NYSBA

FALL/WINTER 2016 | VOL. 8 | NO. 2

The Senior Lawyer

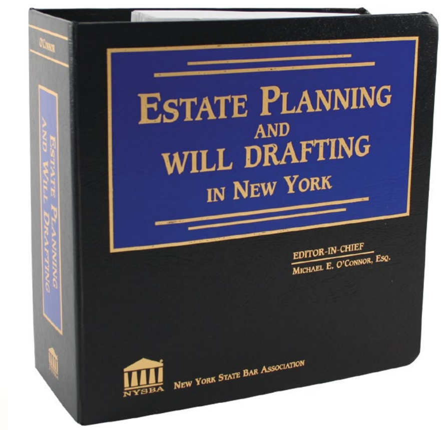
A publication of the Senior Lawyers Section
of the New York State Bar Association

Inside

NEW YORK STATE BAR ASSOCIATION

Estate Planning and Will Drafting in New York

2016 Revision



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Syracuse, NY

Product Description

Each chapter of the 2016 Revision has been reviewed and updated, including major changes to the chapters on IRAs and Tax-Qualified Plans and New York Estate and Gift Taxes.

This comprehensive text provides an excellent overview of the complex rules and considerations involved in estate planning in New York State. Whether your practice incorporates issues surrounding minors, marriage, the elderly, federal and state taxes, this text provides comprehensive guidance to attorneys.

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A Message from the Section Chair

Dear Section Members:

It's once again my pleasure to bring you up to date on the activities of our Section.

In my Chair's Message for our Spring issue I mentioned two projects which were in process at that time. The first involves the implementation of our Section's Executive Committee Community and the rollout of a Section-wide Community, so that all Section members can experience the many benefits which the Community offers. Both Communities are now up and running; detailed instructions on how to access and use the Section-wide Community are included in an article, "Joining and Navigating the Senior Lawyers Section Community," included in this issue of *The Senior Lawyer*, and the article is also posted at www.nysba.org/SLSCommunity.

The second project is the establishment of the Jonathan Lippman Pro Bono Award intended to recognize outstanding pro bono work performed by a member of our Section and to promote the goal of increasing access to justice. Information concerning the Award and the nomination process was widely distributed, and nominations are under consideration. We anticipate presenting this first award at our Section's 2017 Annual Meeting CLE program.

We also have been busy putting together a half-day program on technology, free to members of our Section. Under the leadership of C. Bruce Lawrence and Jay Hollander, Chairs of our Technology Committee, and with the considerable assistance of Stephanie Bugos, our Section's Liaison, that program was presented in New York City on November 1, 2017. The program was well received and we plan to replicate the program in the Spring upstate.

On November 15, 2016, we had another first for our Section. Our Fall CLE program, "The Nine Essential Planning Documents Every Senior Lawyer Should Know and Understand," was presented live in Westchester County and also as a webcast. Our hope that adding the webcast would permit more people to attend was justified, and additional webcasts are in our future. Our 2017 Annual Meeting CLE program is scheduled for the morning of Thursday, January 26, 2017. The topic is "Planning Ahead for Your Senior Life and Your Practice," and I look forward to seeing you there.

In this issue Rosemary Byrne's column, "Looking for the Fountain of Youth? Try a Classroom," highlights the benefits of lifelong learning, particularly for seniors, and provides examples of, and resources for, programs offering this opportunity. If you know of similar courses or programs in your community, or have yourself had experience with them, please consider sharing that information with members of our Section via our new Section-wide community.

Also in this issue we have articles on retirement planning, as well as topics which recognize the diverse nature of our membership, including ethical obligations when materials are mistakenly delivered by an opposing party and a "Checklist for Lawyers' Business Disaster Planning and Recovery" (an excerpt from NYSBA's "Planning Ahead Guide"). In addition, consistent with our commitment to support pro bono opportunities for all attorneys in general, and senior attorneys in particular, this issue includes an article by Melissa B. Greenberger, "Senior Lawyers Helping Long Islanders in Need." Prior issues have highlighted other pro bono programs, and future issues will include information on others. Information about pro bono opportunities can be found also on NYSBA's website at www.nysba.org/ProBono.

Choosing articles for a publication which has so diverse a membership as does ours is challenging. Any suggestions for topics, or for article reprints, are welcome. Also, consider writing an article for *The Senior Lawyer*. The more articles we have from Section members, the more relevant it will be for us all. In addition, we are looking for Section members interested in serving as an Editorial Board for this publication. Please contact me at cabb1@optonline.net if you are interested in being a part of *The Senior Lawyer*.

Carole A. Burns

On Seniority

By Rosemary C. Byrne

Looking for the Fountain of Youth? Try a Classroom

"Education is the best provision for old age."
—Aristotle

"Live as if you will die tomorrow. Learn as if you will live forever."
—Mahatma Gandhi

Today, virtually every gerontologist and expert on aging emphasizes to the baby boomer and beyond population the longevity benefits of a healthy mind and a fit body. Many now say that *exercise* is the new fountain of youth for the body while *education* is the new fountain of youth for the mind.

Indeed, philosophers from Aristotle to Gandhi and the scores of learned thinkers between them have long extolled the virtues of education and the passion for lifelong learning. Gerontological and neuroscientific research now confirms that view and strongly suggests that learning itself can reduce or slow cognitive decline. Coupling that benefit with the added emotional advantages of enhanced social interactions makes for a winning combination. Simply put, lifelong learning is a way of keeping the mind and body engaged by pursuing knowledge.

For this On Seniority column I'd like to explore what it is about education that makes it such an important component of a healthy and fulfilling senior life, and the array and variety of programs and opportunities available to pursue lifelong learning. I'll save the joys and benefits of exercise for a later date.

The Importance of Lifelong Learning in Planning for Seniority

As more and more baby boomers advance through midlife, enter seniority and contemplate retirement, it is not surprising that articles and seminars about planning for this next chapter in life abound. Virtually all of those programs addressed specifically to attorneys and other professionals, my own included, highlight the elements which our generation will need as we move forward and ponder retirement or downsizing from our primary careers. Chief among them are **a *strong social network*, *a source of intellectual stimulation*** and ***a daily structure*** which will replicate our work experience and guide us though the transition. See, On Seniority, NYSBA *The Senior Lawyer*, Fall 2015/Vol. 7/No. 2.

Those of us who plan to work full time until we meet our maker may continue to derive these much needed life components from practicing law. For many of us, however, when we cease or downsize our active engagement as attorneys—a profession which has occupied more than a third of our waking hours during the decades we practiced—we experience a void. We may have derived much of our personal and professional identity and the structure of our days from our work and professional obligations. Very few non-work activities are likely to simultaneously satisfy our all-important need for structure, stimulation and socialization. Pursuit of education and lifelong learning programs and activities may fill the bill for all three. Experts proffer that lifelong learning can play an important role in active, productive aging. It offers baby boomers, retirees and others the opportunity to attend classes, provides access to college libraries and other facilities and cultural events, and gives them a built-in social network of others interested in intellectual stimulation.

I've informally surveyed colleagues, friends and other "senior" students about why they engage in lifelong learning and how pursuing educational opportunities fits into their planning for seniority. This sampling of their responses confirms what the experts say.

"It makes me more interesting and aware."

"Stimulates my mind and the use of my brain."

"Keeps me engaged and challenged."

"I enjoy the rediscovery of topics that interest me and exploring new areas I now have time to pursue."

"Helps me adapt to change and transition to retirement in a positive way."

"Keeps me involved—meeting new people, making new friends."

"I learn more about things I need to know like computers and social media in a safe environment."

"Helps replace my daily work schedule."

"Enables me to find new passions and renew old interests."

"Gives me an interest I can enjoy with my spouse—reconnecting us to the time we met when we were students together."

"It's empowering!"

Back to the Classroom

Clearly, organized classroom study is not the only forum for educational enrichment and personal development. Travel (domestic and foreign), day trips and excursions, lectures or lecture series at local museums and libraries, as well as voluntarism and pro bono work, can present challenges and provide satisfying intellectual stimulation.

In many ways, however, taking courses with our peers in a subject we are interested in or passionate about on a regular schedule for a designated period of time provides the best opportunity to maximize the potential for achieving structure, stimulation and socialization and the benefits which accrue from them. Most of the programs discussed here do not carry academic credit. You can also choose to focus on advanced degree or certificate programs, which many schools offer, particularly if you are interested in a new career or business opportunities.

Classroom study is an educational format we know and have experienced. It provides a social experience akin to law school and college, learning environments in which we may have made our best friends or met our spouse or partner. It is a familiar way to structure our days and an easy form of socialization.

Many colleges and universities and other institutions offer online courses, often at extremely high academic levels or in degree programs. For some, this may maximize the intellectual stimulation. What these online courses may contribute in substantive enrichment may be offset by the fact that they lack the interpersonal element which many of our generation hold dear and find most familiar—one-on-one, face-to-face social encounters. You can't easily go out for coffee with other seniors in your online classroom, and if you can listen to a course at any time you may be missing the benefit of having a specific place to be at a specific time.

Finding a Course

The range of topics offered in lifelong learning and continuing education programs in New York is virtually limitless. Think of the most comprehensive college curriculum and the offerings of technical schools, add a smidge of business and legal topics and you may have scratched the surface of what's available for lifelong learners. Indeed, the difficulty will most likely not be finding a course but choosing only one or two to study at a time.

The starting point is deciding what you want to know more about. Consider studying something you are passionate about and want to explore in more depth or peruse the catalogs until something catches your interest. Alternatively, consider something you know absolutely nothing about and may find challenging or interesting to explore. You can scratch the surface of many subjects or pursue one in depth in a class or series of classes or everything in between. The joy is that you have the freedom to change your mind or change your preference as often as you like.

Facilities for pursuing educational interests abound throughout the Empire State. In New York City major universities and scores of other institutions offer lifelong learning opportunities. A brief look at three major universities highlights the many forms these opportunities can take.

My personal favorite is Fordham University's College at 60 (www.fordham.edu/collegeat60), so named for its location at Fordham's Lincoln Center campus at 60th Street but aptly describing the threshold age of the vast majority of its students. Courses are taught by experienced academics, many of whom are members of Fordham's faculty, and cover traditional college level liberal arts subjects, albeit without exams, papers, grades or credit. Students are interviewed before being admitted to the program. The Fordham class schedule mirrors a traditional academic calendar. Classes are two hours and meet once a week. Class size rarely exceeds 25 or 30. At the College at 60 I've renewed my interest in European history (my college major) with courses on the Tudors and the Victorians (and the monarchies between). I've also expanded my knowledge of the Constitution and its history and delighted in studying Presidential campaigns which rival this year's slugfest. Fellow students tend to be retired or semi-retired professionals, including a number of attorneys and a few judges.

For me, Fordham is the "gold standard" providing all of the desired components—semester-long structure, high-level intellectual stimulation and the opportunity to spend time each week and socialize with a class of similarly situated fellow students.

Based upon my research, New York University's School of Professional Studies (http://www.scps.nyu.edu) offers similar intellectually challenging and stimulating programs. Like Fordham, classes are taught by seasoned faculty and scholars. Course offerings are more numerous than those at Fordham but some classes are much larger, replicating a college lecture format rather than a seminar size. NYU also offers myriad professional and business development classes and certificate programs not available at Fordham. Although there is a discount for seniors (25%), classes are not limited to those "of an age." While NYU may satisfy the structure and scholarly stimulation needs of seniors, the size of classes and the expanded age range may, for some, result in a less desirable opportunity for social interaction.

A different structure is available at Columbia University (http://sps.columbia.edu/auditing/lifelong-learners-auditing-program) which will allow lifelong learning students to register for and audit many of its undergraduate classes on a space-available basis. Tuition and fees are higher than those of Fordham and NYU. Similarly, if you are a New York City resident for a nominal fee you can avail yourself of the opportunity to audit many of the undergraduate courses offered at the various campuses of the City University of New York. Non-degree student applications or auditing forms must be obtained from each individual college.

A word about auditing: Many colleges and universities, like Columbia and CUNY, permit seniors to audit select undergraduate or graduate courses. Enrollment and participation in the classes are at the discretion of the instructor which in many cases means you are a non-participating silent listener (not exactly a lawyer's forte) and makes the registration process more complicated and less predictable. You may also find that you are one of a very few seniors in a large lecture class in which traditionally aged undergraduates predominate. The inability to fully participate may detract from the desired objective of intellectual stimulation, as may the predominance of undergraduates who might not share your excitement or passion about the subject matter. The classroom demographics may also limit the potential to meet and spend time with like-minded fellow students. On the other hand, age diversity may provide different perspectives and experiences and the classroom environment itself may create its own learning experience. Auditing can be very much like attending a lecture series. Depending on the instructor and your fellow students it can also be an exciting opportunity to meet and learn from a wide amalgam of people and ideas you might not otherwise be exposed to. It may work for some, and not for others. If the topic interests you, and there is a school nearby, why not give it a try!

