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ONEONONE

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

A Message from the Chair

I was honored to become Chair of the Section at the Annual Meeting of the NYSBA in late January 2002. I intend to continue the great strides our Section has taken in promoting the interests of our members as well as the general welfare of the Association.

Our Annual Meeting was very well attended and has been reputed to be among the best Annual Meeting programs ever, regardless of Section, by its attendees. Our upcoming Summer Meeting at West Point at the Hotel Thayer promises even to surpass attendance and provide program value beyond that of our previous summer meetings. The Summer Meeting will be held July 11-14, 2002. On Thursday evening, July 11th, we will have a cocktail reception on the patio overlooking the majestic Hudson River. Holding our Summer Meeting at the awesome Hotel Thayer, located adjacent to one of our nation's premier military schools, is very exciting and especially poignant during this time in our nation's history. There will be a tour of West Point, a boat cruise on the Hudson River, and a gala reception on Saturday evening, July 13, 2002. Shopping can be enjoyed at Woodbury Commons, the splendid outlet-shopping arena which is a few minutes away from the Hotel Thayer. Everyone from children to adults will benefit from our meaningful and fun plans. The CLE program is designed specifically to provide valuable and practical information for all who attend and includes updates on family law, real estate law, estate planning, criminal law, elder law and negligence law. A highlight of the program will be a truly comprehensive presentation by J. Gardiner Pieper, Esq., of Bar Review course fame, on recent Court of Appeals and Appellate Division cases of general interest. He will be regaling us with his wit and intellect on Friday, July 12th. The CLE program, which will include other acclaimed speakers, will be held on Friday and Saturday mornings from 9:00 a.m. until 1:00 p.m.

As I look back upon the year which has recently concluded with Jeffrey M. Fetter, Esq. as our excellent Chair, our Section has vastly increased its member services without the necessity of increasing its extremely modest annual dues. For $20 per year, our members receive this award-winning publication, *One on One*, which is published quarterly, as well as our *wEbrief*, which receives rave reviews and comments throughout

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the year. These two publications alone justify far more than the membership dues for our Section, according to our members.

As a further service for our members, we hope to continue a "Job Bulletin Board" in our *wEbrief* so that members who are seeking positions or who desire to fill positions in their firms may have a medium for accommodating their needs on a timely, cost-free basis.

In January, our Section presented at the Annual Meeting of the Association a program which featured the extremely popular Jonathan G. Blattmachr, Esq. who has the extraordinary ability to make the subject of estate planning vibrant and exciting to a large audience. Included in the program was the now famous "Hot Tips from the Experts" segment, by our own treasure—none other than my law partner, Willard H. DaSilva, Esq. For those of you not yet familiar with this popular portion of our program, Section members give brief gems of interesting law, procedures and other information in rapid-fire succession. (How about considering yourself for next January? Drop us a note.) Gary L. Casella, Esq., Counsel to the Ninth Judicial District's Grievance Committee and our own Frank R. Rosiny, Esq., both spoke eloquently on Ethics and Professional Responsibility. Our program was extraordinarily well attended.

Of course, as is the case with other Sections, we participate actively in presenting the views of our members to the House of Delegates of the Association on various issues that are debated in that body and make our presence and positions known. We maintain a voice on a regular basis with a view toward the protection of the interests of our members and of the general public.

Stephen P. Gallagher is our "link" to the world of technology. He continues to work hard to help our members have "state-of-the-art" offices. Besides being our representative to the NYSBA, he serves as the Director of the Association's valuable Law Practice Management Department. Those of you who have met him know how fortunate our Section is to work closely with him.

All of the foregoing activities have also been made possible because of the support of the officers of the Section and of our Executive Committee, who serve diligently and faithfully in bringing about extraordinary results.

Our Section is moving rapidly in providing additional and better services to our members and in representing them in Association activities and policies. All of you who have contributed so meaningfully to the activities of our Section will make my task during the coming year that much easier. Without your help, it would have been impossible to achieve the outstanding results which continue to make our Section not only one of the most popular Sections of the Association, but also one of the most progressive Sections in providing benefits to its members and to the Association in general. I look forward to being your new Chair.

Lynne S. Hilowitz

From the Editor

Well I will try this for the third time. No, not my third try at being the editor of this publication, but instead, my writing of this editor's message. Yes, that is correct, MY THIRD TRY. The first two times I was given the message that the wonderful WordPerfect has caused some type of major error and will shut down. I am sure that the readers are all familiar with this exciting message. However, those of you who use WordPerfect know that when the program shuts down, the document that you were in is saved and you are asked, upon rebooting, whether you would like to open it or rename it. Oh well, this is true and the program did save my first of four paragraphs and for this I should be happy.

The second time was my own fault, as I received this "I'm tired of working and need to shut down" message again from WordPerfect. However, after three of five paragraphs, I had saved my document prior to seeing those now famous words. So I only lost approximately 20 minutes of work this time. I am not as dumb as WordPerfect thinks I am.

I have now moved to a different computer and will need to finish this message up quickly as the ghosts of WordPerfect are sure to find me again. I think it is now time that I follow the advice that has been given to me so often, I should simply try using Word instead. I think that I will heed that advice in the future.

I hope that you will find good advice in this issue of *One on One*. We have tried to present articles on various practical and timely topics of interest to us sole and small firm practitioners. I thank all of my friends and colleagues who were nice enough to listen to my repeated requests for articles and actually came through. We have tried to offer a variety of information from both a substantive and administrative perspective. If the small firm and sole practitioners know anything, we know that a law practice does not run itself. There is such a thing as "the business of law" as well as "the practice of law." We hope that you may find something of value in this issue to assist in both areas.

Thank you again to all of the authors and a special thank you to Stephen Gallagher, without whom this issue of *One on One* might never have reached our members. On behalf of our Section, we thank him and all the people at the Bar Association for their help with this issue.

Charles B. Rosenstein

REQUEST FOR ARTICLES

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

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

In Memoriam

Charles W. Shorter III

The last several months have been particularly difficult for many of us. Some lost family members in the tragedy of September 11, others, like myself, lost close friends, and still others were deeply touched in other hard ways.

On January 22, 2002, another void was left in my life. Charlie Shorter, a fighter to the end, left us, succumbing to cancer at the young age of 72.

A man of quick and exceptional intellect, Charlie was a gentle, giving person. Firm, resolute, responsible and sharing were only a few of the adjectives describing this remarkable man. Charlie made himself available to anyone who sought his valuable counsel and advice. During my tenure as Section Chair, I received calls and/or clippings from Charlie every week on topics of interest to all attorneys, especially on ethics. He was saddened by what he saw as the deterioration of the profession and the increase of those who performed service for the Association strictly for personal gain. This was a man who served on the NYSBA Special Committees on Lawyer Competency, Mandatory Pro Bono, Continuing Legal Education, and Law Office Economics and Technology.

Ever a smile on his face, Charlie proudly served as the voice of reason on the Section's Executive Committee, even years after his term as Section Chair had ended. He attended virtually every GP Summer Meeting with his beautiful wife and best friend Betty, and sometimes with one or both of his daughters, Kim and Terry, and his granddaughter Kelly, the prides of his life. A frequent lecturer for the Section and the Association, Charlie chaired many CLE programs and was instrumental in setting the Section on its path of development in the area of technology—a remarkable thing considering Charlie was the consummate general practitioner in rural Norwich, New York, a place Charlie used to kid was "equally distant from nowhere."

Charlie was never one to brag. He made *you* feel special, whoever you were. *You* were the important one in the room. *You* were the smart one in the conversation. Because of his humility, even those who knew Charlie professionally probably did not know that he was a *cum laude* graduate of Wesleyan and the Root Tilden Scholar at the New York University School of Law.

Charlie probably would be calling me about now and scolding me for making such a fuss over his passing. Well, Mr. Shorter, if I am fortunate enough to see you again some day, I'll take my chances that, at the end of our first conversation, I'll be forgiven for yet another of my youthful transgressions.

We miss you, Charlie. May your shining disposition and resolute character always stay with your beautiful family and those of us who were honored to call you Friend.

