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ONEONONE

A publication of the General Practice, Solo & Small Firm Section
of the New York State Bar Association

Message from the Chair

The General Practice, Solo & Small Firm Section was having an "identity crisis." What select group of attorneys was it trying to appeal to?

Ultimately, the Executive Committee recognized that our Section is an important supplement to **all** of the substantive Sections of the NYSBA.

The core of our Section is practice management—to enable us to better serve our clients and to enable us to enjoy our families and friends.

We strive to recognize issues and we have the maturity to refer to a specialist when appropriate.

Westchester County District Attorney Jeanine Ferris Pirro spoke at our January 2003 Annual Meeting Program on "Internet Pedophilia" in acknowledgment that many practitioners would be interested in her presentation from the perspective of parent as well as from the perspective of attorney.

Similarly, we have joined with the Elder Law Section for this summer's meeting—in Newport, Rhode Island, August 13-August 17—so that practitioners in all fields will be better prepared to assist their grandparents, their parents and/or themselves when confronted with concerns in the latter stage of life.

The General Practice, Solo & Small Firm Section has a proud heritage. We created the New York Lawyers Deskbook and the New York Lawyers Formbook more than a dozen years ago. Updated annually, these publications remain among the most popular and well-regarded of the NYSBA offerings.

General practice, solo and small firm practitioners are the primary source of legal counsel for low- and middle-income Americans and for small businesses. Active participation in the Section helps us do our part in providing justice to all people of this nation.

Dwayne Weissman

P.S. Best of luck to Stephen P. Gallagher, long time staff liaison to the Section, upon his retirement from the NYSBA. His insight and hard work are already missed.

Inside

From the Editors


Frank G. D'Angelo

This edition begins a new column, which we are calling "Letters to the Editors." We have decided that those who wish to comment about any of the material contained in this publication should have a public platform to do so. It is also for those who would just like to provide an informative short statement about some topic of interest—and also enlighten the rest of us—even though it may not reach the length of an article. We therefore encourage those who might have thought about sharing some piece of information—but did not want to or could not write an entire article—to take advantage of this opportunity. We will give attribution to the writer of each letter that we include in this new column.


Martin Minkowitz

We will also be forming an Editorial Board to assist in the future preparation of this publication. Anyone who wishes to be considered for inclusion on this Board should write to the Editors. We hope to have that Board involved with the next publication.

As always, we encourage your comments and participation in the General Practice Section's activities and hope that you will take an active role with us.

Martin M. Minkowitz
Frank G. D'Angelo

REQUEST FOR ARTICLES

If you have written an article and would like to have it published in *One on One* please submit to either of the Co-Editors:

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Garden City, NY 11530

Martin M. Minkowitz
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180 Maiden Lane
New York, NY 10038

Articles should be submitted on a 3 1/2" floppy disk, in WordPerfect or Microsoft Word, together with a printed original and biographical information.

Attorney's Fees Under the Code of Professional Responsibility: The Interplay of Ethics and Professional Liability

By Barry R. Temkin

Since 1970, the conduct of New York lawyers has been governed by the Lawyers' Code of Professional Responsibility (the "Code"),[1] which proscribes, among other things, charging a client "an illegal or excessive fee."[2] The Code prohibits the sharing of a fee with non-lawyers,[3] and circumscribes the division of fees with an attorney who is not a partner or associate in the same firm. This article will analyze the sharing of fees among lawyers who are not partners or associates in the same firm, a common practice whose legal implications are often misunderstood.

"Under the Code, the mere act of forwarding a client to another lawyer is not a proper basis for fee splitting."

Under some circumstances, a lawyer is permitted and, indeed, obligated by professional considerations to refer to another attorney a matter which he or she is not competent or prepared to handle.[4] The practice of receiving a fee in consideration of the referral is widespread and commonplace, especially (but not exclusively) in the personal injury arena. But there are ethical and practical ramifications of the practice. Indeed, an attorney who refers a case to another lawyer may find herself, under some circumstances, charged with civil liability in the event of alleged malpractice by receiving counsel.

According to DR 2-107 of the Code, the division of a fee with another attorney is contingent upon the client's approval and either the sharing of legal work or responsibility between referring and receiving counsel:

> A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, unless:
>
> 1. The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
> 2. The division is in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation.
> 3. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.[5]

The Ethical Considerations, rather than explaining the disciplinary rule, succinctly paraphrase it: "A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed by each lawyer, or, by a writing given to the client, each lawyer assumes joint responsibility for the representation and if the total fee is reasonable."[6] Although the plain language of DR 2-107 permits the sharing of fees between partners and associates only, the courts have interpreted it to permit the sharing of fees with an attorney who has an "of counsel" relationship with the firm.[7]

Under the Code, the mere act of forwarding a client to another lawyer is not a proper basis for fee splitting.[8] The prohibition of a finder's fee, payable regardless of the service performed or responsibility assumed by a forwarding lawyer, was originally intended "to keep the profession of law from becoming an ordinary business."[9]

Under DR 2-107 an attorney may lawfully receive a referral fee by giving the client a writing in which she assumes joint responsibility for the representation. A lawyer who refers a case to another attorney without such a writing may participate in the total fee to the extent of his participation in the legal work. To the extent that a lawyer does some work on the overall representation of the client, a court will generally uphold an agreement between two lawyers to share fees from the joint representation.[10] A leading analysis of fee-splitting among lawyers is contained in the Court of Appeals decision in *Benjamin v. Koeppel.*[11] Receiving counsel in *Benjamin* agreed to pay a one-third referral fee to the originating attorney, but then reneged on the agreement, arguing that it was an illegal referral fee because the plaintiff was not properly registered as an attorney. The referring attorney had done some work on the case, including interviewing the client, evaluating the case and attending a meeting between the client and a firm partner. The Court of Appeals held that the referring attorney was entitled to his share of the fee as allocated in the parties' agreement, reasoning that: "The courts will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either refused to contribute more substantially."[12]

A lawyer who wishes to participate in fee sharing should ensure that his contribution to the overall result is proportionate to his portion of the fees. This balance was struck by the New York State Bar Association Committee on Professional Ethics, which wrote in Formal Opinion 609 that: "Although it is not unethical for the lawyers to agree in advance on a proposed fee split," at the conclusion of the matter, the relative proportions should be reexamined and adjusted in the event that "the services actually performed and responsibility assumed by the forwarding attorney and the forwardee are grossly disproportionate to the division of fees agreed upon at the outset."[13]

In addition to possible forfeiture of the fee, an attorney who makes a referral to another lawyer or firm should be mindful of the possibility of an action for legal malpractice in the event that receiving counsel mishandles the case. Professor Roy Simon has written, in interpreting DR 2-107, that: "Financial responsibility for the representation plainly refers to malpractice liability."[14]

The New York County Lawyers' Association Committee on Professional Ethics has interpreted DR 2-107 to imply financial responsibility on the part of referring counsel who participates in a referral fee.[15] According to NYCLA Ethics Opinion 715,[16] although referring counsel has no obligation to supervise the work of a specialist, he should be prepared to indemnify the client for the former's malpractice because, in the view of the committee, "joint responsibility is synonymous with joint and several liability."[17] The Ethics Committee reasoned that a lawyer who agrees to share fees for a referral is "ethically obligated to accept vicarious liability for any act of malpractice that occurs during the course of the representation."[18] Ethics Opinion 715 also opines that referring counsel may extract an indemnity agreement from receiving counsel.

However, it should be noted that the New York courts have tended to tread lightly in the area of attorney liability for negligent referral or supervision of other attorneys.[19] Generally, these cases have held that if multiple law firms are working on a single matter for a client, each is only responsible for its own negligence.[20]

"[I]t should be noted that the New York courts have tended to tread lightly in the area of attorney liability for negligent referral or supervision of other attorneys."

Understandably, additional caution should be exercised when referring a case to out-of-state counsel. For example, a New York lawyer who referred a negligence case to an unscrupulous New Jersey practitioner was held liable in *Tormo v. Yormark*,[21] when the latter made off with client settlement funds. In that case, the New York attorney was unaware that his New Jersey counterpart, although a duly licensed attorney in good standing, had been indicted for insurance fraud by the county district attorney. The New York lawyer's representations to the client that his indicted colleague was "a good, well-qualified attorney," along with allegedly false representations about the status of the case in New Jersey, were sufficient to give rise to an action for professional liability, notwithstanding the fact that he had not agreed to participate in the fee.[22]

Practice Pointers

For busy practitioners, a review of existing office procedures concerning fee sharing might be in order. For example, deciding to forego referral fees altogether is not a palatable option for some practitioners, and, in any event, may be insufficient to insulate an attorney from liability. And while entering into a written agreement by which both attorneys share in the responsibility to the client may insulate counsel from a disciplinary proceeding premised on DR 2-107, such an agreement would do little to shield referring counsel from an action for legal malpractice based on the conduct of receiving counsel.

With these considerations in mind, the following suggestions may be of assistance to practitioners:

(1) Avoid naked referral fees. An attorney should be able to document the work performed on the referred case and should maintain a file with copies of plead-

ings, correspondence and other documents reviewed in connection with the case.

(2) Maintain a due diligence file on receiving counsel. Even if receiving counsel is a long-standing acquaintance, it cannot hurt to place yourself in a position to state that you checked out his expertise and background by a search of such background sources as Westlaw and *The New York Law Journal*.

(3) Be sure that the client is aware of and has approved the fee-splitting agreement.

(4) Periodically contact the client, and let him know that you are available to address or discuss any concerns that he may have, without undercutting the advice and counsel of receiving counsel.

(5) Consider requesting an indemnity agreement from receiving counsel along the lines suggested in NYCLA Ethics Opinion 715.

(6) Beware of out-of-state referrals, which could be subject to substantially different legal standards.

(7) Be sure that the total fee is reasonable within the meaning of DR 2-107(A)(3).

(8) Remember that the fee-sharing aspects of DR 2-107 should be read in conjunction with the overall ethics requirements of the entire Code. A lawyer who simply treats other attorneys and clients with decency and respect will go a long way toward satisfying the requirements of the Code.

