm

Not surprisingly, to the extent that a lawyer or his firm has responsibility for preserving files, the responsibility does not end on his retirement, or upon dissolution of the firm. The Disciplinary Rules in New York make this obligation abundantly clear. Upon the dissolution of a firm the members of the firm are obligated to make appropriate arrangements for preservation of its files, especially its bookkeeping, banking and billing records.[12]

Endnotes

1. Lawyers have been disciplined for failure to fulfill a duty to safeguard documents. *Florida Bar v. Penrose*, 413 So. 2d 15 (Fla. 1982) (abandoning practice leaving files unattended); *Florida v. Ward*, 366 So. 2d 405 (Fla. 1978) (losing client's insurance policy); *Attorney Grievance Committee v. Pollack*, 425 A.2d 1352 (Md. 1981) (temporarily misplacing a deed); *In re Laubenheimer*, 335 N.W.2d 624 (Wis. 1983) (transferring files to another lawyer without client notice or consent). Moreover, there is ample authority for a lawyer's duty to return client documents and papers at the conclusion of the representation. *E.g., Nolan v. Foreman*, 665 F.2d 738 (5th Cir. 1982).
2. *Informal Opinion 1384*, "Disposition of a Lawyer's Closed or Dormant Files Relating to Representation or Services to Clients." American Bar Association, Committee on Ethics and Professional Responsibility (March 14, 1977).
3. *Id.*
4. *Opinion 623*, "Closed files; disposition procedures; dissolution of law firm." New York State Bar Association, Committee on Professional Ethics (November 7, 1991).
5. *Id.*
6. *Opinion 1384*, ABA.
7. Restatement of the Law (Third)—The Law Governing Lawyers § 46, American Law Institute (2000).
8. N.Y. Rules of Court § 1200.46 [DR 9-102](d)(5).
9. Rule 1.15 of the ABA Model Rules, regarding safekeeping of property, suggests a *five-year* period for keeping records of client trust funds and preserving "other (client) property."
10. *Opinion 623*, NYSBA.
11. *Id.*
12. N.Y. Rules of Court § 1200.46.

Stuart B. Newman is a Member of Salon Marrow Dyckman & Newman LLP. He is also the Chair of the Advisory Board of the *NY Business Law Journal*. **The author wishes to acknowledge the invaluable assistance of Charis Uyecio, a third-year student at Columbia Law School, in researching and developing this article.**

This article originally appeared in the Spring 2004 issue of the NY Business Law Journal, *Vol. 8, No. 1, published by the Business Law Section of the New York State Bar Association.*

The New Rules of Professional Conduct for Elder Law Attorneys: Something Old, Something New, Something Borrowed, but Hopefully No One Blue

By JulieAnn Calareso

On December 16, 2008, Chief Judge Judith S. Kaye and the Presiding Justices of the Appellate Division announced the adoption of "The Rules of Professional Conduct," a new set of rules governing attorney conduct for all attorneys admitted to practice in New York (hereinafter, the "Rules," or referred to by specific rule number).[1] The Rules were adopted after the New York State Bar Association's Committee on Standards of Attorney Conduct (COSAC) concluded a five-year study which culminated in presenting the Rules to a committee appointed by the Administrative Board of the Courts.[2] The committee then made rule recommendations that were considered and, ultimately, adopted by Chief Judge Kaye and the Appellate Divisions.[3]

New York elder law practitioners are regularly presented with client situations that require a working knowledge of many areas of law. The elder law practitioner's understanding of the state's ethical rules is involved just as regularly and, often, with fewer concrete answers. The ethical considerations faced by elder law practitioners may include questions raised because the attorney has been retained by one child on behalf of a parent, or by one family member on behalf of another. Similarly, elder law attorneys are often retained to handle matters affecting multiple generations of family members, including family members not present at the initial attorney-client meeting and unannounced before the conflict check. Elder law practitioners also frequently handle matters for people suffering from disabilities due to physical limitations or diminished mental capacities. These situations (and the dozens of variations on these situations) require the elder law practitioner to consider the ethical standards adopted by the state before commencing with vigilant representation of the client's (or clients') interests. The state's ethical standards for attorneys are being changed and this article considers how some of those changes will impact the elder law practitioner in daily practice.

The Rules, effective April 1, 2009, replace the current Canons, Ethical Considerations and Disciplinary Rules contained in the New York Code of Professional Responsibility (referred to throughout as the "Code," or by specific Ethical Consideration or Disciplinary Rule number). The Rules embrace the American Bar Association's model rules format. With New York's adoption of the Rules, the ABA's model rules format will be in use in 48 states, with California and Maine as the only exceptions.[4] Like most states, New York's Rules are not an exact enactment of the ABA Model Rules. In fact, of the 48 states that have adopted the model rules format, no two states have adopted an identical set of rules.[5] Nevertheless, the commentaries have indicated that the purpose of moving to the model rules format was, in part, to allow New York lawyers and courts to make use of a national body of ethics law in conducting research and reaching determinations on ethical issues.[6] In addition, the use of the model rule format will better position New York to set national precedent on ethical issues.[7]

"The state's ethical standards for attorneys are being changed and this article considers how some of those changes will impact the elder law practitioner in daily practice."

Much of the language of the Rules will be familiar to practitioners, as the language contained in the Code was adopted into the Rules where the Administrative Board of the Courts and the Justices of the Appellate Division felt it was suitable.[8] Moreover, any person who has taken the Bar Examination since 1982 (which is two-thirds of all NYSBA members) has been required to take the Multistate Professional Responsibility Examination, which is based on the ABA Model Rules.[9] It is anticipated that this baseline exposure, coupled with the user-friendly format of the Rules, will allow practitioners statewide to easily adhere to and incorporate into their practices the new ethical standards for the State of New York.

The adoption of the model rules format will result in the Rules being presented in a more cohesive and coherent format than the Code. The Rules are presented in eight basic areas: the Client-Lawyer Relationship, the Counselor, the Advocate, Transactions with Persons Other than Clients, Law Firms and Associations, Public Service, Information About Legal Services, and Maintaining the Integrity of the Profession.[10] Grouping the Rules into these categories permits a practitioner to easily locate and identify specific rules governing particular situations. Several commentators have undertaken the Herculean effort to analyze, compare, contrast and comment on the new Rules and the old Code. Those sources, liberally used in the preparation of these materials and cited throughout, should be read by all practitioners seeking to learn the new Rules. While every attorney should familiarize himself or herself with each of the individual rules, the

elder law practitioner should pay attention to several of the Rules in particular. These specific rules are discussed below.

Rule 1.5 is entitled "Fees and Division of Fees." This topic was formerly covered in DR 2-106 and DR 2-107. Though Rule 1.5 is very similar to the Disciplinary Rules it replaces, it now contains a subdivision (b) which requires a communication to the client stating the scope of the representation and the basis or rate of the fee and expenses. Such communication must be made before or within a reasonable time after the start of the representation. Rule 1.5(b) does not apply when the lawyer charges a regularly represented client on the same basis or rate and performs services that are of the same general kind as previously rendered to and paid for by the client. This is similar to the written letter of engagement requirement of 22 N.Y.C.R.R. § 1215, although Rule 1.5(b) does not impose a threshold dollar amount on a matter before requiring communication. Of particular note is that Rule 1.5 does not require the communication to be in writing, whereas 22 N.Y.C.R.R. § 1215 does.

Another rule of particular relevance to elder law attorneys is Rule 1.6. This rule is called "Confidentiality of Information" and is the modern counterpart to DR 4-101. The first thing that is apparent about the new rule is its abandonment of the terms "confidences" and "secrets" and the use, in their stead, of the all-encompassing phrase "confidential information." Confidential information now encompasses those things that were formerly confidences or secrets, including "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."[11] Excepted from the definition is the lawyer's legal knowledge or legal research, and information generally known in the local community or in the trade, field or profession to which the information relates. The attorney may often find himself or herself facing a barrage of confidential information conveyed from the client, or the client's agent, under a Power of Attorney, which the attorney must then strictly safeguard from disclosure from other family members, social workers and health care providers, facility admissions coordinators and other well-intentioned persons. Vigilance in protecting confidential information must be maintained.

The scope of the exceptions for revealing confidential information has been broadened in Rule 1.6(b) to include the permissible revelation of confidential information to "prevent reasonably certain death or substantial bodily harm." This exception may be particularly poignant to elder law practitioners who find themselves safeguarding information revealed by an elderly client, the disclosure of which may assist in keeping that client safe. An example that comes to mind includes the situation where the client has revealed that he or she has been physically or mentally abused by an adult child but has indicated that no action is being, or should be, taken on this matter. An elder law attorney is obligated to maintain that confidential information, but the Rules now permit an exception when substantial bodily harm is reasonably certain.

As elder law attorneys, we are often a client's primary source of counseling and support. It is not uncommon to have a client indicate a desire to have us personally benefit as a reward for our trusted relationship. The Rules, however, spell out the prohibition on solicitation of gifts from clients that were formerly embodied in Canon 5 and Ethical Consideration 5-5. Specifically, Rule 1.8(c) states that a lawyer shall not "solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to a lawyer; or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable." Interestingly, "relatives" include spouses, children, grandchildren, parents, grandparents, or other relatives or individuals with whom the lawyer or client maintains a close, familial relationship. However, the Appellate Division did not include the language proposed by the Bar Association including domestic partners in this definition.[12]

The conflict of interest rule embodied in Rule 1.8 carries forward other significant provisions relating to the elder law practitioner. Rule 1.8(f) contains the rule on accepting payment from third parties that was formerly included in DR 5-107(A) and (B). An attorney can only accept payment from a third party when the "client gives informed consent; there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and the client's confidential information is protected as required by Rule 1.6." The elder law attorney often finds himself or herself collecting fees from children who are expending their own money for services for an elder. Perhaps as frequently, children are expending their parents' funds for such services. In such situations, the attorney is obligated to inquire, both of himself or herself and with the family, as to who the client truly is. While many times the interests of the elder and the family member paying the bill coincide, a clear statement to all involved as to whom the attorney represents, with the required disclosure and consent from the elder, is appropriate.

Rule 1.8(h) expands an attorney's ability to limit himself or herself from a malpractice claim. While this is similar in substance to DR 6-102, it imposes an obligation on the attorney to inform the client or former client in writing of the desirability of securing independent counsel on the issue and affords the client or former client a chance to do so. While one would hope that there won't

be widespread invocation of this rule, it will provide a mechanism for protecting an attorney from a client seeking to blaze new legal pathways. An elder law attorney may be more willing to challenge a federal provision of the Medicaid statute or engage in an experimental planning technique if assured of being insulated from suit. An attorney may enter into an agreement with a client to limit prospective liability if the client "is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith."

Duties to former clients remain as they were in DR 5-108(A)(1). However, under Rule 1.9, if the attorney wishes to represent "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client" the former client must give consent. The Rule imposes a requirement that such consent be done in writing, which is an addition to the old Code provision. The elder law attorney may find herself in such a situation where initial representation involved the whole family. Clarifying who the client is may be key to avoiding future problems.

One of the most common scenarios that an elder law attorney faces is dealing with clients with diminished capacity. Previously, Ethical Considerations 7-11 and 7-12 contained guidance to attorneys in handling such situations. However, Rule 1.14 now embodies this important situation. The attorney is obliged to maintain "a conventional relationship with the client" as much as is reasonably possible. When there is a reasonable belief that a client (1) has diminished capacity, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in a client's own interest, then the attorney may "take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian." Even if the attorney invokes Rule 1.14(b), he or she is still bound by Rule 1.6 (protection of confidential information) but is impliedly authorized to reveal confidential information of the client to the extent reasonably necessary to protect the client's interests, according to Rule 1.14(c). While the inclusion of this provision in the Rules is a significant step and a welcome acknowledgment of the prevalence of this situation in our practice, the Rule itself may create its own level of ambiguities and concerns. What is "substantial" harm? Does diminished capacity require a layman's determination or a professional medical one? As this Rule comes into play, these murky issues will surface and, hopefully, be addressed.

The Rules also contain a new provision that is not found in the Code—a duty to prospective clients. While this may be more relevant in a family law or matrimonial context (where attorney shopping is done to prevent opposition from retaining that counsel), Rule 1.18 now clearly defines the relationship between an attorney and a prospective client regardless of whether a formal attorney-client relationship comes to exist. We may find this provision at work in our practice as large family contingents parade into our conference rooms for initial consultations, only to discuss a divergence of objectives.

"While it is still wise business practice to surround yourself with competent and qualified geriatric care managers, doctors, psychologists, accountants and theologians as needed, Rule 2.1 authorizes the attorney to take a compassionate role in the representation of the client by raising with the client external factors worth considering."

Elder law attorneys often find themselves in a position as the elder's or family's first contact in seeking to address whatever situation faces them. Oftentimes, a compassionate elder law attorney is able to clearly see that the situation encompasses much more than legal issues. Rule 2.1 gives attorneys permission to "refer not only to law but to other considerations such as moral, economic, social, psychological and political factors that may be relevant to the client's situation." While it is still wise business practice to surround yourself with competent and qualified geriatric care managers, doctors, psychologists, accountants and theologians as needed, Rule 2.1 authorizes the attorney to take a compassionate role in the representation of the client by raising with the client external factors worth considering. The morality of asset preservation techniques, the spiritual components to end-of-life decision-making, and the emotional toll some decisions may take on a family are often questions we find ourselves facing. Rule 2.1 permits us to highlight other considerations a family or client may wish to address in connection with the legal issue at hand.

On a more practical note, Rule 4.4 governs the often occurring instance of crossed wires. In this day and age of increased electronic communications, hitting the "send" button a little too quickly happens all too often. Unfortunately in the world of instantaneous electronic messaging, messages are sometimes sent to the wrong person. Rule 4.4(b) exists to cover those erroneously sent messages. "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." It is respectfully submitted that the choice of the word "document" may create more ambiguity than clarity, as communications these

days often embody electronic means (voice mail, text messages, faxes, and e-mails) more than traditional correspondence. Nevertheless, this rule, which is a new provision in New York's responsibility spectrum, although not new to the ethical debate, places the onus solely upon the sender to take remedial action after the erroneous recipient has notified the sender of such event.

While many of us surely feel that our legal fees sometimes translate into what is essentially *pro bono* work—especially in a court-appointed situation—the Rules lay out the lofty ambitions of *pro bono* legal work in detail. Article 6 of the Rules covers Public Service, and Rule 6.1 identifies the goals of *pro bono* service. An attorney also serving as an officer or member of a not-for-profit legal services organization is not exposed to conflicts of interests that might otherwise disqualify him or her from representing clients in their ordinary course of practice according to Rule 6.3. This Rule will further the ability of top-notch practitioners to serve the vital role of leadership in not-for-profit legal service agencies.

Similarly, Rule 6.4 requires disclosure to a client when an attorney is working on a committee seeking reformation of a law, the reformation of which would adversely affect the client. Alternatively, the attorney is obligated to inform the committee of the fact that he or she is representing someone who will be materially adversely affected by the reformation.

While elder law attorneys may not be advertising their practices in the same manner as some of the personal injury Bar, it is always advisable to be vigilant about compliance with the attorney advertising rules. Most practitioners are familiar with the attorney advertising rules due to the significant revision that took effect in 2007.[13] These rules, with which we have become so familiar, are now embodied in Rules 7.1, 7.2, 7.3 and 7.5. The significant revision to the attorney advertising rules in 2007 came about after being examined at length by the court in 2005 and 2006. While the Rules adopt the language from DR 2-101 and DR 2-103, there is a current legal challenge to some of those rules, the outcome of which may indicate whether a modification to the Rules is required. *Alexander & Catalano v. Cahill* was a suit commenced in the Northern District of New York by a Syracuse law firm challenging, on a constitutional basis, the new attorney advertising rules.[14] At the trial level, the case resulted in five specific attorney advertising rules being voided: (1) use of moniker that imply an ability to obtain results (contained in former DR-2-101(C)(7) and now in Rule 7.1(c)(7)); (2) portrayal of judges or fictitious law firms (contained in form DR-2-101(C)(3) and now in Rule 7.1(c)(3)); (3) use of attention-getting techniques that lack relevance in selecting a lawyer (contained in former DR-2-101(C)(5) and now in Rule 7.1(c)(5)); (4) use of client endorsements or testimonials in pending matters (contained in former DR-2-101(C)(1) and now contained in Rule 7.1(c)(1)); and (5) use of Internet pop-up advertisements except on the lawyer's own Web site (contained in former DR-2-101(G)(1) and now contained in Rule 7.1(G)(1)).[15] The state has appealed the decision, and oral argument was heard by a three-judge panel on January 22, 2009.[16] An injunction stands pending the outcome of the appeal. It will be interesting to see how this appeal comes out, as it will affect how attorney advertising continues to occur in New York State.