Opportunities Beyond the Five Boroughs

Recognizing that many (perhaps most) NYSBA member live outside New York City, in preparing this column I've sought out and researched lifelong learning opportunities throughout the state. For a small registration fee most SUNY schools offer auditing opportunities to those over the age of 50, based upon space availability and approval of the instructor who sets the level of participation of the senior student.

Many colleges and universities statewide also participate in programs sponsored by the Osher Lifelong Learning Institute and the AARP's Institute for Learning in Retirement. The number and subject range of classes may vary from program to program. Membership in the Osher program at Rochester Institute of Technology (http://www.rit.edu/osher), for example, is typical of other Osher programs. For a fee of about $315 seniors are offered the opportunity to take select courses at the college of liberal arts, attend lecture series or social activities, have borrowing privileges at the library, and receive a reduced rate for access to the college's fitness facilities.

Like NYU, Hofstra University in Hempstead (www.hofstra.edu) offers an array of certificate and professional development programs as well as personal enrichment programs geared to adult students of all ages. Hofstra also offers the PEIR (Personal Enrichment in Retirement) program, especially designed for seniors (55+), which includes classes, discussion groups, social events and outings and volunteer opportunities.

The range of topics in Osher and AARP-related programs and many other lifelong learning programs often expands far beyond the traditional liberal arts curriculum and includes hands-on classes in crafts, hobbies, travel, languages, computer skills, photography and everything in between. Some of these programs are institutionally affiliated; others are run by volunteers. Current or retired university faculty may teach at some; volunteer experts may teach at others. These programs may follow an academic calendar or involve only one or more lectures. They also generally offer a wider array of social activities—informal gatherings, field trips, group travel, etc. Because they are so varied, these programs may give us an opportunity to achieve some, but perhaps not all, the structure, social interaction and intellectual stimulation we desire. The following list of institutions offering such lifelong learning programs may be helpful. It is by no means exhaustive.[1]

- Colgate University in Hamilton—http://www.colgate.edu/llp
- Long Island University in Southampton—http://www.liu/Riverhead/CE/CCR.aspx
- Marist College in Poughkeepsie—http://www.marist,edu/gpp/cls
- College of Mount Saint Vincent in Riversdale—http://www.mountsaintvincent.edu
- Syracuse University—http://www.suce.syr.edu/IRP
- Iona College in New Rochelle—http://www.iona.edu/liric
- Union College in Schenectady—http://www.union.edu/offices/ucall
- SUNY New Paltz—http://www.newpaltz.edu/cpe/lifetime

- SUNY Binghamton—http://www2.binghamton.edu/gse/community-partnerships/lyceum.html
- SUNY Polytechnic Institute in Utica—http://www.sunyit.edu/mvlir
- SUNY Stony Brook—http://www.sunysb.edu/olli

In closing, I would offer a few questions you might consider to assist you in exploring lifelong learning opportunities and in assessing how they may satisfy your own need for socialization, structure and stimulation.

What is your budget? Consider both time and money.

Are you looking for traditional liberal arts courses or those geared more to personal or professional development?

Are you interested in in-depth study of a single subject or less intense study of many subjects?

Whom do you want for classmates?

How actively do you want to participate in class?

Do you want to attend selected lectures or would you prefer a class schedule of predictable duration?

How important are organized social activities?

Whatever you study or program you choose I hope you find it enjoyable, stimulating, and satisfying.

I look forward to hearing your thoughts on this column and invite you to submit articles, anecdotes, and questions of interest to you. Have you faced a particular issue as a senior, had a successful (or unsuccessful) downsizing of your current home or firm, begun a new career, started a new business or had a travel experience you would like to share? We also look forward to hearing of your pro bono work, part-time lawyering or traditional retirement.

You can email me at rcb@sbscoaching.com.

Until next time—

Rosemary

Endnote

1 I encourage you to share your experience with and knowledge of courses and programs in your community. I would be glad to include them in a follow up column and in the message board of the recently activated Senior Lawyers Section Community.

Rosemary C. Byrne of Step-by-Step Coaching LLC is a corporate attorney and former litigator, with an encore career as an NYU-trained and certified Life Coach and certified Retirement Coach. A frequent speaker on transition and retirement life planning, she is Vice Chair of the NYSBA Senior Lawyers Section and co-chair of its Financial and Quality of Life Planning Committee. She is a graduate of the Benjamin N. Cardozo School of Law and served as a member of the law school's Board of Overseers. A co-author of *No Winner Ever Got There Without a Coach*, her article "Planning for Seniority: A Baby Boomer's Playbook" appeared in Experience magazine, published by the ABA.

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Foundation Fellow, Patricia L.R. Rodriguez
Law Office of Patricia L.R. Rodriguez, Schenectady, NY

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Revocable and Irrevocable Trusts

By Anthony J. Enea

The use of Revocable and Irrevocable Trusts for both estate planning and Medicaid asset protection planning has grown significantly over the past 15-20 years. The following is an overview of the pros and cons of utilizing each.

Revocable Living Trust

A Revocable Living Trust is a written instrument created during the lifetime of the Grantor (the person establishing the Trust) and is effective during the lifetime of the Grantor with respect to the assets which are placed in the Trust. It is an agreement between the Grantor(s) and the Trustees (Administrators of the Trust) as to how property transferred to the Trust is going to be held, distributed and administered both during the lifetime of the Grantor(s) and upon the death of the Grantor(s). The Trust is not effective until it is funded with assets. The Revocable Living Trust is distinguishable from a Testamentary Trust which is made a part of a Last Will and Testament, and only becomes effective upon the death of the Testator (the drafter of the will).

The Grantor of a Revocable Living Trust retains the power to freely amend and revoke the Trust as well as to reacquire its assets. The Grantor can also specify to whom and in what amounts/ percentages the assets titled in the Trust are to be distributed to upon the Grantor's demise. It is distinguishable from an Irrevocable Trust which cannot be amended or revoked by the Grantor. However, at the death of the Grantor(s) of a Revocable Trust, the Trust becomes irrevocable. At this point, the assets titled in the name of the Trust will not be subjected to probate upon the Grantor's death.

Furthermore, the same person can be both the sole Trustee and the sole holder of the present beneficial interest (Beneficiary) so long as one or more other persons hold a beneficial interest. The beneficial interest held by the other person can be vested or contingent (present or future). It is important to note that a lifetime Trust will be deemed to be irrevocable unless it expressly provides that it is revocable.

Advantages of a Revocable Living Trust

The use of a Revocable Living Trust provides the following benefits:

- Avoids the cost and time associated with probate and its attending expenses such as court filing fees, legal fees, legal fees, guardian ad litem fees and executor's commissions (but, may have trustee's commissions);
- Helps avoid potential challenges to a Last Will and Testament regarding issues of the Testator's competency. Attacks on grounds of lack of due execution are very difficult to prove.
- Helps protect the Grantor's privacy. It is a private document and unlike a Will, its provisions are not accessible for public review.
- Assets in the Revocable Living Trust will be available for immediate distribution after the death of the Grantor, subject to ensuring sufficient assets are available to pay estate taxes.
- There are no gift tax consequences when the assets are transferred to the Revocable Trust.
- The Revocable Living Trust allows for continuation of asset management of Trust assets in the event of disability of Grantor/ Beneficiary.
- Allows the Grantor to name alternate trustees to manage the Trust assets in the event that he or she becomes incapacitated or disabled.

Disadvantages of Using a Revocable Living Trust

There are some disadvantages to utilizing a Revocable Living Trust:

- You must transfer all of your assets, including title to any real property, or vehicles to the Trust during your lifetime. Additionally, any assets acquired during the Trust's existence must be transferred to the Trust. Any items not transferred to the name of the Trust may still be subject to a probate proceeding at the Grantor's death.
- The cost of having an attorney prepare a Revocable Living Trust is generally higher than the cost of preparing a Last Will and Testament.
- There will be legal fees incurred in amending or modifying the Trust during your lifetime and you will still need a Last Will (commonly known as a "pour over" Will) in the event there are assets which have not been transferred to the Trust. A Last Will and Testament is still needed because it is highly unlikely that you will have transferred all of your assets into a Revocable Living Trust prior to your death, thus creating the need for the existence of a Will to transfer the assets that are in your name alone at the time of your death.
- The assets transferred to a Revocable Living Trust are not protected for purposes of Medicaid eligibility and long-term care planning (in home care and/

or nursing home care). Because the Trust is revocable, the assets are considered an available resource for Medicaid eligibility purposes. Medicaid can impose a lien / claim against the assets titled in the name of the Revocable Living Trust.

- The Revocable Living Trust has no special estate tax treatment, and depending on the size of the estate, an estate tax return may need to be filed and estate taxes may be due.
- Execution of the Revocable Living Trust requires a higher standard of competency than a Last Will and Testament.

Irrevocable Trust

There are various types of Irrevocable Trusts with different purposes and objectives. For example, if you want to gift assets during your lifetime to a trust to be used for the benefit of your children and/or grandchildren an Irrevocable Trust might be an appropriate vehicle. If you have a disabled child and/or grandchild an Irrevocable Special Needs Trust is often utilized. If you have significant life insurance assets and don't want the assets to go outright to the beneficiary, or the life insurance death benefit to be part of your taxable estate, an Irrevocable Life Insurance Trust is an appropriate choice.

The most common Irrevocable Trust being utilized by seniors today is an Irrevocable Medicaid Asset Protection Trust. Unlike a Revocable Living Trust, this Irrevocable Trust cannot be amended and/or revoked by the Grantor and neither the Grantor nor his or her spouse should be appointed as Trustee of said Trust. The primary purpose of the Irrevocable Medicaid Asset Protection Trust is to shelter assets so that if one needs home care and/or nursing home care services in the future, the assets titled in the name of the Trust are not counted as available resources for purposes of Medicaid eligibility and are not resources against which Medicaid has a claim and/or lien against for the value of the services they have provided.

Advantages of Using an Irrevocable Trust

- The Trust creator(s) (Grantor(s)) can receive any income generated by the trust assets (if the Trust provides for such right) and have the right to reside in and utilize any real property transferred to the trust during their lifetime.
- The trust creator will continue to be able to utilize any tax exemptions such as STAR, Senior Citizen and Veterans and will also be able to take advantage of the personal residence exclusion for income tax purposes in the event the residence is sold.
- Like the Revocable Trust, the assets titled in the name of the Irrevocable Trust will not be subject to the Probate Process.
- Grantor can reserve the right to reside in the premises owned by the Trust for his or her lifetime. IRC §2036(c). If the right to reside is reserved, then the real property cannot be sold or leased without the grantor's permission.
- Grantor(s) can retain the Personal Residence Exclusion for capital gains tax purposes ($500,000 exclusion if married, $250,000 exclusion if single, pursuant to IRC §121(a)).
- Under IRC §2036(a), assets in the Trust are included and taxable in the estate of the Grantor at the date of death value. This allows the Trust Beneficiaries to get a step up in cost basis. IRC §1014(e).
- Grantor(s) can reserve power in a non-fiduciary capacity and without approval and consent of a fiduciary, to reacquire all or any part of the trust corpus by substituting property of equivalent value. The Grantor is considered the owner of the Trust corpus for income tax purposes. IRC §675(4).
- If a limited power of appointment is retained, the transfer of assets to the Trust is an incomplete gift. Treasury Regulation 25-2511-2(b).

Disadvantages of Using an Irrevocable Trust

- The transfer of assets to the Irrevocable Trust will disqualify the creator of the trust and his or her spouse from eligibility for nursing home Medicaid (not home care Medicaid) for five years ("the look back period"). However, once the five years have lapsed the assets in the trust are no longer available resources for purposes of Medicaid eligibility and Medicaid cannot file a claim and/or lien against the trust assets.
- The trust does not allow the trustees to distribute the trust principal to or for the benefit of the creator(s). Grantor(s) can receive income, which can affect Medicaid eligibility. However, the Grantor can give the Trustees the power to distribute principal and income to their children and others. This can be of value if access to the trust principal is ever needed.

It is most important that all tax and Medicaid consequences are reviewed with the client before making transfers to either a Revocable or Irrevocable Trust.

Anthony Enea, Esq. is a member of Enea, Scanlan & Sirignano, LLP with offices in White Plains and Somers, New York. He is a past chair of the Elder Law Section of NYSBA and Past President and Founding Member of the New York Chapter of NAELA. His telephone number is (914) 948-1500.

Senior Lawyers Helping Long Islanders in Need

By Melissa B. Greenberger

Retired? Semi-retired? Looking for an opportunity to use your skills and give back to the community? Worried about taking on a client and not being able to snowbird for the winter? No worries. Nassau Suffolk Law Services Committee, Inc. ("NSLS") has a program to fit your needs.