Endnotes

1. N.Y. Comp. Codes R. & Regs. tit 22 §§ 1200.1 *et seq*. (N.Y.C.R.R.).
2. *The Lawyer's Code of Professional Responsibility* DR 2-106(A) (hereinafter "Code").
3. DR 3-102(A) (unethical to split fees with non-lawyers); *see also* Judiciary Law § 491 (illegal to split fees with non-lawyers).
4. *See* DR 6-101 (a lawyer should not handle a matter which he knows he is not competent to handle); EC 6-1 (same).
5. DR 2-107; 22 N.Y.C.R.R. § 1200.12[a].
6. EC 2-22.
7. *Gold v. Katz*, 193 A.D.2d 566, 598 N.Y.S.2d 205 (1st Dep't 1993); *Nicholson v. Nason & Cohen*, N.Y.L.J., Aug. 28, 1992, p. 21, col. 4, *aff'd,* 192 A.D.2d 473, 597 N.Y.S.2d 23 (1st Dep't 1993).
8. NYSBA Comm. on Professional Ethics, Formal Op. 609 (1990) (hereinafter "NYSBA Op."); NYSBA Op. 745 (2001).
9. *Greenwald v. Zyvith*, 23 A.D.2d 201, 259 N.Y.S.2d 387 (2d Dep't 1965).
10. *Simon's New York Code of Professional Responsibility Annotated* (West 2002) at 251.
11. 85 N.Y.2d 549, 626 N.Y.S.2d 982 (1995).
12. 85 N.Y.2d at 556, 626 N.Y.S.2d at 985 (*citations omitted)*.
13. NYSBA Op. 609 (1990).
14. Simon, *Simon's Code of Professional Responsibility* (Thompson West 2003) at 274 (quoting from DR 2-107).
15. NYCLA Eth. Op. 715, 1996 WL 592658 (NYCLA Comm. Prof. Eth. 1996).
16. *Id.*
17. 1996 WL 592658 at * 3
18. *Id.*
19. *See* Temkin, *Can Negligent Referral to Another Attorney Constitute Legal Malpractice?,* 17 Touro L. Rev. 639 (2001).
20. *See Broadway Management Co. v. Tunstead & Schechter*, 110 A.D. 2d 587, 487 N.Y.S.2d 799 (1st Dep't 1985); *CVC Capital Corp. v. Weil, Gotshal and Manges,* 192 A.D.2d 324, 595 N.Y.S.2d 458 (1st Dep't 1993).
21. 398 F. Supp. 1159 (D.N.J. 1975).
22. *Id*. at 1166.

Barry R. Temkin is a senior trial attorney at Jacobowitz Garfinkel & Lesman in Manhattan, a member of the New York County Lawyers' Association Committee on Professional Ethics and the New York State Bar Association Committee on Attorney Professionalism. The author is a graduate of the University of Pennsylvania Law School and a former Brooklyn Assistant District Attorney. The views expressed in this article are those of the author.

Healthy Individuals and Healthy Organizations

By Stephen P. Gallagher

Growth and change have been the major themes of my entire professional career. Much of my work has been about organizational development, and particularly about the correspondence between healthy individuals and healthy organizations. Since joining the staff of the New York State Bar Association (NYSBA) in 1990, I have had the pleasure of working with literally thousands of NYSBA members as they have sought to reach their own balance between family and career goals. As I prepare to refocus my own priorities away from the Bar Association, I'd like to take a moment to share some of what I have learned, and hopefully some of what I will leave behind.

The General Practice Section and the Law Practice Management Committee have served as my home base during my time with NYSBA, and I draw most of my experiences from working with these two groups. In looking back over my years here in Albany, I'd like to refer back to an article that I wrote in the New York State Bar Association *Journal* (1990) and later in a *Technology and Legal Practice Symposium Issue* of the *Syracuse Law Review* (2002). The article suggested that we were in the early, turbulent days of a revolution as significant as any other in human history. I'd also like to weave in thoughts from another popular business book affectionately titled *Geeks & Geezers*[1] by leadership experts Warren G. Bennis and Robert J. Thomas.

Geeks & Geezers started out as a study of cross-generational leadership that looked at two groups of leaders—the youngest and the oldest, the geeks and the geezers. The geeks were young (35 and under); most of them were involved in the now-troubled but still vital New Economy. These young people had distinguished themselves by leading or building organizations at an early age. They had also proven themselves by *leading people* rather than having a good idea or a "killer app."

The geezers in the study are the grandparents of the geeks. The geezers were widely admired for their wisdom and skill. The geezers were all 70 and over, and I had no difficulty recognizing the names and accomplishments of every geezer in the study. I must admit that I did not know many of the younger people who made up the group of geeks. One of the reasons I liked this particular book was because I do not fit comfortably into either one of these two groups. At times, I find myself thinking more as a "geezer," but other times I take on a "geek's" perspective as much as any 35-year old.

General Practitioner and Leadership

1. **Establish a Sense of Urgency**[2]**—**In 2000, I began questioning whether senior management at your firm has a clear understanding of the dangers and opportunities posed by new, unconventional rivals. Gary Hamel and C.K. Prahalad suggest that, in order to begin preparing for the future, you need to ask yourself: "Am I more of a maintenance engineer keeping today's business humming along, or an architect imagining tomorrow's businesses?" [3] I have written quite a bit about the changing business environment and how professional service providers need to realign their products and services in response to these new challenges. Firms that are unaware of what the competition is doing will find themselves unable to participate in the new competitive space.

   I hope I was able to get you to think about these changes, but more importantly, I hope you were able to make some changes to your business that will better position you to take advantage of emerging opportunities.

2. **Listen to the Revolution—**Law firms have traditionally delivered competent legal services to clients who have contracted for those services. The legal profession must do a better job of listening to its customers, because the insights into the customer's individual needs and preferences will become one of the most important business challenges facing lawyers.

   There is no reason for law firms in the future to restrict their core services to traditional "legal self." Although it is important to ask how satisfied current customers are, it is equally important to ask yourself which customers are not even being served.

3. **Reshape the Legal Marketplace—**Lawyers can no longer afford to wait to see what happens. Instead, they need to anticipate "value" as perceived by customers and provide new products or services based on an entirely new business model.

   The challenging opportunities to reshape the direction of the profession and the legal marketplace will need a massive transfusion of talented individuals sensitive to changing consumer demands. Experience is showing that innovation and creativity take place when diverse groups of individuals get together to solve problems. Law firms need to learn from business partners to explore new approaches to problem solving.

There is a great deal of research from the behavioral sciences supporting the notion that people prefer to spend time with people who are similar to themselves. However, if your firm hires only new people whom insiders like and feel comfortable being around, you should expect to continue to rely on ONLY past history, well-developed procedures and proven technologies to grow your business. In these times when most companies are experimenting with new procedures—inventing and testing new technologies to satisfy customer demands, enter new markets and gain an advantage over the competition—hiring new kinds of people will be key for your firm's survival.[4]

4. **Think Outside the Box—**Take a close look at how other professional service providers are incorporating new strategies and techniques to gain competitive advantage. You need to be looking to establish a knowledge management system to collect and organize internal work product so that knowledge gained from previous experiences can be efficiently recycled for new applications. Knowledge management will be the salvation of many firms, while a deathblow to many others.

5. **Maximize Your Time at Bat—**According to Gary Hamel, "Getting to the future first, and being first up on the scoreboard, requires that a law firm learn faster than its rivals about the precise dimensions of customer demand and required product performance." Small firms can be much more responsive to changes in the "marketspace."

   To learn faster, Hamel proposes, "A firm needs to maximize its time at bat, rather than sit on the sidelines waiting for the perfect conditions for the home run attempt." Law firms should begin rewarding staff for experimenting with innovative approaches to client services. Some of these experiments will fail, but others will exceed all expectations.

6. **Develop New Skills and Competencies—**The *new* practice of law must be crafted to anticipate and address what the consumer believes is valuable or quality work. Lawyers will need to reinvent the entire industrial landscape, and new core competencies will be needed to create new benefits. These new technical and entrepreneurial skills will be quite different from what has made their organization (and them personally) so successful, so many of you may need to look beyond the more traditional CLE programs to acquire these new skills and competencies. Law firms will need to look much beyond the top 2 percent of law school graduates to identify the individuals with the leadership skills and abilities needed to address consumer demands. Law firms will find some of these talents beyond the law school itself. Seeking diversity in your law firm is only the tip of this iceberg. If you have not taken major strides yet, get started soon.

7. **Escape the Bonds of Legacy—**The practice of law can no longer be seen as a regulated profession. Law firms will need to bring together widely disparate technologies, manage standards-setting processes and build alliances with suppliers to shape the direction of future legal services. As your law firm continues to measure individual timekeeper productivity and profitability, you need to begin exploring ways to replace hourly billing strategy before your clients start demanding this.

   Law firms need to pay particular attention to what Jeffrey Pfeffer and Robert Sutton refer to as the "smart talk trap."[5] This is a syndrome where inefficient companies hire, reward and promote people for sounding smart rather than making sure that smart things are done. In such organizations, talking somehow becomes an acceptable—even preferred—substitute for actually doing anything. This particular syndrome can wreak havoc with billing hours and client services if left unchecked.

8. **Think Beyond the Numbers—**Compensation or performance-appraisal systems can force individuals to choose between the new vision of the future and their self-interests. If the firm is currently successful in terms of strong billable hours, complacency can be high; so change initiatives can take time. Price pressures created by new e-commerce business models will only accelerate in the years ahead. These changes will affect every sector of the economy, so the legal profession cannot afford to sit back while other professional service providers redefine their own *new* areas of practice.

   According to David Maister, "It is the manager's job to inspire, cajole, exhort, nag, support, critique, praise, encourage, confront and comfort as individual people struggle to live their work lives according to high standards. And, the primary quality required of managers is courage—the courage actually to manage and enforce the standards that are preached."[6]

9. **Make the Internet Your Best Friend—**Sharing knowledge with clients and maintaining closer, richer relationships with them remains a highest

priority for all professional service providers. Although there is nothing new about this strategy, the Internet is providing clients with new tools to acquire knowledge, and using these tools has given clients a much higher level of sophistication.

Because the consumer is driving the direction of future legal services, and the consumer is demanding greater access to information, lawyers will increasingly need to become more comfortable with network technologies in order to be players in shaping future services. This has only accelerated in the past several years.

10. **Create Practice Quality Standards—**Any law firm's competitiveness—and *raison d' etre*—is based on its competencies and capabilities and their relevance to its business environment. As law firms continue to expand alliances and affiliations with outside service providers, the infrastructure will need to change to support the delivery of a consistent, high-quality legal work product. A law firm's infrastructure will need to provide all professionals with the tools to work collaboratively among many offices. It will also require work habits supporting remote collaboration, a mutual understanding of the elements that define work quality and a set of common standards for satisfactory client service.[7] Consumers will continue to demand high standards of quality, so law firms will have to develop the internal processes and controls to assure standards of quality are met.