Another provision that elder law attorneys should be ever mindful of is the provision in the Rules that prohibit a lawyer or her firm from advertising themselves as "specialists" or "experts" in any area of law. Formerly, DR 2-105 embodied this prohibition, and Rule 7.4 now states that a "lawyer or law firm shall not state that the lawyer or law firm is a specialist or specializes in a particular field of law." There are the exceptions for those attorneys who have received recognition or certification as a specialist by a private organization approved by the ABA for that purpose, such as NAELA. However,

> a lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: The [name of the private certifying organization] is not affiliated with any governmental authority. Certification is not a requirement for the practice of law in the State of New York and does not necessarily indicate greater competence than other attorneys experienced in this field of law. Rule 7.4(c)(1).

Therefore, NAELA's certification as a "Certified Elder Law Attorney" (CELA) may be displayed and advertised, provided the required disclaimer is also provided. Many times the use of "specialist" or "expert" is used in an offhanded way to emphasis the level of dedication that we pay to the practice of elder law, but a careful practitioner will train himself or herself to remove such jargon from his or her vocabulary so as not to run afoul of this rule.

One final provision for comment is on misconduct by an attorney, which, unfortunately, remains an issue. The Appellate Division rejected an effort by NYSBA to abandon the catch-all phrase "and other conduct that adversely reflects on the lawyer's fitness as a lawyer" that is embodied in former DR-1-102(A)(7) and is now contained in Rule 8.4(h). An attorney is still obligated to report another attorney for "a violation . . . that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer," according to Rule 8.3. This is carried forward from DR-1-103(A). Therefore, we remain obli-

gated to be watchdogs of our peers and a failure to report such violations is, itself, a violation.

The interesting aside in this issue is that of the conduct of an attorney engaging in the unauthorized practice of law for a different jurisdiction, and the conduct of a non-attorney in the unauthorized practice of law. DR 3-101 and the ethical considerations of Canon 3 of the Code of Professional Responsibility are carried forward in the Rule 5.5. Rule 5.5(a) carries forward the prohibition contained in DR 3-101(A) of a lawyer licensed to practice in New York State from practicing law of a different jurisdiction "in violation of the regulation of the legal profession in that state." As elder law attorneys, we are often asked to address issues for our "snow bird" clients, or to assist in the transfer of property located in other states. Careful observance of this Rule is critical, and a solid relationship with other practitioners in other jurisdictions is good business practice, as well as a potentially valuable marketing tool. In addition, the Ethical Considerations of the Code evidence a desire to protect the integrity of the profession and "is grounded in the need of the public for integrity and competence of those who undertake to render legal services."[17] While the Rules do not carry forward that same verbiage, attorneys licensed to practice in New York State should be protective of the practice of law. When an attorney learns of a non-licensed person engaging in the practice of law, it is advisable to contact one of the many local Bar Associations who have committees in place to receive reports of such action, investigate and report such behavior to the appropriate authorities.

As you can see, the Rules present new challenges for New York practitioners who must now be familiar with the Rules and become comfortable navigating them in daily practice. As more and more attorneys read the Rules, discuss them, and begin to adhere to them in practice we will be better able to serve our clients and honor the legal profession.

Endnotes

1. *See* Press Release, New York State Unified Court System, "New Attorney Rules of Professional Conduct Announced," December 16, 2008, available at www.courts.state.ny.us/press/pr2008_7.shtml, hereinafter referred to as ANYS UCS Press Release.@ New York Judiciary Law authorizes the Appellate Division of the Supreme Court to discipline attorneys for professional misconduct.
2. *See id.*
3. *See id.*
4. *See* New York State Bar Association's Committee on Standards of Professional Conduct Proposed Rules of Professional Responsibility, *available at* www.nysba.org (hereinafter referred to as the "COSAC Report"). *See also* Proposed Rules of Professional Conduct, New York State Bar Association, February 1, 2008, *available at* www.nysba.org (hereinafter referred to as the "NYSBA Report").
5. *See* Krane, Steven, *Meet the New York Rules of Professional Conduct*, New York State Bar Association Continuing Legal Education Seminar, "Meet the New York Rules of Professional Conduct: What's New, What's Changed and What's Remained the Same," January 22, 2009, at page 1.
6. *See* NYSBA Report at xiii-xiv; *see also* COSAC Report at v.
7. *See id.*
8. *See id.*; *see also* Simon, Roy, *Comparing the New NY Rules of Professional Conduct to the Existing NY Code of Professional Responsibility (Part I)*, The New York Professional Responsibility Report, February 2009.
9. *See* COSAC Report at vi.
10. *See* Krane; *see also* New York State Bar Association Proposed Rules of Professional Conduct Report, February 1, 2008, Approved by the House of Delegates on November 3, 2007.
11. *See* Rule 1.0(d), which defines "Confidential Information" as what is defined by Rule 1.6.
12. *See* Krane at page 7.
13. The presiding justices of the Appellate Division adopted amended attorney advertising rules effective February 1, 2007. These amended rules are actually one Disciplinary Rule, DR 2-101, codified at 22 N.Y.C.R.R. § 1200.6.
14. *Alexander & Catalano v Cahill*, 2007 WL2120024, N.D.N.Y., July 23, 2007.
15. *See id.*
16. *See Second Circuit Skeptical Over Restoration of Rules Curbing Content of Ads* by Daniel Weis, Law.com, January 23, 2009, *available at* http://www.law.com.
17. *See* New York Code of Professional Responsibility, Canon 3, Ethical Consideration 3-1.

JulieAnn Calareso is an attorney with the firm of Burke & Casserly, P.C. in Albany, New York.

This article originally appeared in the Summer 2009 issue of the Elder Law Attorney, *Vol. 19, No. 2, published by the Elder Law Section of the New York State Bar Association.*

Important Revision of EPTL 5-1.4: Extension of Revocatory Effect of Divorce

By Linda J. Wank

On July 7, 2008, Governor Paterson signed into law a bill[1] that extends the revocatory effect of divorce to non-probate dispositions of property and certain fiduciary designations of a former spouse. This article summarizes the provisions of the newly enacted law and outlines how it differs from the Uniform Probate Code Section after which it was patterned.[2]

I. Background and Impetus for the Bill

In recent years, the divorce rate among Americans has consistently risen, with second and even third marriages becoming more and more common. In 2007, for example, more than 55,000 marriages in New York ended in divorce or annulment, and 25% of these marriages had lasted fewer than five years.[3] At the same time, revocable trusts have become an increasingly popular estate planning tool, as practitioners and clients have come to understand the many advantages offered by such trusts.[4] And frequently, a significant portion of a client's overall net worth consists of non-probate assets that pass independently of a Will or revocable trust, such as life insurance, retirement plans and property held jointly with rights of survivorship.

"[T]he new law provides for the revocation upon divorce of dispositions to or for the benefit of a former spouse by Will, revocable trust, security registration in beneficiary form (TOD), beneficiary designations in a life insurance policy and (to the extent permitted by law) beneficiary designations in a pension or retirement plan."

The importance of updating an estate plan in the wake of a divorce should be apparent. But as divorcing couples struggle to reach an agreement on such pressing issues as child custody, visitation and support, estate planning is often put on the back burner. To be sure, the failure to implement changes after a divorce is rarely based on any lingering affection for a former spouse; most clients simply neglect to focus and take the necessary affirmative action. Fortunately, there has been a statutory "default rule" in New York for many years that addresses this situation, albeit in limited circumstances. The default rule is contained in Estates, Powers and Trusts Law Section 5-1.4. As originally enacted in 1967, Section 5-1.4 creates a conclusive presumption that divorce is deemed to revoke all dispositions in a Will to a former spouse (as well as fiduciary nominations of a former spouse), and the dispositions are treated as if the former spouse predeceased the testator.[5] Under other provisions of New York law, divorce also revokes the nomination of a former spouse as a health care agent[6] and the power of a former spouse to dispose of a decedent's remains.[7] And New York case law has long provided that divorce transforms a tenancy by the entirety into a tenancy in common.[8] Incongruously, however, the revocatory effect of divorce has never before been extended in New York to joint tenancies with rights of survivorship, or to the designation of a former spouse as an attorney-in-fact or as the beneficiary of non-probate assets.

II. The New Law

The proliferation of the use of revocable trusts (which are often the functional equivalent of Wills), coupled with the substantial growth in value of other non-probate property and the steady rise in divorce rates, presented a strong case for extending the revocatory effect of a divorce beyond a Will. Accordingly, the bill that was signed into law last July repealed existing Section 5-1.4 and replaced it with a new Section 5-1.4. The new Section 5-1.4 creates a consistent rule with respect to probate and non-probate transfers. Specifically, the new law provides for the revocation upon divorce of dispositions to or for the benefit of a former spouse by Will, revocable trust, security registration in beneficiary form (TOD), beneficiary designations in a life insurance policy and (to the extent permitted by law) beneficiary designations in a pension or retirement plan. It also provides for the revocation upon divorce of all nominations of a former spouse to serve in any fiduciary or representative capacity, including as executor, trustee, conservator, guardian, agent or attorney-in-fact. Finally, the new law provides that divorce severs the interests of former spouses in property held by them at the time of divorce as joint tenants with rights of survivorship, and transforms all such interests into tenancies in common (which, as noted above, had already been the case for property held in a tenancy by the entirety).

An important aspect of the new law is that it includes opt-out provisions for the expanded default rule, both for dispositions to a former spouse and fiduciary nominations[9] and for severances of a joint tenancy.[10] For circumstances in which a couple may wish not to have a disposition or appointment revoked or a joint tenancy severed, a client may elect out of the expanded default rule by expressly providing in the applicable "governing instru-

ment" (as defined in the statute)[11] that divorce shall not revoke such dispositions to, nominations in favor of, or joint tenancies with a former spouse.[12]

III. Uniform Probate Code

Given that new EPTL 5-1.4 was patterned after Revised UPC § 2-804,[13] the two laws contain many similar provisions. For example, under both UPC § 2-804 and EPTL 5-1.4, dispositions to a former spouse that are revoked by divorce are revived by the remarriage of the former spouses to each other. And importantly, both laws protect payors or other third parties from liability (where, for example, payment is made to a former spouse designated in a governing instrument after a divorce has taken place), unless and until such payor or third party receives written notice of the divorce. Even after notice is received, the payor or third party has the option of discharging its liability by depositing the property in question with the court that has jurisdiction over the decedent's estate.

Despite many similarities, practitioners should be aware that there are certain substantive differences between the two laws. First, under UPC § 2-804 divorce simultaneously revokes dispositions not only in favor of a former spouse, but also, and more broadly, dispositions in favor of any relative of the former spouse who, as a result of a divorce, is no longer related to the testator by blood, adoption or affinity.[14] The draftspersons of the New York bill considered extending the scope of revocation to a divorced spouse's relatives, but ultimately decided to limit the application of new Section 5-1.4 only to former spouses. Second, UPC § 2-804 includes a provision designed to address its possible preemption by the Employee Retirement Income Security Act of 1974 (ERISA), which federalized pension and employee benefit law.[15] Section 514(a) of ERISA provides that Title I[16] and IV[17] of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA.[18] The U.S. Supreme Court has held that, to the extent that a state law applies to employee benefit plans governed by ERISA, federal law preempts any state law that automatically divests the designation of a spouse as beneficiary of non-probate assets upon divorce.[19] In an effort to circumvent the ERISA issue, UPC § 2-804 directs that if any of its provisions are preempted by federal law, the person who received property to which he or she was not entitled is obligated to return such property or is personally liable to the person who would have been entitled to such property if there were no preemption. Defining which provisions of state probate law "relate to" employee benefit plans continues to be a difficult task for the federal courts.[20] Moreover, certain types of benefit plans, such as governmental plans, are exempt from ERISA.[21] In light of the foregoing, the New York bill did not attempt to override ERISA, and new Section 5-1.4 explicitly recognizes that pension and retirement plan benefits designated to a former spouse are revoked by divorce only to the extent permitted by law.[22]

IV. Effective Date

While the effective date provisions of new legislation are always important, the effective date section of the new statute deserves special attention. With respect to dispositions and nominations that take place only upon death, such as under a revocable trust, the revocation provisions apply to all testators who die after the effective date—July 7, 2008—even if the divorce was finalized prior to the effective date. For nominations of a former spouse in currently operative documents, however, such as powers of attorney, the revocation provisions apply only if the divorce is finalized after the effective date.[23] And keep in mind that the revocatory effect will not apply if a client dies during the course of matrimonial proceedings, but before a divorce is finalized. Therefore, it is imperative that clients who are contemplating a separation or divorce review their estate planning documents and consult with an attorney to evaluate whether interim changes should be made.

V. Conclusion

Although the expanded default rules contained in new Section 5-1.4 are designed to carry out the likely intent of clients in the vast majority of cases, they may not effectuate the desired outcome in every particular situation. Estate planning attorneys are encouraged to study the new Section 5-1.4 and to counsel clients on its application in the context of each client's individual circumstances.

Endnotes

1. Bill A.8858-A / S.5966-A was enacted at 2008 N.Y. Laws ch. 173 and is now N.Y. Estates, Powers and Trusts Law 5-1.4 (EPTL) (effective July 7, 2008).
2. Uniform Probate Code § 2-804 (1990) (UPC).
3. *See generally*, http://www.health.state.ny.us/nydoh/vital_statistics/2007/table48.htm & http://www.health.state.ny.us/nydoh/vital_statistics/2007/table51.htm.
4. *See* G. Warren Whitaker, *Revocable Trusts in New York: Why Not?*, N.Y.L.J., Sept. 22, 2000.
5. EPTL 5-1.4 (1967), "Revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment or other provision in will to former spouse." It should be noted that the provisions of EPTL 5-1.4 apply not only in the case of divorce, but in the case of a judicial separation or annulment of a marriage. For ease of reference, however, this article refers solely to divorce as the event that triggers revocation.
6. N.Y. Public Health Law § 2985(1)(e) (PHL).
7. PHL § 4201(5).
8. *Stelz v. Shreck*, 128 N.Y. 2631 (1891).
9. EPTL 5-1.4(a).
10. *Id.* at § (c).
11. *Id.* at § (f)(5) "'Governing Instrument' includes, but is not limited to, a will, testamentary instrument, trust agreement (including,

but not limited to, a totten trust account under [EPTL] 7-5.1(d)), insurance policy, thrift, savings, retirement pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust, agreement with a bank, brokerage firm or investment company, registration of securities in beneficiary form pursuant to part 4 of article 13 of this chapter, a court order, or a contract relating to the division of property made between the divorced individuals before or after the marriage, divorce, or annulment."

12. *Id.* at §§ (a) and (c).
13. UPC § 2-804 (1990) (*Revocation of Probate and Nonprobate Transfers by Divorce, No Revocation by Other Changes of Circumstances*). UPC § 2-804 was originally promulgated as U.S.C. § 2-580 and was revised in 1990 to extend its reach to non-probate assets favoring a former spouse.
14. See *Hermon v. Urteago*, 39 Cal. App. 4th 1525 (1995), for an interesting discussion of California's revocation on divorce statute (Probate Code Section 6122), which, like the New York law, does not revoke dispositions to relatives of former spouses.
15. ERISA, 29 U.S.C. §§ 1001-1461 (1988) (ERISA).
16. ERISA, Title I, *Protection of Employee Benefit Rights*, 29 U.S.C. §§ 1001, *et seq.* (1988).
17. *Id.* at Title IV, *Plan Termination Insurance*.
18. *Id.* at § 514(a), 29 U.S.C. § 1144(a) (1988).
19. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).
20. For example, in *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir. 1991), the court held that ERISA preempted an Oklahoma statute that resembled new EPTL 5-1.4 and UPC § 2-804 (Okla. Stat. Ann. Tit. 15, § 178 (West Supp. 1992)), which attempted to apply revocation-upon-divorce rules to ERISA-covered death benefits. Meanwhile, in *Mendez-Bellido v. Board of Trustees*, 709 F. Supp. 329 (E.D.N.Y. 1989), the court denied ERISA preemption and applied EPTL § 4-1.6 (the so called "slayer rule") reasoning "state laws prohibiting murderers from receiving death benefits are relatively uniform and there is little threat of creating a patchwork scheme of regulation sought to be avoided by the enactment of ERISA."
21. *See* ERISA at § 1003(b)(1) (1988).
22. EPTL 5-1.4(a).
23. *See* 2008 N.Y. Laws ch. 173, § 2 ("This section shall apply only where the marriage of a person executing a disposition, appointment, provision or nomination in a governing instrument, as defined in EPTL 5-1.4(f)(5), such section as added by section one of this act, to or for the benefit of a former spouse ends in a divorce or annulment, as defined in EPTL 5-1.4(f)(2), on or after such effective date or, where such a marriage ends prior to such effective date, only where such a disposition, appointment, provision or nomination takes effect only at the death of the person who executes it and such person dies on or after the effective date of this act.") (Reproduced in the 2008 Amendments note in *New York Surrogate's Court*, Lexis Nexis, 2009 ed. (the "Green Book")).

Linda J. Wank is a partner in the New York City law firm of Frankfurt, Kurnit, Klein & Selz and is Chair of this Section's Committee on Estate and Trust Administration.