Steven L. Kessler

Client Relations Update

By Jay A. Smith

Effective March 4, 2002, by joint order, the Appellate Divisions in the State of New York have further practical and ethical requirements as to defining, in written form, new relationships between an attorney and client.[1] Personal injury and matrimonial attorneys are familiar with the written agreements which delineate the attorney/client relationship.[2] Indeed, all but the Appellate Division, Third Department, require that personal injury contingent fee retainer agreements be filed.

Now, the Bar must recognize that a "written letter of engagement" is required in any new, non-matrimonial legal matter that is expected to generate a fee in excess of $3,000.

"[A]ll but the Appellate Division, Third Department, require that personal injury contingent fee retainer agreements be filed."

As you can see, this places additional responsibility on attorneys to properly document the attorney/client relationship with a writing that explains (1) the scope of the legal services to be provided; (2) the anticipated attorney's fees, expenses and billing practices; and (3) the newly established client's right to arbitration under proper circumstances.[3] The fee dispute resolution program,[4] which applies to attorney/client relationships that became effective on January 1, 2002, is subject to certain exceptions, however.[5]

It should be noted that letters of engagement should be provided to the client before, or at the commencement of, representation. Under certain circumstances, letters of engagement may be provided within a reasonable time after the commencement of representation[6] and, in any event, need not be duplicated where a written retainer agreement has been executed addressing these required matters.[7] However, where the scope of services or the fee changes during the course of the representation, an updated engagement letter (or retainer agreement) is thus required.[8]

Additionally, based on the foregoing, it is now time to amend your Statement of Client's Rights to include the following language: "In the event of a fee dispute, you may have the right to seek arbitration; your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request."[9]

An updated version of the statement of client's rights is available at the Web site of the New York State Uniform Court System.[10]

In short, these updated requirements promote the "up front" practice of law which, by definition, should reduce complaints against the bar with respect to a central and most sensitive issue, attorney's fees.

Endnotes

1. 22 N.Y.C.R.R. Part 1215.
2. DR 2-106(D); 22 N.Y.C.R.R. Part 1400.
3. 22 N.Y.C.R.R. § 1215.1(b).
4. 22 N.Y.C.R.R. Part 137.
5. The fee dispute resolution program does not apply to [1] representation in criminal matters, [2] where amounts in dispute involve sums less than $1,000 or more than $50,000 [absent consent of the parties] or [3] claims involving substantial legal questions such as professional malpractice and misconduct together with additional exclusions. *See* 22 N.Y.C.R.R. § 137.1.
6. 22 N.Y.C.R.R. § 1215.1(a).
7. 22 N.Y.C.R.R. § 1215.1(c).
8. 22 N.Y.C.R.R. § 215.1(a).
9. 22 N.Y.C.R.R. Part 1210
10. www.courts.state.ny.us.

Effect of the Federal Repeal of the Estate Tax on the New York State Estate Tax

By Jeffrey M. Fetter, Daniel N. DeFio and Robert D. Scolaro

With the passage of the Economic Growth and Tax Relief Reconciliation Act of 2001, affectionately dubbed "EGTRRA," the public received what the politicians have been saying the public has wanted, relief from the dreaded death tax. While it is now common knowledge to the practitioner and layperson alike that EGTRRA does not deliver the freedom from the death tax it promised, it does make significant strides to relieve many people from an estate tax burden by raising the applicable exclusion amount (the "unified credit") against estate taxes. However, what is not commonly known to laypersons, and many practitioners, is that not only did the federal government place much of the financial burden of funding the increased applicable exclusion on the individual states, but in rare cases, such as New York, placed the burden on the taxpayers themselves.

Background

EGTRRA became law on June 7, 2001. The Federal repeal of the Estate and Generation-Skipping Transfer (GST) Tax does not become effective until January 1, 2010, but only remains repealed until December 31, 2010 unless Congress reenacts EGTRRA. If Congress does not reenact EGTRRA, the Federal Estate and GST Tax Law, as it was on June 6, 2001, will become the effective law once again.

In addition, New York State stopped implementing a separate estate tax for resident decedents dying after February 1, 2000. Under New York Estate Tax Law § 952 (a), New York State, like many other states, started to impose an estate tax on its residents equal to the maximum amount allowable against the Federal Estate Tax as a Credit for State Death Taxes under IRC[1] § 2011.

EGTRRA's Dark Side

Prior to EGTRRA, IRC § 2011 allowed a credit against the tax imposed by IRC § 2001, equal to the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or the District of Columbia, in respect to any property included in the decedent's gross estate. The amount of the credit is not to exceed the appropriate amount calculated under the tax table found in IRC § 2011(b).

EGTRRA, however, provides that for estates of decedents dying after December 31, 2001, the Federal Credit for State Death Taxes will be reduced by twenty-five percent (25%) each year from 2002 to 2004 and will be completely eliminated in 2005 when the federal relief for state death taxes becomes an unlimited deduction from the decedent's Federal gross estate. The following table shows how the maximum Federal Credit for State Death Taxes allowed under IRC § 2011 is gradually reduced and eventually eliminated:

Year of Death	Federal Credit for State Death Taxes
2002	75% of the credit allowed under IRC § 2011
2003	50% of the credit allowed under IRC § 2011
2004	25% of the credit allowed under IRC § 2011
2005 - 2009	No credit allowed, but a full, unlimited deduction
2010	No credit, no deduction because Estate Tax repealed
2011	100% of the credit allowed under IRC § 2011, unless EGTRRA 2001 is reenacted

By reducing the state death tax credit, the federal government removed a significant amount of revenue from the hands of states who tied their estate tax to the federal credit under IRC § 2011. In addition, starting in 2005, when the credit for state death taxes will instead be an unlimited deduction, this provides an advantage to decedent's estates in the higher marginal tax brackets because with the deduction (and the resulting savings from the deduction), the estates in the higher marginal tax brackets will receive a greater benefit because the deduction will be greater.

Effect on New York State Residents

In and of itself, EGTRRA does not affect New York State's imposition of an estate tax and the actual taxes that New York State will receive will not change as a result of EGTRRA.[2] Under New York Estate Tax Law § 952 (a), the New York Estate Tax shall be an amount equal to the maximum amount allowable against the Federal Estate Tax as a Credit for State Death Taxes under IRC § 2011. EGTRRA reduces the amount of the Credit for State Death Taxes under IRC § 2011, therefore it would seem that New York's Estate Tax will be reduced accordingly. However, under New York Tax

Law § 951(a), for purposes of the Article dealing with New York's Estate Tax, the term "internal revenue code" is defined as the Internal Revenue Code of 1986, with all amendments as of July 22, 1998. In addition, New York State Tax Law § 951(a) allows for a unified credit which is not tied to the unified credit under IRC § 2010, amended as of July 22, 1998, but rather the unified credit under IRC § 2010 in effect at the time of the decedent's death, not to exceed $1,000,000. Therefore, the net effect to a New York decedent who dies this year with taxable assets greater than the $1,000,000 amount is that his or her estate will owe an additional tax to New York State beyond the credit that the estate tax will receive for state death taxes.

In short, as of January 1, 2002, New York State now allows each decedent a $1,000,000 unified credit, and will impose a New York State tax on amounts in excess of the $1,000,000 unified credit calculated under the tax table under IRC § 2011, as it stood on July 22, 1998. However, the IRS will calculate the state death tax credit under IRC § 2011 as it stands on the decedent's date of death, which is gradually being eliminated under EGTRRA 2001 (as discussed below). Therefore if a New York resident dies in 2002 with a taxable estate greater than $1,000,000, the credit for state death taxes paid will be allowed for 75% of the New York Estate Tax actually paid, since IRC § 2011 is reduced by 25% in 2002, but New York State calculates its Estate Tax as if the credit was not reduced.

Credits, Deductions, New York State and the Federal Unified Credit

Important to the discussion of the additional estate tax a New York resident will have to pay is the coordination of all of the changes in EGTRRA, and not just the changes to the state death tax credit under IRC § 2011 (and the eventual addition of the deduction under IRC § 2058). Essential is how EGTRRA increases Federal Unified Credit (applicable exclusion amount) under IRC §2010. The schedule below shows how the Federal Unified Credit increases under EGTRRA.