11. **Implement Knowledge Management Systems—**Firms that are able to help clients make better decisions and enhance their business capabilities will flourish. In an era where information that once was sold on an hourly basis is now available free on the Internet, sophisticated clients are no longer interested in obtaining a lawyer's legal advice—they want a lawyer's assistance in crafting a solution to a business problem. The process has become as important as the outcome.

12. **Form Alliances and Partnerships—**Many corporate clients have become quite sophisticated consumers of legal services, so law firms find themselves forming alliances or partnerships to provide clients with highest quality services. As the managing partner, you will need to produce a working environment that is more tolerant of dissent, more supportive of experimentation and—at the same time—more committed to shared discussion and learning. Increasingly, managing partners have been finding out that, while money plays a part in the discussion to leave or stay, other factors seem to matter more.

    Law firms are beginning to look more seriously at career development, responsibility, professional satisfaction and atmosphere to supplement compensation packages.

Leadership Development and Human Development

As I pointed out at the beginning of this article, much of my work over the past 13 years has been about organizational development, and particularly about the correspondence between healthy individuals and healthy organizations. After a quick review of my writings regarding changes in the profession, let me now turn to the book *Geeks & Geezers* to try to explore how and why some people are able to extract wisdom from experiences and others are not. Bennis and Thomas found that every leader in their study, younger or older, had undergone at least one intense, transformational experience. That transformational experience was at the very heart of becoming a leader. The authors called the experience a *crucible.*[8]

World War II was a crucible for almost all the older male leaders, many of whom were transformed by the overwhelming responsibility of leading other men into battle. The younger people in the study (geeks) shared a variety of personal and professional crucibles. Your crucible seems to allow you to see the world in a new light.

Bennis and Thomas defined yesterday's leaders as "specialists who sought and trusted answers." They describe today's leaders as more generalists who know they need to ask the right questions.[9] The authors report that geeks often strain to grab the brass ring on their first pass rather than waiting a few laps to get comfortable in the saddle. Their impatience is palpable. They go on to report that many of these same young people thirst for "twenty years of experience in two years," while reminding those who labeled them naive that, in reality, many people with twenty years' experience actually had one year of experience repeated twenty times.[10]

Bennis and Thomas found that adaptive capacity, which includes such critical skills as the ability to understand context and to recognize and seize opportunities, is the essential competence of leaders. They also found that adaptive capacity is also the defining competence of everyone who retains his or her ability to live well despite life's inevitable changes and losses.[11] The study found that flexible, resilient people are not repelled by problems; they pounce on them, determined to find solutions to the puzzle, however painful they may be. The ability to find meaning and strength in adversity distinguishes leaders from non-leaders. When terrible things happen, less able people feel singled out and powerless. Leaders find purpose and resolve.[12]

I have always felt that leadership development and human development were closely intertwined. The ability to process new experiences, find their meaning and integrate them into one's life, is the signature skill of leaders and, indeed, of anyone who finds ways to live fully and well. Leaders create meaning out of events and relationships that otherwise devastate non-leaders. I was pleased to see that Bennis and Thomas found that the very factors that make a person a great leader are the ones that make him or her a successful, healthy human being.[13] They are the very factors that allow us to live happy, meaningful lives. I came to the same conclusion in my meetings with lawyers throughout New York state.

I learned that no issue or attitude divided geeks from geezers more dramatically than the importance of balance in their lives. Geeks place far more emphasis on achieving balance in their work, family, and personal lives than did geezers at a comparable age. Balancing family goals and objectives with career and law firm goals will continue to be a managing partner's challenge in the years ahead.

Endnotes

1. Warren G. Bennis and Robert J. Thomas, *Geeks & Geezers: How Era, Values and Defining Moments Shape Leaders* (Harvard Business School Press, 2002).
2. *See* John P. Kotter, *Leading Change* (Harvard Business School Press, 1996), p. 4.
3. Gary Hamel and C.K. Prahalad, *Competing for the Future* (Harvard Business School Press, 1994), p. 2.
4. J. G. March, "Exploration and Exploitation in Organizational Learning," *Organizational Science* 2 (1991), pp. 71-87.
5. J. Pfeffer and R.I. Sutton, "The Smart Talk Trap," *Harvard Business Review*, May-June 1999, pp. 135-42.
6. Telephone interview on "Performance and Pay" between Stephen P. Gallagher, Director of New York State Bar Association's Law Practice Management Committee, and David H. Maister, the widely acknowledged world's leading authority on the management of professional service firms. *Available at* <http://www./pmforum.com/a_telephone_interview.html>.
7. *See* E. Leigh Dance, "Delivering Seamless Service: Best Practices of Multidisciplinary Partnerships," *Law Firm Governance*, Spring 2000, Vol. 4, No. 3, p. 6.
8. *See* Bennis and Thomas, *supra* note 1, at 5. The American Heritage Dictionary describes a crucible as "a place, time or situation characterized by the confluence of powerful intellectual, social, economic or political forces; a severe test of patience or belief; a vessel for melting materials at high temperatures."
9. *See* Bennis and Thomas, *supra* note 1, at 13.
10. *Id*. at 64.
11. *Id*. at 92.
12. *Id*. at 108.
13. *Id*. at xii.

Stephen P. Gallagher, former NYSBA Director
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On July 15, 2003, Stephen Gallagher joined Atticus, Inc. as a Senior Practice Advisor (Executive Coach). Atticus provides instruction and techniques for managing the business aspects of a law practice. Since its inception in 1989, Atticus has helped more than 10,000 clients increase profitability and enjoyment in the practice of law. Steve can be contacted via e-mail at Steve@Atticusonline.com.

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The Case of Lotto Fever!

By Stephen L. Ferraro, CPA, CVA and Robert R. Roback, CPA, CFS

Everyone knows that hitting the lottery can be a life-altering experience. Here's a story about "hitting the lottery" that didn't have such a happy ending (for the insured).

The insured in this case ran a small mom-and-pop grocery store in a local suburb. He had managed to earn a fairly consistent, though modest, income for the last four years. One evening, upon his return home from the store, he received a phone call advising him that his business was on fire. He returned to the scene, only to watch as he lost his livelihood. Fortunately, he had insurance. That's where we came in.

The Fire!

The insured claimed to have locked up the store and headed for home roughly 10 minutes before the blaze broke out. He was alone in the store when he closed. He claimed that everything was fine before he left. Upon returning to the scene and seeing the fire, he proceeded to a bar across the street to have a few drinks. He evidently never spoke to the firemen at the scene.

The insurance company determined that arson was involved in this blaze. As in any such case, suspicion first turns to the business owner. Based on the adjuster's preliminary review of the facts and circumstances, the claim was denied. The insured sued. The insurance company and their attorneys had to prove that the insured was responsible for causing this loss, or they would be forced to pay for the damages.

Bring on the Forensic Accountants!

In every arson case, motive must be established. Typically, the motive is financial in nature. We set out to assess the financial condition of the insured prior to this loss to determine if he may have had a motive to burn his business.

We began with a review of his business operations. We learned that sales had been steadily declining in each of the last four years. In fact, the business had been for sale for over one year, with no potential buyers in sight. Competition from the large chains had moved into the area, contributing to his declining sales. To maintain a fairly steady income level (of about $16,000 per year), the insured was forced to cut his expenses. This meant that the insured had to spend more hours at the store.

Increasing competition, declining sales, longer hours with no end in sight—all these factors contributed to the insured's next move.

We then reviewed his personal financial situation. His income was stagnant. Growth of income was not likely—at least if he continued to rely on the store for income. His personal debts were mounting. He had virtually tapped every conceivable dollar of equity he could get his hands on.

A veteran suffering from Post Traumatic Stress Syndrome and alcohol problems, the insured decided to turn to gambling as the solution to his problems. Lotto would be the answer! Unlike most people, however, the insured had access to his own lottery machines and tickets right in his store. So he began to play.

Every week for nearly four years, the store's lottery ticket sales averaged about $2,500. On a rare occasion, sales would jump to $3,500 or $4,000 in any one week, generally corresponding to a larger lottery jackpot. Suddenly, lottery sales began to escalate. They increased from about $2,500 per week to $9,000 per week! Then up to $16,000! Then $22,000! Then $39,000 in one week! Then the FIRE!

Within a two-month period, weekly sales had grown exponentially! A comparison of sales to jackpot values revealed no correlation. There was, however, a correlation between the fire and the State Lottery Office looking for its lottery sales proceeds!

Initially, the insured did not win much money. In fact, just two months before the fire, he had to use about $12,000 of home equity loan proceeds to pay the Lottery what they were due. This bought the insured more time to strike it rich. About two weeks before the fire, the insured actually won a net of between $3,000 and $4,000! He got more daring. He "acquired" nearly $40,000 worth of lottery tickets just days before the fire. Unfortunately for him, he collected only $20,000 of winnings, for a one-week net loss of $20,000! With no more sources to tap, all his equity fully depleted and facing a payment to the State Lottery Commission of about $20,000, the insured resorted to arson. (By the way, he claimed that the cash due the lottery was inadvertently left in a brown paper bag inside the store and was lost in the fire.)

The evidence was overwhelming. A motive was proven. The insured lost his case; the attorneys and insurance company won theirs.

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Losing Compensation Benefits

By Martin Minkowitz

Ninety years ago our forefathers conceived of a law that would provide workers' compensation benefits to injured employees without the need for them to prove freedom from fault. This "no fault law," which some of us remember was then entitled the "Workman's" Compensation Law, was to assure payment of benefits and provide the basis for medical care and treatment for injuries which arose out of and in the course of the employment. It prohibited an employee from waiving or assigning these benefits or the right to receive them. Generally, that was the state of the law until 1996. In that year the legislature made significant changes to the concept of the inviolate right to benefits.

While the claimant had—and still has—a right to settle a claim in what is called a "lump sum settlement"[1] or "non schedule adjustment" (in a case that was established and where compensation was paid for at least three months), that settlement has specific requirements which have to be met. It can also be reopened if there is a change of condition which was not contemplated at the time of the settlement. The revision to the law[2] in 1996 permits a claimant to settle a claim (whether or not it has been established before the Workers' Compensation Board) which is final and conclusive. Although the Board can withhold approval of the settlement if it finds it to be unfair, unconscionable or the result of an intentional misrepresentation of a material fact, this is a waiver of benefits, but with the consent or approval of the claimant, believed to be in the best interests of a claimant who wants to leave workers' compensation behind and move on.