This article originally appeared in the Summer 2009 issue of the Trusts and Estates Law Section Newsletter, *Vol. 42, No. 2, published by the Trusts and Estates Law Section of the New York State Bar Association.*

Protecting the Primary Residence from the Cost of a Nursing Home in a Post-DRA World

By Anthony J. Enea

Many years ago I had my first encounter with the disastrous consequences that result when a client fails to take the necessary steps to protect the client's residence from the cost of a nursing home. An elderly couple had consulted with me regarding a plan for protecting their assets in the event either one of them needed to enter a nursing home. At the time of the consultation the husband had serious health issues, however, his wife was in relatively good health. I made a number of recommendations to the clients, including suggesting that their home be transferred from the husband to the wife. Such a transfer is known in Medicaid parlance as a "spousal transfer," an exempt transfer, which does not create a period of ineligibility for Medicaid.[1]

Unfortunately, the clients decided not to implement my suggestions. As is often the case, several years later I received a telephone call from the couple's daughter advising me that her father had been placed in a nursing home because he suffered from senile dementia, and that her mother had just passed away. Because title to their house was jointly held with his wife, at her death title to the house had now passed by operation of law to the husband. Thus, the primary residence was now an asset against which Medicaid could place a lien and assert a claim.[2] Medicaid could recover from the proceeds of the sale of the home the Medicaid benefits properly paid for the nursing home care of the father.

As a result of the failure to implement a plan to protect the home, Medicaid was paid a significant amount upon the sale of the home. Although we were still able to protect a significant portion of the sale proceeds, significantly more could have been protected if the recommended advance planning had been implemented.

With the average cost of a home in Westchester County being in excess of $600,000, it is not unusual for the primary residence to be the most valuable asset the client owns. Thus, taking prudent steps to protect the residence are well worth the effort.

For Medicaid purposes, the primary residence is known as the "homestead" and is an exempt asset (does not affect eligibility for Medicaid) so long as it is occupied by the applicant, the applicant's spouse or the applicant's minor, disabled or blind child.[3] The homestead can be a one-, two- or three-family home, condo or co-op, and still be exempt for Medicaid eligibility purposes (although any net income derived from the property is not exempt).[4] However, as is stated above, the homestead is an asset against which Medicaid can have a lien or assert a claim. In compliance with federal law, New York has an estates recovery program in place.[5]

"Once a decision has been made to transfer the primary residence, whether as an exempt transfer or a non-exempt transfer (one that will create a period of ineligibility for Medicaid), a variety of estate tax, gift tax as well as capital gains tax considerations come into play, depending on such factors as whether the client reserves a life estate, or transfers the property to a Medicaid Qualifying Trust, also known as an Irrevocable Income Only Trust."

The homestead can be transferred to five categories of individuals without affecting Medicaid eligibility:

1. Spouse
2. Minor child
3. Disabled or blind child of any age
4. Adult child who has lived in the home for at least two years immediately prior to the parent's institutionalization, and who has been a caregiver to the parent
5. Sibling who has lived in the home for at least one year immediately prior to the institutionalization, and who has an equity interest in the home

Thus, if any of the aforestated transfers can be utilized, no ineligibility for Medicaid would result.

Once a decision has been made to transfer the primary residence, whether as an exempt transfer or a non-exempt transfer (one that will create a period of ineligibility for Medicaid), a variety of estate tax, gift tax as well as capital gains tax considerations come into play, depending on such factors as whether the client reserves a life estate, or transfers the property to a Medicaid Qualifying Trust, also known as an Irrevocable Income Only Trust. Additionally, the provisions of the Deficit Reduction Act of 2005 (DRA) must be carefully reviewed. The DRA created a five-year look back period for all non-exempt transfers, as well as an onerous period of ineligibility for Medicaid if an application for nursing home Medicaid is made before the five-

year look back period has expired. These are issues that need to be fully explored and reviewed with the client.

"[R]egardless of which specific planning option is chosen to protect the primary residence, it is critical that some steps be taken to do so."

A non-exempt transfer of the homestead with the retention by the transferor of a life estate in the transferred property often gives the transferor the comfort of knowing that he or she will have the legal right to remain in the premises for the remainder of his or her life. The reservation by the transferor of the life estate will also allow the transferee, upon the death of the transferor, to receive a full step-up in the cost basis of the property to its fair market value on the date of the transferor's death, if there is still an estate tax in existence at that time. However, the client should be advised that if the premises are sold prior to the life tenant's death, there will be capital gains tax consequences resulting from the loss of the step-up in cost basis. Additionally, the client would have to be compensated for the loss of the actuarial value of the life estate relinquished at the time of sale, which would have an impact on the client's Medicaid eligibility.

The most commonly utilized and perhaps best Medicaid planning option relevant to the primary residence is the transfer of the residence to a Medicaid Qualifying Trust, also known as an Irrevocable Income Only Trust. Title to the premises is deeded to the trustees of the trust and the transferor is generally granted a life estate in the premises, and in many cases is given the right to receive all of the trust's income if liquid assets are ever transferred to the trust. However, no invasion of the trust principal can be made to or for the benefit of the trust grantor, although the trust may authorize invasion of the principal of the trust for the benefit of the grantor's children or other third parties.

The transfer to the Irrevocable Income Only Trust will create a five-year look back period as a result of the provisions of the DRA. Thus, it would be most important not to apply for nursing home Medicaid until the look back period has expired to avoid the potentially lengthy ineligibility period imposed by Medicaid as a result of the DRA.

The transfer to the irrevocable trust offers many estate and gift tax advantages which make it preferable to an outright transfer with or without the reservation of a life estate. For example, the transfer to the trust can be structured so as to avoid any gift taxes and to allow the beneficiaries of the trust to receive a step-up in cost basis upon the transferor's death, as well as allowing the continued availability of the principal residence exclusion for capital gains tax purposes.

In conclusion, regardless of which specific planning option is chosen to protect the primary residence, it is critical that some steps be taken to do so. As I often tell clients, until the residence is transferred, nothing has been done to protect the asset from the costs of a nursing home.

Endnotes

1. Social Services Law § 366(5)(d)(3)(ii).
2. Social Services Law § 369(2)(a)(ii); 42 U.S.C.A. § 1396p(a)(1).
3. Social Services Law § 366(2)(a); 18 N.Y.C.R.R. §§ 360-1.4(f).
4. Social Services Law § 360-4.3(d); 18 N.Y.C.R.R. §360-1.4(f).
5. 42 U.S.C.A. § 1396 p(b)(1); Social Services Law §§ 104, 369.

Anthony J. Enea, Esq. is a member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. He is the President of the Westchester County Bar Association, the Treasurer of the Elder Law Section of the New York State Bar Association, the Editor-in-Chief of the *Elder Law Attorney*, a quarterly publication of the Elder Law Section of the New York State Bar Association, and Vice President of the New York Chapter of the National Academy of Elder Law Attorneys.

This article originally appeared in the Summer 2008 issue of the Trusts and Estates Law Section Newsletter *Vol. 41, No. 2, published by the Trusts and Estates Law Section of the New York State Bar Association.*

Estate Planning in World Mythology

By G. Warren Whitaker

Every human culture has its unique myths and legends which express that culture's character and values. Scholars from Carl Jung to Joseph Campbell have studied the myths of cultures throughout the world and across the centuries and have discerned in them recurring themes which represent fundamental patterns of human interaction. Many of these themes involve the stewardship of family wealth and status in difficult times, such as during absence or incapacity, upon the occasion of marriage, and at death. This recurrence shows that concern about the protection of family property is a universal human trait. And as mythical protagonists struggle to manage and pass on their wealth, they must frequently obtain counsel from loyal advisors. This article will examine certain well-known myths, examine the estate planning issues they raise and consider what advice modern advisors might have given in today's world.

Greece: The *Iliad* and *Odyssey* of Homer relate the classic tale of the wanderings of the Greek hero Odysseus. At the outset Odysseus was a successful local figure living on the island of Ithaca with his wife Penelope and his son Telemachus. One day Odysseus was called away on a business trip to the distant city of Troy. He consulted the Oracle, said farewell to his family and departed on what he thought would be a brief sojourn. Unexpectedly, the business at Troy required ten years to conclude, and Odysseus then spent a further ten years trying to make the connections back to Ithaca.

During this long and unanticipated absence, Penelope tried to maintain the family home and business with the help of her young son, but the existence of a vacuum soon became apparent to all. Suitors filled the Odysseus household, offering legal, financial, and insurance services to Penelope, who was unaccustomed to selecting professional advisors. As Odysseus's absence continued, the suitors became more brazen in their efforts to insinuate themselves into the family business, each trying to convince Penelope that he alone could offer her expert advice and that the others wanted only to take advantage of her.

When Odysseus finally returned from his lengthy travels he found his house filled with advisors he had not chosen. In a climactic scene, he confronted and killed the suitors and regained control of his household and family business.

This is a myth about the unavailability of the decision-maker and its consequences for him and his family. In earlier times when travel was dangerous and communication difficult, unavailability was most often brought about by a long voyage. (This explains the laws still on the books in many states that address the situation of a missing person who is declared dead, his will probated and his estate administered, and who then returns to claim his property. *See*, *e.g.*, NY SCPA Section 2226.) In today's world, unavailability is more likely to be caused by mental infirmity due to advanced age. In some countries the possibility of kidnapping or imprisonment must also be taken into account.

Unavailability differs from death in one important respect: the looming, if inchoate, presence of the property owner. When a person dies, many others may fight over his property, but one thing is certain: the decedent no longer owns it. With unavailability, the owner cannot easily communicate his wishes, but his ownership right to the property remains superior to that of any family member, and all others are confronted with the fact that he may return, regain capacity, or be released from captivity.

What advice could the Oracle have given Odysseus before he left Ithaca to address this possible dilemma? ("Oracle" is a Greek word meaning "family attorney.") Odysseus was undoubtedly advised to see that his testamentary estate plan was in place, but the Oracle appears not to have told him about the importance of addressing his unavailability. At the very least Odysseus should have executed a durable financial power of attorney naming an agent who could act for him in the event that he was *hors de combat*. (A "springing" power that only became effective upon his mental incapacity would not have been activated in this case, so he should have executed a presently effective power before departing on his trip.)

Odysseus could have named Penelope as his sole agent. However, in light of the extent and complexity of his holdings, he might have concluded that this would impose a great burden on her, and that he would be helping her by selecting a co-agent to act with her. This could have been a friend or relative (Telemachus was too young to take on this role at the time of Odysseus's departure), but a better choice might have been an experienced professional such as the family attorney or accountant.

The Oracle might have told Odysseus that if he wanted to make more thorough preparations for his potential unavailability, he should create a revocable trust and transfer his business in Ithaca and his other assets into it. Odysseus could have been the sole trustee with all investment powers for as long as his messages could reach home. However, the trust agreement could have provided that once he was unable to communicate, Penelope and a co-trustee, such as Ithaca Trust Company, would be appointed as his successors. (A careful definition of unavailability to encompass the settlor's inability

to communicate, as determined by the successor trustees, would avoid the need for Penelope to go to court to have him declared absent.) The powers and duties of trustees are clearly delineated under local law, and Odysseus would have provided Penelope with the advisor of his choice, rather than leaving her open to the entreaties of suitors and con artists hawking their wares.

What about gifts? When Odysseus was in charge in Ithaca he could have made his own decisions about how best to provide for his family members. He would have no choice but to provide for gifts of his property effective at his death; otherwise the state will give it away for him under the intestacy rules. But what standard should have applied during the twilight period when Odysseus was alive but unavailable, and his needs were unknown while those of his family were pressing? Should his assets have been conserved for his future use if he returned, or for nursing home care, with only minimal amounts paid to provide for the family? Or should funds have been spent lavishly on his wife and son, or even depleted to save estate taxes and possible Medicaid claims? And what about the risk that substantial gifts to Penelope could wind up in the hands of one of the suitors instead of passing to Telemachus? The Oracle should have urged careful consideration of these questions, a trust agreement that named trusted advisors to make these decisions and a letter of wishes providing them with guidance for their actions.

Fortunately, Odysseus returned home, regained the reins of power and was reunited with his family. By the end of the story the only open issue, which might require matrimonial counsel to resolve, is this: will Penelope suspect that Odysseus came home late because he stopped off to visit an attractive woman named Calypso, or will she believe him when he says, "You see, honey, there was this Cyclops . . ."?

Arabia: *The Thousand and One Arabian Nights* is a collection of fantastic Middle Eastern tales filled with geniis, jewel-encrusted caves and flying carpets. Many of these tales revolve around family succession issues. A typical story tells of a wealthy and elderly Sultan whose daughter, the young and beautiful Princess, has fallen in love with a plucky commoner named Aladdin. The Sultan wants the Princess to be happy, but he is understandably concerned that Aladdin may be interested in her primarily as a means of attaining status and power over the caliphate that she will someday inherit. What advice should the Vizier give the Sultan under these circumstances? ("Vizier" is an Arabic term meaning "family attorney.")

Above all, the Vizier should under no circumstances try to dissuade the Princess or Aladdin from going through with their planned marriage. Direct intervention of this kind will only turn both of them against him, and may even prompt the Princess to proceed with the wedding as an act of defiance despite any private reservations she might harbor. And while the Sultan may be implacably opposed to the marriage now, in five years when he is dandling his new grandchildren on his knee he may accept Aladdin into the family and even make him an active participant in the governance of the caliphate. If the Vizier tries to obstruct the marriage, his intrusion will never be forgotten by the Princess, Aladdin or possibly even the Sultan and may lead to his eventual eclipse as the family advisor.

Instead, the Vizier might recommend that the Princess enter into a prenuptial agreement with Aladdin. Such an agreement could provide that the Princess's assets, including inheritances from the Sultan, and the income and increases in value of those assets, will remain her separate property to dispose of as she wishes during the marriage, in the event of divorce and upon her death.

Prenuptial agreements are an important legal tool and an appropriate precaution in many situations. However, they also have their drawbacks. Negotiating a prenuptial agreement can create a strain between the parties, particularly with a young couple about to enter into a first marriage. Moreover, if Aladdin were asked to waive claims against the Princess's assets, he (or his attorney) will probably insist in return that she waive any claims against his current and future property, which may work to her disadvantage if he later becomes a successful investment banker. And if the Vizier tries to pressure the Princess to enter a prenuptial agreement against her wishes, he again runs the risk of earning the enmity of all parties concerned.

A prenuptial agreement is often an essential prophylactic measure, but in this instance the Vizier can offer a better solution. The Princess does not yet have significant assets; rather it is the Sultan's property for which protection is sought after his death. Therefore, instead of focusing on an agreement between the Princess and Aladdin, the Vizier should encourage the Sultan to reexamine his own estate plan. The Sultan could leave his assets in a long-term discretionary trust for the benefit of the Princess and her descendants rather than bequeathing them outright to her. He would thus insulate them from divorce claims and the spousal right of election at her death in most jurisdictions. He could name the Princess as one of the trustees, but to protect her from undue influence he should name a co-trustee, perhaps Baghdad Trust Company, and he might also name the Vizier as Protector with the power to change trustees. This would give the Princess a voice in the management of the assets together with a professional institution and a trusted family advisor, while putting the assets beyond Aladdin's reach.

With such a plan in place the Princess and Aladdin can proceed happily with their wedding plans, the Sultan may rest assured that the caliphate has been protected, and the Vizier will avoid being portrayed as a sinister,

mustachioed villain in animated feature films. (*See, e.g.*, Disney Studios, *Aladdin (*1992*))*

United States: The archetypical American myth tells of the rise of a hard-working youth from rags to riches and the passing of his wealth and his work ethic to the next generation. And the quintessential retelling of this myth is the *Godfather* saga as related in the book by Mario Puzo and the films by Francis Ford Coppola.

Vito Corleone was an ambitious immigrant who, through grit and determination, had built a substantial family business engaged in beverage distribution, financial services, home and business security systems and leisure time activities. As the story opens, Corleone Enterprises is a resounding success and Vito is at the peak of his powers, respected by colleagues, competitors and political figures throughout the country. However, the future for his sons Fredo, Sonny, and Michael and daughter Connie is uncertain. Corleone Enterprises faces fierce competition and enormous pressure to diversify into new fields such as pharmaceuticals. Vito no longer has the energy to lead the family in these new and perilous times, and he must anoint a successor who is up to this demanding task. Fredo does not possess the requisite leadership qualities. Sonny is bold but reckless, and lacks the dispassionate judgment needed to guide the family business successfully. Connie's husband, Carlo, offers his services to the family but proves to be disloyal to its interests as he sides with a competitor.

Michael, who had been expected to pursue a professional career, is drafted into the business against his father's wishes when no one else is available to take up the family standard. Through unexpectedly forceful actions he succeeds in carrying Corleone Industries into a new era, but the cost is high. Sonny is destroyed by the competitive forces that confronted the family. Michael pushes Fredo and Carlo aside, and his immersion in the business leads to his estrangement from Connie and from his wife, Kay. By the end of the tale Michael has saved Corleone Enterprises and led it to new heights, but Vito's family has been virtually destroyed.