Year	Applicable Exclusion Amount (Unified Credit)
2002	$1,000,000
2003	$1,000,000
2004	$1,500,000
2005	$1,500,000
2006–2008	$2,000,000
2009	$3,500,000
2010	Unlimited

Since New York State freezes its unified credit for state Estate Taxes at $1,000,000, the Federal State Death Tax Credit under IRC § 2011, and the Federal State Death Tax Deduction under IRC §2058 for years following 2005 are only beneficial to the decedent's estate if there is to be a tax imposed. With the Federal Unified Credit increasing beyond New York's Unified Credit of $1,000,000 for years following 2004, estates with assets in the ranges between New York's $1,000,000 Unified Credit and the Federal Unified Credit will pay New York Estate Taxes, but receive no federal benefit for those taxes paid, since there will be no federal estate tax imposed, as the table below indicates.

The table below provides a breakdown of how the reduction in the State Death Tax Credit in conjunction with the increased Unified Credit under EGTRRA affects the taxes on a $2,000,000 taxable estate in New York over the next ten years.

Year of Death	Federal Unified Credit Amount	New York Estate Tax	Federal Estate Tax	Federal State Death Tax Credit	Federal Tax Savings for Deduction for New York Estate Tax	"Cost" of New York Estate Tax	Total Aggregate Estate Taxes
2001	$675,000	$99,600	$460,650	$99,600	$0.00	$0.00	$560,250
2002	$1,000,000	$99,600	$360,300	$74,700	$0.00	$24,900	$459,900
2003	$1,000,000	$99,600	$385,200	$49,800	$0.00	$49,800	$484,800
2004	$1,500,000	$99,600	$200,100	$24,900	$0.00	$74,700	$299,700
2005	$1,500,000	$99,600	$180,180	$0.00	$44,820	$54,780	$279,780
2006-2008	$2,000,000	$99,600	$0.00	$0.00	$0.00	$99,600	$99,600
2009	$3,500,000	$99,600	$0.00	$0.00	$0.00	$99,600	$99,600
2010	Unlimited	$99,600	$0.00	$0.00	$0.00	$99,600	$99,600
2011 and thereafter	$1,000,000	$99,600	$360,300	$99,600	$0.00	$0.00	$360,300

Conclusion

EGTRRA does not affect how the New York Estate Tax is calculated. The New York Estate Tax is and will be calculated according to the tax table found in IRC § 2011(b), as it was July 22, 1998. Therefore, unlike many states, New York does not have to react to EGTRRA in order to receive the same amount of taxes it would have received prior to EGTRRA . However, with the State Death Tax Credit being reduced and eventually eliminated, it will once again place New York in the position of imposing an estate tax on its decedents that other states may not have. Ironically, this is very similar to the way New York residents were taxed prior to New York revising its estate tax as of February 2000.

Finally, it is a point of interest that while New York residents will be subject to an additional tax for the next few years, with EGTRRA "sun-setting" in the year 2011, if no overt action is taken by Congress before then, in the year 2011, it will once again cost a New York resident no additional estate taxes, since the New York Estate Tax and the Federal Credit will once again be coordinated, as they were in the year 2001.

Endnotes

1. All references to IRC are to the Internal Revenue Code of 1986, as amended.
2. While this statement is generally true, it is not completely accurate. EGTRRA does reduce that amount of taxes that New York State will receive by increasing the unified credit to $1,000,000 four years sooner than originally anticipated (originally scheduled to be $1,000,000 in the year 2006). New York State will not impose an estate tax on an estate up to $1,000,000 under New York Tax Law § 951.

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Nonresidential Leases and Bankruptcy

By Peter L. Burgess

Introduction

The filing of a bankruptcy case by a nonresidential tenant has an immediate and substantial impact on the rights and obligations existing between a landlord and its tenant. The Bankruptcy Code[1] (the "Code") affords the tenant significant protection from efforts to recover possession of the leasehold and to collect amounts due under the lease even in the face of multiple defaults. In addition, the Code controls issues related to assumption or rejection of nonresidential leases. While many benefits are available to the tenant in bankruptcy court, the Code also has meaningful provisions to protect the landlord. A working knowledge of the Code is very important to any practitioner representing landlords of nonresidential real property.

The Automatic Stay

A tenant receives immediate protection from the bankruptcy court from the moment a petition is filed. Most notable of these protections is the automatic stay provided for in Code § 362.[2] Among other protections, the automatic stay prevents the commencement or continuation of any action or proceeding against the tenant that was or could have been commenced prior to the filing of the bankruptcy case, or to recover a claim against the tenant that arose before the filing of the petition.[3] Any act to obtain possession of "property of the estate," such as leaseholds, is also stayed by the Code.[4] The general effect of the automatic stay is that the landlord in enjoined from enforcing its rights under state law, whether in state court or otherwise, with respect to a lease in default on the date the petition is filed.[5]

For example, the landlord may not contact the tenant in an effort to collect rent or recover possession of the leasehold. Any summary proceeding or other action to recover possession or rent is stayed. The landlord may not foreclose upon a security deposit or other security interest given by the tenant without application to modify the automatic stay.[6]

The practical effect of the automatic stay is that any relief sought by a landlord must be obtained from the bankruptcy court. Willful violations of the automatic stay provisions are punishable by actual and punitive damages, and costs and attorney's fees.[7]

In many instances, a tenant will file a bankruptcy case to prevent dispossession by a summary proceeding. The automatic stay prevents such dispossession even if a warrant of eviction has been issued. The only exception to this rule relates to leases which have terminated through expiration (either prior to or after the filing of the petition).[8] This exception does not apply to lease clauses which provide for termination upon insolvency or the filing of a bankruptcy petition.[9] Although such clauses remain in nonresidential leases, they have not been enforceable since the enactment of the Bankruptcy Reform Act of 1978.[10] This section was enacted by Congress to foster the process of lease assumption in the rehabilitation or reorganization of the debtor.[11]

Relief From the Automatic Stay

Code § 362 also includes provisions providing for relief from the automatic stay under some circumstances.[12] Typically, a motion for relief from the automatic stay will be filed in circumstances involving prepetition defaults under a lease, with the landlord seeking to dispossess the debtor tenant so as to make the leasehold available to the market. Relief from the automatic stay allows the landlord to pursue remedies available under state law, such as a summary proceeding to dispossess. In other instances, a motion for relief from the automatic stay is coupled with a motion seeking to compel an early assumption or rejection of the lease. This is a strategic possibility in circumstances in which the landlord does not object to the continued tenancy of the debtor-tenant, but seeks "adequate protection" and "adequate assurance" of lease performance.

The first ground for relief from the automatic stay is "cause" which includes a lack of "adequate protection."[13] The concept of adequate protection is closely related to the concept of "adequate assurance," a major consideration upon motions to assume unexpired nonresidential leases.[14] As to adequate protection, Code § 365(d)(3) requires that the trustee[15] perform all obligations of the debtor arising from and after the filing of the petition until the lease is assumed or rejected. The bankruptcy court may grant the trustee a grace period of up to 60 days from the date of filing to so perform with accrued and unpaid obligations being due and payable at the end of such period. Payment of post-petition rent, including additional rent, percentage rent, and rental escalation charges, is an example of an "obligation" under Code § 365(d)(3). Other important obligations include the duty to insure, and compliance with use restrictions. In other words, the failure to pay post-petition rent when due can constitute a lack of adequate protection entitling a landlord to relief from the automatic stay.

Adequate assurance provides a landlord with another layer of protection, and is a central issue upon motions to assume. Although the concepts of adequate protection and adequate assurance are related, it is important to understand that they are applied to differing issues.

Relief from the automatic stay is also available if the debtor has no "equity" in the property and the property is not necessary to an effective reorganization.[16] Code § 362 is more appropriate for cases where the "property" is real estate owned by the debtor and subject to a mortgage or other security interest. However, the "equity" could also be the value of the lease as an assignable asset if the rent provided for in the lease is below the current market rate.