However, the 1996 statute revision did make a change that would take away the statutory right to benefit without the approval or consent of the claimant. The law essentially denies benefits to a person who attempts to fraudulently get compensation benefits. Prior to 1996, making false statements, which were made to obtain benefits, was a misdemeanor. The section title was changed from "Penalties for false representation" to "Penalties for fraudulent practices"[3] The stakes have been raised to a class-E felony for an intent to defraud by presenting a claim for payment which is known to contain false statements. In addition, the court when it convicts the claimant can order forfeiture of all rights to compensation benefits. It may also direct restitution of any compensation that was fraudulently obtained.

The law also disqualifies a claimant from receiving benefits if the claimant knowingly made a false statement or misrepresentation to get compensation benefits. In this case the Board, not the court, makes the decision to take away the right to benefits. The Board can compel a waiver of the claimant's benefits and also an additional penalty of the amount attributable to the false statement.[4] This is obviously a severe penalty and its motivation to prevent fraud is laudable. However, the Board appears to be moving cautiously in implementing the loss of right to compensation to avoid abuse. In one case where a claimant intentionally misrepresented that she had part-time employment with another employer after the award of benefits, it was held not sufficient to deny benefits to that claimant who was otherwise entitled to benefits. The misrepresentation regarding post-employment earnings did not disqualify the claimant.[5] In another case where the Board terminated the right to compensation payments under Workers' Compensation Law § 15, the court concluded that the statute does not also permit the termination of medical benefits.[6]

However, a claimant's failure to report or disclose a prior problem or injury to his knee was found to be sufficient to cause the Board and the Appellate Court to conclude that he was disqualified from receiving additional wage replacement benefits.[7]

There are not enough reported cases to give any real understanding of what will constitute a waiver, or disqualification, of the right to payment of compensation benefits. Nor is it possible yet to determine if the statute will have any serious impact on losses and reductions in compensation insurance premiums. We can only wait and hope.

Endnotes

1. Workers' Compensation Law § 15 5-b (WCL).
2. WCL § 32.
3. WCL § 114.
4. WCL 114-a.
5. *Naklicki v. St. Chaples Hosp.*, 224 A.D.2d 850 (1996).
6. *Rodriguez v. Burn Brite Metals Co.*, __ A.D.2d __ (2002).
7. *Losurdo v. Asbestos Free Inc.*, __ A.D.2d __ (2003).

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Probate Issues

By Gary R. Mund

1. Will Execution Issues

a. Due execution. Due execution includes proper execution by the testator, acknowledgment and publication to the witnesses, and proper execution by the witnesses.

i. Testator's signature. Every will must ". . . be signed at the end thereof by the testator or, in the name of the testator, by another person in his presence and by his direction . . ." EPTL 3-2.1(a)(1).

• PRACTICE TIP •

A weak or irregular signature, which sometimes raises an issue of testamentary capacity, often can be explained and resolved by affidavit.

ii. Added matter.

(1) Matter appearing after testator's signature. "No effect shall be given to any matter, other than the attestation clause, which follows the signature of the testator . . ." EPTL 3-2.1(a)(1)(B). "The presence of any matter following the testator's signature, appearing on the will at the time of its execution, shall not invalidate such matter preceding the signature as appeared on the will at the time of its execution . . ." EPTL 3-2.1(a)(1)(A).

• PRACTICE TIP •

While a will must be signed by the testator "at the end thereof," this statutory provision should not be construed as a proscription to having a testator's initials (or even signature) in the margin or at the foot of each page of the instrument; this is actually good practice and may help to establish which pages actually form a part of the will in the event this becomes an issue, e.g., in the case of a detached (or unattached) instrument.

(2) Matter added prior to execution. There is no restriction on altering or revising the content of a will at any time prior to execution, even if such alterations are different in appearance from the underlying instrument (e.g., interlineations in pen made on a typewritten instrument).

• PRACTICE TIP •

Last-minute alterations should be avoided if possible; when such alterations are unavoidable, it is wise to have them initialed by the testator and all witnesses, and to acknowledge all pre-execution changes in the attestation clause and self-proving affidavit.

(3) Matter added subsequent to execution. "No effect shall be given to any matter . . . preceding [the signature of the testator] which was added subsequently to the execution of the will." EPTL 3-2.1(a)(1)(B).

• PRACTICE TIP •

Because the text of a will with post-execution alterations necessarily contains extraneous language, the court will typically direct that the decree admitting such will to probate recite the entire text of the will as originally constituted; in effect, the body of the decree becomes the will itself.

iii. Attesting witnesses.

(1) Requirements. A valid will requires at least two attesting witnesses, who shall sign the will after having had the testator declare the instrument to be his or her will (publication), and having witnessed the testator affix his or her signature in their presence, or having had the testator acknowledge a previously-affixed signature to them. EPTL 3-2.1(a)(2),(3),(4).

• PRACTICE TIP •

It is advisable to include a provision for having attesting witnesses print their names, as well as signing, to facilitate identifying and locating them at a later time.

(2) Absent/forgetful/hostile witnesses. It is possible to prove a will with fewer than two witnesses. Circumstances specifically mentioned in the statute are a witness' death, absence from the state, and

incompetency. SCPA 1405. Testimony of forgetful or hostile witnesses may be overcome by the testimony of one or more other witnesses. SCPA 1405(3).

(a) Some witnesses unavailable. Where there are more than two attesting witnesses, there is no requirement dictating which two witnesses must be used to prove the will, and the unavailability of one witness will not alter the proof requirement if two other witnesses are available. Where only one witness is available, the court may dispense with the testimony of a second witness. SCPA 1405; *but see* SCPA 507 regarding testimony taken outside the court.

• PRACTICE TIP •

Typically, the court will require proof of unavailability by affidavit supported by, e.g., a death certificate for a deceased witness. See also Official Form No. P-8.

(b) All witnesses unavailable. If none of the attesting witnesses is available, a will may be admitted to probate by proving the handwriting of both the testator and at least one of the attesting witnesses, together with ". . . such other facts as would be sufficient to prove the will." SCPA 1405(4).

• PRACTICE TIP •

The proofs described in SCPA 1405(4) are generally made by affidavit, and such affidavits may come from any one or more individuals having actual knowledge of the handwritings and, e.g., the mental state of the testator at or about the time of the will execution.

• PRACTICE TIP •

The situation involving one or more unavailable witnesses highlights the usefulness of self-proving (SCPA 1406) affidavits executed immediately following the will execution.

(3) Notary-witness. A notary public is not *per se* disqualified from also acting as an attesting witness; he or she may also qualify as an attesting witness if sufficiently involved in the execution ceremony to meet the requirements mandated of an attesting witness.

(4) Beneficiary-witness. A witness who is a beneficiary under the will, and whose testimony is necessary to prove the will, forfeits his or her legacy, unless the beneficiary is also a distributee, in which case he or she may receive the lesser of his or her legacy or intestate share. EPTL 3-3.2.

• PRACTICE TIP •

In a beneficiary-witness situation, SCPA 1405 (dispensing with attesting witnesses' testimony) cannot be used to avoid utilizing the testimony of the otherwise competent beneficiary-witness.

• PRACTICE TIP •

The rule regarding beneficiary-witnesses does not apply to executor-witnesses; although probably not the best practice, a nominated executor may also act as an attesting witness without penalty.

(5) Ancient documents. An ancient document is defined as a document over 30 years old, taken from a natural place of custody, and of an unsuspicious nature. *In re Brittain,* 54 Misc. 2d 965, 283 N.Y.S.2d 668 (Sur. Ct., Queens Co. 1967); *In re Samelson,* 40 Misc. 2d 623, 243 N.Y.S.2d 345 (Sur. Ct., Kings Co. 1963). As a last resort, if witnesses are unavailable, a qualifying will may be proved as an ancient document and admitted to probate without further proof.

iv. Execution Ceremony.

(1) Publication. The requirement of publication is met by the testator's declaration to each of the attesting witnesses, ". . . at some time during the ceremony or ceremonies of execution and attestation . . . that the instrument to which [the testator's] signature has been affixed is his will. EPTL 3-2.1(a)(3).

(2) Timing. The attesting witnesses need not act together, provided the execution ceremony is completed within a 30-day period. Compliance with the 30-day requirement is rebuttably presumed. EPTL 3-2.1(a)(4).

v. Non-New York instruments. "A will disposing of personal property, wherever situated, or real property situated in this state, made within or without this state by a domiciliary or nondomiciliary thereof, is formally valid [valid as to manner of execution and attestation] and admissible to probate in this state, if it is in writing and signed by the testator, and otherwise executed and attested in accordance with the local law of:

(1) This state;

(2) The jurisdiction in which the will was executed, at the time of execution; or

(3) The jurisdiction in which the testator was domiciled, either at the time of execution or of death." EPTL 3-5.1(c).

• PRACTICE TIP •

This statutory provision is one possible method to probate a will in New York, such as a holographic will, which otherwise does not comply with New York's due execution requirements.

b. Testamentary capacity.

i. Age. The minimum age for executing a will is eighteen. EPTL 3-1.1.

ii. Competency requirements. "Every person . . . of sound mind and memory . . ." may execute a will. EPTL 3-1.1. The elements of testamentary capacity are an understanding of the nature and consequences of executing a will, knowledge of the nature and extent of the property being disposed of, and knowledge of those who would be considered natural objects of the testator's bounty. *In re Slade,* 106 A.D.2d 914, 483 N.Y.S.2d 513 (4th Dep't 1984).

c. Fraud. A fraudulent will is one where the testator has been induced to execute an instrument containing provisions which were made based on intentional misrepresentations of fact. NY PJI 7:60.

d. Undue influence. A will procured through the use of undue influence may be denied probate. "Undue influence" is substantially more than mere influence alone; ". . . it must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist." *Children's Aid Society v. Loveridge,* 70 N.Y. 387 (1877).

• PRACTICE TIP •

Taken together, the issues of due execution, testamentary capacity, fraud, and undue influence are the classic boilerplate bases for objections to probate. See SCPA 1410 regarding additional requirements for filing probate objections.

e. Multiple/sequential instruments/Revocation.

i. Effect of execution date. In general, where more than one testamentary instrument exists, it is the last in time which controls (provided it disposes of the entire estate). *See generally* EPTL 3-4.1.

ii. Will v. codicil. "A codicil is a supplement to a will, either adding to, taking from, or altering its provisions or confirming it in whole or in part by republication, but not totally revoking such will." EPTL 1-2.1. Generally, a codicil does not stand on its own, but only in conjunction with the underlying will it references; revocation of a will automatically revokes all associated codicils. EPTL 3-4.1(c). Revocation of a codicil, however, does not revoke the underlying will, but may have the undesirable effect of creating a partial intestacy. *Osburn v. Rochester Trust & Safe Deposit Co.,* 209 N.Y. 54, 102 N.E. 571 (1913).

iii. Revocation of prior instruments.