The New York State Unified Court System established the Attorney Emeritus Program ("AEP") to recruit attorneys who are at least 55 years of age, who have at least 10 years of practice experience, and who are in good standing, to engage in pro bono work. Through their service, these attorneys help meet the needs of New Yorkers who cannot afford counsel. Over the past 18 months, NSLS and other New York legal service providers have cooperated closely with Fordham Law School's Feerick Center for Social Justice, which provides programmatic and administrative support to the AEP.

In January 2015, in an effort to recruit additional Emeritus Attorneys for our programs, we created a questionnaire intended to identify potential areas of mutual interest and began our outreach efforts to attorneys on Long Island who had joined the AEP. The challenge in finding a suitable placement for an Emeritus Attorney begins with the initial contact. However, attorneys need not be reluctant to volunteer simply because they have no experience in poverty law issues. All Emeritus Attorneys who volunteer with NSLS receive training and support, malpractice insurance coverage, and CLE credit. In addition, Emeritus Attorneys are reassured that they have transferable skills, such as interviewing and counseling. Bart Rebore, an Emeritus Attorney, stated, "I found myself enjoying the challenge of learning a new area of law…and counseling clients who were in desperate need of legal help."

A nice benefit of being an Emeritus Attorney is the flexibility of scheduling. As one Emeritus Attorney said, "[a]s I no longer wish to pursue law full-time, the flexible time commitment of the Project permits me to incorporate the pro bono work which I want to do into my retirement lifestyle." Some volunteers assist every week, even if only for two hours. Other volunteers assist for a full day, or several days each week. Still others volunteer sporadically, when their schedule allows for it. Even snowbirds can volunteer!

In Nassau County, Emeritus Attorneys primarily work with the Volunteer Lawyers Project. Volunteer attorneys may serve as "Attorney of the Day" in the Landlord-Tenant Part of the District Court under the supervision of a NSLS staff attorney. The program runs Monday through Thursday mornings and the Emeritus Attorneys represent low-income tenants in court on a scheduled day. Additionally, Emeritus Attorneys handle matrimonial and bankruptcy cases on a pro bono basis.

In June 2015 NSLS launched a Self-Help Child Support Project to assist low-income parents in Suffolk County. Four Emeritus Attorneys were recruited specifically to assist with this project. They received training on NSLS' mission and intake procedures. Additional training on child support was provided by Family Court practitioners, including an Emeritus Attorney. Three of the Emeritus Attorneys staffed an Information Station at the Suffolk County Family Court to help launch the program. The volunteer Emeritus Attorneys screen callers for eligibility of services, conduct intake interviews alongside law student volunteers, advise callers on basic child support issues, and provide referrals to other agencies.

"The New York State Unified Court System established the Attorney Emeritus Program ("AEP") to recruit attorneys who are at least 55 years of age, who have at least 10 years of practice experience, and who are in good standing, to engage in pro bono work."

Recently, a newly recruited Emeritus Attorney and a law graduate seeking to fulfill his 50-hour pro bono requirement were in the office for training. They had the opportunity to shadow a current, experienced Emeritus Attorney in the Self-Help Child Support Project. It was particularly rewarding to observe the experienced attorneys working side-by-side with an eager law graduate as they screened callers for eligibility and sought to identify the callers' legal issues. Howard Ende, an Emeritus Attorney, "enjoy[s] working with recent law school graduates who are learning to communicate and interact with clients."

Other Emeritus Attorneys in the Suffolk County office of NSLS serve in various capacities within the Pro Bono Unit. Some of them screen callers for eligibility of services. One Emeritus Attorney, who is a retired New York State Supreme Court Justice, serves as a mentor for new pro bono attorneys who are accepting pro bono divorce cases. Emeritus attorneys with bankruptcy experience can assist with periodically scheduled bankruptcy clinics at NSLS' Islandia office and/or accept cases for full representation on a pro bono basis. There is always a need for pro bono attorneys with matrimonial experience who are willing to handle divorce cases and for elder law attorneys who are willing to assist with inheritance and estate planning matters.

NSLS is excited to announce that two new pro bono projects are expected to launch by the end of the year based in the Islandia (Suffolk County) office. One will focus on helping disabled clients apply for Social Security Supplemental Income (SSI) and helping clients already receiving Social Security Disability (SSD) or SSI benefits respond to overpayment notifications. The other project will focus on helping parents of young adult, developmentally disabled children petition for Article 17A guardianships. The legal assistance provided will be strictly pro se guidance, with no commitment to appear at hearings or in court, unless the pro bono attorney elects to continue with the case and formally appear on a pro bono basis. Both projects are geared to attorneys without any experience in these areas. NSLS will provide free, comprehensive training and all necessary resource materials to volunteer attorneys. Attorneys with experience in these practice areas are also welcome to volunteer, either to work directly with the clients, or to mentor other volunteer attorneys.

The Attorney Emeritus Program has benefited NSLS through the addition of volunteers, the ability to assist more individuals, and the availability of attorneys who are able to train volunteers. With these added volunteer attorneys, NSLS can continue its mission of "doing what's legally possible to create a just world."

To learn more about NSLS, visit www.nslawservices.org. Regardless of whether you are registered with the AEP, contact the Pro Bono Unit in Suffolk County at 631-232-2400 or Roberta Scoll at the Volunteer Lawyers Project in Nassau County at 516-292-8100 to volunteer with NSLS. You might find that it's a nice way to get out of your house, use your skills, meet other attorneys, earn CLE credits, and make a difference in someone's life.

Melissa B. Greenberger, Esq. is the pro bono innovator for Nassau Suffolk Law Services Committee, Inc., where she recruits, trains, and matches emeritus attorneys and law students to pro bono opportunities within the agency. She also oversees the Self-Help Child Support Pro Bono Project.

Helping Your Clients Plan for Retirement

By Leslie H. Tayne

The United States has roughly 78 million people born between 1946 and 1964 who make up one of the largest demographic cohorts that have entered or are approaching retirement age.[1] Retirement is a lifelong investment that, ideally, your client will have already started planning for. If your client has not thought about a retirement plan yet, or has but has hesitations about the functionality of the plan, should we then, as attorneys and trusted advisors, help guide our clients towards a functional retirement plan?

The reality is that we are attorneys and *not* retirement experts nor retirement planners in most cases. However, clients have all kinds of needs and if we function in our role as trusted advisors and get more involved in the long-term needs of the personal lives of our clients, arguably we could fulfill that role as counselor *and* advisor. Let's face it, most of our work as attorneys is short-term and transactional in nature. But what if we took a long-term approach and changed the goal to retain clients as long as possible with the idea that they will generate future business for our practices? We can meet this practice goal by meeting our clients' needs in retirement planning and future comfort through regular discussions and meetings for updates with the client. Simply doing a closing or settling a case for a client is great, but keeping their future plans in mind could maximize the client's ultimate benefit from our services and keep that client close as he or she progresses through their journey in life. Case in point, clients in their 20s and clients in their 40s have very different retirement thoughts and plans, and as each client ages, his or her needs evolve. As a result the clients' need for us as attorneys and a trusted advisor evolves as well. As lawyers, we can help to provide guidance and expertise on various aspects and stages of a client's retirement plans.

Depending on your practice, there may be several key factors to consider and discuss with your clients as a contributor to their retirement planning. First, knowing what you're retained for and how that impacts their retirement planning is key. For example, if you are doing a closing, filing bankruptcy, or helping your client with estate planning, then this will also have an impact on his or her financial future. Regardless of the transaction, the age of your client will dictate his or her short- and long-term goals. Financial support for themselves and their loves ones, including supporting elderly parents, supporting boomerang children or children who are still in college, planning for downsizing, and trying to predict and plan for future health care needs are all discussion points that help the clients see their future financial needs. We want to do a good job with our clients' legal planning and that should include making sure they are thinking about how it impacts their future financial and retirement plans. The factors listed above only touch the surface as to retirement planning through the legal eyes hired by our clients to protect them.

According to a 2013 study by the National Institute on Retirement Security, the average working American household has virtually no retirement savings. The median retirement account balance is $3,000 for all working-age households and $12,000 for near-retirement households.[2] This is far below what is needed to maintain an adequate standard of living in retirement, as evidenced by Fidelity's latest Retirement Health Care Cost Estimate, which estimates that the average 65-year-old couple retiring in 2016 will need to budget for $260,000 in health care costs alone.[3] Furthermore, Americans are retiring with more debt than ever before. For homeowners 65 and older, the percentage carrying mortgage debt increased from 22 percent in 2001 to 30 percent in 2011.[4] Americans are also increasingly entering retirement with outstanding student loan debt, with federal student loan balances for people 65 and older growing from about $2.8 billion in 2005 to $18.2 billion in 2013.[5] This leaves many American families finding themselves constantly wondering how much money they will need to retire and whether they will ever have enough. This also can lead to limitations placed on our ability as attorneys to effectively counsel and provide the best solution for our clients. Once we are aware of our clients' wants and needs and come to understand their financial situations, then we can work to give them the best results with regards to both their legal *and* retirement needs.

With increasing costs of living and an aging population, waiting until the "Golden Years" to begin thinking about retirement planning is not an option. It is important to keep clients informed and educated about retirement planning while discussing other issues you may be dealing with. For example, if you are a personal injury attorney, you may be helping your client settle his or her case after a severe car accident; he or she also may be dealing with a decent amount of medical debt or that client may be behind on his or her mortgage if he or she did not have the income to support his or her financial needs during the litigation process. Ethically, one would argue it is prudent to ask clients these questions and see if the award we achieve is best for them and has the best possible positive impact on their financial needs and future retirement planning. Regardless, it can be argued our job should include a concern and discussion about how the result we achieve impacts the client financially in the short- and long-term.

According to an AARP survey, 72% of Boomers expect to delay retirement because they are "financially unprepared"; half of those surveyed believe they may never even be able to retire.[6] This puts a great deal of anxiety on your clients, leaving them with unanswered questions and concerns. This anxiety does not equate to maximization of attorney-client relationships, as many of us have probably found out over the course of vast practice years. Clients with financial stress or strain become clients who do not pay and/or clients who can be combative, and are thus unable to see the work we do for them as beneficial. The solution could be that discussing finances and retirement planning as early as possible may place the wheels in motion for clients to find strategies that best fit their needs now *and* in the future. It may make sense to ask the clients what plans they have made for retirement to date and then discuss how those plans coordinate with the legal services you are providing to those clients. For example, if you are dealing with a matrimonial matter and your client, as the "non-monied" spouse, has no retirement plan and he/she is 50 years old, that discussion will be far different from the one who is the "monied" spouse and potentially facing the requirement to give half of his or her retirement fund to the "non-monied" spouse. Having these discussions is an important part of maximizing the benefit of the work we do as attorneys.

We have our limitations as attorneys in the retirement planning arena, and thus, these shortcomings may be met by bringing in additional professionals to assist clients and their needs in planning. As a practitioner, we may further establish relationships to form an interdisciplinary team of experts that can work together to meet the needs of our clients. This will not only ensure that your client has access to the resources of an expert team that you trust and have worked with, but will benefit your business as well by establishing the relationships necessary to generate future referrals. Draw upon your existing network of referrals and determine which specialties fit into your "*Retirement Advisor Team*" and who the experts are among your network to best prepare your clients and benefit them and your practice. You do not need to make any formal arrangements, but rather, have a discussion about the intent of this new referral network and why it should be of interest to them. Discuss your intent to create a team with your client as the overall plan to work through your client's legal matter.

The next step in helping your clients plan for retirement is opening the lines of communication and determining what exactly their current needs are, as well as anticipating what their future needs/goals may be. This can not only help your clients plan for retirement, but can help you prepare your business ahead of your clients' needs. As our time is expensive and well consumed with many matters, this part does not even have to be done by you, but through an experienced office assistant. When discussing planning for your clients' retirement needs, it is helpful to have a list of questions that make up the retirement questionnaire. Consider some conversation starters like asking first and foremost, do they have any retirement plans? Do they want to achieve complete retirement or remain working in some capacity throughout life? Also consider their sources of income and family needs for income, housing and college expenses, and number of children, as well as their debt, including who they owe and how much. Probing for answers to these questions can help you and your clients determine a starting place and lay the foundation for a more in-depth discussion about their needs and create lasting relationships. As mentioned already hereinabove, help guide your clients to the professionals who can help them with finances so that the execution of the legal matter you are handling can be maximized. Reassessing these needs and asking the questions may be necessary every few years as goals, circumstances, and laws change and as their case in your office progresses. Consider this as a way to establish a lifelong, trusting relationship with your client which is beneficial to both your practice and the client.

Guiding your clients toward discussions about a retirement plan can, at times, be a little trickier than helping them sort out their legal matter. Trust is key and relationships built on trust are more successful; start slowly and get the client thinking. Consider taking an old-school approach and make that client's matter more than the legalese of the case. If you take steps to understand their financial situation and eventual retirement plan, then they should come to trust you with their financial and legal future. Be the go-to retirement source your clients want and need and give them the gift of retirement-thinking and realization.