The "no equity" ground is particularly useful in a Chapter 7 liquidation case. In this scenario, the debtor has typically ceased operations and questions of reorganization are not at issue. If the lease is without value as an assignable asset, relief is readily available on this ground. A landlord will often move for relief from the automatic stay alleging both lack of adequate protection and no equity of the debtor.

Finally, there are specific provisions related to "single asset real estate" cases.[17] It is unusual for a debtor to have a leasehold as its single asset.

Most motions for relief from the automatic stay involving unexpired nonresidential leases are the product of post-petition payment defaults. A motion for relief may be a good strategic move to ensure payment of post-petition obligations even if the landlord is without objection to the continued tenancy of the debtor.

Rejection of Nonresidential Leases

A landlord must also be mindful of the principles related to assumption or rejection of nonresidential leases. In a case under any chapter of the Code, if the trustee does not assume or reject an unexpired nonresidential lease within sixty (60) days from the date of filing, or within such additional time as fixed by the court for cause upon motion, the lease will be deemed rejected.[18] The debtor can usually get at least one reasonable extension on motion to the court. If a nonresidential lease is deemed rejected, the Code requires that the trustee immediately surrender possession of the leasehold to the landlord.[19]

Upon rejection of a lease, the landlord is relegated to filing a proof of claim for damages incurred on account of such rejection. However, these damages are limited by Code § 502(b)(6) to the rent reserved by the lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of the lease following the earlier of the date of the filing of the petition or the date that the landlord recovered possession plus any rent due, without acceleration, on the earlier of such dates.[20] Administrative claims are paid ahead of other claims including "priority" claims and unsecured claims.[21]

If a lease is not rejected, the landlord may be entitled to an administrative (priority) claim if it can be shown that the bankruptcy estate benefited from the use or occupancy of the leasehold.[22] If the lease is properly rejected, the rejection is effective from the date of the filing of the bankruptcy case[23] and no administrative claim will be available.

Assumption of Nonresidential Leases

A landlord will receive the benefit of significant protections in the event that the trustee attempts to assume the lease. The lease may not be assumed if it had been terminated prior to the filing of the petition.[24] Remember, "termination" clauses are not given effect by the Code. Also, the lease may not be assumed if applicable non-bankruptcy law excuses a party to the lease, other than the debtor, from accepting performance from the debtor or an assignee of the lease, and such party does not consent to the assumption or assignment.[25]

Special rules apply to the assumption of an unexpired lease if there has been a default.[26] In such instances, the trustee must satisfy three requirements. First, the trustee must cure or provide adequate assurance that the trustee will promptly cure the existing defaults.[27] Second, the trustee must compensate or provide adequate assurance that the trustee will promptly compensate a party other than the debtor tenant for any actual pecuniary loss resulting from the existing defaults.[28] Third, the trustee must provide adequate assurance of future performance under the lease.[29] The Code provides specific requirements for "adequate assurance of future performance" for leases of real property in a shopping center.[30]

Conclusion

From the perspective of the landlord, an aggressive posture in the bankruptcy case of a debtor-tenant is the best way to recover possession, or assure prompt payment of post-petition obligations and pre-petition defaults. Strategic remedies include motions for relief from the automatic stay, motions compelling the trustee to assume or reject the lease, and motions to compel performance of lease obligations by the trustee. Although the bankruptcy court is intended to protect the debtors before it, the Code has recognized the important rights of the creditor-landlord.

Endnotes

1. 11 U.S.C. § 101 *et. seq.*
2. 11 U.S.C. § 362(a).
3. 11 U.S.C. § 362(a)(1).
4. 11 U.S.C. § 362(a)(3).
5. *See Omni Int'l, Ltd. v. Mimi's of Atlanta, Inc. (In re Mimi's of Atlanta, Inc.)*, 5 B.R. 623 (Bankr. N.D. Ga. 1980), *aff'd*, 11 B.R. 710 (Bankr. N.D. Ga. 1981).
6. 11 U.S.C. § 362(a)(4), (a)(5).
7. 11 U.S.C. § 362(h).
8. 11 U.S.C. § 362(b)(10).
9. 11 U.S.C. § 365(e)(1).
10. The Bankruptcy Reform Act of 1978 became generally effective on October 1, 1979.
11. *In re National Shoes, Inc.*, 20 B.R. 55 (Bankr. S.D. N.Y. 1982).
12. 11 U.S.C. § 362(d).
13. 11 U.S.C. § 362(d)(1).
14. *See* 11 U.S.C. § 365(b)(1).
15. The "trustee" is typically an attorney from a "pool" of trustees in a Chapter 7 liquidation case, and the debtor-tenant itself in a Chapter 11 reorganization case.
16. 11 U.S.C. § 362(d)(2).
17. 11 U.S.C. § 362(d)(3).
18. 11 U.S.C. § 365(d)(4).
19. *Id.*
20. 11 U.S.C. § 502(b)(6).
21. 11 U.S.C. § 507(a).
22. 11 U.S.C. § 503.
23. 11 U.S.C. § 365(g)(1).
24. 11 U.S.C. § 365(c)(3).
25. 11 U.S.C. § 365(c)(1).
26. 11 U.S.C. § 365(b)(1).
27. 11 U.S.C. § 365(b)(1)(A).
28. 11 U.S.C. § 365(b)(1)(B).
29. 11 U.S.C. § 365(b)(1)(C).
30. 11 U.S.C. § 365(b)(3).

Peter L. Burgess is associated with Lemery Greisler LLC, a business oriented law firm with offices in Albany and Saratoga Springs, New York. Much of his practice involves the representation of financial institutions and other creditors. A graduate of Marquette University, Mr. Burgess received his J.D. degree from Albany Law School.

Scenes from the *2002 Annual Meeting*

January 22, 2002
New York Marriott Marquis

Jonathan Blattmachr

Jeffrey Fetter

Dwayne Weissman

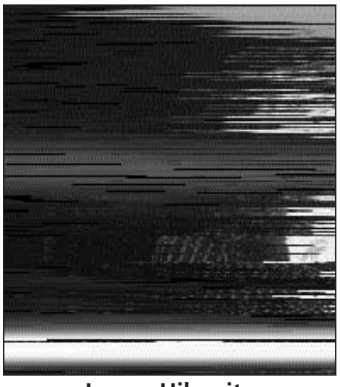
Jonathan Blattmachr

Frank Rosiny

Willard DaSilva

Lynne Hilowitz and Jonathan Blattmachr

Frank Rosiny



Lynne Hilowitz

Jonathan Blattmachr

Law Practice Management Column

By Stephen P. Gallagher

New GP/Solo Section Web Site

The Law Practice Management (LPM) committee chair, Jon A. Dorf, who doubles as the GP/Solo Section's Ninth District Representative, is looking for volunteers who share a concern and a passion about improving law firm management. The LPM committee is looking to partner with the GP/Solo Section to build a "community of practice" for leaders who would like to deepen their knowledge and expertise in this area by interacting on an ongoing basis. Over time, members will be able to use e-mail and the Section's Web site to build on each other's ideas, and extend valuable relationships based on respect and trust. If you have an interest in joining the Law Practice Management committee, contact me at: sgallagher@nysba.org.

WEbrief Electronic Newsletter

The LPM "communities of practice" will not just be a new Web site, or our database, or a collection of best practices. With the re-design of the NYSBA Web site expected in Spring 2002, the LPM "communities of practice" will include links to books, articles, knowledge bases, discussion groups, Web sites, and other repositories that members share in a joint effort to create knowledge.

"Communities of practice" start with a certain baseline of common knowledge, so before joining this LPM "community of practice," sign up for *wEbrief*, the Section's monthly e-newsletter, accessed through the GP/Solo Section Web site. This e-newsletter is currently free to anyone with e-mail connections. *WEbrief* is an e-newsletter service, which provides practical, informative and useful information to New York practitioners.

> Subscribe to ***wEbrief*** by visiting the GP/Solo Section Web site at: http://www.nysba.org/sections/gp/index.html. A Web version of this free, monthly newsletter—archived and searchable—is accessible online at: http://www.nysba2.org/netplus/ebrief020212.htm.