(1) Express revocation. A will or any part thereof may be revoked by express revocation language contained in another will, by a separate revocatory instrument executed in the same manner as a will, or by "[a]n act of burning, tearing, cutting, cancellation, obliteration, or other mutilation or destruction . . ." performed by the testator or at his or her direction as specified by statute. EPTL 3-4.1(a).

(2) Implied revocation. A will (or codicil) which is later in time than a prior testamentary instrument revokes the prior instrument to the extent that the dispositions in the later instrument are inconsistent with those in the prior one. Also, alterations to a will or codicil which are extensive, and which affect the testamentary scheme or the incidents of due execution, may constitute an implied revocation. *In re Lavigne*, 79 A.D.2d 975,

aff'd, 52 N.Y.2d 1008, 420 N.E.2d 92 (1983); *In re McCaffrey*, 174 Misc. 162, 20 N.Y.S.2d 178 (1940); *see generally In re Cunnion*, 201 N.Y. 123, 94 N.E. 648 (1911).

iv. Revival. Revocation of a will does not automatically revive a prior will which was previously revoked (EPTL 3-4.6(a)), unless the statutory requirements for revival of the prior instrument are met. EPTL 3-4.6(b).

• PRACTICE TIP •

Although it is possible to revive a revoked will by formal instrument expressly reviving such will, in today's world of ubiquitous computers and word processors, it is far better practice to simply redraw and re-execute the previously revoked instrument.

v. Extrinsic documents. New York does not recognize the doctrine of incorporation by reference, unless specifically authorized by statute. Thus, the provisions of an external document referred to in a will are unenforceable unless the provisions themselves are also included in the will. *Booth v. Baptist Church*, 126 N.Y. 215, 28 N.E. 238 (1891).

(1) Pour-over trusts. A major statutory exception to the incorporation-by-reference rule is where a portion of the estate is left to the trustee of a valid *inter vivos* trust; there is very wide latitude in the nature and terms of the trust, provided only that the trust must actually be in existence at the time of death of the testator. EPTL 3-3.7.

• PRACTICE TIP •

The use of pour-over trusts is widespread and quite common. Care must be exercised, however, to insure that the trust actually exists, is valid, and continues past the date of death of the testator; a will provision which pours assets into a previously terminated inter vivos trust or, if such trust is invalid or non-existent, pursuant to the provisions of said trust prior to its termination, would fail as a prohibited incorporation by reference.

(2) Advisory lists. While extrinsic advisory lists (usually, detailed lists of dispositions of specific property to specific individuals) are often useful and expedient, they are advisory only, and not enforceable unless physically incorporated into the body of the will.

vi. Counterpart (duplicate) original wills. Generally, it is necessary to produce *all* counterparts of a will where the testator has executed more than one original, to rebut a presumption that the testator destroyed a missing original with the intent of revoking it. 2 Warren's Heaton on Surrogate's Courts § 41.13[6][a]; *see In re Staiger,* 243 N.Y. 468, 154 N.E. 312 (1926); *In re Fogarty,* 155 Misc. 727, 281 N.Y.S. 577.

• PRACTICE TIP •

It is never good practice to execute more than one original will. If necessary, photocopies should be made of the signed original after execution.

vii. Jurisdictional requirements. Where multiple testamentary instruments are filed in the court, it is necessary to join:

(1) "Any person designated in the will as beneficiary, executor, trustee or guardian whose rights or interests are adversely affected by any other instrument offered for probate that is later in date of execution or which amends or modifies an instrument offered for probate" (SCPA 1403(c)); and

(2) "Any person designated as beneficiary, executor, trustee or guardian in any other will of the same testator filed in the surrogate's court of the county in which the propounded will is filed whose rights or interests are adversely affected by the instrument offered for probate" (SCPA 1403(d)).

2. Jurisdiction Issues

a Subject matter jurisdiction.

i. Original jurisdiction. The Surrogate's Court has jurisdiction ". . . in all matters relating to estates and the affairs of decedents . . . to try and determine all questions, legal and equitable . . . in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires." SCPA 201(3).

(1) Domiciliary estates. Jurisdiction in domiciliary estates is predicated upon domicile of the decedent in New York at the time of death. Proper venue (which is

not jurisdictional) is in the county of domicile. SCPA 205.

(2) Non-domiciliary estates. Jurisdiction in non-domiciliary estates is discretionary, and predicated upon the existence of decedent's property within the state, or a cause of action for wrongful death against a New York domiciliary. Proper venue is in the county where property is located, or the domicile of the putative defendant; where more than one county is proper, the first court to assert jurisdiction retains it. SCPA 206.

• PRACTICE TIP •

Because the locality of certain types of assets is movable under SCPA 208, any proceeding which relies on such property as the basis for venue would allow for some "forum shopping" among various Surrogate's Courts.

ii. Ancillary jurisdiction. Ancillary jurisdiction in New York relies on the validity of the underlying probate (or comparable) proceeding in the jurisdiction of domicile, coupled with the existence in New York of property upon which the will may operate. SCPA 1602(1).

• PRACTICE TIP •

An ancillary proceeding may only be based upon an original proceeding in the jurisdiction of domicile. Thus, it is not possible to bring an ancillary proceeding based upon a nondomiciliary proceeding in another jurisdiction. Similarly, an ancillary proceeding cannot be brought in the jurisdiction of domicile. In either case, the only recourse would be to commence an original proceeding.

While in an appropriate case the parties (or their counsel) may view the convenience of bringing an original nondomiciliary proceeding as a compelling factor, caution should always be exercised when bringing any such proceeding, to insure that no probatable assets exist in the jurisdiction of domicile. Should any such assets be discovered at a later time, it would then be necessary to commence a duplicate original proceeding in the jurisdiction of domicile, possibly requiring arrangements for the transmittal of an original will (or at least exemplified copies of documents) and other substantial inconveniences.

b. Personal jurisdiction.

i. Traditional jurisdiction.

(1) Necessary parties. The general concept of Surrogate's Court jurisdiction is that the necessary parties to any proceeding are all persons who will or might be adversely affected by the grant of the relief being sought. The class of necessary parties in a probate proceeding is, in most cases, fixed by statute. SCPA 1403(1); SCPA 1123(2)(i)(2); SCPA 1215(1)(b); SCPA 316.

(2) Effect of pre-/post-decease. The class of necessary parties is fixed at the instant of death of the decedent. Thus, the issue of a predeceased individual who otherwise would have been a distributee is resolved by statute. EPTL 4-1.1.

In the case of a post-decease, since the post-deceased party was living at the time of death of the decedent, the necessary party now becomes the estate of the post-deceased party. This is not necessarily the party's issue, but will depend upon who constitutes the class of the post-deceased's distributees, whether the post-deceased had a will, and whether any fiduciary has been appointed in the post-deceased's estate.

• PRACTICE TIP •

Joining the estate of a post-deceased party is generally accomplished by joining the fiduciary of the post-deceased's estate, if one has been appointed and does not have any conflict of interest. Absent that, it would be necessary to join the distributees of the post-deceased and, if he or she had a will not yet admitted to probate, the legatees named in that will as well.

(3) Methods.

(a) Adult, competent parties. Jurisdiction over adult, competent parties may be obtained by acknowledged waiver and consent (SCPA 401(4)), by general appearance (SCPA 401(2)), or by service of citation (SCPA 305-312). Service of citation generally is made by personal delivery within the state, and by registered or certified mail, return receipt requested, or special mail service without the state. SCPA

307(1),(2). Other methods of service may be prescribed by the court when the foregoing methods are unsuccessful. SCPA 307(3).

• PRACTICE TIP •

When in-state service by personal delivery cannot be effected, the court will, on proper application, typically order substituted service ("delivery and mail" or "nail and mail"). When out-of-state service by registered, certified, or special mail cannot be effected, the court will often allow service by regular first-class mailing, provided a reasonable showing can be made that the respondent does, in fact, receive mail at the given address. It is important to remember that any alternative form of service other than personal delivery or mailing, as set forth in SCPA 307(1) and (2), requires a court order in advance of the service.

(b) Persons under disability. "Person under disability" is a statutorily defined term. SCPA 103(40). The manner of service will depend on the nature of the disability: service upon an infant is made upon the parent, guardian, or adult person responsible for his or her care (SCPA 307(4)); service upon an incompetent or incapacitated person is made pursuant to CPLR 309(b) and (c) (SCPA 307(5)); service upon unknowns or persons whose whereabouts are unknown is usually made by publication (SCPA 307(3)(a)); service upon a prisoner typically is made upon the prisoner individually and upon the warden of the prison facility.

• PRACTICE TIP •

It is always advisable to determine if the provisions of virtual representation (SCPA 315) can apply with respect to a person under disability, thus completely avoiding the necessity of separately acquiring jurisdiction over such person.

ii. Multiple testamentary instruments. Because of the need to join potentially adversely affected parties (SCPA 1403(c),(d)), all filed instruments (wills and codicils) must be carefully reviewed to determine their interrelationship and their impact on the interests of the persons interested in the estate.

• PRACTICE TIP •

Where a will is accompanied by multiple codicils, determining their interaction for the purpose of establishing personal jurisdiction can quickly become an overwhelming, nightmarish task. Moreover, all persons adversely affected will need to be joined as parties. For this reason, it is recommended that codicils be kept to a minimum: one, or at most, two, relating to any single will. Executing a totally new will and avoiding the use of codicils altogether, while a bit more effort at first, usually results in far less effort, inconvenience, and expense at the time of probate.

iii. Absent/unknown distributees.

(1) Due diligence. The basis for an order directing service by publication is a showing (by affidavit) of the exercise of due diligence in attempting to identify and/or locate unknown or missing distributees. The search for distributees need not be exhaustive, but should be commensurate with the size of the estate, the nature and value of the interests sought to be joined, and the proximity or remoteness of the kinship. *See generally* 22 N.Y.C.R.R. § 207.16(d).

• PRACTICE TIP •

It is the quality of the search, not the quantity of papers filed, which helps to determine whether a sufficient amount of diligence has been exercised. Reporting that five responses, yielding no information, have been received from organizations that the decedent dealt with on a regular basis is far more valuable than reporting that no responses at all have been received from 50 randomly-polled organizations, having no relationship with the decedent or his or her family.