Endnotes

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Unwanted Medical Care and Treatment—Things You Can Do to Get Only the Care and Treatment You Want and to Which You Are Entitled

By David C. Leven

Too many people die suffering unnecessarily in this country and in New York State. Some patients receive unwanted, often aggressive care which contributes to or causes this suffering until they die. This care may be provided because wishes regarding care and treatment were never expressed. For others, it is provided contrary to clearly expressed wishes.

This article will focus on the issue of unwanted care and treatment (these words are used interchangeably) and what you can do (for yourselves, loved ones, and possibly clients) including enforcing rights under laws designed to help you get care and treatment in accordance with your wishes, to improve your quality of life and to allow you to have a death in accordance with your values and goals. What is discussed in this article applies to you but also to loved ones and clients, if you are still providing representation.

Dying Today

A very brief summary about how we die today is provided here because it is important to know that when considering what your goals of care are, what matters to you, and what suffering you might endure relevant to quality of life, as decisions are made by you or by others for you. Understand that while people are living longer they are not necessarily dying better. Increasingly, medical technology can keep us alive longer. That is good for some of us who may have a good quality of life and relatively good deaths, but it is not good for others who may have a prolonged dying process and who die badly. Now, some 70% of people die each year from chronic diseases, with more than half of those dying from heart disease, cancer or stroke. Many people die with poorly controlled symptoms and pain; psychiatric disorders and psychosocial and spiritual distress; concrete needs in the home; and challenges in care coordination, communication, decision making, and goal-setting.

A 2015 report, *Dying in America*, by the Institute of Medicine, confirms that many drastic improvements are needed in the treatment of the dying. It states that "…improved care for people near the end of life is a goal within the nation's reach," meaning, of course, that much change is needed. It notes too, "As much as people may want and expect to be in control of decisions about their own care throughout their lives, numerous factors can work against realizing that desire." The report documents many areas where changes are needed and makes numerous good recommendations.

Unwanted Health Care Treatment (and Wanted Treatment)

The wishes of patients need to be honored far more than they are now. This will require changes in the way that medicine is practiced and how doctors and patients interact. It will certainly require that patients take essential steps to ensure that they do not get unwanted treatment but do get treatment that they wish. Just two years ago, a national survey conducted by Purple Strategies revealed that about one in four Americans say that they or a family member experienced excessive or unwanted medical treatment. That is about 25 million people. This is unacceptable.

The survey also revealed that older Americans strongly support holding doctors accountable when they fail to honor patients' end-of-life health care wishes and that older Americans want both incentives and sanctions to ensure physicians respect patients' preferences. Six out of 10 (61%) of those polled support reimbursing doctors for end-of-life consultations; nearly two-thirds (65%) support withholding payment to health care providers who fail to honor their end-of-life medical wishes.

Large majorities of the survey respondents would discuss (93%) or write down (90%) their advance directive, or change (91%) or speak (84%) to their own doctors. Two-thirds (66%) say they would "take political action to protect patients' rights to their own choice in end-of-life care." Four out of 10 said they would "take legal action" (41%) or "not pay for the treatment" (40%) in response to unwanted medical treatment. Not surprisingly, 95% said it is important for health care providers to respect their end-of-life medical wishes. Almost eight out of 10 (79%) would be angry if their health care providers did not honor those wishes.

According to a recent study, most patients with metastatic cancers receive aggressive care at the end of life that does not appear to be of value. Aaron Falchook, MD, a co-author of a study on this topic says, "Overuse of aggressive care at the very end of life for a cancer patient can translate to increased burden on patients and their families. In essence what we're doing is we're giving patients side effects without giving them the benefits of the treatment, and that's really the fundamental problem with aggressive care at the end of life." Many if not most of the patients in the study should probably have been transitioned earlier from disease-directed treatment to palliative care or hospice. The quality of their lives would have been better. As Ronald C. Chen, MD, a lead study author said, "Additional efforts are critically needed to improve end-of-life care for patients with terminal disease to ensure that the care provided meets the goals and preferences of patients and their families."

This study on aggressive cancer care was presented at a recent meeting of the American Society of Clinical Oncology. It found that three-quarters of patients with metastatic cancers (lung, colorectal, breast, pancreatic or prostate) received aggressive invasive procedures or were admitted to tertiary care facilities within the last 30 days of life. The study examined some 28,000 patients from 14 states, all 65 years or younger.

An important lesson here is that you, as a patient with a terminal illness, must be informed of the risks and benefits of any disease directed treatment and all alternative treatments including palliative care and hospice, so that you can make informed decisions about your treatment. But, unfortunately, you may have to initiate the discussion about treatment options with your health care providers as they may not provide you with essential information, even though they are ethically and legally obligated to do so.

For a detailed article on the topic of unwanted or overtreatment, see "Avoiding Overtreatment at the End of Life: Physician-Patient Communication and Truly Informed Consent," *Pace Law Review*, Vol. 36, p. 737, 2016. Also for a review of cases of unwanted or futile care, characterized as the Medical Futility Blog, see feedblitz@mail.feedblitz.com. The blog is by law school professor Thaddeus Pope.

Health Care Proxies

To meet the goal of having health care wishes respected there are certain steps which should be taken to increase the likelihood of that happening. Most importantly, all adults, 18 and over, including your clients, as well as your children and you, should complete a health care proxy. Some 70% of people, when terminally ill, will at some point no longer have decision-making capacity and will not be able to make decisions about health care options. If you or your clients have not appointed a health care agent to make decisions and no one knows what your goals of care are and what treatments would or would not be wanted, decisions may easily be made that are contrary to what would have been wanted.

Too many times we hear stories about people no longer able to make health care decisions, who suffered terribly at the end of their lives, and were kept alive on machines because no one knew their health care wishes. Many people will have in fact considered their end-of-life treatment preferences and, of course, expect and want them to be honored. Still, only about 30% of them have communicated these preferences to loved ones or doctors and have appointed a health care agent to make health care decisions for them when decision-making capacity is lost. The time to appoint a trusted person to make these decisions and to have conversations with loved ones and doctors about goals of care and treatment preferences is now, while people are relatively healthy and have decision making capacity. This is a gift to loved ones and yourselves.

There are many reasons why people do not take the time to discuss their treatment options with loved ones and their doctors such as "I don't have time," or "It's too overwhelming," or "I don't like talking about these things." None of these reasons is good enough, particularly when considering the significant benefits to people and those close to them when conversations occur and a health care proxy is completed. When people know our wishes, and understand the reasons behind them, they may be more likely to be honored; communication between loved ones and doctors may be facilitated when the time comes for health care decisions to be made, relieving the burdens on all involved; and serious and sometimes never-ending conflicts, which often arise between family members, may be avoided. Those who have these discussions may feel good about having had them, and their stress level about end of life may be reduced.

Values, religious and otherwise, about what makes life worthwhile, what gives life meaning, what matters to us should be discussed. One consideration is whether it is more important to have a better quality of life or an extended life. Decisions concerning life-sustaining treatment are the most difficult for people to make. So, you might discuss with loved ones different scenarios which might confront you to help with the decision-making process. A few short examples of situations that might arise and that might be considered for discussion are:

- You have advanced dementia, are 90 years old, have been bedridden for years and no longer recognize your loved ones. You now cannot eat or even be hand fed. Would you want a feeding tube?
- If you were terminally ill and in great, intolerable pain, would you want to be sedated to unconsciousness if it were necessary to control the pain (this is known as "palliative sedation")?
- If you were permanently unconscious, would you want a feeding tube?

Completing the simple two-page health care proxy form itself is simple. Two witnesses are needed, neither of whom can be the agent (who is appointed). The person appointed as the agent (an alternate agent should also be appointed if possible) should be: willing to speak on your behalf, able to act on your wishes even if different from theirs, a strong advocate who is trusted, someone who knows you well and understands what is important to you, and who would be able to handle conflict if it arises. After discussions have been had with loved ones and doctors and the health care proxy form is completed, copies should be made for all, including your lawyer if one is involved. Keep a wallet-size copy with you and/or take a photo of your health care proxy and put it on your cell phone and ask your health care agent and alternate to do the same.

Discussions should continue about end-of-life preferences through the years as your thinking may change, and you should communicate changes so that your health care agent (and alternate) and other loved ones continue to understand current preferences and values. By having conversations about health care and end-of-life decisions and appointing a health care agent, a significant gift will be given to those who most matter as well as yourself.

and antibiotics. For each category of treatment at least two options are offered.

As an example, for intubation and mechanical ventilation (to help with breathing), there are three choices: do not intubate, a trial period, and intubation and long-term mechanical ventilation, if needed. Other instructions can also be indicated.

As an example as to how the MOLST form can be completed, assume a patient retains medical decision-making capacity and wants to die naturally in a residential setting, not in the intensive-care unit of a hospital on a ventilator with a feeding tube. Using MOLST, after discussion with the patient and with his or her informed consent, the patient's doctor could issue medical orders regarding life-sustaining treatment, including any or all of the following medical orders: provide comfort measures (palliative care) only; do not attempt resuscitation (allow natural death); do not intubate; do not hospitalize; no feeding tube; no IV fluids; do not use antibiotics; no dialysis; no transfusions. If the patient wants aggressive treatments or some treatments on a trial basis, then those decisions would be indicated on the MOLST form.

"Medical Orders for Life Sustaining Treatment (MOLST) can help ensure patients receive desired health care treatment and interventions and that unwanted treatment and interventions are not provided."

The orders should be honored by all health care providers in any setting, including emergency responders who are summoned by a 9-1-1 telephone call after the patient loses medical decision-making capacity. Although it is critically important to appoint a trusted person to be a health care agent and to complete the health care proxy form, MOLST, which should be compatible with what the health care agent has been told about goals of care, gives people added assurance that their goals of care and specific health wishes will be adhered to. And, because MOLST are written orders of a physician, they may carry more weight with health care professionals in an emergency or other situation when decisions about life sustaining treatment must be made. When the MOLST form is prepared, it is probably wise to have the health care agent present too, if possible, so that everything stated in the MOLST is in fact consistent with what has been told to the health care agent. The health care agent should be given a copy of the MOLST form, as should other loved ones and doctors who may be involved with care.

People for whom it is appropriate should be encouraged to complete a MOLST form primarily to avoid life sustaining treatment interventions in situations where they would not want them and would prefer palliative care to provide a better quality of life rather than an ex-

Medical Orders for Life Sustaining Treatment (MOLST)

Completing a MOLST form might be a good option for some elderly patients and especially for those people who may not have anyone to appoint as a health care agent. Medical Orders for Life Sustaining Treatment (MOLST) can help ensure patients receive desired health care treatment and interventions and that unwanted treatment and interventions are not provided. As important as MOLST is, most people, including many health care professionals, are unaware of it nine years after it was initiated statewide in New York.

MOLST is on a bright pink form. It is signed by a doctor and patient, or by a health care agent or surrogate for patients who do not have decision-making capacity. It tells others the patient's wishes regarding life-sustaining treatment. It is appropriate for patients who have serious health conditions who live in a long-term care facility or require long-term care services, or who might die within a year, or who want to avoid or receive any or all life sustaining treatments. As medical orders, MOLST is transferable between health care settings.

The first page of the document mainly concerns cardio-pulmonary resuscitation. For those who do not want to be resuscitated it is a substitute for the traditional Do Not Resuscitate Order (DNR). The second page has treatment guidelines with several options, where the patient can choose comfort measures only or limited medical interventions or no limitations on medical interventions, all of which are explained, as well as instructions for intubation and mechanical ventilation, future hospitalization transfers and artificially administered fluids and nutrition tended life. As explained earlier, too many people are now kept alive contrary to their goals of care because they did not previously express their desire to forgo certain or all life sustaining treatments and now cannot do so (most of us will no longer have the ability to make health care decisions when decisions about life sustaining treatment must be made). The consequence is that too many patients suffer as they are provided life-prolonging treatments which may diminish quality but not extend life by any appreciable amount of time. For others who have not in the past stated their wishes, life sustaining treatments may have been withheld or stopped, contrary to their wishes, which were never expressed.

Many doctors are reluctant to have discussions with their patients about goals of care and end-of-life care and avoid doing so even though Medicare will now reimburse doctors for having such discussions. MOLST is an excellent tool to promote more and better physician-patient communications. Studies show that having these conversations, particularly near or at the end of life, results in patients better accepting their terminal illness, significantly increasing those who have DNRs, reducing aggressive treatment, and increasing the number of people referred to and enrolled in outpatient hospice. Studies on the actual use of MOLST are quite positive and indicate good outcomes with the wishes of patients, particularly regarding resuscitation, more likely to be followed than where there is not a MOLST. Since many health care professionals are still unaware of MOLST or are not yet using it, you may have to bring it to the attention of your doctor.