On the new GP/Solo Section Web site, the archived versions of the e-newsletter will be moved to a private area accessible to members of the GP/Solo Section.

WEbrief Kernels

The following items appeared in the March 2002 *wEbrief* e-newsletter. Take note of several important features. After signing up for this service, you will receive *wEbrief* as an e-mail message the second Wednesday of each month. No hard copy of this newsletter is produced. The second important feature about this newsletter is that community members generate the content. If you have information you would like to share with colleagues, this is a great way to help your community. Send items of interest to: sgallagher@nysba.org.

Leonard E. Sienko, Jr., Esq., Hancock, N.Y. submitted the following selected items:

KIDMATE—A JOINT CUSTODY PROGRAM

Kidmate is a computer program for negotiating custody between separating parents. It creates visitation schedules and calculates percentage splits. Parents may use Kidmate to help keep track of the children's schedule and create new calendars. The three modules, Timesharing, Record Keeper and E-screen, take you step-by-step through creating a parenting schedule, keeping track of the schedule, and documenting child-related expenses. Kidmate is priced at $149.00 (Sorry, Windows only). Kidmate is compatible with Windows 3.1, Windows 95, Windows 98, Windows 2000 and Windows NT. This program is available to the judges of the New York State Supreme Court and the New York State Family Court under a group license obtained by the Office of Court Administration. If you work in any of those courts, just ask your District Office for a copy.

For more information, see http://www.kidmate.com/index.cfm.

E.COURTS: A Service Of The New York State Unified Court System

All electronic services of the Unified Court System can now be found conveniently packaged at one Web site. You can look up a civil court case in the Supreme Court in all 62 New York counties, and search through Supreme Court calendars. You can search for the next court appearance in a criminal case, and—in several counties—file cases on the Internet. Coming soon, in addition to the many free services, users may also register with CaseTrac. Registered CaseTrac users will be able to track specific cases online or be automatically notified of any change in a case they are "watching." Also coming soon, attorneys who are registered with the New York State Unified Court System will be able to receive unique e-mail addresses.

For more information, see http://e.courts.state.ny.us/.

Revised Statement of Client's Rights

Here is the URL for the revised Statement of Client's Rights, reflecting at paragraph number four the right to

seek arbitration under Part 137 of the Rules of the Chief Administrator:

For more information, see http://www.courts.state.ny.us/clientrights2002.html.

Getting Connected—While Reducing Stress

The GP/Solo Section has created a special electronic mailing list for Section members. You need an e-mail account and Internet access to take full advantage of this new service, so we have come up with a special offer to help you get connected. If we have your e-mail address on record at the Bar Center, we will be sending out an e-mail inviting you to join. Whereas *wEbrief* is a one-way, news alert, the new GP/Solo mailing list will enable participants to ask questions and stimulate discussion from other participants—comments go back and forth between participants and the list. You must be a member of the GP/Solo Section to participate in this list.

If you would like me to check your records, just e-mail me at: sgallagher@nysba.org. Make sure to include your full name, mailing address, and NYSBA ID number if you have it available. I will check your records, and as a special favor, we'll send you a copy of **Handbook on Stress Management for Lawyers**, which was written for us by Ellen I. Carni, Ph.D. You will also receive a five-dollar coupon for other Law Practice Management publications.

Practice Management Forum

As a member of the GP/Solo Section, you will be receiving a newsletter, *Practice Management Forum,* which will provide you with more information about the Web-based, practice management community. You will need an e-mail address and Internet access to take full advantage of this new resource, but we hope to show you how the value of the Internet can actually allow the community of users to improve the utility of information—creating enhanced value to all community members. Rather than using the Internet to merely convey information from one user to another, you will begin seeing how connecting individuals into temporary alliances will actually create greater knowledge—greater value for all parties on the network.

I wrote an article, "After September 11: The Ever-Growing Value of Online Community" for the American Bar Association Law Practice Management's Law Practice Quarterly (Vol. 3, No. 1 February 2002). With Web access you can read this article at: http://www.abanet.org/lpm/bodies/newsarticle0202_p5_body.htm.

First Among Equals: How to Manage a Group of Professionals

Patrick J. McKenna (patrick.mckenna@attglobal.com, Web site: www.edge.ai) and David H. Maister (DavidMaister@msn.com, Web site: www.DavidMaister.com) are two world leaders in practice management and professional group leadership. David and Patrick's new book, *First Among Equals: How to Manage a Group of Professionals* (www.firstamongequals.com) should prove to be a valuable guide for anyone responsible for managing professionals. This includes everything from overseeing an individual's work product to leadership responsibilities for merging practice groups.

This book can serve as a detailed road map for newcomers as well as experienced managers, who are being asked to run teams with no training and often no managerial qualifications beyond legal skills, and possibly an ability to attract clients.

Consumers and Law Firm Branding Campaigns

I frequently get asked questions about how much money a law firm should invest in marketing of legal services. This has always been a difficult question to answer, and with the emergence of the Internet and other forms of electronic networks, the question becomes even more complex. The decline in loyalty in general, and brand loyalty specifically, will only continue and will not be abated by more messages delivered through increased numbers and forms of media.

According to Regis McKenna in his new book, *Total Access: Giving Customers What They Want in an Anytime, Anywhere World*, the term "brand" has lost its meaning in much the same way that "marketing" has. Many businesses are still spending considerable sums of money on branding campaigns, ignoring the technological and social realities that are shifting the marketplace from broadcast to access. McKenna states that, "What we do know is that interactive consumers are not passive, as past marketing supposed. They are not anesthetized couch potatoes mindlessly absorbing images and messages. They're proactive, but they are also overwhelmed, over-saturated, and, for the most part, passive to mass media advertising." (McKenna, R. *Total Access*, p. 7.)

> Regis McKenna's book, *Total Access: Giving Customers What They Want in an Anytime, Anywhere World* (Boston: Harvard Business School Press, 2001) is available at: http://www.hbsp.harvard.edu/hbsp/prod_detail.asp?2441

Re-think Law Firm Structure

If you are looking to build a law firm today, you might consider distributing responsibilities based on the following new criteria:

1. Customer Relationship Management
2. Product Innovation
3. Infrastructure Management

Pension Plan Opportunities After EGTRRA: Tax Savings Ideas for Your Business Clients, *And for Your Own Practice*

By Marc Miller

Make next April 15 less painful and less taxing than the Tax Day that just passed! The new tax law offers astounding opportunities for small business owners, and especially for small law practices, to reduce their taxes while increasing their wealth, using new retirement plans. Business people should understand pension basics to take advantage of these opportunities. Practitioners who already have plans will discover new strategies to reach their financial goals faster.

The new law, the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) is good news for everyone saving for retirement. Its most visible change increases the amounts employees can contribute to 401(k) plans, the popular voluntary savings plans. Congress also added special catch-up contribution limits for employees over 50 years old, acknowledging Americans' minimal retirement savings, and Social Security's tenuous benefits.

Table 1 demonstrates annual employee contribution limits to 401(k) and 403(b) plans:

Year	Under Age 50	Over Age 50
2002	$11,000	$12,000
2003	$12,000	$14,000
2004	$13,000	$16,000
2005	$14,000	$18,000
2006 and beyond	$15,000	$20,000

Younger employees who contribute the annual maximum can accumulate very large retirement nest eggs. A 40 year old who starts saving for retirement today could easily accumulate $1.25 million by age 65, even while investing in lower risk stocks and bonds. Even a 50 year old, without any retirement nest egg, might accumulate a half million dollars by retirement. *In fact, since retirement assets grow faster in tax-deferred accounts, participants can take advantage of safer investments, and still have superior results*.

New Legislative Environment

Small business owners have new incentives to update their retirement plans. For 20 years, Congress regularly reduced the attractiveness of company-provided retirement plans; this year's incentives reverse years of legislative ambivalence. As Congress could repeal these opportunities in the future, business owners must reconsider their plans now, while the opportunity is assured.

Firms enjoy a number of tax benefits when they contribute to retirement plans. Contributions are tax deductible. Employee plan balances grow tax deferred. Benefits received after retirement might be taxed at a lower rate.