(2) Publication. An order of publication will be granted once there is a showing that parties are either unknown or cannot be located, despite the exercise of due diligence. It is a "last resort" technique to afford jurisdictional notice to necessary parties.

• PRACTICE TIP •

The first publication must be made within 30 days after the order is granted (CPLR 316(c)); otherwise the order is stale and a supplemental order must be submitted.

• PRACTICE TIP •

It is tempting to seek to publish early in the proceeding because of the long time frame (once a week for four weeks) involved. Nevertheless, the wiser course is to resist this temptation and delay publication until all other jurisdiction is complete; if it is discovered that an additional party whose whereabouts were believed to be known cannot be located, it is then a simple matter to incorporate that party into the affidavit of due diligence and add him or her to the order of publication. Had the same discovery been made after publication had already been completed, there would be no alternative but to publish again, a time-consuming, costly, and totally unnecessary exercise.

(3) Guardian *ad litem*. The appointment of a guardian *ad litem* to protect the interests of a person under disability is generally required. SCPA 402(2). Several notable exceptions, where the court may dispense with such appointment in probate, are when:

(a) The proceeding is uncontested and the person under disability receives a share under the will which is greater than or equal to his or her intestate share (SCPA 403(3)(a));

(b) The Public Administrator is joined on behalf of the person under disability (SCPA 403(3)(c));

(c) A surviving spouse receives the entire estate under the will, and total probate assets do not exceed $50,000, provided that the letters testamentary limit the collection of assets to an aggregate of $50,000 (SCPA 403(3)(d)).

iv. Absent/unknown/uncertain distributee class.

(1) **Status issues.** In addition to persons whose identities or whereabouts are unknown, certain status issues will raise jurisdictional questions which must be addressed. Examples of such issues would be a spouse not in good standing (EPTL 5-1.2), non-marital issue (EPTL 4-1.2), putative adopteds (EPTL 2-1.3), and parental disqualification (EPTL 4-1.4).

(2) **Joinder requirements.** Status relating to *in personam* jurisdiction may be a threshold issue, possibly requiring a hearing and determination in order to complete the probate proceeding. Often, the more expedient solution is simply to join all potential distributees as parties, irrespective of whether or not they actually have such status.

In the event uncertain status affects all members of a putative distributee class, it becomes necessary to join the next presumptive class. Thus, for example, where a decedent is survived only by non-marital or all missing children, it would be necessary to join the parents, if any, or the siblings and their issue, if any, or whichever subsequent class has at least one known member whose status is certain.

• PRACTICE TIP •

Where objections to probate are filed by a distributee having questionable status, there is a dilemma as to whether the status issue should be resolved initially, or the matter simply proceed as a contested probate. While the specific facts will often dictate which course will be followed, it is vital to insure that jurisdiction is complete before any action is taken, so that all necessary parties will be bound by the ultimate result.

v. Other prior/concurrent proceedings.

(1) Probate of prior will. Upon application, the court will vacate a decree probating an earlier will in the event a later will is filed and sought to be probated. *See* SCPA 209(1). In the proceeding on the later will, jurisdiction would likely be required over any person having a pecuniary interest under the earlier (previously probated) will. *See* SCPA 1403(d).

(2) Probate of same will. Cross-proceedings to probate the same will usually result from a dispute over who will be granted letters. In general, a showing of ineligibility must be made to deprive a person who has priority of letters. SCPA 707; *see also* SCPA 711; SCPA 719. *See generally* SCPA 1418 and 1419 regarding priority to receive letters of administration c.t.a.

(3) Probate of later will. Because it is the last valid will which controls the disposition

of the estate, the probate proceeding with respect to the last will has priority over other probate proceedings.

• PRACTICE TIP •

In general, the courts will not consider two probate proceedings for two different wills concurrently. If there is a pending proceeding and an earlier instrument is proffered, it will be received by the court for filing only; the court ordinarily will not permit a probate proceeding for that instrument to be filed at that time. Note, however, that the filing of the earlier instrument might change the jurisdictional requirements in the pending probate of the later instrument, necessitating the amendment of that probate petition and the acquiring of any additional jurisdiction.

In the event a probate proceeding is sought to be filed for a will which is later in date than that of the pending proceeding, the new proceeding will be accepted for filing, and the prior proceeding will be suspended pending the outcome of the new proceeding. Here, again, the earlier will is considered to be a will on file for jurisdictional purposes.

(4) Administration or Voluntary Administration. As with a probate proceeding for an earlier will (*supra*), a pending administration or voluntary administration proceeding will be suspended, and a completed administration or voluntary administration proceeding will be vacated, upon the filing of a probate proceeding with a will for the same decedent. Upon admission of the will to probate, the prior letters of administration, if any, must be revoked in the probate decree. SCPA 1413.

3. Fiduciary Issues

a. Ineligible fiduciaries. "Letters may issue to a natural person or to a person authorized by law to be a fiduciary except as follows:

"1. Persons ineligible

"(a) an infant

"(b) an incompetent

"(c) a non-domiciliary alien except one who is a foreign guardian as provided in subdivision four of section one thousand seven hundred sixteen of [the EPTL], or one who shall serve with one or more co-fiduciaries, at least one of whom is resident in this state. Any appointment of a non-domiciliary alien fiduciary or a New York resident fiduciary [under this provision is] made by the court in its discretion.

"(d) a felon

"(e) one who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office.

"2. Persons ineligible in court's discretion. The court may declare ineligible to act as fiduciary a person unable to read and write the English language."

SCPA 707.

• PRACTICE TIP •

The procedure set forth in subdivision (1)(c) may be used where all nominated executors are non-domiciliary aliens. However, the application must then be one for administration c.t.a., since letters testamentary can only issue to executors named in the will.

• PRACTICE TIP •

Frequently, when the proposed fiduciary is alleged to be a resident alien, the court will require proof of resident alien status ("green card") as an indication of the intent and ability to legally remain a New York resident, prior to the issuance of letters.

• PRACTICE TIP •

A person who is ineligible to receive letters is not rendered eligible by a nomination in the will. Therefore, care must be exercised in the original nomination when the will is drafted.

b. Missing fiduciaries. In the event the nominated executor is not the petitioner, he or she must be joined as a party, by whatever method is available. SCPA 1403(1)(b); *see* SCPA 1416(2).

c. Recalcitrant fiduciaries. A fiduciary who will neither qualify nor renounce may be excluded and deemed to have renounced in accordance with the mechanism set forth in SCPA 1416.

• PRACTICE TIP •

An application under SCPA 1416 should not be confused with an application to declare a fiduciary ineligible to serve under SCPA 707; the latter determination by the court constitutes a statutory bar to serving as a fiduciary, while the former is simply a deemed renunciation which, if the nominated executor wishes, may be retracted under SCPA 1417.

• PRACTICE TIP •

If it is anticipated at the outset that the nominated executor will fail to qualify or renounce, the court may entertain an application for SCPA 1416 relief in the original petition, thus obviating the necessity to serve and file separate orders for such relief after the conclusion of the probate proceeding.

d. Co-fiduciaries.

i. Named in will. All executors and other fiduciaries have a right to serve in the order of priority set forth in the will, unless ineligible (SCPA 707) or renouncing, or deemed to have renounced (SCPA 1416). *See* SCPA 1414.

ii. By designation. A person designated as co-fiduciary by a nondomiciliary alien may be appointed in the discretion of the court (SCPA 707(1)(c)); one designated pursuant to a power contained in the will (SCPA 1414(4)) may be appointed subject to the authority granted by, and any contingency specified in the will (SCPA 1414(3)).

e. Qualification problems.

i. Oath and Designation/Domicile. Every fiduciary must execute an acknowledged designation and, unless exempted (e.g., a trust company), an oath. Incident to the fiduciary's qualification is a statement setting forth the fiduciary's domiciliary address. SCPA 708(1),(2); *see* SCPA 708(4).

• PRACTICE TIP •

The address given as the domicile of the fiduciary must be the fiduciary's actual domicile, not an office address or a post office box. In the case of a domiciliary alien, the domicile must be a New York address.

ii. Bond. An executor's bond is normally waived unless required by the will. SCPA 710(1). A trustee's bond (or bond of an executor acting as trustee) is required unless waived in the will. The amount of the bond for each fiduciary capacity is set forth in SCPA 801.

• PRACTICE TIP •

Particular care should be exercised in drafting a will, to insure that bond exoneration clauses are clear, correct, and unequivocal.

f. Limited letters. In appropriate circumstances, the court may limit letters based on particular circumstances, such as difficulty or inability to fix a bond, or for the protection of certain assets not susceptible to bonding.

• PRACTICE TIP •

In recent years, the courts have shown increasing inclination to limit letters testamentary, where a cause of action for wrongful death is or may be brought, to commencement and prosecution, a practice formerly employed only with letters of administration. This necessitates the filing of a "compromise and account," a separate proceeding, at the conclusion of the litigation, for the purpose of having the court approve any settlement and grant additional authority to collect and distribute proceeds.

4. Domicile Issues

a. Effect of domicile. The practical difference between a domiciliary and non-domiciliary estate, aside from the necessity of showing sufficient assets in the jurisdiction to persuade the court to invoke its jurisdiction in a non-domiciliary estate, is the need to join the state tax commission in the case of a non-domiciliary decedent. SCPA 1403(1)(g).

b. Establishing domicile. Because domicile is based on intent, and it is not possible to inquire directly as to the intent of the decedent, his or her intent must be gleaned from secondary evidence, such as voting records, motor vehicle registration, duration of physical presence, and nature and extent of financial and community ties. SCPA 103(15); *In re Newcomb*, 192 N.Y. 238, 84 N.E. 950 (1908); *In re Urdang*, 194 A.D.2d 615, 599 N.Y.S.2d 60 (2d Dep't 1993).