Palliative Care Laws in New York

There was an urgent need in New York for laws to ensure that health-care practitioners provide, and patients receive, the information and counseling needed to make informed decisions about their treatment and care to reduce the number of patients dying badly. Many physicians have historically been unwilling or unable to have discussions with their dying patients about their diagnosis, prognosis, and treatment options, and the risks and benefits of alternative options, or those discussions have been inadequate and/or untimely, to the detriment of their patients. Since patients have an absolute right to accept or reject any treatment that is offered, doctors have an ethical responsibility to provide information about treatment options so patients can make informed decisions.

The lack of timely physician-patient communication—or any physician-patient communication—is evident regarding hospice. Hospices provide high-quality end-of-life care with well-trained interdisciplinary teams, like palliative care teams. Since hospices provide significant benefits to patients and their families, discussions should take place about hospice and how it can be helpful, and referrals for most patients should be made soon after or even at the time of a terminal diagnosis. However, hospice referrals have usually been made close to death or not at all, even though patients are eligible when a doctor determines that, with a reasonable degree of medical certainty, the patient will die within six months. In New York State about two-thirds of patients are enrolled for less than a month and one-third for a week or less before they die. New York State also has had a poor record regarding hospice utilization. The state has one of the lowest rates in the country of patients dying in hospice: about 30% compared to the national average of close to 50%.

"Since hospices provide significant benefits to patients and their families, discussions should take place about hospice and how it can be helpful, and referrals for most patients should be made soon after or even at the time of a terminal diagnosis."

There are significant benefits for patients when end-of-life discussions between physicians and their dying patients occur. Quality of life is improved, decisions are made to pursue less aggressive interventions, patients are more likely to receive end-of-life care consistent with their wishes, and hospice referrals occur earlier. End-of-life discussions often produce dramatic positive results. It is the responsibility of health-care practitioners to initiate these discussions, as they are now required to do in New York and as both a best practice and standard of care dictate. It should also, it seems, be the responsibility of lawyers to inform their clients of their rights regarding palliative care and hospice and to be advocates for them, when appropriate.

New York Laws on Palliative Care

New York State has wisely enacted laws, unique to this state, to begin to address the problems of inadequate pain and other symptom control, the lack of information provided to patients about palliative care, hospice and other end-of-life options, and the failure to provide timely palliative care, and hospice care, if at all.

The Palliative Care Information Act and Palliative Care Access Act, both effective in 2011, are critically important patient rights laws.

Palliative Care Information Act (PCIA)

The Palliative Care Information Act (PCIA), Public Health Law, Section 2997-c, is a patients' rights law that is a model for the nation. Terminally ill patients now have a clearly defined right to receive information and counseling about their palliative care and end-of-life options, including hospice, which will enable them to make informed treatment decisions during the final months of their lives. The law states, in part:

> If a patient is diagnosed with a terminal illness or condition, the patient's attending health care practitioner shall offer to provide the patient with information and counseling regarding palliative care and end-of-life options appropriate to the patient, including but not limited to: the range of options appropriate to the patient; the prognosis, risks and benefits of the various options; and the patient's legal rights to comprehensive pain and symptom management at the end of life; and information regarding other appropriate treatment options should the patient wish to initiate or continue treatment.

Definitions

"Palliative Care": Health Care treatment, including interdisciplinary end-of-life care, and consultation with patients and family members, to prevent or relieve pain and suffering and to enhance the patient's quality of life, including hospice care.

"Terminal Illness or Condition": Reasonably expected to cause death within 6 months.

"Appropriate": Consistent with applicable legal, health and professional standards, the patient's clinical and other circumstances; and the patient's reasonably known wishes and beliefs.

"Attending health care practitioner": A physician or nurse practitioner who has primary responsibility for the care and treatment of the patient. Where more than one physician or nurse practitioner share that responsibility, each of them has responsibility [to offer information and counseling], unless they agree to assign that responsibility to one of them.

Compliance with PCIA

Offer to provide information and counseling:

Patient accepts:

- Provide information and counseling directly, orally or in writing.
- Arrange for another physician, NP or professionally qualified person to provide the information and counseling.
- If unwilling to or does not feel qualified to provide information and counseling, either arrange for another physician or NP or refer to another physician or NP.

Patient declines:

- Patient is not provided with information.
- Information and counseling shall be provided to a person with authority to make health care decisions for the patient if the patient lacks decision making capacity.

If you believe that you may have a terminal illness and you have not yet been offered information and counseling, then you may want to ask your attending health care practitioner to provide you with information and counseling so that you will be able to make informed treatment decisions for yourself. You should also inform seriously ill family members and clients of their rights under the PCIA and recommend that they too raise the issue of being provided the required information and counseling if they want it.

Studies have demonstrated the need for the PCIA:

- Dying patients are not informed or sufficiently informed of diagnosis, prognosis and treatment options.
- The vast majority of dying patients in fact want to know their diagnosis and prognosis.
- The lack of physician-patient end-of-life discussions results in hospice referrals only very near death or not at all.
- End-of-life discussion with patients results in a better quality of life, and they have better deaths and may even live longer.
- Costs are reduced.

Palliative Care Access Act (PCAA)

The PCAA: Expands on the PCIA, Public Health Law, Section 2997-d

- Applies to hospitals, nursing homes, home care agencies and enhanced and special needs assisted living residences.
- Applies to patients with advanced, life limiting conditions and illnesses who might benefit from palliative care (defined as in the PCIA).
- Requires providers to establish policies and procedures to provide these patients with services with access to information and counseling concerning palliative care and pain management appropriate to the patient.

- Facilitates access to appropriate palliative care and pain management consultations and services.
- Provides the information and counseling to those lawfully authorized to make decisions for patients who lack capacity to make medical decisions.

According to the NYS Department of Health,

> Like the PCIA, the PCAA is intended to ensure that patients are fully informed of the options available to them when they are faced with a serious illness or condition, so that they are empowered to make choices consistent with their goals of care, and wishes and beliefs, and to optimize their quality of life. The law is not intended…to discourage conversations about palliative care with patients who have distressing symptoms and serious conditions, but do not technically fall within the law's requirements. Palliative care and disease-modifying therapies are not mutually exclusive. Patients may opt to pursue palliative care while also pursuing aggressive treatment. Palliative care may be provided together with life-prolonging or curative care or as the main focus of care.

As with the PCIA, the PCAA may seem to apply but you still may not be provided the required information and counseling and services may not have been facilitated by the health care facility. You may need to be an advocate for yourself to ensure that you receive the treatment and care to which you are entitled and which will benefit you.

Resource for PCIA and PCAA :

- New York State Department of Health website, questions and answers and guidance for practitioners, http://www.health.ny.gov/professionals/patients/patient_rights/palliative_care/.

Legislation on Unwanted Medical Care

The chair of the Assembly Health Committee, Richard Gottfried, has introduced a bill. (A.2140-A; it will have a new number in 2017 after the new legislative session begins.) If enacted, it will hopefully reduce unwanted medical care and will provide potential remedies when such care is provided. It specifically provides, in part, that:

> 2. In a judicial or administrative action or proceeding relating to a health care provider's failure or refusal to adhere to or accommodate a patient's patient health care decision:
>
> (a) The action or proceeding shall not be barred because the health care provider's failure or refusal to adhere to or accommodate a patient's health care decision (i) did not cause physical, mental, emotional, or economic injury to the patient or (ii) improved the physical, mental, or emotional condition of the patient. However, the presence or absence of such injury or improvement may be considered in the measure of damages, penalty or other relief.
>
> (b) A court may award damages for each day the health care provider's failure or refusal to adhere to or accommodate a patient's health care decision in the amount of two thousand dollars for each day or such other amount as the court may deem just.
>
> (c) A waiver by or on behalf of a patient of the right to bring an action or proceeding under this subdivision shall be against public policy and shall be void.
>
> (d) Laws and rules relating to civil actions or proceedings shall apply, except as explicitly provided otherwise in this section.
>
> 3. This section shall not change the authority of a health care provider to provide a health care service or treatment in the absence of or contrary to a patient's consent, where authorized by law.
>
> 4. No health care provider shall seek or accept payment or reimbursement from or on behalf of the patient or a third-party payer for a health care service or treatment that is provided in the absence of or contrary to the patient's consent, unless it was authorized by law to be provided in the absence of or contrary to the patient's consent.

Regarding this latter provision, the Family Health Care Decisions Act, PHL, Article 29-cc, has a provision which generally prohibits reimbursement for unwanted care, with certain exceptions.

As stated in the sponsor's memo to A.2140-A:

> New York and other states provide a safe harbor for physicians and health care providers who adhere in good faith to valid advance directives and patient decisions. However, many states, including New York, do not provide corresponding punishment provisions or specifically allow for the recovery of damages, when appropriate, for disregard of such valid directives. This is unfair to patients and family members who suffer because of

having unwanted treatment provided, or not having wanted treatment provided. This bill will ensure that there may be remedies in appropriate cases. Additionally, providers should not be able to seek or recover payment for clearly expressed unwanted treatment. This bill will prohibit providers from seeking and obtaining payment for such unwanted treatment.

Final Thoughts

All of us have the right to accept or refuse any medical treatment that is offered to us at any time. Near the end of life, many of us will choose, and have the absolute right to choose, if we have decision making capacity, to either forgo certain treatments, or to have them stopped, at any time. These include feeding tubes, respirators, cardiac devices, dialysis, antibiotics or other life sustaining drugs, etc. And, if our symptoms become unbearable and cannot be controlled, particularly pain (which most often can be managed well, but not always), the option of palliative sedation, near the end of life, should be available. Life sustaining treatments, if any, are stopped as are food and fluids; the patient is sedated to unconsciousness, often until death arrives, although the patient may want to regain consciousness during the process to see if the symptoms are being controlled. Death occurs within days and up to about two weeks. For some, voluntarily stopping eating and drinking may be a reasonable end of life option, particularly in the absence of aid in dying, a process which generally takes 10 to 14 days for death to arrive. It is quite difficult for many because of thirst issues and requires a great deal of discipline. In this situation the cause of death is dehydration, not starvation as some believe.

We should be in charge of our own deaths as we have been our own lives.

Conclusion

Unwanted medical care or treatment is provided too often to patients, particularly the dying. You as a patient and your clients need to understand that this happens and why it happens. You and they also should know that there are things that can be done which will hopefully ensure that only that care and treatment that is wanted, will in fact be provided.

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*** The organization provides free counseling services to the terminally ill and their families and to those planning for the end of their lives. Contact Judith Schwarz, PhD, Clinical Coordinator, Judy@endoflifechoicesny.org, 212 252 2015, who is available to speak with people about any of the issues discussed in this article.**

Factors to Consider When Transferring a Residence for Elder Law and Estate Planning Purposes: A Primer

By Anthony J. Enea

Transferring one's residence raises a number of significant and complex issues and concerns that need to be thoroughly addressed prior to making the transfer. The following is an overview of the types of transfers of a residence that can be made and their consequences:

A. Outright Transfer of the Residence Without the Reservation of a Life Estate

Generally, this is not the best option as the transferee of the property will receive the transferor's original cost basis in the property (original purchase price plus amount of any capital improvements made). A gift tax return will need to be filed and utilization of one's lifetime gift and estate tax credit will need to be used. For Medicaid eligibility purposes, the outright transfer of the residence creates a 60 month look-back period (unless it is a transfer to one's spouse, blind and/or disabled child, caretaker child and/or sibling with an equity interest), thus disqualifying the transferor and his or her spouse for nursing home Medicaid (not Medicaid home care) for 60 months.

From an income/capital gains tax perspective, the use of an outright transfer of the residence results in the transferor losing the Internal Revenue Code ("IRC") §121(a) principal residence exclusion for capital gains (income tax) purposes of $250,000 (single person) or $500,000 (married couple). With the federal capital gains tax rate, including the Medicare surtax, being approximately 25%, the income tax impact could be significant. However, if after the transfer is completed, the transferee owns and resides in the premises for two out of five years, he or she will be able to use his or her principal residence exclusion. Any Veteran's, STAR and Senior Citizen's exemptions would also be lost with an outright transfer. It will also be necessary to obtain a fair market value appraisal of the premises gifted for purposes of calculating the federal gift tax credit utilized for the transfer. The consequences of an outright transfer can be financially significant.

B. Transfer of the Residence With the Reservation of a Life Estate

This is a type of transfer which was commonly recommended in the past. A transfer of real property by deed with a retained life estate will also create the 60-month look-back period for nursing home Medicaid.