What planning advice could Tom Hagen, the family *consigliere*, have offered to Don Corleone to help him avoid this result? ("*Consigliere*" is a Sicilian word whose meaning the reader can guess.) Hagen might have told the Don that it was not obligatory for Corleone Enterprises to remain as a unified, active family-owned business for another generation, and that in fact it might have been unwise for the Don to aim for this goal. Continuity of a family business can be more a matter of the founder's ego and his wish to create a monument to himself than a farsighted plan for the welfare of future generations. Some of the most successful American families sold their core businesses decades ago, and some of those core businesses have ceased to exist. Knowing when to cash out of a business and diversify investments (and family energy) is just as critical as knowing how to build a fortune.

Vito could have engaged an investment banker to take Corleone Industries public; alternatively, he might have sought a private placement of the business with the Tattaglia family or sold it to a private equity fund organized by Salazzo the Turk. Vito could then have divided the proceeds among his children so that they could each pursue their separate careers and interests. Sonny might have followed his instincts and used his share to enter the pharmaceutical field—although he would start from a smaller base, he would not be placing the family's entire fortune into play and so could take the risks necessary to succeed in an emerging industry, which a fiduciary who is acting for others cannot and should not take. Fredo, who has always rankled at being passed over by the family, could have started a new career for himself in the Las Vegas casino industry, independent from and freed of constant comparisons to his more dynamic brothers. Michael might have achieved his father's dream of becoming a respected banker or accountant, and used his share of the family fortune to buy new uniforms for his children's soccer teams. And Connie could have asked that a portion of her inheritance be paid to a charitable foundation that would address the social issues Vito ignored as he clambered to the top, such as the prevention of cruelty to horses.

Conclusion: These myths and stories from around the world demonstrate how the family attorney, by whatever name he or she is known, can help the client-protagonist to resolve the age-old problems that inevitably arise in providing for the protection of family wealth and its passage to future generations.

G. Warren Whitaker is a partner of Day, Berry & Howard LLP in New York. He is the former chair of the Trusts and Estates Law Section of the New York State Bar Association, is a member of ACTEC and its International Committee, and is the Chair of the New York branch of the Society of Trust and Estate Practitioners (STEP).

Originally published in *Probate & Property*, Volume 20, No. 4, July/August 2006.

This article also appeared in the Winter 2006 issue of the Trusts and Estates Law Section Newsletter, *Vol. 39, No. 4, published by the Trusts and Estates Law Section of the New York State Bar Association.*

Brave New World: Ethical Issues Involving Surrogate Health Care Decisions

By Shari A. Levitan and Helen Adrian

It is well understood by the public that a person has the right to consent to a medical treatment. The doctrine of consent stems from the concept of battery. "At common law, even the touching of one person by another without consent and without legal justification was a battery."[1] This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. "Every human being of *adult years and sound* mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[2] The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.[3] In practice, a competent person will be asked to consent to medical treatment.

Although it is clear that a competent person may consent to treatment, most state statutes provide that a person who is incompetent cannot consent to medical treatment.[4] Incompetent persons are referred to in this article as either "patients" or "principals." Health care agents and/or proxies are referred to as either a "surrogate" or "decision maker." Although every state's definition may differ, a good working definition of competent might be:

> the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision.[5]

A person may be incompetent for a variety of reasons and circumstances. For example, the person may be under the age of 18, unable to understand the health care decision, or unable to communicate a health care decision. For whatever reason, if a person is incompetent, he or she cannot consent to medical treatment.

If a person is incompetent and not able to consent for him or herself, then the only way for the person to consent to medical treatment is through a surrogate. A surrogate is a person who speaks for the incompetent and could be a family member, friend, spouse or health care provider.

But there are limits to the surrogate's decision making authority. Because of advances in science and medicine, the range of health care decisions that might have to be made by a surrogate far exceed the legal guidance available. The already difficult responsibility of the surrogate may well be complicated by the surrogate's own ethical response to new situations, as well as the medical community's ethical response and, possibly, that of family and the greater community.

The Law Regarding Surrogate Decision Making: What We Know

Surrogate decision makers can look to the law for guidance regarding their authority, for the standard on which they base decisions, and for the limits of their authority.

By What Authority?

Surrogate health care decision makers may derive their authority from statutes that create a health care proxy or from other sources when a proxy is not available.

Currently, all 50 states have a statute that creates a durable power of attorney for health care or a health care proxy.6 Such statutes outline the requirements for the creation of a surrogate's authority, the execution formalities, and other details. Because of space constraints, this presentation will focus on the proxy statutes of Massachusetts, New York, California and Florida.[7]

Although it is common for estate planning professionals to draft a health care proxy for a client, less common is the circumstance when the proxy is actually used and there is conflict with other family members, a health care professional or an institution. In this situation, the professional may find him- or herself in an interesting ethical predicament illustrated by the following hypothetical:

> An attorney drafts estate planning documents, including a proxy, for his client, A. The proxy names A's son, B, as the surrogate decision maker. A becomes incapacitated, and B comes to the attorney with the proxy in hand and asks the attorney for assistance and representation. Can the attorney, who represented A, now represent B as he exercises the authority given in the proxy?

According to the American Bar Association's Model Rules for Professional Conduct, an attorney who has formerly represented a client cannot thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, in writing.[8] Here, the attorney's

former client, A, is not competent to give the written consent waiving the conflict. But is this representation materially adverse? The attorney may simply be carrying out the express wishes of his client, A, by assisting B in exercising the proxy power that A gave to him. This situation may be more analogous to representing a principal and then an agent in a business endeavor than it is to representing a ward and then the guardian in a proceeding to establish the guardianship.

In many circumstances, a health care proxy was never executed or could never have been executed. For example, the person in need of a surrogate may never have had the capacity to execute a proxy because that person has always been a child or has always been unable to understand health care decisions. When a proxy is not available to authorize a surrogate to act, the surrogate must look to other sources for authority.

One source of a surrogate's authority other than a proxy may be a statutory provision allowing a family member to make health care decisions for the incompetent person. For example, the Massachusetts statute provides that if no health care proxy has been executed, the health care provider may rely on the informed consent given by responsible parties on behalf of the incompetent patient to the extent permitted by law.[9] In other states, a parent may have authority as a health care surrogate without statutory authority.

Another source of a surrogate's authority other than a proxy may be a formal, court-supervised guardianship. In the well-known *Cruzan* case, the patient did not execute a proxy while competent and her parents became the co-guardians of her person with the authority to make health care decisions, although with some limitations.[10]

In New York, a parent of a child may have authority to make decisions. *In re AB* involved a child who was in a persistent vegetative state.[11] The child never had the capacity to execute a health care proxy. The child's mother as parent and natural guardian petitioned the court to remove life support. The Supreme Court of New York held that, as parent and natural guardian, the mother had the authority to consent to the removal of life support.

By What Standard?

In general there are two standards by which a surrogate decision maker may make health care decisions: substituted judgment and best interest.

Substituted judgment focuses on the patient's viewpoint:

> If a patient, while competent, expressed clear wishes regarding treatment, the standard for surrogate decision-making is substituted judgment (i.e., what the patient would have wanted, if competent.) In other words, if the patient's wishes are known or knowable, they are to be respected. The surrogate decision maker must endeavor to faithfully reflect the patient's wishes in making health care decisions.[12]

Some of the factors that a court might consider include the patient's expressed preferences; the patient's religious convictions and their relation to refusal of treatment; the effect on the patient's family; and the probability of adverse side effects and the prognosis with and without treatment.[13]

Best interest focuses on the decision maker's viewpoint:

> If an incompetent patient's prior wishes are not known or knowable, the standard for surrogate decision-making is best interest (i.e., what is best for the patient). The surrogate decision maker must carefully assess the benefits and harm of various treatment options (including the option of no treatment) and determine which of these options has the most favorable benefit-harm ratio.[14]

Some of the factors that a surrogate may consider include the patient's present levels of physical, sensory, emotional and cognitive functioning; the quality of life, life expectancy and the prognosis for recovery with and without treatment; the various treatment options; the degree of humiliation, dependence and loss of dignity resulting from the condition and treatment; the opinions of the family, the reasons behind those opinions, and the motivations of the family in advocating a particular course of treatment.[15]

Many state statutes require that surrogates make decisions based on a combination of the standards. For example, under the Massachusetts health care proxy statute, the agent makes health care decisions "(i) in accordance with the agent's assessment of the principal's wishes, including the principal's religious and moral beliefs, or (ii) if the principal's wishes are unknown, in accordance with the agent's assessment of the principal's best interests."[16] The laws of Florida and California similarly require the surrogate to first consider the patient's wishes before considering the patient's best interests.[17] Under New York's health care proxy statute, the surrogate must first consult with a licensed physician, registered nurse, licensed psychologist, licensed master social worker or a licensed clinical social worker.[18] Then the surrogate must make health care decisions in accordance with the patient's wishes, including the patient's religious and moral beliefs or, if the patient's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the patient's best interests. The New York statute specifically states that the surrogate has no authority to decide to remove nutrition and hydration

if the patient's wishes are not known.[19] Accordingly, an end-of-life decision may not be made based on the best interests standard.

What Limits?

Although it seems that a health care surrogate has broad powers, he or she may not have unlimited power and authority to make decisions regarding the patient's health. Generally, if a surrogate has authority based on a health care proxy statute, then the authority is quite broad. For example, the Massachusetts statute states that "an agent shall have the authority to make **any and all** health care decisions on the principal's behalf that the principal could make, including decisions about life-sustaining treatment, subject, however, to any express limitations in the health care proxy."[20] The term, "all decisions" has been interpreted broadly and includes decisions regarding mental health care and involuntary confinement, as well as the authority to consent to treatment and to refuse treatment, and the related issue of pain management.[21]

Although health care proxy statutes seem to provide broad powers, many proxy statutes expressly limit the authority of the agent to "health care decisions." For example, under the Massachusetts statute, "health care" means "any treatment, service or procedure **to diagnose or treat** the physical or mental condition **of a patient**."[22] The New York statute specifically states that a surrogate acting by proxy has no authority to make end-of-life decisions, absent evidence of a patient's wishes.[23] Therefore, some health decisions that a surrogate could be called on to make may not come within the definition of "health care decisions," and the surrogate may lack the authority to speak for the patient.

When the surrogate's authority is based on qualification as a guardian, the surrogate may still encounter limits to his or her authority to make health care decisions. For example, in the *Cruzan* case, the patient was in a persistent vegetative state and her parents became co-guardians.24 The guardians did not consent to treatment on the patient's behalf. The guardians found that their authority to refuse to consent to treatment was limited by a Missouri law, upheld by the Supreme Court, which required the guardians to produce clear and convincing evidence of the patient's wishes regarding end-of-life decisions. Absent that evidence, the guardians were not able to make the desired surrogate health care decision.

Ethical Considerations Regarding Surrogate Decision Making: What We Don't Know

Given the limits on the scope of a surrogate's authority, there are many situations in which a surrogate finds that existing law provides insufficient guidance. Until the law catches up to scientific advances, resolving new and previously untested questions in these cases requires interpretation and extrapolation of existing law, with guidance from the ethical principles that helped shape existing law.

What Happens if the Patient Objects?

In some cases, a patient might object to the decision made by the surrogate health care decision maker. In the case of health care proxies, the authority of the surrogate decision maker is limited to circumstances in which the principal either cannot make, or is unable to communicate, medical decisions for him- or herself. Many proxy statutes address the conflict between the surrogate decision maker and the patient. In Massachusetts and New York, if the patient objects to a decision made by a surrogate under a health care proxy, then the patient's decision will prevail unless a court determines that the patient is incompetent to make decisions.[25] Similarly, in California, an agent is not authorized to make a health care decision if the principal objects to the decision.[26]

In *Cohen*, the patient gave her surrogate a health care power of attorney.[27] The surrogate made a decision under that authority that the patient should be confined to a mental health facility. The patient objected to the confinement, revoked the proxy, and filed a motion to dismiss the hospital's petition for involuntary commitment. The Massachusetts court held that although the broad language of the proxy includes mental health decisions, if the patient objects to medical treatment, then the decision is invalid unless a court determines that the patient is incompetent, and therefore cannot competently direct his or her medical treatment. In *Cohen*, the patient's objection functioned as a revocation of the proxy. Without authority under the proxy, the surrogate was forced to seek authority from the court to make health care decisions.

Mental illness poses unique challenges for the surrogate decision maker because treatment often produces substantial side effects, many patients do not appreciate the risks they pose to their own health and well being during times of crisis, and the patient may resent the surrogate for exercising power regarding mental health treatment. A relatively new and untested Washington state statute specifically addresses mental health advance directives.[28] Under this statute, a person with a history of mental illness may execute a directive consenting irrevocably in advance to mental illness treatment through a surrogate decision maker. The directive is irrevocable by the patient during a subsequent period of incapacity.[29] If a patient objects to mental illness treatment during a period of incapacity, the advance directive would not be revoked by the objection, and, if an agent is appointed, the agent's authority to act would not be revoked.[30]

In some cases, if the patient objects but is found to be incompetent, the court will use the best interest standard when making a decision regarding health care. In *In re Storar*, the patient was an adult who had never had the

mental competency to express his health case preferences and who suffered from terminal bladder cancer.[31] The health care facility determined that the patient needed regular blood transfusions; however, after several transfusions had taken place, the patient expressed discomfort and emotional stress. The patient's guardian decided to refuse to consent to further transfusions. The health care facility petitioned the court to override the patient's objection and the guardian's decision. The court held under the best interest standard that the treatments could continue because, although they were disagreeable to the patient, they allowed him to maintain his usual mental and physical activities such as feeding himself and taking walks.

In the case of a patient whose incompetence is solely due to age, there remains a question about whether his or her objection would be more persuasive to the court. Parents are the legal decision makers on health matters for their children, although their authority is not unlimited, and the state may challenge decisions made by the parent if not in the best interests of the child. Consider if the child were 17 years old, just on the cusp of being competent to consent to treatment, and she objected to her parent's consent to a particular treatment, such as an aggressive experimental treatment for cancer that would likely have devastating side effects. Would the court consider the patient's impending legal competency and consider her wishes? Would the court apply the same standards as if the parent had petitioned to be appointed the guardian of her person after she reached age 18?

What Happens if the Decision Benefits Someone Other Than the Patient?

A health care surrogate may be asked to make a health-related decision that benefits someone other than the patient. For example, the spouse of a patient in a persistent vegetative state might desire to have children with that person, which would require the surrogate health care decision maker to consent to the harvesting of gametic material from the patient, or consent to the use of previously stored gametic material. Arguably, this process would not benefit the patient's health (although, if the patient had previously expressed the wish and desire to procreate, there may be "benefit" to the patient, albeit not directly related to the patient's health); rather, in this example, it benefits the patient's partner. In another example, the surrogate may request experimental, aggressive treatment for the patient in lieu of conventional treatment, and the experimental treatment may have potentially severely debilitating side effects or an increased likelihood of fatality. The surrogate decision make may wish to include the patient in an experimental study for research purposes in which some of the participants may receive placebos instead of treatment and may require the disclosure of medical information unrelated to the particular illness. Participation in the experimental study may not benefit, and may actually harm, the patient, but may benefit society at large. In other situations, the surrogate may be asked to consent to the patient donating an organ, such as a kidney or bone marrow, to a family member, or, in a more extreme case, to consent to the storage of tissue or cells that may possibly be used to treat a child in the future, but for which there is no current need. This decision may not benefit the patient's health at all, but most certainly will expose the patient to unnecessary medical risk. The question remains whether a surrogate decision maker has the authority to make a decision that the patient may have made if competent, but that does not benefit the patient.

Decisions that benefit someone other than the patient are not decisions that a surrogate can make under the authority of a health care proxy. Under the language of most health care proxy statutes, a surrogate may make "health care decisions," defined as decisions for the diagnosis or treatment of the patient. See the above discussion, with the exception of California. Under the Uniform Anatomical Gift Act, adopted with variations in all states, designated individuals may consent to organ donation, provided the purpose of the donation is for transplantation, therapy, education or research.[32] It is not clear whether the health care surrogate may consent to organ donation, particularly if he or she is not a decision maker under the state statute. Even if such a decision will benefit the patient in some way as well as another person, the surrogate may not have the authority to consent to a procedure that does not diagnose or treat the patient, much less one that may result in harm to the patient, as in the case of an experimental study.[33]

Perhaps the most interesting ethical questions in this area arise when parents deliberately conceive another child in order to create a match for organ donation for an ill child. First, was the decision to conceive a child deliberately with the intention of donating an organ ethical, and, second, are the parents the appropriate persons to consent to the procedure when and if it is determined that the two children are an appropriate match for organ donation.