Small businesses use plans to enrich shareholder/employees and to reward employees for years of quality service. Thoughtful business owners use plans to solve personal financial problems, such as estate planning problems or college savings deficits, also.

All types of plans, available to all types of businesses, have been improved. Both broad categories of plans, Defined Contribution and Defined Benefit plans, are now more useful. Updated plans are available to all businesses, regardless of whether the employer is a corporation, partnership, or sole proprietorship, profit making or not-for-profit.

Defined Contribution Plans

Profit sharing plans and money purchase plans are two types of Defined Contribution (DC) plans. Contributions are based on "defined" formulas—10% or 20% of salary, for instance. The contributions are "defined", but the retirement benefits will grow or shrink as they are invested.

Profit sharing plans are voluntary retirement programs for businesses. No contributions are required annually. In good years, employers may now contribute up to 25% of covered compensation, up to $40,000, into an employee's account. Both the percentage and dollar limit are larger than previously allowed.

Money purchase plans, the Defined Contribution plans that have "required" contributions, also have $40,000 annual contribution limits per participant. Individual participants may receive a contribution of up to 100% of compensation, as long as the total contribution for the entire firm doesn't exceed 25% of all employees' eligible compensation. Here again, both percentage and dollar limits are increased from prior rules.

Table 2 summarizes Defined Contribution plan contribution rules:

DC Plan	Contribution Limits	Annual Contributions
Profit Share	25% of individual compensation $40,000 maximum	Not Required
Money Purchase	100% of individual compensation $40,000 maximum	Required

Many small firms should have profit sharing plans. Table 3 shows how a typical small firm—husband, wife and two assistants—might use a simple profit sharing plan. This plan is an excellent first plan, as there are no required future contributions.

Table 3 demonstrates a typical profit sharing plan:

	Age	Salary	Contribution	% of Salary
Mindy	35	$160,000	$40,000	25%
Marc	33	40,000	10,000	25%
A	50	32,000	8,000	25%
B	25	28,000	7,000	25%
Total			$65,000	

Many law firms—perhaps most established firms—already have "paired" profit share and money purchase plans. These firms endured the expense of two plans to have maximum contribution flexibility. This combination allowed a minimum contribution of 10% of compensation, and a maximum of 25%. These employers must merge their plans into updated profit sharing plans. The resulting plans have no minimum contribution, a maximum 25% contribution, and fewer administrative headaches.

Many firms will realize that they can implement profit sharing plans that are much more "discriminatory" than previously allowed. Creative pension actuaries invented Maximum Advantage (MAD) plans. In a MAD plan, the partners in the firm, usually the older members, can receive very large contributions, while rank and file employees, usually younger participants, continue to receive moderate contributions. IRS rules assure that this apparent discrimination is legal, as long as minimum plan benefits are provided to younger employees.

A typical plan might provide a $40,000 contribution for each law partner. All other employees in a firm receive 5% of their salary. Table 3 demonstrates how a MAD profit sharing plan can reward the business owner. In this example, the taxes saved by contributing to the plan exceed the employee costs.

Table 4 demonstrates a small business MAD plan:

	Age	Salary	Contribution	% of Salary
Jerry	55	$160,000	$40,000	25%
A	35	35,000	1,750	5%
B	30	30,000	1,500	5%
C	25	23,000	1,250	5%
D	20	20,000	1,000	5%
Total			45,500	

Profitable firms with older owners and younger rank and file employees may replace their existing Defined Contribution plans. Firms use MAD profit sharing plans to increase key employee contributions while minimizing rank and file contributions.

A firm that already has a 401(k) plan can add MAD plan provisions to the existing plan. If the firm's 401(k) employer matches already meet the minimum MAD benefits for rank and file employees, then only senior management will receive the increased benefit. The firm will increase the tax-deductible contribution for key employees, without any additional rank and file costs.

Defined Benefit Plans for Older Participants

Profitable firms that want to reward older key employees with the maximum possible contributions will turn to Defined Benefit (DB) plans. DB plans start with a desired annual retirement benefit—50% of salary for life, for example. The plan actuary works backwards, and calculates how much money must be contributed for each employee, based on the number of years until retirement. Older employees require much larger contributions than younger employees, as they have fewer years until retirement to accumulate their pension benefits. The payout at retirement is an assured number, but the annual contributions will vary. Annual contributions are required, but plan actuaries can be creative in lowering or increasing contributions as each year's profit picture becomes apparent.

Defined Benefit plans are not new. However, EGTRRA rules allow astoundingly large tax-deductible contributions. The regulations provide greater ability to accumulate very large nest eggs. EGTRRA also eliminated a number of arcane rules that acted as barriers to implementing Defined Benefit plans. DB plans are quickly becoming popular, again.

Table 4 shows an effective Defined Benefit plan:

	Age	Salary	Monthly Pension @ 65	Contribution
Mario	50	$200,000	$13,333	$109,980
A	45	50,000	3,667	17,485
B	40	45,000	3,750	12,030
C	35	40,000	3,333	7,295
D	30	35,000	2,917	4,477
E	25	30,000	2,500	2,749
Total				$154,016

Law firms will consider Defined Benefit plans to enhance contributions for older partners. Participants can quickly accumulate large retirement accounts in DB plans.

One insurance company calculated the maximum possible contribution for a 52-year-old attorney earning $200,000 of draw to exceed $263,000. While this example may be extreme, it demonstrates how effective DB plans can be to accumulate large wealth in a short time.

A partner who doesn't need *any* draw because of sufficient investment or family income, might consider a

strategy where *all* compensation is deposited to a tax beneficial DB plan. As long as the participant has earned sufficient compensation for five prior years, a Defined Benefit contribution can be made even without taking any current taxable compensation. An attorney who receives occasional, large litigation windfalls, or who recently inherited a family legacy might consider deferring all income into a DB plan.

Practitioners nearing retirement who already have sufficient investment income might live on that passive income, and defer their practice earnings with this 100% pension deposit strategy. They slash their current income tax liabilities using this strategy.

Liberalized Loan and Rollover Rules

EGTRRA unified many of the rules for different types of plans. Almost all the changes are beneficial to plan participants.

All qualified retirement plans may now allow participant loans, even to owners. Plan loans of up to $50,000, but not more than 50% of a participant's vested interest, are legal. This change especially liberalized the rules for sole proprietors, partnerships and owner/employees of S corporations. While participants should continue to use caution before taking loans from accounts earmarked for retirement, the change does make pension money available for education, home down payment, or business opportunity.

Most types of qualified pensions and IRAs became eligible for rollover into current plans. Participants may roll old IRAs—rollover accounts or regular IRAs—into their current pension accounts. Participants currently in government or not-for-profit plans, who did not previously qualify for tax-deferred rollover IRAs when employment terminated, may now do so.

Solving Estate Plan Problems

Retirement plans are useful family security and estate planning tools, because qualified plans may purchase life insurance on participants. Insurance premiums are paid with tax-deducted dollars. Insurance death benefits that exceed policy cash values are income-tax-free to the beneficiary. Indeed, pension life insurance may be a unique asset, purchased with tax-deductible dollars, and still be received income-tax-free by a beneficiary.

Some respected tax attorneys are confident that insured death benefits from retirement plans can escape estate taxation, as well. They use sophisticated trusts and beneficiary designations to shield pension insurance proceeds from estate taxation. Even without this added tax feature, insured death benefits are a preferred estate planning tool.

EGTRRA eased several other estate planning problems with retirement plans. It increases the threshold at which families become subject to estate taxes, so fewer families will have estate taxes due on pension death benefits. EGTRRA liberalized the rules that mandate minimum distributions after retirees turn age 70 ½. With proper planning, participants with large accounts can leave larger tax deferred balances to their beneficiaries.

EGTRRA makes it easier to have larger pension accounts. It reduces or defers some of the taxes due upon retirement or death. There is a real opportunity to turn a thoughtful pension program into a family tax shelter. It's worth a bit of planning to achieve these results.

Seize the Opportunity!