Pursuant to §2036(a) of the IRC, the transfer of a residence with a retained life estate (possession or enjoyment of and/or right to income) permits the transferee of the residence to receive a full step-up in his or her cost basis in the premises upon the death of the transferor, to the fair market value of the premises on the transferor's date of death. This occurs because the residence is includible in the gross taxable estate of the transferor upon his or her demise. This, of course, presumes the continued existence of an estate tax upon the death of the transferor.

If a life estate has been retained, a sale during the transferor's lifetime will result in a loss of the step up in cost basis, thus subjecting the transferee to a capital gains tax on the sale with respect to the value of the remainder interest being sold (difference between transferor's original cost basis, including capital improvements, and the sale price), and the life tenant pursuant to Medicaid rules is entitled to a portion of the proceeds of sale based on the value of his or her life estate. The life tenant may also utilize the personal residence exclusion with respect to the consideration received for the value allotted to his or her life estate as actuarially determined. The portion of the proceeds of sale due to the life tenant could be significant, and will be considered an available resource impacting the Medicaid eligibility of the life tenant. The existence of the possibility that the premises may be sold prior to the death of the transferor(s) poses a significant detrimental risk that needs to be explored in great detail with the client if a deed with the reservation of a life estate is contemplated.

It may be advisable to make the gift an "incomplete gift" for gift tax and capital gains tax purposes and the reservation of a limited testamentary power of appointment by the Grantor should also be considered.

It should be remembered that IRC §2702 values the transfer of the remainder interest to a family member at its full value without any discount for the life estate retained. Retention of a life estate falls within one of the exceptions of IRC §2702.

Pursuant to IRC §2702, if the homestead is transferred to a non-family member, the use of a traditional life estate will result in a completed gift of the remainder interest. It should also be remembered that the gift of a future interest (remainder or reversionary interest) is not subject to the annual exclusion of $14,000 per donee for the year 2016.

C. Transfer to a Medicaid Asset Protection Trust

For various reasons, the use of the Medicaid Asset Protection (MAP) is the most logical option. As previously explained, irrespective of the fair market value of the residence transferred to the Trust, the period of ineligibility for nursing home Medicaid will effectively be 60 months. However, the properly drafted MAP will allow the residence to be sold during the lifetime of the transferor with little or no capital gains tax consequences, as the transferee can utilize the transferor's personal residence exclusion of $500,000, if married, and $250,000 if single. This can be accomplished by reserving in the trust instrument the power to the Grantor(s), in a non-fiduciary capacity and without the approval and consent of a fiduciary, to reacquire all or any part of the trust corpus by substituting property in the trust with property of equivalent value. The Grantor(s) will be considered the owner of the trust corpus for income tax purposes. See IRC §675(4). Additionally, the transfer to the Trust can be structured to allow the transferee to receive the premises with a stepped-up cost basis upon the death of the transferor, through the reservation of a life income interest (life estate) to the Grantor. IRC §2036(a).

The tax advantages and the continued flexibility of being able to sell the premises during the transferor's lifetime without income tax consequences, in my opinion, makes the MAP an ideal option in most circumstances.

The transfer of the residence to the MAP is a taxable gift of a future interest; thus, no annual exclusion is available and the full value of premises must be reported on a gift tax return.

If a limited power of appointment is retained, the gift to the MAP is incomplete. Treasury Reg. 25.2511-2(b). No gift tax return is technically required; however, it is advisable to review with an accountant the filing of a gift tax return for informational purposes.

On the death of the Grantor of the Trust, the date of death value of all assets in the trust will be included in the Grantor's taxable estate pursuant to §2036(a) of the IRC, as a result of the life income interest retained by the Grantor.

Inclusion in Grantor's estate will result in a full step-up in cost basis for all trust assets pursuant to §1014(e) of IRC, assuming an estate tax is still in existence at the time of the Grantor's demise.

In conclusion, it is most important that all of the aforestated options and their consequences be thoroughly reviewed with the client prior to a transfer of real property being made. Just deeding the property out without a thorough explanation of the ramifications will inevitably lead to problems.

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Horseplay: Employee's Fault, Employer's Burden

By James Shovlin

Workers' Compensation allows employees who are injured on the job to receive compensation for their injuries; but should they receive this compensation when the injury was caused by their own foolery? In a recent 2015 New York Workers' Compensation case, a maintenance worker injured his hand while allegedly jumping up to clean a spot stain on a high pillar.[1] The maintenance worker filed a Workers' Compensation claim in order to receive compensation for his injuries. The Workers' Compensation Law Judge found that the worker was entitled to Workers' Compensation benefits. The insurance carrier for the employer had doubts about the truthfulness of the maintenance worker's story. After all, the maintenance worker had previously claimed that he was jumping up to grab his keys from atop the pillar. The insurance carrier appealed the case by an application of review, asserting that the maintenance worker's injuries were actually the result of him "goofing off." The Board Panel who reviewed the case agreed with the insurance carrier that the maintenance worker was "goofing off" but affirmed the Judge's decision anyway.[2] The reason for this decision was fairly simple: under New York Workers' Compensation Law, the maintenance worker's actions are considered horseplay, which is fully compensable.[3]

Workers' Compensation is a legal remedy in which employees who are injured within the scope of their employment receive compensation for those injuries without regard to fault as a cause of the injury.[4] Horseplay is a concept within the legal framework of Workers' Compensation in which an employee is injured while he/she is, for lack of a better phrase, "goofing off." There is no specific mention of the term "horseplay" in New York Workers' Compensation statutes even though the term is found in several New York Workers' Compensation cases. The reason for this is that horseplay is not an exception to the rules of Worker's Compensation. Instead, the Board considers horseplay to be within the scope of employment. "Horseplay or frivolous activities, although involving intentional acts, are natural diversions between coemployees during lulls in work activities, and injuries sustained during them are compensable under workers' compensation law." *Shumway v. Kelley.*[5]

In many areas of law, especially torts, the concept of fault is used as a basis of liability for injury. It is logical that if a person causes his own injuries, he should not be permitted to impose the consequences of those injuries on someone who has not been negligent at all or whose negligence is trivial in comparison.[6] Consequently, the affirmative defense of "Contributory Negligence" is used considerably in tort law. Employees who are injured as a result of horseplay are able to avoid fault under contributory negligence because employers are unable to argue this defense under New York Workers' Compensation Law.[7] By the very nature of Workers' Compensation, negligence is not a factor. Therefore, an employee can injure himself/herself while engaging in an act of horseplay and not be held liable for the injury.

There are two main types of horseplay related cases: 1) cases in which the employee who engages in horseplay injures himself/herself, and 2) cases in which the employee who engages in horseplay injures a fellow employee. With the latter, the concept of receiving Workers' Compensation benefits might seem like an obvious result. After all, such a case would simply involve an employee getting injured while at work and receiving medical and compensatory benefits for those injuries. For example, in *Briger v. Toys R Us*, claimant was injured when a co-employee stuck out her foot in an attempt to trip plaintiff.[8] *Briger* found that the co-employee's action was a spontaneous prankish act, done in fun with no intention of causing injury. Therefore, the injury was fully compensable under New York Workers' Compensation Law.[9] It should be noted that if the co-employee's action had been done with the intention to injure the claimant, the claimant would still have a claim against his employer for compensation under Workers' Compensation Law.[10] The claimant could also sue that co-employee for an intentional tort and still collect compensation benefits, although any judgment or settlement is subject to offset by the employer or its insurance carrier.[11] For a case like *Briger,* it seems rather obvious why the injured employee would receive Workers' Compensation. The employee was working within the scope of his/her employment when he/she suffered an injury as a result of a co-employee's actions. Surely an employee should be compensated when he or she is injured while working. It is different, however, when the employee himself or herself engages in horseplay and suffers an injury. It is different because said employee is clearly not working when he or she is engaging in horseplay. Cases such as these are more complex and are the main focus of this article.

An early New York Workers' Compensation case involving horseplay is *Sarriera v. Axel Electronics, Inc*.[12] In this case, the claimant and a co-worker were discussing the co-worker's weight during a lull in their work. Claimant then decided to pick up said co-worker, which resulted in the claimant falling and injuring his leg. The Court found that this was not a deviation from the claimant's employment but instead "an episode to which the employment lent some stimulus."[13] Because the Court found that the accident was within the scope of the claimant's employment, the accident was compensable.[14] Furthermore, the Court found that the claimant's act of horseplay could be reasonably anticipated as a work-related incident.[15] Many horseplay cases are decided using similar reasoning and therefore result in compensation for the claimant.

Another example of a horseplay case is *Lubrano v. Malinet*.[16] In this case, claimant was working as a "gas jockey" at a service station. During work hours one day, a fellow employee showed claimant that it was possible to toss a lighted match into a bucket containing a residue of oil, gasoline and grease without causing an explosion. Several other employees had demonstrated the trick as well. Then on a separate day, while there was a lull in work, claimant attempted the trick for himself. The trick did not go as planned and resulted in the residue exploding, which caused excessive burns to the claimant.[17] The Court stated that, "injuries or deaths arising from employee horseplay are compensable under the Workers' Compensation Law if they result from conduct which 'may reasonably be regarded as an incident of the employment.'"[18] Because there was testimony that other workers had also performed this trick in the past, it was established that this was not an isolated incident. As a result, the Court concluded that the claimant's action was cumulative horseplay, which is compensable under New York Workers' Compensation Law.[19]

Finally there is *Aucompaugh v. General Electric*, a well-known New York horseplay case.[20] In *Aucompaugh*, claimant fell and injured himself while attempting to do a handstand on the arms of a swivel chair. The Board found that claimant and his co-workers regularly did physical exercises while at work. The Board even went as far to say that "young men, whose jobs call for expenditures of physical energy, cannot be expected, during slack periods, to sit in idleness and gossip; that the employer must expect that they will engage in some form of activity and that the risk was a risk of employment".[21] Once again, the Board found that the claimant's action was within the scope of his employment because the horseplay in question was sufficiently related to the employment. As a result, the Board found the injury compensable.[22]

Not all horseplay cases, however, result in compensation for the claimant. In *Gladwell v. C&S Communications Inc*., claimant was riding in a van driven by his employer.[23] While driving, a co-worker who was also in the van decided to do a stunt in which he leaned back out of the open van door while the van was moving. After completing the stunt, the co-worker went back to his seat and the claimant then attempted the stunt as well. While claimant was attempting the stunt, he lost his balance and fell, which resulted in injury. The Court stated that while injuries resulting from horseplay can be compensable, that is only the case in instances where the horseplay arises out of a regular and foreseeable aspect of the employment.[24] *Gladwell* found that this was not the case for the claimant. The Court determined that this was an isolated act of horseplay because there was no evidence that the employer was aware of or allowed the claimant's activity. Because claimant's action was a singular event that was not a regular or foreseeable incident of his employment, the Court found that the injury was not compensable under New York Workers' Compensation Law.[25]

Continuing the precedent set forth in *Gladwell* is the more recent case, *Healtheon Medical Services*.[26] In *Healtheon*, claimant claimed that while cleaning up at work, she found a roll of toilet paper that inspired her to play a prank on an individual who worked near her office.[27] The individual was not a co-employee and had no affiliation with the employer. The prank was to wrap the individual's car in the toilet paper, which claimant did. Upon return to the office, claimant told a co-worker about the prank. The co-worker advised claimant to further the prank by putting post-it notes on top of the toilet-papered car. Claimant did just that and once again returned to her office. Claimant then left the office again to photograph her prank. Upon re-entry into her office for the third time, claimant tripped and injured herself. *Healtheon* quoted *Gladwell* in stating, "although momentary deviations for a customary and accepted purpose have been found compensable, accidents resulting from obviously unauthorized and isolated incidents of foolery are not compensable."[28] The Board also said that injuries resulting from a purely personal act that was performed solely for the claimant's benefit and is not related to any service for the employer are not within the scope of employment. The claimant's actions were clearly more than just a brief deviation from work.[29] The Board also found that the claimant's actions were in no way related to her employment.[30] As a result, claimant's injuries were also not compensable under New York Workers' Compensation Law.

Overall, horseplay cases in New York Workers' Compensation Law have generally not changed. While cases may have further defined certain terms in Workers' Compensation Law, the general rules have stayed the same. Workers' Compensation itself is a concept in which

> *"Workers' Compensation itself is a concept in which fault for an injury is supposed to be irrelevant. Thus, it makes sense then that when an employee engages in horseplay, he or she should be compensated for injuries regardless of fault."*

fault for an injury is supposed to be irrelevant. Thus, it makes sense then that when an employee engages in horseplay, he or she should be compensated for injuries regardless of fault. As previously mentioned, though, there are cases in which the claimants were not compensated for their injuries.[31] As these cases are decided, the precedents they create do slightly alter the trend in a manner more favorable to the employer. *Gladwell*, for example, stresses the idea that the employee will only be compensated for a horseplay injury when such horseplay is regular and foreseeable.[32] They further clarify that the action cannot be an isolated act of horseplay.[33] In that case, however, the claimant engaged in his act of horseplay right after watching his co-worker do the same action. Surely it is not unreasonable to believe that the employer could have foreseen the employee doing something that a co-employee just did. For that reason, the *Gladwell* court could have found that this was a habitual act that the employer had a duty to stop. Instead, the Court found in favor of the employer, a precedential decision that potentially could have had a much bigger impact on the New York Workers' Compensation Law than it did.