Even if the surrogate has authority as a court-appointed guardian, the surrogate may still be restricted in his or her ability to consent to a medical procedure that benefits someone other than the patient. In the Strunk case, the patient was an incompetent adult who had never had the capability to sign a health care proxy.[34] The patient's brother suffered from kidney disease and required a transplant, and the only family member who matched was the incompetent patient. The patient's guardians, his parents, thought it best to consent to the patient having one of his kidneys removed and donated to his brother and petitioned the court for authority to force the health care facility to comply. The Kentucky Court of Appeals held that it was in the best interest of the patient to donate a kidney to his brother because the patient was close to

his brother, emotionally and psychologically dependent on him, and because his well-being would suffer more from the loss of his only brother than from the loss of one of his kidneys.

In contrast to the holding in the *Strunk* case, the Wisconsin Supreme Court found that guardians could not consent to the removal of a kidney for the benefit of a sibling. In *In re Guardianship of Pescinski*, the patient was an incompetent adult who existed in a catatonic state.[35] The patient was the only family member who provided an appropriate match for donating a kidney to another family member who would die without it. The court held that it was not in the best interest of the patient for the guardian to consent to such a procedure, noting that the patient was without understanding or ability to acknowledge the emotional and psychological benefits of having that family member continue to live. Therefore, the patient gained nothing from the donation and the procedure was not in his best interest.

While the subject of consent to organ donation during the patient's life is still a matter of debate, once the patient dies, the state statute, and the priority of decision makers thereunder, should apply. Under common law, the patient's next of kin has the right to make decisions concerning burial or cremation, organ donation and autopsy, subject to the overriding authority of the state to regulate those matters for the public safety.[36]

Once impossible, science has progressed to the point where it is possible for an incompetent person in a persistent vegetative state to have children, and the question becomes: Who has the right to consent to the removal of gametic material on behalf of the incompetent person? In many cases, no express consent to the removal was provided by the patient, nor was direction given for the permissible use of the sperm or ova. A surrogate acting under a health care proxy likely would not have the authority to consent because the removal of sperm or ova is not a procedure to diagnose or treat the patient, but such retrieval is occurring with increasing frequency, particularly if the treating physician is presented with some evidence of the patient's wishes, as is sometimes available in the case of an expected decline in health.[37] The Uniform Anatomical Gift Act, although applicable to bodily fluids, arguably does not apply, unless specific provisions are included in the particular state statute. For example, the New York statute specifically includes ova. In fact, many institutions are working to create guidelines for evaluating such requests for patients in a persistent vegetative state or post death.[38] If the courts have the authority to consent, which standard would they use, substituted judgment or best interest? And, even if the retrieval is accomplished successfully, it is not clear who has the authority to store the gametic material, nor is it clear who has permission to authorize its use, during the patient's life or following his or her death.[39] The scant case law that exists does not address postmortem procurement of gametic material.

What Happens if Someone Other Than the Principal/Patient Objects?

If a person other than the patient objects to the health care decision made by the surrogate, some state statutes allow for a proceeding to challenge the surrogate's decision. For example, in Massachusetts and New York, the health care proxy statutes provide that a health care provider, guardian family member, or friend has the right to commence a special suit in court to override the surrogate's decision.[40] The petitioner must show that the surrogate's decision was made in bad faith or was not made in accordance with the standard established by law.[41] This type of proceeding is not as extensive as a guardianship proceeding and would likely only override a particular decision of the surrogate; the burden would be extremely heavy in any action to remove the surrogate. In a recent situation in Massachusetts, the hospital objected to the decisions of the surrogate decision maker who acted under a valid health care proxy, believing the proxy acted contrary to the patient's best interests. The surrogate decision maker disagreed, stating that she acted consistent with her mother's wishes. Although the probate court upheld the authority of the surrogate decision maker, the court stated that the patient's expressed wishes could not have anticipated her current situation, and directed the surrogate to make future decisions based on the patient's best interests.[42] The hospital sometime later claimed that the patient's health had deteriorated further, and planned go to court again to seek removal of life support. The parties eventually came to agreement that terminating life support was appropriate, and that occurred in the summer of 2005.

In other cases, a person who objects to a surrogate's decision may institute a temporary or permanent guardianship proceeding to override the surrogate's authority to make health care decisions. For example, in the *Guardianship of Elma Mason*, the surrogate with authority under a health care proxy (the patient's son) and the temporary guardian (the health care facility) disagreed as to whether to enter a "do not resuscitate" order on the patient's chart.[43] The Massachusetts Court of Appeals held that the surrogate's authority to make health care decisions was terminated when the temporary guardian was appointed because the petition of the temporary guardian qualified as a proceeding under the Massachusetts statute described above.

In New York, the health care proxy statute specifically states that the guardian can override a decision made by a surrogate health care decision maker. "Every adult shall be presumed competent to appoint a health care agent unless . . . a committee or guardian of the person has been appointed for the adult. . . ."[44] The appointment of a guardian prevents the patient from executing a valid

health care proxy and prevents any already-appointed surrogate from making any health care decisions.

In contrast, the Florida statute provides that the surrogate continue to make all health care decisions even after a guardian of the person has been appointed, unless the court has modified or revoked the power of the surrogate.[45]

For these reasons, many health care powers of attorney documents include a guardian nomination provision to name the designated agent to serve as guardian of the person of the principal, in the event a guardianship proceeding is required. But even if the surrogate decision maker is the guardian of the incompetent person, if a claim is made that the guardian is not acting in a manner consistent with the patient's wishes, or in her best interests, the court may intervene. For example, in the well-publicized Schiavo case, a woman in a persistent vegetative state had not created a health care proxy, nor a living will, while capable of doing so.[46] Her husband, serving as her court-appointed legal guardian, made the decision to remove her artificial life support. Her parents, and eventually the State of Florida, objected to the guardian's decision. After numerous court proceedings and an attempted state legislative intervention, the guardian's authority to act in a manner believed to be consistent with the ward's wishes was upheld, and artificial nutrition and hydration were removed.

In theory, having either a validly executed health care proxy or a court-appointed guardian should eliminate uncertainty and the need to resort to the courts. If there is conflict among family members, however, the court may serve as the ultimate decision maker.

What Happens if the Surrogate and the Person Financially Responsible Do Not Agree on the Health Care Decision?

In some circumstances, the surrogate decision maker and the person financially responsible for payment for the health care treatment may not be the same person, and the surrogate responsible for financial decisions may believe that a particular experimental treatment, which is not covered by insurance, is not a wise use of the patient's resources. The financially responsible person could be a conservator or guardian of the property, the heirs or spouse of the patient, or the health care facility. The bifurcation of decision making can make an already difficult decision even more so.

In a case arising in New York before the adoption of the health care proxy statute, the spouse of a patient consented to the removal of the patient's feeding tube.[47] The health care facility refused to honor the consent and petitioned the court to determine whether the life support should be removed. The court initially held that the spouse had not shown clear and convincing evidence of the patient's wishes to be free from life support, which was the appropriate standard at that time. Therefore, the patient remained on life support with the feeding tube. After the patient's death, the health care facility sued the spouse for payment of services relating to the time after the spouse had consented to the removal of life support. The New York Court of Appeals held that the facility rightfully refused to discontinue treatment because the burden to show the patient's wishes was on the spouse. The spouse had not met the burden, the treatment was appropriate, and the spouse was not excused from payment. Had the patient remained alive, it is not clear that she (or indeed anyone else with financial decision making authority) could have argued that the financial resources were inadequate to support the treatment. On the other hand, if the particular treatment were elective, the outcome might be different.

Conclusion

Health care proxy statutes and other sources of authority give the surrogate health care decision maker the power to make decisions, but statutes and case law have not kept pace with advances in medicine and science and new applications of existing science that blur the line between treatment of the patient and procedures that benefit others. Clients, surrogates, and the attorneys who advise them must consider ethics, as well as the law, to resolve the tough new questions that science presents.

Endnotes

1. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 269 (1990).
2. *Id.* (emphasis added).
3. *Id.* at 270.
4. Mass. Gen. Laws ch. 201D, § 1; N.Y. Pub. Health Law § 2980.
5. Mass. Gen. Laws ch. 201D, § 1.
6. For a list of the state statutes and further discussion, see T.P. Gallanis, *Write and Wrong: Rethinking the Way We Communicate Health-Care Decisions*, 31 Conn. L. Rev. 1015, n.113 (1999).
7. *See* Mass. Gen. Laws ch. 201D, § 1; N.Y. Pub. Health Law § 2980; Cal. Prob. Code § 4701; Fla. Stat. ch. 765.201.
8. Model Rules 1.9(a).
9. Mass. Gen. Laws ch. 201D, §16.
10. *Cruzan*, 497 U.S. at 265.
11. *In re AB*, 768 N.Y.S.2d 256 (N.Y. App. Div. 2003).
12. Francoise Baylis, *Expert Testimony by Persons Trained in Ethical Reasoning: The Case of Andrew Sawatzky*, 28 J. L. Med. & Ethics 224, 225-26 (2000); *Superintendent of Belchertown State School v. Saikewicz*, 370 N.E.2d 417, 423 (Mass. 1977) (refusal of treatment by parent-guardian).
13. *Woods v. Commonwealth of Kentucky*, 142 S.W.3d 24, 34 (Ky. 2004) (internal quotations omitted).
14. Baylis, *supra* note 12, at 226.
15. *Woods*, 142 S.W.3d at 35.
16. Mass. Gen. Laws ch. 201D, § 5.
17. Fla. Stat. ch. 765.205(1)(b); Cal. Prob. Code § 4714.
18. N.Y. Pub. Health Law § 2982(2).
19. *Id.*

20. Mass. Gen. Laws ch. 201D, § 5 (emphasis added).
21. See *Cohen v. Bolduc*, 760 N.E.2d 714 (Mass. 2002).
22. Mass. Gen. Laws ch. 201D, § 1 (emphasis added); *see also* N.Y. Pub. Health Law §§ 2980, 2982; *but see* Cal. Prob. Code § 4617, which does not limit by definition.
23. N.Y. Pub. Health Law § 2982(2).
24. *Cruzan*, 497 U.S. at 261.
25. Mass. Gen. Laws ch. 201D, § 6; N.Y. Pub. Health Law § 2983.
26. Cal. Prob. Code § 4689.
27. *Cohen v. Bolduc*, 760 N.E.2d at 714.
28. Wash. Rev. Code §§ 71.32.020 *et seq.*, effective July 27, 2003.
29. *See* Wash. Rev. Code § 71.32.070 (5).
30. *See* Nick Anderson, Notes & Comments, *Dr. Jekyll's Waiver of Mr. Hyde's Right to Refuse Medical Treatment: Washington's New Law Authorizing Mental Health Care Advance Directives Needs Additional Protections*, 78 Wash. L. Rev 795 (2003).
31. *In re Storar*, 420 N.E.2d 64 (N.Y. 1981).
32. Uniform Anatomical Gift Act, 8A U.L.A. 4 (Supp. 1991). *See also, e.g.*, Mass. Gen. Laws ch. 113, § 8; Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 St. Louis U. L.J. 451, 459, n.52 (2000).
33. Sandra Carnahan, *Promoting Medical Research Without Sacrificing Patient Autonomy: Legal and Ethical Issues Raised by the Waiver of Informed Consent for Emergency Research*. 52 Okla. L. Rev. 565, 582 (1999); *see also* Michael T. Morley, *Proxy Consent to Organ Donation by Incompetents*, 111 Yale L.J. 1215, 1245 (March 2002) (in which the author opines that parent-guardians have both the constitutional right and moral duty to consider the best interest of the entire family).
34. *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. Ct. App. 1969).
35. *In re Guardianship of Pescinski*, 226 N.W.2d 180 (Wis. 1975).
36. Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J. L. Med. & Ethics 347 (1999).
37. *Id.*; Carson Strong, Jeffrey R. Gingrich & William H. Kutteh, *Ethics of Postmortem Sperm Retrieval*, 15 Hum. Reprod. 739-745 (2000).
38. See *New York Hospital Guidelines for Consideration of Request for Post-mortem Sperm Retrieval*, reproduced on the Cornell University Department of Urology website at http://cornellurology.com/uro/cornell/guidelines.html.
39. *See New York Hospital Guidelines, supra* note 38.
40. Mass. Gen. Laws ch. 201D, § 17; N.Y. Pub. Health Law § 2992.
41. Id.
42. *In re Howe*, No. 03-P-1255, 2004 WL 1446057 (Mass. Prob. & Fam. Ct., Suffolk Div., March 22, 2004).
43. *Guardianship of Elma Mason*, 669 N.E.2d 1081 (Mass. App. Ct. 1996).
44. N.Y. Pub. Health Law § 2982(b)(1).
45. Fla. Stat. ch. 765.205(3).
46. *Schiavo v. Schindler*, 780 So.2d. 176 (Fl. Dist. Ct. App. 2001).
47. *Grace Plaza of Great Neck, Inc. v. Elbaum*, 623 N.E.2d 513 (N.Y. 1993).

Shari A. Levitan is a partner in the Boston, MA office of Holland & Knight LLP, and is vice-chair of the ABA Probate and Trust Division Bioethics Committee. Helen Adrian is an associate in the Atlanta, GA office of Holland & Knight LLP.

This article also appeared in the Spring 2006 issue of the Trusts and Estates Law Section Newsletter, *Vol. 39, No. 1, published by the Trusts and Estates Law Section of the New York State Bar Association.*

Making Tax Free *Inter Vivos* Gifts to Grandchildren

By Lainie R. Fastman

Clients often express their desire to "do something for the grandchildren." Even if the client does not have apparent Generation Skipping Transfer Tax ("GST") concerns, it is a good idea to review all GST exempt gift-giving options.

GST taxes apply to all transfers after October 22, 1986, to certain donees called "skip persons."[1] A skip person is an individual assigned to a generation more than one generation below that of the transferor.[2] Thus grandchildren are "skip persons." The GST tax's flat rate is equal to the highest estate and gift tax rate in effect at the time of the transfer (46% in 2006). The GST tax exemption is equal to the federal estate tax exemption. In 2006, every individual has a GST tax exemption of $2,000,000.[3]

An *inter vivos* direct skip is a transfer of an interest in property made to a skip person that is subject to gift tax. The GST tax is not imposed on any "direct skip" that is an otherwise non-taxable gift.[4] Assume, for example, that the donor makes a gift of $3,000,000 in 2006. He gives $1,000,000 to his son and $2,000,000 to his grandchild. The donor will incur gift taxes, as the current gift tax exemption is $1,000,000. In addition, the $2,000,000 to the grandchild is a GST taxable gift. The donor may elect to allocate his total GST exemption of $2,000,000 to the gift, rather than saving the exemption for future gifts or for his estate. In such case, no GST tax is payable at the time of the gift over and above the gift tax imposed on the $3,000,000 gift.

The mysteries of the calculation of GST taxes are not the subject of this brief exploration; it is, rather, the avoidance of the imposition of the tax on lifetime giving to grandchildren that concerns us. Since a general transfer tax exemption is not always co-extensive with a GST tax exemption, a review of the differences and similarities between the exemptions is useful.[5]

The Annual Exclusion Gift

I.R.C. § 2503(b) provides that a donor may make a gift of a present interest in property to any person, including a grandchild, during any calendar year free of transfer taxes. The statute fixes a formula, on the base amount of $10,000 set in 1998, tied to a cost-of-living adjustment, to arrive at the precise amount constituting a tax free gift in any given year. The formula will yield a sum equal to a multiple of $1,000, and amounts to a $12,000 exemption in 2006.[6] If grandpa gives to each of his grandchildren an outright gift in 2006, he has made a "direct skip" type of transfer as defined in I.R.C. § 2611. Fortunately, if grandpa limits his gift to $12,000 per grandchild, he has made a GST tax exempt gift.[7] No gift tax return need be filed. If grandma decides to "split" the gift, the couple may give $24,000 to each of the grandchildren, even though the entire gift is paid out of grandpa's separate assets. At least one spouse must file a gift tax return Form 709, in accordance with I.R.C. § 2513. Each spouse must be a citizen of the U.S. at the time the gift is made and the consent of the spouse must be indicated on the return. If the gift is not in cash, valuation evidence must also be submitted with the return.

In accordance with I.R.C. § 6075(b), the return cannot be filed prior to January 1st of the year following the year of the gift and the return may not be filed later than April 15th of the year the return is due.

The fiduciary of a deceased spouse's estate may consent to split gifts made in the year of death, and a guardian may similarly consent on behalf of an incompetent spouse.[8] Of course, if the gift is to come out of the assets of an incompetent spouse, the guardian must secure consent from the Court pursuant to N.Y. Mental Hygiene Law § 81.21. Counsel should consider the inclusion of a power to consent to split gifts in any power of attorney prepared for a married client.

Uniform Transfers to Minors Act Gifts

One method for making a gift for the benefit of a person under the age of 21 is the establishment of an account pursuant to the Uniform Transfers to Minors Act ("UTMA"). Previously, such an account had to be distributed to the beneficiary when the beneficiary reached the age of 18, but the Estates Powers and Trusts Law[9] now provides that the distribution to the beneficiary may be deferred until age 21. Any interest in property may be the subject of an UTMA transfer. For instance, a donor may convey an interest in real property by executing a deed to A as custodian for B under the UTMA.