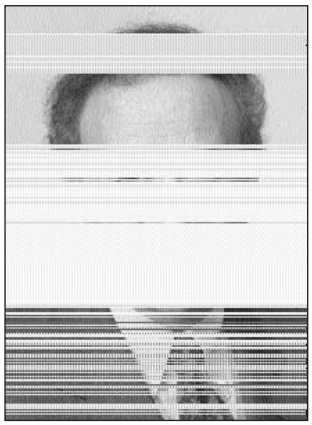
Business owners and professionals must re-examine their retirement plan strategies. All business owners must challenge their advisors to create better, more cost effective retirement plans, while the opportunity is available!

Marc H. Miller, CLU, ChFC, has represented Strategies for Wealth Creation and Protection, a General Agency of the Guardian Life Insurance Company, since 1980. He specializes in implementing estate, pension, and insurance solutions. His most recent article, *Long Term Care Planning, What Every Accountant Should Know,* appeared in *CPA Journal*. Marc may be contacted at: Mmiller@strat4wealth.com.

The author acknowledges the help of Sheila Hickey, CPC, case design specialist with the Guardian Life Insurance Company, for providing the pension calculations.

Out to Lunch

By Martin Minkowitz



Are workers entitled to the coverage of their employer's workers' compensation policy if by accident they walk in front of a car or trip on a sidewalk or otherwise injure themselves while out to lunch? Don't answer too soon. The quick answer, which might seem to be the most obvious, may not necessarily be the right one.

If you know that workers' compensation only pays for an injury that arises out of and in the course of the employment, you will have concluded that going to lunch probably is not in the course of the employment. An injury that occurred while out to lunch, therefore, also did not arise out of the employment. That, in fact, is the general rule. It is based upon the concept that if an activity is purely personal, or in the course of a purely personal pursuit, it is not within the scope of the employment and not compensable under the Workers' Compensation Law. This could be tested by inquiry whether the activity is both reasonable and sufficiently work-related under the circumstances.[1] It becomes a question of fact for the Workers' Compensation Board. If the fact finding by the Board is supported by substantial evidence, it must be sustained by the Appellate Division.[2]

The claimant also has the rebuttable presumption contained in the Workers' Compensation Law that an unwitnessed accident, which may result in death, which is found to be in the course of the employment may be presumed to arise out of the employment. Of course if the worker is engaged in a purely personal act, the presumption would be rebutted.

A number of cases where the facts demonstrated that the lunchtime break was for the benefit of the employer have held that the accident occurred in the course of the employment. This sometimes occurs where the employer provides the location for the lunch on the worksite premises.

Likewise, when an employer sends his employee, during the employee's lunch time, on a special errand, if an injury occurs in the course of that special errand, even off premises, it would be covered under the Workers' Compensation Law.

An Appellate Division decision a few months ago demonstrates the point.[3] The worker, just after beginning his shift as a bulk newspaper delivery driver, was found dead in the drivers' room at the employer's premises. The autopsy revealed that he had choked to death on a piece of ham. In his truck was a partially eaten ham sandwich and the vehicle was parked near the drivers' room fully loaded. The Workers' Compensation Board ruled that "although decedent's unwitnessed accidental death in the course of his employment was entitled to the Workers' Compensation Law § 21 presumption that it arose out of his employment, claimant's death resulted from a purely personal act and, therefore, the presumption was rebutted." In reversing the Board, the court said,

> We note that decedent's death occurred during a holiday weekend when, according to the dispatcher, decedent was required to wait at the employer's premises until the other drivers began their deliveries to determine if he was needed to load additional newspapers to cover any shortage reported. During such a waiting period, decedent was "not required to remain immobile and inactive but [was] free to indulge in any reasonable activity during the waiting period."[4]

After having so opined in an unusual reversal of the Board's fact finding authority, the court concluded that "Since decedent's act of eating at the employer's premises was not shown to be an unreasonable activity, we find that the Board's decision lacks support in the record."

So as I started by noting, it is not always easy to say no benefits are awardable merely because the injured or deceased worker was "out to lunch."

Endnotes

1. *In re Vogel*, 265 A.D.2d 705, 696 N.Y.S.2d 571 (3d Dep't 1999).
2. *Cruz v. Karl Ehmer, Inc.*, 282 A.D.2d 841, 724 N.Y.S.2d 777 (3d Dep't 2001).
3. *Harris v. Poughkeepsie Journal*, __ A.D.2d __ , 733 N.Y.S.2d 548 (3d Dep't 2001).
4. *Id. at 550 (quoting Anadio v. Ideal Leather Finishers*, 32 A.D.2d 40, 42, 299 N.Y.S.2d 489 (3d Dep't 1969)).

Martin Minkowitz is a partner with Stroock & Stroock & Lavan in New York City. A former Deputy Superintendent and General Counsel of the New York State Insurance Department and former General Counsel with the NYS Workers' Compensation Board, Mr. Minkowitz is an Adjunct Professor at New York Law School and is the author of the commentaries to McKinney's Worker's Compensation Law.

All Paralegal Education Programs Are *Not* Created Equal

As the number of paralegal education programs proliferate throughout the nation, attorneys, legal administrators and paralegals need to be aware of the disparity of program standards and look beyond the certificate or paralegal degree on the résumé, to the credentials of the program itself. Is the program approved by the American Bar Association (ABA) or is it a member of the American Association for Paralegal Education (AAfPE)? Does the program content consist of sufficient coursework and clock hours to provide the education and skills necessary to function in an entry-level paralegal position? Researching the credibility of unfamiliar paralegal programs will avoid the costly mistake of hiring unqualified individuals.

The ABA approval of paralegal education programs is a recognized and accepted national standard. Membership in AAfPE requires an education program to be ABA-approved or in substantial compliance with ABA standards. Absent the ABA credential or AAfPE membership, a transcript of coursework with clock hours or semester units should be examined.

AAfPE, along with the five other major law-related associations, the National Federation of Paralegal Associations (NFPA), the National Association of Legal Assistants (NALA), the Legal Assistant Management Association (LAMA), the Association of Legal Administrators (ALA), and the Standing Committee on Legal Assistants of the American Bar Association (ABA), drafted the brochure, *Choosing a Quality Paralegal Education Program*. The pamphlet may be viewed at this Web site: http://www.paralegals.org/Choice/howto.html.

These organizations, all of which are dedicated to insuring the quality and growth of the legal profession, set forth the minimum education necessary to prepare a person to succeed in an entry-level position in the paralegal field. The collective wisdom of these law-related organizations is that a paralegal program must include at least 18 semester units of paralegal coursework and appropriate general education.

Of growing concern within New York is the number of SUNY campuses now offering 86-clock-hour certificate programs given over six weekends. They are some of the many new distance or short-term paralegal education programs on the rise throughout the nation. Many require less than 100 clock hours (approximately six semester units) to complete. (ABA approval requires 60 semester units.) These programs, as in New York, often affiliate with the continuing legal education departments of major universities, adding prestige to the program, which may or may not be warranted.

Beyond the recognized standards of ABA approval and AAfPE membership, the "CLA" or "RP" designation on a résumé demonstrates a level of advanced professional competency. The CLA (Certified Legal Assistant) designation is earned by successfully completing a two-day comprehensive examination and has been offered by NALA for over 20 years. The RP (Registered Paralegal) designation also requires successful completion of a comprehensive examination and has been offered by the NFPA for over three years. For clarification, a paralegal holding a certificate from a paralegal education program may hold a certificate, but they are *not* a "certified" legal assistant or paralegal.

Concerned sole practitioners, managing partners, law office administrators, supervising paralegals, and others who monitor law office quality and effectiveness are urged to visit the following sites for additional information on evaluating and locating worthwhile programs:

ABA Standing Committee on Legal Assistants (ABA SCOLA): http://www.abanet.org/legalassts/home.html

American Association for Paralegal Education (AAfPE) http://www.aafpe.org

National Federation of Paralegal Associations (NFPA) http://www.paralegals.org.