So what are the factors used to determine whether horseplay is compensable? The courts in the aforementioned cases, as well as in other cases, all reference certain elements that are to be considered when answering this question. These elements may differ in relevance depending on the case but all have significant weight in general horseplay law. An essential element in horseplay, as well as in all Workers' Compensation cases, is that the claimant's action was not done by willful intention to bring about the injury or death of himself/herself or another.[34] This standard is shown in an early case, *Stillwagon v. Callan Bros*.[35] In *Stillwagon*, claimant and a co-employee got into a verbal altercation over a work-related issue. Claimant then struck co-employee with his fist, which resulted in retaliation by the co-employee. The co-employee struck claimant, which resulted in claimant's death. The Court applied the willful intentions standard and determined that claimant's injury (death) was not compensable.[36] Because claimant willfully intended to injure the co-employee, claimant's resulting injury was thereby not compensable under Workers' Compensation Law. If the claimant has willful intent to cause himself/herself or another injury, the Board will never find it to be horseplay. By its nature, horseplay involves playful pranks and stunts intended to cause amusement, not willful intentions to cause injury.

Another factor to consider is whether the horseplay action is related to the claimant's employment. *Aucompaugh* states that an injury resulting from horseplay is compensable when the horseplay was sufficiently related to the employment.[37] Likewise, the *Healtheon* decision says that it is well established that injuries resulting from a personal act, that is not related to any services for the employer are not compensable.[38] This precedent can be traced back to *Richardson v. Fiedler Roofing*, which states that whether a specific activity is within the scope of employment rather than purely personal depends on whether the activity is both reasonable and sufficiently work-related under the circumstances.[39] *Aucompaugh* found that doing a handstand on a swivel chair was sufficiently related to claimant's employment. *Healtheon*, on the other hand, found that the claimant's actions in that case (putting toilet paper and post-it notes on a neighbor's car and photographing it) were in no way related to her employment. The standard for relativity does not seem to be a difficult one to meet based on these cases. The claimant's actions in *Healtheon* were not related to her employment because she was pranking a non-employee outside of her office. *Aucompaugh* found that claimant's action did relate to his employment because it took place in his office chair where the claimant generally worked. A New York Worker's Compensation Board will typically find an action relative to a claimant's employment as long as the action can be traced to any of claimant's typical work duties.

Foreseeability is yet another element weighed by the Board/Court to determine compensability. Some courts have linked foreseeability to whether the action has happened before.[40] In other words, if a specific act of horseplay has been done before, it is more likely that the employer could have foreseen it happening again. This factor may seem strange considering foreseeability is typically irrelevant in New York Workers' Compensation Law.[41] After all, the basic policy for Workers' Compensation is that if the injury was accidental and arose within the course of employment, recovery should be allowed regardless of foreseeability of injury.[42] Nevertheless, foreseeability has been used as a factor to determine whether horseplay cases are compensable.

In *Kotlarich v. Inc. Vill. of Greenwood Lake*, the Court stressed the importance of foreseeability and whether the horseplay action had been done before.[43] *Kotlarich* stated that when horseplay causes an injury that was precipitated by the claimant and was an isolated act of foolery that was not foreseeable by the employer, claimant would not be entitled to compensation because the injuries did not arise out of his employment. A year later, *Gladwell* reiterated this standard saying, "although recoveries for injuries resulting from horseplay have been permitted, they have been limited to instances where the horseplay arises 'out of a regular and foreseeable feature of the employment.'"[44] In both *Kotlarich* and *Gladwell*, the respective Courts found that the horseplay actions were not foreseeable and thus not compensatory. *Kotlarich* involved a part-time police officer (claimant) who jokingly unfastened his gun-holster. Claimant's actions caused a fellow officer to draw his gun, which accidentally fired and resulted in an injury for the claimant. The Court reasoned that this was an isolated and unforeseeable incident because the Police Department prohibited the unnecessary display of weapons. Thus, because it was unauthorized, it was also isolated. In *Gladwell*, which as previously mentioned involves a claimant who hung out of a moving van after seeing his co-worker do so, the Court also found that the act was unforeseeable. The court reasoned that the employer, who was driving the van, could not have foreseen this isolated incident. The results of both cases appear to show a low threshold for the foreseeability standard. *Kotlarich* claimed that because there was a policy against unnecessarily displaying weapons, doing so would be unforeseeable. But doesn't establishing such rule admit that the employer was aware that such an action was possible? As for *Gladwell*, it seems likely that the employer could have foreseen claimant's actions after having witnessed his other employee doing that very action. Ultimately, the foreseeability standard is based on precedent, which in some cases may allow for the employer to plead ignorance if a rule prohibiting the action is put into place or if the action had been done by another employee only moments before. Therefore, the foreseeability factor may be an employer and/or employer's insurance carrier's best opportunity to argue that the injury arouse outside the scope of employment.

A final factor to consider, which may actually be a sub-factor of foreseeability, is common occurrence. Common occurrence refers to whether such acts of horseplay are done regularly within the employment. As previously mentioned, an injury caused by an isolated act of horseplay will generally not be compensated. When such an act is standard, however, the Board will find in favor of the claimant. *Lubrano* referred to what they called "cumulative horseplay."[45] "Cumulative horseplay" occurs when several employees engage in the same act of horseplay. Because horseplay is cumulative, the Board expects the employer to be aware of such horseplay. Another case that stresses the importance of a common occurrence is *Home Depot USA, Inc.*[46] In *Home Depot*, claimant and a co-worker were wrestling each other, which resulted in an injury to the claimant. The Court determined that because the claimant and co-worker had previously engaged in wrestling activity before, it was proper for the claimant to be compensated for his injuries.[47] The common occurrence factor may be the easiest for a claimant to prove and basically guarantees that the Board will find the injury compensable. As long as a claimant can show that the horseplay was a common occurrence in the work-place, the Board should almost always find that the act of horseplay was within the scope of employment.

Based on the aforementioned observations, several conclusions can be made with regard to horseplay under New York Workers' Compensation Law. A horseplay Workers' Compensation case arises when an employee engages in horseplay and either injures himself/herself or someone else. Horseplay cases, like all Workers' Compensation cases, are not based on negligence. Instead, they are founded on the idea that an employee can engage in acts of play and/or foolishness at work and still be within the scope of his/her employment. Consequently, many horseplay cases result in the Board finding that the claimant's injury is fully compensable under New York Workers' Compensation. There are, however, exceptions to horseplay and so the Board must weigh several factors to determine whether the act by the claimant was, in fact, an act of horseplay. While the horseplay action can be careless, negligent, or just foolish, it cannot be an action in which there is intent to cause injury. In order to be considered horseplay, an action must also be related to the employment. In other words, it cannot be a purely personal act with no connection to the claimant's work. The action must also be reasonably foreseeable by the employer. If the employer could have reasonably predicted that an employee might engage in a specific horseplay action, any injuries resulting from said action would be compensable under Workers' Compensation. Likewise, if the Board finds that the horseplay is a common occurrence, and not an isolated incident, the resulting injury will be within the scope of employment and thus compensable.

So why exactly do we allow employees who injure themselves while engaging in horseplay to receive compensation for those injuries? The simple answer is that the concept fits so well within the construct of Workers' Compensation. After all, the very idea behind Workers' Compensation is that employees should be compensated for their injuries without being faulted for their own negligence. Horseplay is no exception to this rule. Therefore, no matter how foolish the horseplay by the employee, New York Workers' Compensation Law ensures that any resulting injuries will be fully compensable.

Endnotes

1. *See* Employer: Stop & Shop New York Metro., No. G090 3734, WL 5711066 (N.Y. Work. Comp. Bd.) (Sept. 23, 2015).
2. *Id*.
3. *Id*.
4. N.Y. Workers' Comp. Law § 10 (McKinney 2011).
5. Shumway v. Kelley, 60 A.D.3d 1457 (N.Y. App. Div. 4th Dept. 2009).
6. Martin Minkowitz, New York Workers' Compensation § 1:5 (2d ed. 2011)
7. N.Y. Workers' Comp. Law § 11 (McKinney 2009).
8. Briger v. Toys R Us, 236 A.D.2d 683 (N.Y. App. Div. 3d Dep't 1997).
9. *Id*. at 684.
10. N.Y. Workers' Comp. Law § 11 (McKinney 2009).
11. N.Y. Workers' Comp. Law § 29 (McKinney 2011).
12. Sarriera v. Axel Elec., Inc., 25 A.D.2d 592 (N.Y. App. Div. 3d Dept. 1966).
13. *Id*.
14. *Id*.
15. *Id*.
16. Lubrano v. Malinet, 480 N.E.2d 737 (N.Y. 1985).
17. *Id*.

18. *Id.*
19. *Id.*
20. Aucompaugh v. Gen. Elec., 111 A.D.2d 1073 (N.Y. App. Div. 3d Dept. 1985).
21. *Id.* at 1074.
22. *Id.*
23. Gladwell v. C&S Commc'ns Inc., 224 A.D.2d 775 (N.Y. App. Div. 3d Dept. 1996).
24. *Id.* at 776.
25. *Id.*
26. Healtheon Med. Servs., No. G101 0821, 2015 WL 746256 (N.Y. Work. Comp. Bd.) (Feb. 18, 2015).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *See* Gladwell v. C&S Commc'ns Inc., 224 A.D.2d 775 (N.Y. App. Div. 3d Dept. 1985); Healtheon Med. Servs., G101 0821, 2015 WL 746256 (N.Y. Work. Comp. Bd.) (Feb. 18, 2015).
32. Gladwell v. C&S Commc'ns Inc., 224 A.D.2d 775, 776 (N.Y. App. Div. 3d Dept. 1985).
33. *Id.*
34. N.Y. Workers' Comp. Law § 10 (McKinney 2011).
35. Stillwagon v. Callan Bros., 183 A.D. 141 (N.Y. 1918).
36. *Id.* at 145.
37. Aucompaugh v Gen. Elec., 111 A.D.2d 1073 (N.Y. App. Div. 3d Dept. 1985).
38. Healtheon Med. Servs., G101 0821, 2015 WL 746256 (N.Y. Work. Comp. Bd.) (Feb. 18, 2015).
39. Matter of Richardson v. Fiedler Roofing, 493 N.E.2d 228 (N.Y. 1988).
40. *See* Gladwell v. C&S Commc'ns Inc., 224 A.D.2d 775 (N.Y. App. Div. 3d Dept. 1985); Kotlarich v. Inc. Vill. of Greenwood Lake, 101 A.D.2d 673 (N.Y. App. Div. 3d Dept. 1984).
41. Matter of Wolfe v. Sibley, Lindsay & Curr Co., 330 N.E.2d 603 (N.Y. 1975).
42. *Id.*
43. Kotlarich v. Inc. Vill. of Greenwood Lake, 101 A.D.2d 673 (N.Y. App. Div. 3d Dept. 1984).
44. Gladwell v. C&S Commc'ns Inc., 224 A.D.2d 775, 776 (N.Y. App. Div. 3d Dept. 1985).
45. Lubrano v. Malinet, 480 N.E.2d 737 (N.Y. 1985).
46. Home Depot USA, Inc, No. 0075 1337, 2008 WL 4404323 (N.Y. Work. Comp. Bd.) (Sept. 17, 2008).
47. *Id.*

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This article originally appeared in the Summer 2016 issue of One on One*, published by the General Practice Section of the New York State Bar Association.*

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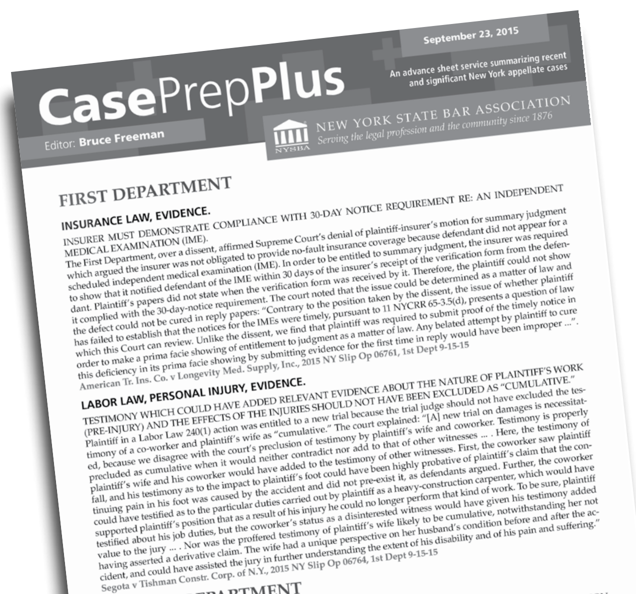

Checklist for Lawyers' Business Disaster Planning and Recovery

Law Practice Management Committee, Subcommittee on Law Practice Continuity

Imagine yourself as a lawyer whose offices have just been closed as a result of a "disaster," whether it is a fire, flood, windstorm, terrorist attack or the product of some other natural or man-made event. Building management has notified you that, in all likelihood, you will not be permitted to re-enter the building for at least a week or maybe longer. To heighten the sense of urgency, assume you or your firm have no disaster recovery plan to which you can refer and thus no step-by-step approach to handling the situation. This is not an event anyone expects, but it is a risk faced by every lawyer, regardless of practice setting or locale.