The creator of the account names a custodian, and, preferably, a successor custodian, to avoid the need to appoint a successor upon the death or incapacity of the original custodian. Since the donor will often neglect to name a successor custodian, one should be aware of EPTL 7-6.7, which permits an "obligor," e.g., a bank or brokerage house holding the property for the custodian, to name a successor custodian. If the property is worth less than $50,000, the property may be paid or distributed by the obligor to an adult member of the minor's family.

The custodian is a fiduciary pursuant to EPTL 7-6.12, and has unfettered power over the custodial property in accordance with EPTL 7-6.13. Counsel should ensure that the property is not included in a donor-grandparent's estate by instructing the client not to name himself as the custodian. Naming the child's parent is also not a good idea, since the parent's use of the property to discharge

his duty of support may have undesirable income tax consequences.

The custodian may use the property for the benefit of the minor without regard to the resources and support available to the minor. A 14-year-old minor, or any interested person on his behalf, may seek a court order to have the custodian pay to the minor, or expend on his behalf, so much of the custodial property as the court considers advisable under the circumstances.[10]

It should be kept in mind that the custodial property is an asset belonging to the minor, and for various purposes may be deemed an "available" resource. In *In re Smith*,[11] in an Article 78 proceeding the court confirmed a determination by social service agencies which had denied petitioner-mother food stamps, as she would have been disqualified had she disclosed the existence of the mutual funds contained in her 5-year-old daughter's UTMA account.

Since a UTMA account is established for a single beneficiary, a gift to such an account not exceeding the annual gift tax exclusion amount will also qualify for the annual GST tax exemption, as such gift satisfies the "separate share" requirement of I.R.C. Reg. 26.2654-1(a).

Gifts to Minors Trusts

Although the annual gift tax exemption is only available for a gift of a "present interest," a notable exception of this rule is the Gift to Minors Trust pursuant to I.R.C. § 2503(c). A transfer to a trust for the benefit of a minor which meets the requirements of I.R.C. § 2503 (c) is not considered a gift of a future interest. To be tax-free, the gift may not exceed the exempt amount set forth in I.R.C. § 2503(b).

There are two basic requirements for a Section 2503(c) trust:

1) The trust's principal and accumulated income must be paid to the beneficiary when the beneficiary reaches the age of 21.

2) Should the beneficiary die prior to distribution of all income and principal, all trust assets must be paid to the beneficiary's estate or must be subject to a general power of appointment exercisable by the beneficiary.[12]

It is important in drafting the trust to take care that the trust provisions do not inadvertently violate the rules of Section 2503(c). For instance, a provision to pay the trust to the beneficiary's "heirs at law," if the beneficiary were to die before reaching the age of 21, will disqualify the trust, as the beneficiary's heirs at law may not be equivalent to the beneficiary's estate.[13]

The trust must provide that income and principal may be expended for the beneficiary's benefit until the beneficiary reaches the age of 21.[14] It is sufficient if the trust provides that the beneficiary has the right to demand the distribution to him of trust property for a reasonable period of time upon reaching the age of 21. If the beneficiary does not exercise the demand right, the trust may continue for whatever duration the terms of the trust instrument provide.

I.R.C. Reg. 25.2503-4(b)(1) provides that there may be "no substantial restriction"[15] on the exercise of the Trustee's discretion to spend income and principal for the benefit of the beneficiary. Accordingly, a grandparent cannot restrict the use of the trust assets to a specific purpose, such as education.

Rev. Rul. 69-345, 1969-1 C.B. 226, addresses the range of permissible restrictions by comparing various restrictions with the powers of a guardian under state law.[16] A direction which limited the Trustee's discretion to provide for the support, care, education, comfort and welfare was deemed to be broad enough not to offend the statute.[17] Similarly, a trust for the education, comfort and support is permitted.[18] The better practice is to provide the broadest discretion to the Trustee.

Clearly, the requirement that the trust property pass to the beneficiary at age 21, and, if the beneficiary dies before that time, that his estate is the irrevocable owner of the property, or that it is subject to the beneficiary's general power of appointment, will dictate that an I.R.C. § 2503(c) trust can have only one beneficiary. Compliance with that rule, however, will also ensure compliance with the requirement of the GST annual gift tax exemption that a separate share be maintained for the donee grandchild.[19]

If grandma names the custodial parent as Trustee, the Trustee's power to apply the property to discharge the parent's duty of support of the beneficiary may result in the property being taxed in the estate of the Trustee / parent. Similarly, if grandma is the Trustee, her unlimited power over income and principal may lead to inclusion of the property in grandma's estate under I.R.C. § 2036 or 2038. It is best to appoint a friend or other relative as Trustee.

The trust is a separate taxpayer for income tax purposes. While trust income that is distributed to the beneficiary may be deducted on the trust's fiduciary income tax return, it is taxable income to the beneficiary, and it may be important to consider the Kiddie tax. If children under the age of fourteen have unearned income in excess of $1,700 per year in 2006, their parents' highest income tax rate will apply. On May 17, 2006, the Kiddie tax was extended by the Tax Increase Prevention and Reconciliation Act of 2005 (Pub. L. 109-222) to children under the age of 18, retroactive to January 1st of 2006. Of course, if the grandparent is inclined to pay income tax on the trust, the trust may be structured as a grantor trust.[20]

The Mandatory Income Trust

The "present interest" requirement for the annual exclusion under I.R.C. § 2503(b)(1) can be met with a "mandatory income trust," also known as a "Section 2503(b) income trust," under which all income is paid to the beneficiary. The income interest is the "present interest" required by the statute.[21] The income alone is eligible for the gift tax exemption. The trust may also provide that an annuity or unitrust interest be paid to the beneficiary.[22] In the case of an annuity interest, the beneficiary must be entitled each year to a fixed percentage of the initial principal funding the trust. A unitrust interest is a fixed percentage to be paid out of the trust property as revalued each year. If the income generated is insufficient to satisfy the unitrust amount, the balance is paid from principal. In fashioning a mandatory income trust, the income interest must be able to be valued for gift tax purposes.

The income beneficiary must have the immediate, unrestricted use, possession or enjoyment of the property.[23] Thus, the Trustee is prohibited from accumulating the income and may not divert the income for any reason. The income may be paid to the beneficiary directly, to a custodian under the Uniform Transfers to Minors Act, or to the beneficiary's legal guardian.

Only the income interest qualifies for the gift tax exemption. The remainder interest, being a gift of future interest, does not. Thus a taxable gift takes place at the creation of the trust, incurring potential GST gift taxes. However, by manipulating the duration of the trust, the remainder interest is devalued for gift tax purposes. The longer the term of the trust, the lower the value of the remainder interest. As the beneficiary must be entitled to the remainder interest, all growth of the remainder inures to him.

As with the gifts to minors trust we examined earlier, the income only trust may have only one beneficiary. This separate share requirement will ensure that the gift tax exclusion is also available for a GST exemption.[24]

The Crummey Trust

Some of the disadvantages of the standard I.R.C. § 2503 trust are the lack of flexibility in crafting the trust purposes and the mandatory termination when the beneficiary reaches the age of 21.

Grantors often desire to carefully circumscribe the trust's purposes under the discretion of the Trustee. A solution is the so-called "Crummey" trust. The grantor creates a trust to be the recipient of annual exclusion gifts, then makes an annual exclusion gift, notifying the donee of his right to withdraw the gift within a limited amount of time, typically at least 30 days. If the beneficiary declines to withdraw the property, it becomes an irrevocable part of the trust. The beneficiary's right to withdraw additions from the Crummey trust serves to satisfy the present interest requirement of the annual exclusion statute.

In *Crummey v. Commissioner*,[25] this method for obtaining the annual exclusion was sanctioned and has remained permissible in spite of challenges by the IRS.

The annual withdrawal power must be real and exercisable, and each beneficiary must be notified of the right to withdraw the additions to the trust. The IRS has attempted to challenge the bona fides of the exclusion on the grounds that the Crummey notices were not timely sent, that there were insufficient funds to draw from, or that the persons with the right to withdraw were not "interested" in the trust. In Technical Advice Memorandum 9628004 (Apr. 1, 1996), the exclusions failed because the donees were not given proper advance notice of their rights to withdraw the gift, the withdrawal rights expired before the funding of the trust and the Crummey power holders had no other right to the trust property other than withdrawal rights. In short, adding beneficiaries to the trust who have "naked powers" to withdraw but no vested remainder interests will not qualify for the annual exclusion.

Obviously there should not be a "prearranged understanding" that the withdrawal right will not be exercised and / or that doing so would result in undesirable consequences.[26]

Care should be taken that the Trustee, often a family member and beneficiary of the trust, does not have rights over the trust property which may be deemed so extensive as to constitute a general power of appointment, causing the trust property to be taxable in the Trustee's estate. This will not occur if the Trustee / beneficiary is granted discretion to distribute trust property according to an ascertainable standard, such as the beneficiary's "health, maintenance and support."[27]

It may be difficult for a standard Crummey trust to qualify for the GST tax annual exclusion. However, the IRS has determined that the annual GST exclusion was applicable where grandmother created separate trusts for the benefit of her four grandchildren.[28] The trusts contained Crummey withdrawal powers for each beneficiary authorizing the donee to withdraw each year the annual addition to the trust.

It is also permissible to have one trust agreement that provides explicitly that each of the grandchildren has a completely separate sub-account in the trust. The Trustee may not have discretion to transfer property between accounts. Each sub-account beneficiary must be irrevocably entitled to the account. Each sub-account must have its own tax ID number, and separate fiduciary income tax returns must be filed for each account.

One may also combine any of the previously discussed trusts with the Crummey trust. When, e.g., the

I.R.C. § 2503(c) minor's trust would ordinarily end at 21, the trust could provide that if the beneficiary declines to withdraw the trust property at reaching 21, the trust will continue. The trust is then converted into a Crummey trust with the annual additions and concomitant withdrawal powers.

Gifts to 529 Plans

In addition to the foregoing methods of gifting, grandparents may use their annual exclusion by making cash contributions to an account earmarked for the tuition for higher education established for the exclusive benefit of designated beneficiaries, a so-called Qualified Tuition or 529 Plan. There are two basic types of qualified tuition programs, the prepaid tuition program and the college savings program.

A "designated beneficiary" means that beneficiary originally designated at the commencement of the contributions by the donor to the Plan, or, if the donor changed the beneficiary designation, the new beneficiary. Beneficiaries may be changed, provided the new beneficiary is a "member of the family" of the original beneficiary.[29] Effective January 1, 1998, a "member of the family" includes the beneficiary's spouse, child or other descendant, and certain ancestors, collateral relatives and in-laws.[30] The account holder's ability to change beneficiaries provides desired control. The donor may also terminate the plan and withdraw the funds and use them for another purpose, although this will cause income tax penalties.

Neither the donor nor the beneficiary may directly or indirectly direct the investment of any contributions. None of the trust assets may be used as security for a loan.[31] Although the statute specifically requires cash contributions, redemption by the donor of U.S. Savings Bonds to fund the Plan is permitted.

A Plan may pay for "qualified higher education expenses." Tuition, fees, books, supplies and equipment required for enrollment or attendance at an eligible educational institution, as well as room and board expenses, are included in such expenses. The Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") provides that the maximum room and board expenses allowance is the amount applicable to the student in calculating costs of attendance for Federal financial aid programs under Section 472 of the Higher Education Act of 1965, or, in the case of a student living in housing owned or operated by an eligible educational institution, the actual amount charged to the student by the educational institution.

Qualified higher education expenses include expenses for accredited post-secondary educational institutions offering a bachelor's degree; associate's degree; a graduate-level or professional degree, or other post-secondary credentials. Certain post-secondary vocational schools are also eligible educational institutions. The institution must be approved by the IRS. Officers and employees of qualified institution programs are required to report contributions to and distributions from program accounts. To the extent that approved expenses are offset by grants or tuition assistance, they cannot be reimbursed by the gift into the Plan.

If the Plan is in compliance, the gift is treated as a completed gift of a present interest and thus qualifies for the annual exclusion for gift tax purposes.[32] Although completed gifts, contributions to a qualified tuition program, or 529 Plan, will not qualify under the unlimited I.R.C. § 2503(e) gift tax exclusion for money used to pay educational expenses.

The annual contribution will be eligible for the present-interest exclusion permitted by I.R.C. § 2503(b) provided that the total annual gift per donee does not exceed the applicable exclusion amount for the year of the gift. A program will not be treated as a qualified tuition program unless it requires separate accounting for each designated beneficiary.[33] The "separate account requirement" of the programs also ensures a GST tax exemption.

Although the 529 Plan contribution is an annual exclusion eligible gift, the gift may exceed the applicable annual exclusion if the donor elects to spread the gift over a maximum of five years, as if made ratably. For example, a $30,000 contribution to a qualified Plan could be treated as five annual contributions of $6,000 each, and the donor could make up the difference between that amount and the applicable annual exclusion amount in other transfers to the beneficiary.[34] Should the donor die, say, after two years having made a gift exceeding two years' worth of applicable annual exclusion amounts, the balance (three years' worth) will be includible in his estate. Under the rule that the donor may spread his contribution over five years, he could contribute $60,000 every five years, or, should his spouse split the gift, double that amount, assuming no other annual exclusion gifts are made.

Qualified tuition programs or 529 Plans were once limited to state programs and now include prepaid tuition programs that are established and maintained by eligible private institutions that satisfy I.R.C. § 529 requirements.[35]

Another bonus of the plan: EGTRRA provides that accumulated earnings in the Plan may be withdrawn without income tax.[36] In addition, New York residents who contribute to a tuition savings account sponsored by the New York State College Choice Tuition Program are entitled to an income tax deduction of $5,000 for contributions.[37]

Gifts of Educational and Medical Expenses

In addition to the annual exclusion, a donor is also entitled to make unlimited gifts without incurring gift tax

by paying an educational organization for tuition.[38] Payments must be made directly to the educational organization "for the education and training" of an individual.[39] The educational institution must maintain a regular faculty and curriculum and have an enrolled body of students.[40] Only tuition qualifies for the exemption. Books and supplies are not included. The gift must be made directly to the educational organization and cannot be a gift in trust which provides for the education of the grandchild.[41] A gift made to reimburse an individual for amounts he or she paid for education will not qualify for the I.R.C. § 2503(e) exemption. A recent Internal Revenue Ruling has determined that a grandparent who enters into a written agreement with a school to pre-pay each of his or her grandchildren's tuition through grade 12 was entitled to the exclusion.[42] It should be emphasized that a grandparent's commitment to pre-pay tuition must be separate with respect to each grandchild in order for the GST tax exemption to apply.[43]

The statute also permits an exclusion from gift tax for medical expenses. Again, in order to qualify for the exemption, payment must be made directly to the medical providers and may not be made to reimburse an individual for medical expenses. The I.R.C. § 2503(e) gift tax exemption for the payment of medical expenses will only apply to expenses for diagnosis, cure, mitigation, treatment or prevention of disease, as well as to pay for premiums for medical insurance.[44] The statute specifically excludes cosmetic surgery. If medical expenses are reimbursed by insurance, the gift will not qualify either.

As with tuition payments, grandparents who wish to ensure that medical payments made to pay for their grandchildren's medical expenses qualify for the unlimited I.R.C. § 2503(e) exemption must take care to make separate payments for each grandchild in order to obtain the GST tax exemption.[45]

Conclusion

The annual gift tax exclusion continues to be an excellent way of transferring wealth to the next generation and there are many opportunities for grandparents who wish to extend their generosity to grandchildren to employ the exclusion. They must, however, be vigilant to ensure that any gift to a grandchild beneficiary is distinctly separate from gifts given to other donees. Inadvertent co-mingling of donated assets, or the possibility of doing so, will disqualify the gift as a GST tax exempt annual exclusion gift.