5. Miscellaneous "Gotchas"

a. Lost will. A will may be admitted to probate even if the original instrument has been lost or destroyed, if the petitioner establishes that the will was not revoked and was duly executed, and that all provisions are "clearly and distinctly proved" by each of at least two witnesses or by a copy or draft proved to be true and complete. SCPA 1407. Note that an instrument last in the possession of the testator which cannot be found is presumed to have been destroyed by the testator with the intent of revoking it. *In re Danziger*, 57 Misc. 2d 1014, 293 N.Y.S.2d 979 (Sur. Ct., Nassau Co. 1968); *In re Gray*, 143 A.D.2d 751, 533 N.Y.S.2d 459 (2d Dep't 1988). This presumption may be overcome by a showing of contrary circumstances. *In re Mittelstaedt*, 278 A.D. 231, 104 N.Y.S.2d 378 (1st Dep't 1951), *appeal dismissed*, 304 N.Y. 795, 109 N.E.2d 86 (1952). No such presumption attaches where the instrument was not in the testator's possession. *In re Bly*, 281 A.D. 769, 118 N.Y.S.2d 340 (2d Dep't 1953).

b. Joint wills. The execution of a joint will may, in some circumstances, give rise to the presumption, after the first joint testator dies, that the instrument constitutes a contract to execute a will, essentially making it irrevocable by the surviving testator. EPTL 13-2.1(b).

• PRACTICE TIP •

The execution of joint wills should be considered carefully, to avoid any unintended results.

c. Aliases. When a decedent is known by different names, an asset may be uncollectible if it is held in a name used by the decedent which is not reflected in the fiduciary's letters.

• PRACTICE TIP •

When filing a probate proceeding, be sure to include all aliases used by the decedent as a/k/a's on all filed papers.

d. Distribution scheme.

   i. Per capita. "A disposition or distribution of property is per capita when it is made to persons, each of whom is to take in his own right an equal portion of such property." EPTL 1-2.11.

   ii. Per stirpes. "A per stirpes disposition or distribution of property is made to persons who take as issue of a deceased ancestor in the following manner:

   > "The property so passing is divided into as many equal shares as there are (i) surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and (ii) deceased issue in the same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. The share of a deceased issue in such nearest generation who left surviving issue shall be distributed in the same manner as to such issue." EPTL 1-2.14.

   iii. By representation. "By representation means a disposition or distribution of property made in the following manner to persons who take as issue of a deceased ancestor:

   > "The property so passing is divided into as many equal shares as there are (i) surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and (ii) deceased issue in the same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent, without issue." EPTL 1-2.16.

• PRACTICE TIP •

See Appendix A for a visual representation of these mind-boggling statutory definitions. A picture is worth a thousand words.

e. Anti-lapse. Unless the will provides otherwise, when a testamentary disposition is made to issue or to brothers and sisters, either individually or as a class, who have predeceased the testator, the predeceased beneficiaries' shares do not lapse, but vest in their respective surviving issue, per stirpes if the will was executed prior to September 1, 1992, and by representation if the will was executed on or after September 1, 1992. EPTL 3-3.3.

• PRACTICE TIP •

Any will provision which overrides the anti-lapse statute should be very clear as to exactly who takes the property in the event of a gift-over.

f. Disposition of non-probate property. Any attempt to dispose of non-probate property (property passing by operation of law, such as joint property or insurance policies with named beneficiaries) by will is an exercise in futility. A limited exception exists in the case of "Totten trusts" (bank accounts in trust form), provided the will contains ". . . an express direction concerning such trust account, which must be described in the will as being in trust for a named beneficiary in a named financial institution." EPTL 7-5.2(2). *See also* EPTL 7-5.2(4),(5).

g. Powers of appointment. Where a will purports to exercise a power of appointment (EPTL 10-3.1(a)), the default takers under the instrument creating the power must be joined as necessary parties. SCPA 1403(1)(e).

• PRACTICE TIP •

Many courts will require production of the instrument creating the power, in order to determine whether the appropriate jurisdictional parties have been listed in the petition.

h. *In terrorem* clauses. In New York, a will provision designed to prevent a disposition from taking effect in case the will is contested by the beneficiary (an "*in terrorem* clause") is effective, subject to certain statutory limitations set forth in EPTL 3-3.5.

• PRACTICE TIP •

As a practical matter, in terrorem *clauses are of limited value; in a will which completely disinherits a distributee, an* in terrorem *clause will be useless to prevent a will contest by that distributee—he or she stands to lose nothing by the contest. The* in terrorem *clause would only be effective in that case if the testator had left a bequest to that distributee of greater than mere nominal value, something most testators probably would be unwilling to do.*

i. Attorney-fiduciary considerations.

i. SCPA 2307-a. "When an attorney prepares a will to be proved in the courts of this state and such attorney or a then affiliated attorney is therein an executor-designee, the testator shall be informed prior to the execution of the will that:

"(a) subject to limited statutory exceptions, any person, including an attorney, is eligible to serve as an executor;

"(b) absent an agreement to the contrary, any person, including an attorney, who serves as an executor is entitled to receive an executor's statutory commissions; and

"(c) if such attorney or an affiliated attorney renders legal services in connection with the executor's official duties, such attorney or a then affiliated attorney is entitled to receive just and reasonable compensation for such legal services, in addition to the executor's statutory commissions." SCPA 2307-a(1).

The statute requires acknowledgment of these disclosure provisions in a written statement executed before at least one independent witness. SCPA 2307-a(2). The penalty for failure to obtain such written acknowledgment is reduction of the attorney-executor's commissions to one-half the statutory rate. SCPA 2307-a(5).

• PRACTICE TIP •

It is important to note that this statute applies to the estates of all decedents dying after December 31, 1996, irrespective of the date of the will. Thus, it has significant retroactive effect, and an attorney who has drafted any wills in the past which may be subject to these provisions would be well advised to obtain appropriate disclosure statements at this time.

ii. Court Rules 16(e); 52 (22 N.Y.C.R.R. § 207.16(e); § 207.52). In conjunction with SCPA 2307-a, a nominated attorney-fiduciary is required to file a statement disclosing that the fiduciary is an attorney, whether the fiduciary or his or her law firm will act as counsel, and whether or not the attorney was the draftsperson of the propounded will. 22 N.Y.C.R.R. § 207.16(e). Additionally, an attorney-fiduciary acting as counsel is required to file an affidavit within 12 months from the issuance of letters (24 months if the estate files a federal estate tax return) disclosing the total commissions paid or to be paid to the attorney, and the total attorneys' fees paid or to be paid to the attorney. 22 N.Y.C.R.R. § 207.52.

j. *Putnam/Weinstock/Satterlee* issues. If a person having a confidential relationship with the testator or a member of that person's family receives a legacy under the will, there may be an inference of undue influence by such legatee. Such confidential relationship may be with the testator's attorney (*In re Putnam*, 257 N.Y. 140, 177 N.E. 399 (1931), or with any other person (*In re Satterlee*, 281 A.D. 251, 119 N.Y.S.2d 309 (1st Dep't 1953) (substantial bequests to testator's lawyer and physician); *In re Collins*, 124 A.D.2d 48, 510 N.Y.S.2d 940 (4th Dep't 1987) (financial advisor-draftsman). In all such cases, the legatee, even in an uncontested proceeding, will be called upon to explain the circumstances of such bequest. Such explanation may take the form of an affidavit, an *ex parte* hearing, or even an investigation by the public administrator, depending upon the situation and the local court practice.

• PRACTICE TIP •

To prevent delay in the probate proceeding, it is best in these situations to have the will drafted by an independent, disinterested lawyer.

Gary R. Mund is the Probate Clerk of Kings County Surrogate's Court, Brooklyn, New York, and a member of this Section's Expanded Executive Committee.

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Special Report on the Separate Account Rule for Beneficiaries of IRA Accounts

By Seymour Goldberg

Many IRA owners have multiple nonspouse beneficiaries of their IRA accounts. It is important that attorneys, accountants and financial planners become aware of the IRS distribution rules that apply after the IRA owner passes away.

It is important that the nonspouse beneficiaries act in a timely manner in order to satisfy the separate account rules that are reflected in the final regulations at 1.401(a)(9)-8, Q & A-2 and Q & A-3.

The reason that the separate account rule is important is the fact that each beneficiary after the death of the IRA owner may then use his or her life expectancy in determining the required minimum distributions from his or her pro rata share of the decedent's IRA account.

According to the preamble to the final regulations, the separate accounts with different beneficiaries of the IRA can be established at any time, either before or after the IRA owner's required beginning date. However, according to the IRS final regulations at 1.401(a)(9)-8, Q & A-2(a)(2), a separate account must be established no later than the last day of the year following the calendar year of the IRA owner's death in order for each beneficiary to use his or her respective life expectancy for minimum distribution purposes.

Practitioner tip:

If the separate accounts are established after the last day of the year following the IRA owner's death, then each beneficiary may not use his or her respective life expectancy for minimum distribution purposes. Instead, each beneficiary must receive required minimum distributions based upon the oldest beneficiary's life expectancy. This can create serious problems if one of the beneficiaries is a charity or the IRA owner's estate.

The IRS final regulations at 1.401(a)(9)-8, Q & A-2(a)(2) further provide in relevant part as follows:

> If the [IRA owner's account] is [timely] divided into separate accounts and the beneficiaries with respect to one separate account differ from the beneficiaries with respect to the other separate accounts of the [IRA owner], for years subsequent to the calendar year containing the date on which the separate accounts were established, or date of death if later, such separate account [of the IRA owner] is not aggregated with the other separate accounts [of the IRA owner] in order to determine whether the distributions from such separate account under the [IRA] satisfy section 401(a)(9). Instead, the rules in section 401(a)(9) separately apply to such separate account under the [IRA]. However, the applicable distribution period for each separate account is determined disregarding the other beneficiaries of the [IRA owner] only if the separate account is established on a date no later than the last day of the year following the calendar year of the [IRA owner's] death.

According to the IRS, the separate account rules become operative in the calendar year after the separate accounts are established. However, the separate accounts must be timely established in order to implement the separate account rule.

The author of this report was involved in obtaining two IRS letter rulings with respect to the implementation of the separate account rules under the IRS final regulations. See IRS letter rulings 200248030 and 200248031, both dated September 3, 2002.

In order to implement the separate account rule described in this special report, the following steps should be taken:

1. Upon the death of the IRA owner, the advisor should determine whether or not there are multiple beneficiaries of the deceased IRA owner's account.
2. If there are multiple beneficiaries of the IRA owner's account, then someone should be given the responsibility with respect to implementing the separate account rule.

Practitioner tip:

Often the beneficiaries are not advised as to the mechanics of timely implementing the separate account rule. Since an IRA generally is not a probate asset, the attorney for the estate may assume that the decedent's financial consultant will correctly handle the post-death retirement distribution issues. This may or may not be the case. There are currently a number of civil disputes pending against financial planners who have given the beneficiaries improper post-death retirement distribution advice.