The National Association of Legal Assistants (NALA) http://www.nala.org

Legal Assistant Management Association (LAMA) http://www.lamanet.org

Association of Legal Administrators (ALA) http://www.alanet.org

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NYSBA LPM Committee members

Summer Meeting Schedule
General Practice Section
Hotel Thayer, West Point, New York
July 11-14, 2002

Thursday, July 11, 2002:	Welcome & Greetings, Section Chair, **Lynne S. Hilowitz, Esq.**
Evening: Time TBA	Cocktails/Dinner at Hotel Thayer, West Point, New York
Friday, July 12, 2002:	
7:30 a.m. - 8:45 a.m.	Executive Breakfast Meeting
9:00 a.m. - 11:00 a.m.	"Recent Court of Appeals and Appellate Division Cases of general interest rather than focusing exclusively on the CLPR," - **J. Gardiner Pieper, Esq., Pieper New York- Multistate Bar Review, Ltd.**
11:00 a.m. - 11:15 a.m.	Coffee Break
11:15 a.m. - 12:45 p.m.	"Taxes & Matrimonial Law," **Melvyn B. Frumkes, Esq., Melvyn B. Frumkes & Associates, P.A. and Willard H. DaSilva, Esq., Hilowitz & McEvily LLP**
	Lunch and activities on your own Boat Cruise on Hudson River Tour of West Point Shopping at Woodbury Commons
Saturday, July 13, 2002	
9:00 a.m. - 10:00 a.m.	"Estate Taxes and Planning After the Economic Growth & Tax Relief Reconciliation Act of 2001," **Lynne S. Hilowitz, Esq., DaSilva, Hilowitz & McEvily LLP**
10:00 a.m. - 10:15 a.m.	"Real Estate Disclosure Law," **Charles B. Rosenstein, Esq., Rosenstein & Bouchard**
10:15 a.m. - 10:30 a.m.	Coffee Break
10:30 a.m. - 11:15 a.m.	"Elder Law Update," **Dwayne Weissman, Esq.**
11:15 a.m. - 12:15 p.m.	"Nuts and Bolts of a Negligence Case," **Bert Blitz, Esq., Shandell, Blitz, Blitz & Bookson, LLP**
	Lunch and activities on your own Boat Cruise on Hudson River Tour of West Point Shopping at Woodbury Commons
Evening: Time TBA	Gala Reception-Hotel Thayer

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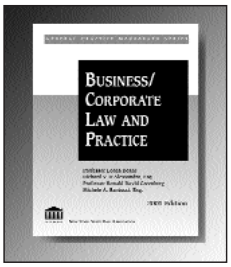
Business/Corporate Law and Practice



This monograph, organized into three parts, includes coverage of corporate and partnership law, buying and selling a small business and the tax implications of forming a corporation.

2001 • PN: 40511
List Price: $75
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Criminal Law and Practice

Criminal Law and Practice is a practical guide for attorneys representing clients charged with violations, misdemeanors or felonies. This monograph focuses on the types of offenses and crimes that the general practitioner is most likely to encounter.

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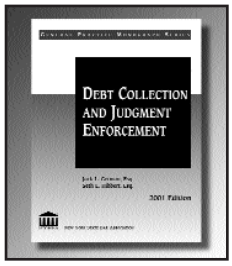
Debt Collection and Judgment Enforcement



This latest edition offers guidance on the basics of debt collection from evaluating the claim and debtor, to demand upon the debtor and payment agreements, to alternatives to litigation.

2001 • PN: 42381
List Price: $50
Mmbr. Price: $38

Elder Law and Will Drafting

The first part of *Elder Law and Will Drafting* provides an introduction to the scope and practice of elder law in New York state. This edition also includes a step-by-step overview of the drafting of a simple will—from the initial client interview to the will execution.

2001 • PN: 4082
List Price: $70
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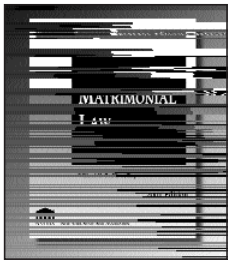
Matrimonial Law



Written by Willard DaSilva, a leading matrimonial law practitioner, *Matrimonial Law* provides a step-by-step overview for the practitioner handling a basic matrimonial case. While the substantive law governing matrimonial actions is well covered, the emphasis is on the frequently encountered aspects of representing clients.

2001 • PN: 41211
List Price: $75
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Mechanic's Liens

Mechanic's Liens, written by George Foster Mackey and Norman Alvy, is an invaluable guide to what can be a volatile area of practice. The methods of preparing, filing and enforcing mechanic's liens on both private and public works construction are covered.

2001 •PN: 40311
List Price: $55
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Mortgages

The authors of *Mortgages* provide a clause-by-clause analysis of the standard mortgage, introduce the recommended additional clauses most worthy of inclusion in a mortgage rider and provide a review of basic mortgage terms.

2001 • PN: 4138
List Price: $60
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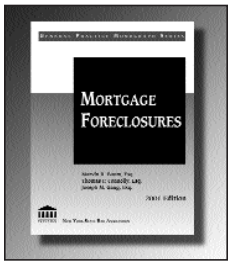
Mortgage Foreclosures



This monograph guides the practitioner through the basics of a mortgage foreclosure proceeding. With its helpful practice guides and many useful forms, this is an invaluable resource.

2001 • PN: 41411
List Price: $50
Mmbr. Price: $40

Enhance or update your library with these titles.

Preparing for and Litigating the Plaintiff's Personal Injury Case in New York

This useful publication is a quick reference guide to areas likely to be encountered in the preparation and trial of a civil case in New York state. The book discusses preliminary considerations and also covers substantive law, liens, insurance law, pleadings, discovery and trial techniques.

2001 • PN: 41911
List Price: $65
Mmbr. Price: $50

Probate and Administration of Decedents' Estates

This monograph is a practical guide for an attorney representing a petitioner in a probate or administration proceeding. The authors, experienced trusts and estates practitioners, provide a step-by-step guide for handling a basic probate proceeding and for completing the appropriate tax-related forms.

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List Price: $60
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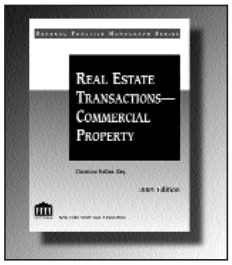
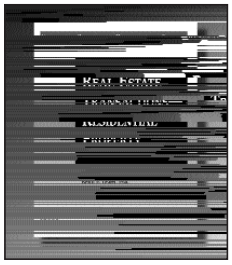
Real Estate Transactions—Commercial Property



This latest edition provides an overview of the major issues an attorney needs to address in representing a commercial real estate client and suggests some practical approaches to solving problems that may arise in the context of commercial real estate transactions.

2001 • PN: 40371
List Price: $70
Mmbr. Price: $55

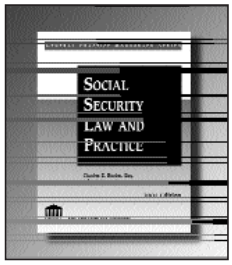
Real Estate Transactions—Residential Property



Written by Claire Samuelson Meadow, an experienced real estate practitioner, this reference is a practical guide for attorneys representing residential purchasers or sellers. This invaluable monograph covers sales of resale homes, newly constructed homes, condominium units and cooperative apartments.

2001 • PN: 42141
List Price: $75
Mmbr. Price: $62

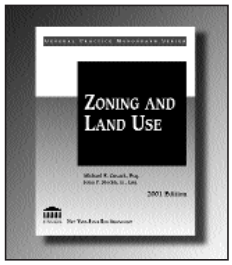
Social Security Law and Practice



The Social Security Act is "among the most intricate ever drafted by Congress.". This monograph offers valuable, practical advice on how to muddle through the enormous bureaucracy. With analysis of the statutes and regulations, the authors guide you through the various aspects of practice and procedure.

2001• PN: 42291
List Price: $60
Mmbr. Price: $45

Zoning and Land Use



This publication is devoted to practitioners who need to understand the general goals, framework and statutes relevant to zoning and land use law in New York state. It is intended to provide a broad discussion of zoning and land use in New York state and, above all, to remove the mystique surrounding this practice area.

2001 • PN: 42391
List Price: $65
Mmbr. Price: $55

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