Endnotes

1. I.R.C. § 2601 (2006).
2. Treas. Reg. § 26.2612-1(d)(1).
3. I.R.C. § 2631(a).
4. *Id.* § 2642(c)(1).
5. Although, the amount of the exclusion is closely intertwined with the instrumentality of the gift, they are, of course, conceptually different.
6. I.R.C. § 2503(b)(2).
7. *Id.* § 2642(c)(1).
8. Treas. Reg. § 25.2513-2(c).
9. N.Y. Est. Powers & Trusts Law ("EPTL") 7-6.20 (McKinney 2006).
10. *Id.* 7-6.14.
11. 767 N.Y.S.2d 751 (2003).
12. I.R.C. § 2514(c)
13. *Ross v. Comm'r*, 71 T.C. 897, 900-01 (1979), *aff'd*, 652 F.2d 1365 (9th Cir. 1981).
14. Rev. Rul. 74-43, 1974-1.
15. *Cf. Ross v. United States*, 348 F.2d 577 (5th Cir. 1965).
16. *Id.* at 581.
17. Rev. Rul. 67-20, 1967-2 C.B. 349.
18. *Heidrich v. Comm'r*, 55 T.C. 746 (1971); *see also Craig v. Comm'r*, 30 T.C.M. (CCH) 1098 (1971).
19. Treas. Reg. § 26.2654-1(a).
20. I.R.C. § 671.
21. *Id.* § 25.2503-3(c), example 4.
22. I.R.S. Priv. Ltr. Rul. 86-37-084 (June 17, 1986).
23. Treas. Reg § 25.2503-3(b).
24. *Id.* § 26.2654-1(a).
25. 297 F.2d 82 (9th Cir. 1968).
26. I.R.S. Tech. Adv. Mem. 96-28-004 (Apr. 1, 1996).
27. Treas. Reg. §§ 25.2511-1(g)(2), 25.2514-1(c)(2), 20.2041-1(c)(2).
28. I.R.S. Priv. Ltr. Rul. 200114026 (Jan. 5, 2001).
29. I.R.C. § 529(c)(3)(C).
30. *Id.*
31. I.R.C. § 529(b)(1)(B)(5).
32. I.R.C. § 529(c)(2)(A).
33. I.R.C. § 529(b)(1)(B)(3).
34. I.R.C. § 529(c)(2)(B).
35. I.R.C. § 529(b)(1).
36. I.R.C. § 529(a).
37. N.Y. Tax Law § 612(c)(32) (McKinney 2006).
38. I.R.C. § 2503(e).
39. Treas. Reg. § 25.2503-6.
40. I.R.C. § 170(b)(1)(A)(ii).
41. *See* Treas. Reg. § 25.2503-6, Example 2.
42. Priv. Ltr. Rul. 200602002. *But see* Blanche Lark Christerson, *Private Wealth Management, Duetsche Bank,* Tax Topics, Jan. 27, 2006, for possible income tax consequences to the parents whose duty of support may be discharged by the arrangement, pursuant to Treas. Reg. § 1.662(a)-4.
43. Treas. Reg. § 26.2654-1(a).
44. I.R.C. § 213(d).
45. *Id.* § 2642(c)(1).

Lainie R. Fastman is a partner with The Law Firm of Hall & Hall, LLP, Staten Island, New York.

This article originally appeared in the Fall 2006 issue of the Trusts and Estates Law Section Newsletter, *Vol. 39, No. 3, published by the Trusts and Estates Law Section of the New York State Bar Association.*

Unwarranted Invasions of Personal Privacy Under Federal FOIA and New York FOIL

By Stephen E. Gottlieb[1]

The problems of protecting privacy in the computer age are outstripping the laws intended to protect individual privacy. And that is having the effect of distorting the effect of distinctions both federal and New York privacy law have traditionally made. Information in "rap sheets" and data banks compiled from government information illustrate the concern.

Unwarranted Invasions and Rap Sheets

The federal Freedom of Information Act exempts from disclosure "unwarranted invasions of personal privacy"[2] and "clearly unwarranted invasions of personal privacy."[3] New York uses an almost identical exemption from disclosure for "an unwarranted invasion of personal privacy" for agency records which:[4]

> (b) if disclosed would constitute an unwarranted invasion of personal privacy.
> . . .

Thus a crucial issue under both statutes is to determine what is warranted.

The federal statute does not provide a definition. The U.S. Supreme Court took a major step in defining "an unwarranted invasion of personal privacy" in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*.[5] The case grew out of efforts by a network news correspondent to link organized crime with a corrupt politician and with government contracts. The FBI refused to supply "rap" sheets about a living member of the family the reporter was probing.

Rap sheets contain information both about convictions and about arrests and proceedings which did not lead to a conviction. The federal Freedom of Information Act requires federal agencies to provide "reasonably describe[d] . . . records" to any person.[6] Individual records may not be disclosed without individual consent unless required by the Freedom of Information Act, or FOIA.[7] The two relevant FOIA exceptions both employ the "unwarranted invasion of privacy" language:

> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.[8]

Though noting that exemption (6) might be relevant, the Court focused on (7).[9] The issue as thus framed by the Court was whether disclosing records about an individual constituting a rap sheet would be an "unwarranted invasion of personal privacy."

The Court noted that some of the information in rap sheets is public information insofar as it is contained in the individual court files of the places where an individual may have been convicted.[10] On the other hand, other portions of rap sheets are *not* public and the states *forbid* the dissemination of records of arrest, as opposed to conviction.[11]

The Court made a second "distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole."[12] The Court unanimously concluded, though in two separate opinions, that there was a protected privacy interest in that second distinction and kept the entire rap sheet private.

Federal and New York Treatment of Law Enforcement Records

Both New York and federal statutes authorize law enforcement agencies to withhold data in another set of exemptions relating to law enforcement which implicate privacy concerns. The federal statute authorizes an agency to protect records "compiled for law enforcement purposes, but only to the extent" that disclosure:

> (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual. . . .[13]

Similarly, New York protects records "compiled for law enforcement purposes" if their disclosure would:

> i. interfere with law enforcement investigations or judicial proceedings;

> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures. . . .[14]

Most of those exceptions, like those in the federal statute, are for the protection of law enforcement. Nevertheless, the effect is to protect individual privacy.

The New York Public Officers Law protects records the release of which "could endanger the life or safety of any person"[15] and defines "an unwarranted invasion of personal privacy" by reference to section 89(2)[16] which elaborates the definition of "an unwarranted invasion of personal privacy" as including:

> i. disclosure of employment, medical or credit histories or personal references of applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility;
>
> iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
>
> iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it;
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; or
>
> vi. information of a personal nature contained in a workers' compensation record, except as provided by section 110-a of the workers' compensation law.

There are exceptions where "identifying details are deleted," the subject consents, or seeks access to records about him or herself.

Of those exceptions, only section 89(b)(iv) applies to the possibility that rap sheets "would result in economic or personal hardship" but the next clause eliminates any protection unless "such information is not relevant to the work of the agency requesting or maintaining it." Rap sheets, of course, are relevant to the work of the law enforcement agencies collecting them. Nevertheless, the definition is nonexclusive by its terms, leaving protection against "an unwarranted invasion of personal privacy" in section 87(2)(b), supplemented by section 87(2)(e), for departmental, not privacy, reasons.

Thus the statutory scheme diverges somewhat but the result appears to be the same.

The private or public character of rap sheets stands in the crossfire between different treatments of criminal justice. On the one hand, the current effort to find, identify and cordon off everyone ever convicted of a sexual offense illustrates a kind of public safety approach, though one that may well prove self-defeating. On the other hand, some states try to protect ex-offenders who have served their sentences in order to try to reintegrate them into society and provide a path to a productive rather than a criminal life. Their focus is rehabilitation of the ex-offender.

The freedom of information laws were designed to assist the public in evaluating public servants.[17] The Court seemed more concerned with rehabilitation by protecting the privacy of the ex-offender,[18] though that seems an odd posture for some members of the *Reporters Committee* Court who have tended to welcome relatively harsh approaches to criminal law and procedure.[19]

Degrees of Privacy and Data Mining

The view that there are degrees of privacy which need to be protected has also been advanced by Daniel Solove.[20] He argues that the dangers of collecting and organizing information in a single data bank far exceed the risks from dispersed information even though legally "public" and accessible. Government and private entities are able to merge disparate bits of data gained from a variety of originally independent sources into a single file as if it were reliably about a single individual.[21] The merged data may in fact include both spurious relationships and inaccurate information. Solove refers to the computerized manipulation of such data as giving rise to Kafkaesque problems because it is quite likely that the individuals involved will never find out that some kinds of opportunities like jobs or consultantships were never offered or why opportunities for which they applied were given to others. It is sometimes a problem to identify the reasons for denial even when the individual realizes that he or she has been barred as from some airplane flights. It is still more problematic when the individuals don't realize they are being considered for a benefit. Indeed those manipulating the machines may not know, either, in any real sense—the machine makes decisions and its negative conclusions do not necessarily show up as decisions. Thus the individuals don't know what they have lost and have no way to confront the problem.

Governments dramatically expand the risks of data mining when they provide extensive databases for private use, largely without legal regulation. Databases designed in different ways are then merged with unreliable results. The recent attempt to purge the voting lists in Ohio because their "registration applications did not match government databases" provided an example of the havoc such merged lists can create. In Ohio, the Secretary of State refused and the courts supported her determina-

tion because of the likely disfranchisement of thousands of eligible voters as a result of trivial discrepancies and other inaccuracies.[22]

There are at least two parts to this problem. One part of the problem is the collapse of the distinction between innocent and harmful information. Any information can become harmful when it can be used to disqualify voters because of discrepancies in the ways they write their names or addresses, for example, or because somewhere they may have given the wrong age. The other part of the problem is the release of government information in bulk insofar as it facilitates the data mining that creates these risks.

Thus the Court made an important point about the difference between older and newer forms of record keeping. The "cat may be out of the bag" nevertheless. There is little restriction on private commercial databases.[23] Indeed New York privacy law is very narrowly focused on commercial use of one's name or likeness, and New York has rejected other common law privacy torts altogether.[24] And the internet already contains an enormous quantity of data about each of us. The problem therefore may be how to minimize the damage. New York tried to take a step in the right direction with restrictions on the commercial use of public information.[25] But the problem has more to do with how the information is treated, whether efforts are made to check the information, whether and how the individual involved may have the opportunity to correct the data, or even become aware that there is data to be checked, and what the information may be used for, and whether it is sufficiently reliable for the purpose.[26]

The problem created by data mining is that it destroys the distinction between private information, the inappropriate release of which may be unjustifiably harmful, and information which is appropriately public.[27]

The statutory standard, "unwarranted invasion of personal privacy," obviously contemplates a balance between the benefits of disclosure ("warranted") against the consequent invasion of personal privacy. As Justice Blackmun suggested, there are some very difficult tradeoffs inherent in the vague language of an "unwarranted invasion of personal privacy."

Endnotes

1. The author would like to express his appreciation for the expert editorial comments and suggestions of Camille Jobin-Davis.
2. 5 U.S.C. § 552(b)(7).
3. 5 U.S.C. § 552(b)(6).
4. N.Y. PUB. OFF. LAW § 87(2)(b).
5. *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).
6. 5 U.S.C. § 552(a)(3).
7. 5 U.S.C. § 552(a)(4) defines "records" and section 552a(b) requires consent unless, *inter alia*, and as provided by section 552a(b)(2), disclosure is required by 5 U.S.C. § 552. Compare with N.Y. PUB. OFF. LAW § 96. The Court and Justice Blackmun noted that disclosure of rap sheets to the public may be prohibited by another statute, referring to the prohibition of disclosure in 28 U.S.C.S. § 534, and therefore might be excluded from disclosure under the Freedom of Information Act by 5 U.S.C. § 552(b)(3), but that argument had been abandoned and was not before the Court. *Reporters Comm.*, 489 U.S. at 757-58, 765; *Id.* at 781 (Blackmun, J., concurring in the judgment).
8. 5 U.S.C. § 552(b)(6)-(7).
9. *Reporters Comm.*, 489 U.S. at 762n.
10. *Id.* at 764.
11. *See Reporters Comm.*, 489 U.S. at 759; and see N.Y. CRIM. PROC. § 160.50 (requiring records be sealed, destroyed or returned on termination of a criminal action in favor of the accused).
12. *Reporters Comm.*, 489 U.S. at 764.
13. 5 U.S.C. § 552(b)(7). *See also* the still stronger language in the federal Privacy Act at 5 U.S.C. § 552a(j)(2).
14. N.Y. PUB. OFF. LAW § 87(2)(e).
15. N.Y. PUB. OFF. LAW § 87(2)(f).
16. N.Y. PUB. OFF. LAW § 87(2)(b).
17. *See Reporters Comm.*, 489 U.S. at 772.
18. *See Reporters Comm.*, 489 U.S. at 767 ("the law enforcement profession generally assumes . . . that individual subjects have a significant privacy interest in their criminal histories").
19. For example, several of the justices in the majority supported the execution of an inmate without a hearing on exculpatory evidence unearthed after trial, *Herrera v. Collins*, 506 U.S. 390 (1993).
20. Daniel J. Solove, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE, 8, 42-44 (New York University Press, 2004).
21. *Id.* at 44-47.
22. Ian Urbina, *Ohio: Flagged Voters Remain Nameless*, N.Y. TIMES, October 30, 2008 at A19.
23. *See* Solove, DIGITAL PERSON, 9, 46, 120-23.
24. *See* N. Y. CIV. RIGHTS LAW, § 50; *Messenger v. Gruner & Jahr Printing & Publ'g*, 94 N.Y.2d 436, 727 N.E.2d 549, 706 N.Y.S.2d 52 (2000); *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902) (rejecting a common law privacy tort).
25. N.Y. PUB. OFF. LAW § 89(2)(b)(iii), treating "sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes" as an example of an unwarranted invasion of privacy.
26. *See* Daniel J. Solove and Marc Rotenberg, INFORMATION PRIVACY LAW 22-25 (New York: Aspen, 2003) (describing the statutory sources of privacy law and the proposed Code of Fair Information Practices). *See also* Part Two of the OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data §§ 7-14 (23rd September, 1980) *available at* http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html (visited February 15, 2009).
27. *See* Solove, DIGITAL PERSON, 8, 44-47 (describing the inadequacy of the secrecy and invasion conceptions of privacy and the impact of vast quantities of public information on the distinction between public and private).

Stephen E. Gottlieb has been a member of the Albany Law faculty for three decades and, among other courses, has taught constitutional and privacy law, written about the Rehnquist Court, and served on the Board of Directors of the New York Civil Liberties Union.

This article originally appeared in the Spring 2009 issue of the Government, Law and Policy Journal, *Vol. 11, No. 1, published by the Committee on Attorneys in Public Service of the New York State Bar Association.*

Life Settlements: Legal Rights and Opportunities for Insurance Policy Owners

By Chris Orestis

A life insurance settlement is the sale of a life insurance policy by the owner while still alive to a third party institutional investor. The seller receives a lump-sum payment in exchange for transferring ownership of the policy and the final death benefit. The investment entity takes over the premium payments and carries the policy for the remainder of the insured's life.

The right of a policy owner to engage in a life settlement was guaranteed when U.S. Supreme Court Justice Oliver Wendell Holmes ruled in 1911 (*Grigbsy v. Russell*) that life insurance is personal property and the owner is protected by all the same inalienable rights that any owner of real estate, stocks or any other assets enjoy. This decision established a life insurance policy as transferable property that contains specific legal rights, including the right to sell the policy to a third party. By the end of the 20th Century, viaticals emerged as an opportunity for AIDS patients to cash out of a life insurance policy while still alive to cover the high costs of care not covered by health insurance. The Life Settlement market became an offshoot of viaticals and has been growing rapidly ever since, with $13 billion in transactions completed in 2008.

A 2003 study conducted by Conning & Co. estimated that 90 million senior citizens owned approximately $500 billion worth of life insurance in 2003, of which over $100 billion was owned by seniors eligible for Life Settlements. The Wharton Business School issued a study that observed, "Life insurance policies are typically assignable, which means that a policyholder is free to transfer their ownership of the policy to another person. A policyholder's right to assign their *policy to someone other than the insurance carrier has existed for some time."* The study also went on to observe that a life settlement "*gives the policyholder the economic freedom to choose between a number of buyers and, in so doing, to receive the fair market price for their policy."*

A number of insurance industry organizations, such as the National Association of Insurance Commissioners (NAIC), National Council of Insurance Legislators (NCOIL), American Council of Life Insurers (ACLI), National Association of Insurance and Financial Advisors (NAIFA), American Association of Life Underwriters (AALU) and the Life Insurance Settlement Association (LISA), have also recognized the legal rights of a policy owner to liquidate a life insurance policy through a life settlement. Stuart Reese, chairman, president and CEO of MassMutual Life Insurance Company, said that if a policy is first purchased with protection in mind and is no longer needed after a period of time, then a contract holder does have property rights and "there is a legitimate Life Settlement business which is consistent with the purpose of insurance."

*"The right of a policy owner to engage in a life settlement was guaranteed when U.S. Supreme Court Justice Oliver Wendell Holmes ruled in 1911 (*Grigbsy v. Russell*) that life insurance is personal property and the owner is protected by all the same inalienable rights that any owner of real estate, stocks or any other assets enjoy."*

Q: Is it time to consider cashing in a life insurance policy for its Life Settlement value?

A: If a policy owner has outlived the purpose of a life insurance policy, has decided that it has become an underperforming asset, or has had a life event that requires liquidity, then selling a life insurance policy through a Life Settlement transaction should be considered.

Eligibility:

- Age 65 or older (younger ages can be considered based on health) all forms of life insurance can qualify.
- Life Insurance policy with a minimum face value of $50,000.
- Process takes 90 days or less.
- There are no caps on the amount of money that can be raised through a Life Settlement.
- A Life Settlement is the sale of an asset, not a loan, and has no restrictions or requirements to be secured or paid back.
- There are no upfront fees paid by the policyholder.
- The policy owner is no longer responsible for paying premiums once a Life Settlement is complete.
- A policy owner is under no obligation throughout the process. Once a Life Settlement is complete, the policyholder will receive a lump-sum payment in exchange for the policy.