3. If the beneficiaries of the decedent's IRA decide to implement the separate account rule, then a competent professional advisor should give the beneficiaries specific instructions on what the beneficiaries should do and when.

4. The following approach should be considered in implementing the separate account rule:

   a. The attorney or financial planner should meet with the beneficiaries and advise them to establish separate accounts with respect to the deceased IRA owner's account. If a meeting is not possible, then written instructions should be given to each beneficiary as to what should be done and when.

   b. Each nonspouse beneficiary of the IRA should be told that a nonspouse beneficiary may not roll over an inherited IRA into his or her name.

Practitioner tip:

Each nonspouse beneficiary should be told that a nonspouse beneficiary must have the IRA maintained in the deceased IRA owner's name for the beneficiary's respective benefit.

If the IRA is erroneously retitled in the name of a nonspouse beneficiary, then this improper IRA account is considered to be fully and immediately taxable to the nonspouse beneficiary and is also subject to a 6% nondeductible excise tax under IRC Sec. 4973 (excess contribution) to the nonspouse beneficiary. This excise tax is a cumulative excise tax and accrues each year until corrected. There are a number of IRS letter rulings on this issue. Unfortunately, this issue can happen when the beneficiaries deal with a consultant who is not aware of the IRS distribution rules and the IRS letter rulings.

5. In addition to the proper titling of the decedent's IRA, another IRS rule must be satisfied with respect to the separate account rule if the decedent had multiple beneficiaries of his or her IRA account. The final regulations at 1.401(a)(9)-8, Q & A-3 discuss the pro rata rule. This final regulation provides in essence as follows:

> The separate accounting must allocate all post-death investment gains and losses . . . for the period prior to the establishment of the separate accounts on a pro rata basis in a reasonable and consistent manner among the separate accounts. However, once the separate accounts are actually established, the separate accounting can provide for separate investments for each separate account under which gains and losses from the investment of the account are only allocated to that account, or investment gains or losses can continue to be allocated among the separate accounts on a pro rata basis. A separate accounting must allocate any post-death distribution to the separate account of the beneficiary receiving that distribution.

Practitioner tip:

If a partial distribution is made after the death of the IRA owner and prior to implementing the separate account rule, then any post-death distributions must also satisfy the pro rata rule.

Application of the Separate Account Rule

The best way to illustrate the separate account rules is to use examples.

The following examples should help you in implementing the separate account rule:

Example 1

Assume that John, age 75, dies on March 1, 2003. His required minimum distribution for the calendar year 2003 is $20,000. John failed to receive this amount prior to the date of his death. The beneficiaries of his IRA are Jack, age 20 in the calendar year 2003 and Jill, age 30 in the calendar year 2003. Both Jack and Jill are equal beneficiaries of John's IRA.

Question: Who should receive the $20,000 required minimum distribution from John's IRA for the calendar year 2003?

Answer: Jack should receive $10,000 and Jill should receive $10,000 in order to satisfy the pro rata rule if the distribution is made prior to the implementation of the separate account rule.

Example 2

Assume the facts in Example 1. Further assume that Jack would like to receive $15,000 in July 2003 prior to the implementation of the separate account rule. However, Jill would only like to receive $10,000 prior to the implementation of the separate account rule.

Question: Will this discrepancy create a problem in implementing the separate account rule at a later date?

Answer: In the absence of an IRS letter ruling to the contrary, it appears that the separate account rule will be violated since the pro rata rule is breached.

Example 3

Assume the facts in Example 1. Further assume that each beneficiary receives $10,000 during August 2003.

Question: By what date should the separate account rule be implemented?

Answer: The separate account rule should be implemented by December 31, 2003, if possible. However, in no event may it be implemented after December 31, 2004.

Example 4

Assume the facts in Example 3. Further assume that the beneficiaries would like to implement the separate account rule by December 31, 2003.

Question: How is the separate account rule implemented?

Answer: The beneficiaries should give written instructions to the financial institution to divide Jack's IRA into two equal inherited IRAs which should read as follows:

John deceased IRA f/b/o Jack (Jack's SS # should be used on the account)	John deceased IRA f/b/o Jill (Jill's SS # should be used on the account)

Example 5

Assume the facts in Example 4. Further assume that the separate account rule was implemented on December 15, 2003. Further assume that each separate IRA account had a balance of $500,000 as of December 31, 2003.

Question: What is the amount of the required minimum distribution that Jack and Jill must receive from each separate IRA account during the calendar year 2004?

Answer: Jack must receive a required minimum distribution of $8,051.53 in 2004 from John's deceased IRA f/b/o Jack. This is based upon the following calculation:

(1)	John's deceased IRA account balance as of December 31, 2003.	$500,000
(2)	Divided by Jack's single life expectancy of 62.1 as determined in the year after John's death. In 2004, Jack is age 21.	62.1
(3)	Result (1 + 2)	$ 8,051.53

In the year after John's death, Jack is age 21. The single life expectancy of an individual age 21 is 62.1 years.

Jill must receive a required minimum distribution of $9,541.98 in 2004 from John's deceased IRA f/b/o Jill. This is based upon the following calculation:

(1)	John's deceased IRA account balance as of December 31, 2003.	$ 500,000
(2)	Divided by Jill's single life expectancy determined in the year of John's death. In 2004, Jill is age 31.	52.4
(3)	Result (1 + 2)	$ 9,541.98

In the year after John's death, Jill is age 31. The single life expectancy of an individual age 31 is 52.4 years.

Example 6

Assume the facts in Example 5.

Question: In determining the required minimum distribution for the calendar year 2005, what calculation formula must Jack and Jill use?

Answer: Jack will determine the account balance of John's deceased IRA f/b/o Jack as of December 31, 2004 and divide that amount by 61.1 years in order to determine his required minimum distribution for the calendar year 2005. Jill will determine the account balance of John's deceased IRA f/b/o Jill as of December 31, 2004 and divide that amount by 51.4 years in order to determine her required minimum distribution for the calendar year 2005.

Practitioner tip:

Jack and Jill will reduce the term-certain period that is allocable to each of them by one for each year after 2005 as well.

Example 7

Assume the facts in Example 3. Further assume that the separate account rule was implemented in February 2004. Further assume that John's deceased IRA account as of December 31, 2003 amounted to $1,000,000.

Question: What is the amount of the required minimum distribution that Jack and Jill must each receive during the calendar year 2004?

Answer: Jack and Jill must each receive a required minimum distribution of $9,541.98 for the calendar year 2004. This is calculated as follows:

(1)	John's deceased IRA account balance as of December 31, 2003.	$ 1,000,000

(2) Divided by Jill's single life expectancy determined in the year after John's death. 52.4

(3) Result (1) 2) $ 19,083.96

Jack and Jill will each receive 50% of $19,083.96 or $9,541.98 as his or her required minimum distribution for the calendar year 2004. Since the separate account rule was not implemented by December 31, 2003, then the life expectancy that must be used in determining the required minimum distributions for the calendar year 2004 is based upon the life expectancy of the oldest beneficiary. The life expectancy of the oldest beneficiary is determined in the calendar year after John's year of death. In the calendar year 2004, Jill is age 31 and her life expectancy is 52.4 years.

Example 8

Assume the facts in Example 7.

Question: In determining the required minimum distribution for the calendar year 2005, what calculation formula must Jack and Jill use?

Answer: Jack will determine the account balance of John's deceased IRA f/b/o Jack as of December 31, 2004 and divide that amount by 61.1 years in order to determine his required minimum distribution for the calendar year 2005. Jill will determine the account balance of John's deceased IRA f/b/o Jill as of December 31, 2004 and divide that amount by 51.4 years in order to determine her required minimum distribution for the calendar year 2005.

Practitioner tip:

Jack and Jill will reduce the term-certain period that is allocable to each of them by one for each year after 2005 as well.

Example 9

Assume the facts in Example 8 except that the separate accounts are established in June 2005.

Question: Has the separate account rule been timely implemented?

Answer: No. According to the final regulations under 1.401(a)(9)-8, Q & A-2(a)(2), the separate account rule must be timely implemented by no later than the last day of the year following the calendar year of the IRA owner's death. Therefore, the separate account rule must be timely implemented by December 31, 2004 since John died in 2003.

Example 10

Assume the facts in Example 9.

Question: In determining the required minimum distribution for the calendar year 2005, what calculation formula must Jack and Jill use?

Answer: The account balance of John's deceased IRA is determined as of December 31, 2004 and is divided by 51.4 years. That amount is the aggregate amount of the required minimum distribution for the calendar year 2005. Jack and Jill would each receive 50% of that amount as their respective share of the aggregate distribution.

Practitioner tip:

Since the separate account rule was not timely implemented by December 31, 2004, the required minimum distributions from John's deceased IRA must always be based upon the life expectancy of the oldest beneficiary of John's IRA. Since Jill is the oldest beneficiary and had a life expectancy of 52.4 years in the calendar year 2004, then that life expectancy is reduced by one for each year thereafter for both Jack and Jill. In 2005, the remaining life expectancy used by both Jack and Jill is therefore 51.4 years. They may, of course, accelerate distributions from time to time. This result would not change even if Jack and Jill separate John's IRA at a later date. Any action taken by Jack and Jill after December 31, 2004 will not help Jack since he must use Jill's life expectancy.

This article originally appeared in the Spring 2003 issue of the *Trusts and Estates Law Section Newsletter* published by the New York State Bar Association.

Letters to the Editor

This begins a new column, which we are calling "Letters to the Editors." We have decided that those who wish to comment about any of the material contained in this publication should have a public platform to do so. It is also for those who would just like to provide an informative short statement about some topic of interest—and also enlighten the rest of us—even though it may not reach the length of an article. We therefore encourage those who might have thought about sharing some piece of information—but did not want to or could not write an entire article—to take advantage of this opportunity. We will give attribution to the writer of each letter that we include in this new column.

Gentlemen:

I was distressed to read in Thomas Mitchell's article on the PCDA in the Fall/Winter 2002 issue of "One on One" a favorable reference to Mr. Krieger's NYLJ article asserting that an attorney may have professional liability for counseling a client to decline to deliver a PCDS. I and most knowledgeable attorneys I know strongly disagree with that assertion. One should not lightly assert professional liability of attorneys.

I urge you to reprint in the next issue of "One on One" the side-by-side printing of the articles by me and Mr. Krieger (the same as his NYLJ article) that appeared in the Summer 2002 issue of the NYSBA's N.Y. Real Property Law Journal. That way your readers can judge the debate for themselves.

Very truly yours,

Karl B. Holtzschue

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