A couple of specific applications of this innovative financial option are important for elder law and estate planning attorneys to be aware of:

(1) *Medicaid*—Life insurance policies are unprotected assets and state Medicaid programs expect any policy with cash value beyond a minimal amount to be surrendered. Those proceeds would then be spent down on care before Medicaid dollars would begin. Instead of surrendering a policy for minimal cash value, the owner could instead receive considerably more through a Life Settlement. The use of proceeds is without restriction, and could be used to cover out-of- pocket costs and private pay home health care, assisted living or skilled nursing arrangements until spent down.

Assume, hypothetically, that client, 67 years of age and in fair health, has determined that he and / or his wife will probably need Medicaid at some point in the future. Assume also that client has a 20-year whole life insurance policy with 13 years remaining, with a cash surrender value of $81,039, an interpolated terminal reserve value of $90,050 (available from the life insurance company by requesting IRS Form 712), and a death benefit of $1,000,000 payable to his wife, and in the event she predeceases him, to his children. Client's other assets consist of a modest home (valued at $350,000) and other assets totaling $125,000. Assume further that client's family history indicates a shorter than normal life expectancy, but that his wife is likely to live well into her 90s.

Traditional estate planning might suggest that the preferred approach to the above facts would involve Credit Shelter and Gap estate planning or early gifting of the home or other assets to the client's children to steer clear of the five-year look-back rule, or some combination of the foregoing. But assume that client was concerned about his children's spendthrift tendencies and creditor issues, such as claims by spouses, and therefore was unwilling to turn control of his hard- earned assets over to his children.

An alternative planning strategy is for the client to gift (assign) the life insurance policy to a trust of which his children are the sole Settler's, Trustees and Beneficiaries, thereby removing the proceeds from both his estate and that of his wife's. Because the policy held in the children's trust is relatively illiquid (assume the trust requires unanimous consent of all the children to act) and is subject to a spendthrift provision (which defends against creditor claims), the policy is generally protected from the client's concerns regarding his children as stated above. Assume, too, that the above trust contained a provision which gave the children a pro rata right of withdrawal if any life insurance policy was subject to a vertical or Life Settlement, similar to that provided above.

Though the gift tax value of life insurance is generally its replacement cost (Treas. Reg. § 25.2512-6(a)), that cost can vary depending on the type of life insurance involved. In the above circumstances, the value of the whole life policy probably would be its interpolated terminal reserve value ($90,050) at the date of the gift, plus the unused portion of the last-paid premium.

Now assume that five years later client has been diagnosed with aggressive cancer and is not expected to live longer than four years, though there is a chance he might fully recover but the treatment is very expensive. Assume further that the proposed treatment will quickly use up most, if not all, of the client's remaining assets and that husband and wife now need to apply for Medicaid assistance.

Assume, too, that the client's children have determined that a Life Settlement will pay out an amount greater than any existing cash surrender value for the current assignment of the ownership of the policy. Assume children in fact liquidate the policy through a Life Settlement and use the funds to establish a special or supplemental needs trust for parents to supplement said parents' needs and provide them with luxuries not covered by Medicaid, such as vacations, a leased vehicle, credit cards, etc.

Notwithstanding the unfortunate circumstances described above, an early gifting strategy and a Life Settlement combined with a special or supplemental needs trust for parents, provided for a safety net for the above hypothetical clients. Removing the life insurance policy early, when its value was low, also provided a level of protection from the five-year look-back rule and perhaps some relief from estate taxation.

(2) *Irrevocable Life Insurance Trusts (ILITs)*—For clients who no longer need or want to sustain an ILIT, the option of cashing in the policy for its highest possible value through a Life Settlement should be considered. The trust is the owner of the policy and it can be sold with the proceeds going back into the trust to be administered for the beneficiaries. Through the use of simple amending language to the ILIT, withdrawal provisions could allow for the treatment of the proceeds to be administered as if the still-alive insured were deceased.

Consider, for example, your typical Irrevocable Life Insurance Trust (ILIT). Generally, an ILIT will provide that only *upon the death* of the Settler (i.e., the person who established the trust), the trustee will collect the proceeds of any policy on the life of the Settler and will administer and distribute the assets for the benefit of the beneficiaries.

But what if the Settlor is not deceased but the policy has been subject to a Life Settlement? What if the Settlor survives for many years to come? Can the beneficiaries access the funds in the ILIT as if the Settlor were deceased? Does the Settlor want the beneficiaries to have

that access? Regardless of the answer to any of the foregoing, the ILIT should specifically address the issue of Life Settlements.

For example, the ILIT might at some point provide:

> Notwithstanding any provision herein to the contrary, in the event any policies of insurance on the Settlor's life are paid prior to the Settlor's death as a part of any viatical settlement or similar Life Settlement, the Settlor shall be treated for purposes of administering and distributing the proceeds of such policies as being deceased.

Alternatively, the ILIT might provide:

> In the event any policies of insurance on the Settlor's life are paid prior to the Settlor's death as a part of any viatical settlement or similar Life Settlement, the Settlor shall *not* be treated for purposes of administering and distributing the proceeds of such policies as being deceased.

Alternatively, the ILIT might provide a withdraw opportunity for beneficiaries in the event of a Life Settlement, such as the following:

> Notwithstanding any provision herein to the contrary, in the event any policies of insurance on the Settlor's life are paid prior to the Settlor's death as a part of any viatical settlement or similar Life Settlement, any beneficiary for whom a trust is being held pursuant to this Trust may request that the Trustee distribute to such beneficiary such amount or amounts of principal, including all of his or her net trust estate; provided, however, that the Trustee shall not be required to satisfy any such request unless all the Trustees then serving (of which there must be at least two (2) Trustees, at least one of whom must be an Independent Trustee, as defined herein) consent in writing to such distribution. This power of withdrawal shall be validly exercised only if exercised voluntarily and shall not include an involuntary exercise.

The foregoing are just a few examples of some of the simple drafting considerations estate planners might consider with regard to ILITs and Life Settlements.

A Life Settlement would also be an applicable option in the case of "SILITs" (Special Needs Irrevocable Life Insurance Trusts). Again, the basic idea being that the Settlor (or children) set(s) up an ILIT with early distribution trigger language, allowing the beneficiaries (i.e., the children) to pull Life Settlement (or cash surrender value) out of the trust and establish a special needs trust for parents if the need arises. Early action before illness is critical. If the parents never need the benefits of the SILIT, so be it. But if they ever do, the investment in the policy premiums may one day act, with direction of the children, to assist them to live a better life despite the need for public assistance. In short, ILITs really aren't just for the rich trying to make good use of their annual gift tax exclusion and can work just as well for public assistance planning.

"The introduction of life settlements into the estate planning world should cause every practitioner to stop and think about the implications such settlements may have and how strategic planning can (or the lack thereof) might impact a client and his or her family."

The Life Settlement industry provides an important and efficient function to the insurance marketplace—and it is a practice established by the Supreme Court. This unique financial tool presents estate planners with new opportunities that are only just beginning to be recognized as such. The introduction of life settlements into the estate planning world should cause every practitioner to stop and think about the implications such settlements may have and how strategic planning can (or the lack thereof) might impact a client and his or her family.

Chris Orestis, president of Life Care Funding Group, a national Life Settlement company, can be contacted at 888-670-7773 x 2 or chris@lifecarefunding.com.

Special thanks to Smilie Gregg Rogers, Esq. of Bergen & Parkinson LLC for contributing to this article.

This article originally appeared in the Summer 2009 issue of the Elder Law Attorney, *Vol. 19, No. 2, published by the Elder Law Section of the New York State Bar Association.*

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 (listed on the back page) or Committee Chairs for further information about these Committees.

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

Employment Opportunity
Perry Balagur
Law Office of Perry Balagur
19 Vanderbilt Way
North Woodmere, NY 11581
realestate@nysbar.com

Ellyn D. Kessler
Law Office of Ellyn D. Kessler PLLC
45 East 89 Street, No. 9g
New York, NY 10128
ekessler123@aol.com

Law Practice Continuity
Anthony R. Palermo
Woods Oviatt Gilman LLP
700 Crossroads Building
2 State Street
Rochester, NY 14614
apalermo@woodsoviatt.com

Legislation
Gloria Crowley Markuson
Scarsdale Law Center Building
185 Summerfield Street
Scarsdale, NY 10583
rdm8@aol.com

Membership
Charles A. Goldberger
McCullough, Goldberger & Staudt, LLP
1311 Mamaroneck Avenue, Suite 340
White Plains, NY 10605
cgoldberger@mgslawyers.com

John S. Marwell
Shamberg Marwell Davis & Hollis PC
55 Smith Avenue
Mount Kisco, NY 10549
jmarwell@smdhlaw.com

Pro Bono
George H. Lowe
United States Magistrate Judge
100 South Clinton Street
Syracuse, NY 13261

Elizabeth J. McDonald
8 Austin Park
Pittsford, NY 14534
bethmcd@att.net

Program and CLE
Carole A. Burns
390 Dogwood Lane
Manhasset, NY 11030
cabb1@optonline.net

Publications
Donald J. Snyder
Cosentino, Snyder & Quinn
379 W Main Street
West Winfield, NY 13491
csqlaw@aol.com

Willard H. DaSilva
DaSilva, Hilowitz & McEvily LLP
585 Stewart Avenue
Suite L-16
Garden City, NY 11530
whdasilva@aol.com

Retirement Planning and Investment
Robert D. Taisey
Holland & Knight LLP
195 Broadway
New York, NY 10007
rtaisey@hklaw.com

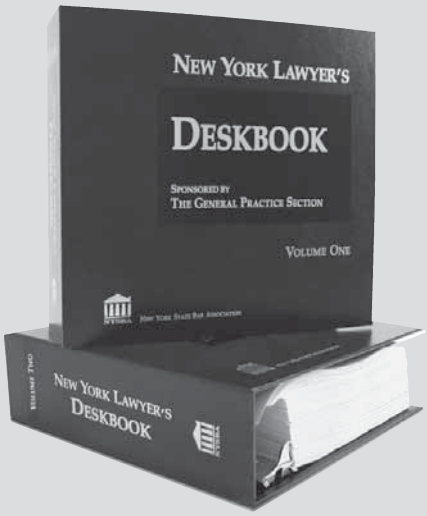
Senior Lawyer Services
M. Barry Levy
Sharretts Paley Carter & Blauvelt PC
75 Broad Street, 26th Floor
New York, NY 10004
mbarrylevy@spcblaw.com

Technology
Charles E. Lapp III
Lapp & Lapp
100 Cedarhurst Avenue
PO Box 435
Cedarhurst, NY 11516
lappandlapp@optimum.net

James P. Duffy III
1290 Avenue of the Americas
New York, NY 10104
jpduffy@bergduffy.com

From the NYSBA Book Store

The 2008–2009 update of New York Lawyer's Deskbook



PRODUCT INFO AND PRICES

1998 (Supp. 2008–2009) / PN: 4150

NYSBA Members	**$250**
Non-members	$325

Free shipping and handling within the continental U.S. The cost for shipping and handling outside the continental U.S. will be added to your order. Prices do not include applicable sales tax.

Winner of the ABA's Constabar Award

Written and edited by leading practitioners, the *New York Lawyer's Deskbook* is a two-volume, 2,000-plus-page resource, covering 27 different areas of practice. Each chapter offers a clear, basic review of its subject and the necessary steps for handling basic transactions in that area. The *Deskbook* gives both new and seasoned practitioners a solid footing in practice areas that may be unfamiliar to them. Practitioners already familiar with an area will use the *Deskbook* as a refresher and will benefit from its many helpful "Practice Guides."

The 2008–2009 supplement is current through the 2008 New York State Legislative session. With updates and revisions throughout, the 2008–2009 supplement also features a revised chapter on Personal Injury Law, and two new chapters on Mediation and on New York Residential Landlord-Tenant Law and Procedure.

Get the Information Edge

NEW YORK STATE BAR ASSOCIATION

1.800.582.2452 www.nysba.org/pubs Mention Code: PUB0587

NYSBA

The Senior Lawyer

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 any one of the Co-Editors whose names and addresses appear on this page.

For ease of publication, articles should be submitted via e-mail to any one of the Co-Editors, 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 Co-Editors request 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 Co-Editors 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 Co-Editors, 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)

NEW YORK STATE BAR ASSOCIATION

NYSBA **Membership Application Senior Lawyers Section**

Section membership is available to current NYSBA members who are age 55 or over.

Join the Senior Lawyers Section now by returning the application or by one of these other convenient ways:

1. VISIT – www.nysba.org/SLS **2. E-MAIL –** membership@nysba.org **3. CALL –** 518.487.5577 or 800.582.2452

YOU MUST FIRST BE A MEMBER OF NYSBA TO JOIN OUR SECTION

To be eligible for membership in the Senior Lawyers Section, you **must first** be a member of NYSBA. You must also be age 55 or over.

☐ As a current member of the New York State Bar Association, I want to join the Senior Lawyers Section. **I enclose my payment of $20 for Senior Lawyer Section dues.**

☐ I wish to become a member of the NYSBA and the Senior Lawyers Section. Please send me a New York State Bar Association application.

☐ I am a Section member — please consider me for appointment to committees marked.

ENROLLMENT INFORMATION

Name _____ Address _____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____ Address _____

City _____ State _____ Zip _____

Office phone (_____) _____ Home phone (_____)_____

Fax number (_____) _____ E-mail address (_____)_____

Date of birth _____ /_____ /_____ States and dates of admission to Bar: _____

I enclose my payment of $20 for Senior Lawyers Section dues. METHOD OF PAYMENT:

☐ Check (payable in U.S. dollars) ☐ MasterCard ☐ Visa ☐ American Express ☐ Discover

Account Number ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Expiration Date _____ Date _____ Signature _____

SENIOR LAWYERS SECTION SUBCOMMITTEES

Join one or more subcommittees of your choice from the list below:

___ Age Discrimination (SLS1100)
___ Employment Opportunity (SLS1200)
___ Law Practice Continuity (SLS1300)
___ Legislation (SLS1030)
___ *Pro Bono* (SLS1400)
___ Program and CLE (SLS1020)
___ Publications (SLS1500)
___ Retirement Planning and Investment (SLS1600)
___ Senior Lawyer Services (SLS1700)
___ Membership (SLS1040)
___ Technology (SLS1800)

The Senior Lawyers Section is currently looking for members of the Section to help build its substantive subcommittees. The Section's leadership welcomes volunteers. To become involved, please contact: SeniorLawyers@nysba.org. Participation in Section subcommittees is a benefit of membership.

Please return payment and application to:

Membership Services
New York State Bar Association
One Elk Street, Albany, NY 12207

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

ADDRESS SERVICE REQUESTED

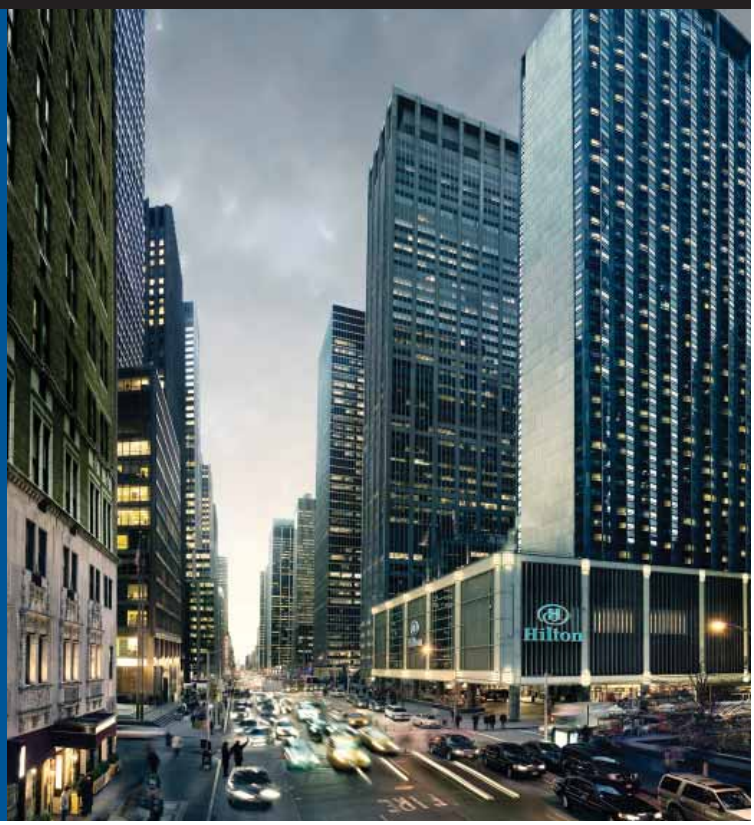
NON-PROFIT
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155

NEW YORK STATE BAR ASSOCIATION

Annual Meeting location has been *moved—*

Hilton New York
1335 Avenue of the Americas
New York City

January 25-30, 2010



SENIOR LAWYERS SECTION
ANNUAL MEETING
FRIDAY, JANUARY 29, 2010