After you kick yourself for not having a disaster plan, what are your first moves? The best answers are likely to be found as you explore these three questions: How do we contact, reassure and communicate with our employees? How do we notify and communicate with our clients? What must be done to put the firm "back in business"?

In order to protect your practice against many of the adverse effects of a catastrophic event, you or your firm should have a business continuity plan in place. It is important that the plan be available in all events. Post it on the firm's computer server; file it with the firm's remotely stored back-up files; send it to every lawyer in the firm and every key administrator and assistant. Implementation of such a plan following the occurrence of a catastrophic event impacting your practice can help put you on a path to disaster recovery. The following outlines a methodology for developing a business continuity plan for catastrophic events and related considerations.

A. Impact Analysis

1. Perform an impact study of catastrophic events to identify functions and services the firm considers critical (i.e., for which continuity is required at all times).
   a. Include specific disaster scenarios causing different levels of disruption
   b. Examine alternative methods for conducting the firm's business, depending on the degree of disruption
   c. Examine methods for uninterrupted provision of critical services
   d. Examine recovery time frames for all functions and services
   e. Examine methods of dealing with individual/personal disasters (e.g., sudden death or disability of a partner)

B. Plan Preparation

1. Identify the location of at least the following:
   a. List of all clients and client matters
   b. Contact lists; in the case of all contacts which would need to be made, be sure to have specific names, addresses and telephone numbers
   c. Client files
      i. Physical
      ii. Electronic
   d. Calendar and docket for all client matters
   e. Billing records
   f. Financial records
      i. Firm operating records
      ii. Client funds
2. Write a business continuity plan (the "Plan") in case of a catastrophic event; identify who in your firm will be responsible for each task set forth in the Plan.
   a. Contact law firm members and all staff
      i. The first concern after any disaster should be to locate and ensure the safety of the firm's members, including all staff. Next, families should be advised that staff members are safe. This will be an easier process if telephone lists or directories with home and mobile numbers are routinely distributed (and mailed to all personnel).
      ii. Consider using a conferencing service provider, which will enable conference calls among all practice and administrative groups. There are some free alternatives available.
   b. Contact clients
      i. Once you have contacted all staff and ensured their safety, the next step is to contact clients to assure them that the firm is in a position to continue to represent

them and to notify them of any interim or new contact information.

ii. To assist in this process, consider the following:

(A) Establish a small command center immediately. Equip the site with at least five or six telephones, four to five personal computers and up to ten local telephone lines. This center will become home to your disaster team and, during the first several days, the focal point of all staff and clients. You may be able to have calls to the firm's main number or DID lines transferred to the command center. For smaller firms or solo practitioners, make arrangements to use your home, a local hotel or motel or another lawyer's office (perhaps by making advance reciprocal arrangements with that lawyer).

(B) As client contact is made, the command center should be notified, and the client's name and contact numbers centrally recorded. Do not alarm clients by repeatedly contacting them to assure them that your firm is "okay." Repeated and haphazard contact will send a different message, one that says all is not well and that you have no plan.

c. Contact courts

i. If you have cases pending, you will need to contact the courts to determine if their facilities were affected by the disaster and, if so, what plan of action they have devised. The courts are also a good source for obtaining records that have been lost or destroyed.

ii. Have "at the ready" a master application form to go to the administrative judge(s) requesting case adjournment(s) and designate a responsible attorney (e.g., head of litigation or deputy) to act on it when necessary.

d. Contact others

i. Contact banks for replacement checks and bank records

ii. Contact payroll service

e. Office space/furnishings

i. Identify/communicate alternative work locations

It may be only a tent or other temporary shelter, but you need a temporary office during the time that your office is being repaired. You will want it to be as close to your office as possible. Whatever situation you arrange, assure that there is some private area in which you can converse with clients. Post a sign where your office was, directing visitors to your temporary quarters.

Some firms have identified other firms similar to them – "twins," if you will – and made arrangements with their twin(s) for the firms to accommodate each other in case of a catastrophic event. Consider identifying a "twin" for your firm and establishing mutually cooperative contingency plans. Your firm's "twin" might not even be another law firm (e.g., consider accounting firms, brokerage firms, etc.). This is obviously intended as a possible temporary solution. Be *very* aware of the need to address conflict of interest and confidentiality issues in this context.

ii. Other suggestions

(A) Call local realtor to find office space

(B) Share space with others temporarily (lawyers, accountants)

(C) Obtain (rent, borrow or purchase) furnishings (desks, chairs, lamps, filing cabinets, bookshelves, etc.)

(D) Contact vendors concerning temporary location

(E) Contact Post Office and other delivery services to stop delivery to damaged location and re-route to temporary location

f. Telephone and Internet service

i. Arrange to have telephone calls forwarded to new number or arrange for a telephone answering service with prepared message until new system in place

ii. Arrange temporary service with a local telephone company at a temporary location

iii. Phones, Internet connections, mobile phones

g. Equipment

i. Contact equipment vendors regarding existing leases/contracts and your/their performance obligations under the terms of lease or contract

ii. Types of equipment needed

(A) Computers, servers and network capabilities

(B) Printers; scanners; copiers; fax machines

iii. Identify laptops and other equipment owned by the firm that might be pulled back from home use during recovery period

h. Office supplies

i. Contact supply vendor to obtain necessary supplies

ii. Contact printer to print stationery, business cards, etc.

iii. Contact forms vendors (billing forms, other forms)

i. Library

i. Establish link with providers, such as Lexis, Loislaw, or Westlaw at your new office location

ii. If necessary, evaluate possibility/cost of repairing books and identify subscriptions/volumes to be replaced immediately

j. Documents and records

i. Client documents and records (opposing counsel/clients/Secretary of State's Office/court clerks may be able to assist with copies and reconstruction of events, dates, deadlines, etc.)

(A) Leases

(B) Wills

(C) Agreements

(D) Settlements

(E) Corporate records

(F) Docket and calendar records

(G) Pleading files and court papers

(H) Client billing information

(I) Current address of client's counsel and contacts

(J) Billable time and receivables information

(K) Correspondence

ii. Firm documents and records

(A) Leases/subleases (landlord, leasing companies may have copies)

(B) Agreements (other parties may have copies)

(C) Client list of names, addresses, phone numbers

(D) Client files and billing records (opposing counsel/clients may be able to provide copies)

(E) Accounts receivable information

(F) "Work-in-process" information/status reports

(G) Financial records (CPA may be able to provide copies)

(H) Insurance policies, broker information (insurance company has policy)

(I) Inventory of physical assets

(J) Payroll and employee records (payroll service, employees may be able to provide information to reconstruct)

iii. Solo practitioners and small firm attorneys should give serious consideration to off-site backup of computer files, to the extent you have not already done so. You may also wish to start a process of scanning or electronic imaging of key documents in your files, back-up copies of which should also be stored off-site.

k. Malpractice insurance issues

i. After a disaster, a law firm may be exposed to malpractice claims resulting from the difficult and time-consuming nature of recovering lost or destroyed records. Below are some of the issues that may arise.

(A) The most frequent source of claims is likely to be failure to take action within a specified time period. Usually, this is seen in the failure to file an action within the statutory period. Possibilities include lawyers sued for failure to file pleadings within the permissible time, failure to comply with orders for filing of any response or other document within a specified time and a host of other errors or omissions that all result from a failure to keep and adhere to a good calendar.

(B) Lack of confidentiality may arise as records that were blown about are recovered.

(C) Some clients may allege that their rights or positions were not prosecuted with sufficient zeal as available records and evidence were lost.

(D) New clients may be in dire straits and become unreasonable if their concerns cannot be addressed and resolved promptly. Unrealistic expectations often turn into claims against a lawyer when no one else can solve the problem or has sufficient assets to address the issues.

ii. If the disaster is widespread, the courts and government are likely to be sympathetic to the plight of those affected. For instance, as a result of the World Trade Center disaster, Governor Pataki signed several executive orders designed to suspend and delay the statutes of limitations for certain actions. At the time, then-Chief Judge Judith Kaye also issued a statement to the members of the New York State Bar stating that the courts would be understanding and honor requests for adjournments where appropriate. Attorneys should apprise themselves of any such actions on the part of the government.

iii. In any event, you should contact the courts and opposing counsel, notify them of your situation and new contact information, and request copies of documents for pending cases and time extensions where necessary. In addition, contact your professional liability carrier and obtain information and advice about how to avoid malpractice in event of missed deadlines and other potential errors or omissions resulting from the disaster.

This originally appeared as Appendix 2G in the NYSBA Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death. *To access the full guide, visit www.nysba.org/PlanningAhead2016.*

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Finders Keepers, Losers Weepers?

By C. Evan Stewart

On May 26, 1963, Elvis went into RCA Victor's Studio B in Nashville and recorded Dory Jones and Ollie Jones's "Finders Keepers, Losers Weepers":

> The loser has to pay the score
> He lost you and I found you
> And I'm keeping you for ever more.[1]

That idea might apply to love, Elvis-style ("a hunk, a hunk of burning love"),[2] but does it also apply to lost documents and lawyers' ethical obligations in that context?

If You Just Look at the Rule…

ABA Model Rule 4.4(b) addresses what lawyers are supposed to do, as a matter of ethics, when they come into possession of materials mistakenly delivered by an opposing party: "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Before 4.4(b) was adopted by the ABA in 2002,[3] there was no Model Rule governing inadvertent disclosure. Notwithstanding, in 1992, the ABA issued Formal Opinion 92-368, which declared that a lawyer receiving attorney-client privileged materials or other confidential information had three ethical duties: (i) refrain from reading the document; (ii) notify the sender of the document; and (iii) obey the direction(s) of the sender as to next steps (e.g., return, destroy, etc.). That guidance was reinforced two years later in ABA Formal Opinion 94-382.

Three years after Model Rule 4.4(b) was issued, the ABA expressly withdrew Formal Opinion 92-368 (*see* ABA Formal Opinion 05-437), and the next year, it expressly withdrew ABA Formal Opinion 94-382 (*see* ABA Formal Opinion 06-440). While both earlier (and now withdrawn) opinions had been concerned with, *inter alia*, "protection of confidentiality, the inviolability of the attorney-client privilege,…and general considerations of common sense, reciprocity, and professional courtesy," the ABA (in withdrawing the earlier opinions) stated that while such "considerations" "may guide a lawyer's conduct," "[t]hey are not…an appropriate basis for a formal opinion [by the ABA], for which we look to the Rules themselves." And since Model Rule 4.4(b) only requires notification, and nothing more, that was (and is) that. Formal Opinion 06-440 also made clear that, besides the notification-only requirement, the receiving lawyer was free to (i) review the document, and (ii) not abide by any instructions from the sender.

When New York State adopted its most recent iteration of attorney ethical rules in 2009, it adopted the language and substance of ABA Model Rule 4.4(b).[4] Thereafter, the Association of the Bar of the City of New York's Committee on Professional Ethics issued Formal Opinion 2012-1. That opinion mirrored ABA Formal Opinion 06-440, permitting an attorney to review the document and disregard the instructions of the sender; furthermore, it also expressly withdrew a prior opinion (Formal Opinion 2003-04), which required additional obligations beyond those that are set forth in Rule 4.4(b).

According to a leading legal academic who played a key role in drafting the New York State rules, Rule 4.4(b) is a "model of clarity";[5] compliance with it, therefore, should be quite straight forward. But wait, there is a catch; indeed, there is more than one.

The Multi-Jurisdictional Issue

First off is the fact that numerous jurisdictions do not follow the ABA's (and New York's) lead on this ethical standard. For example, a number of states require exactly what the ABA suggested in 1992: (i) stop reading the document; (ii) notify the sender; and (iii) abide by the sender's instructions.[6] Other states require something a little less than those three steps.[7] And while some states do in fact follow the ABA and New York,[8] still other states have no Rule 4.4(b) at all.[9] This disparate kettle of fish tees up an ethical quandary for any lawyer who has clients beyond just the four corners of the state in which she is licensed: how does she comply with these very different ethical obligations vis-à-vis inadvertent disclosure?[10]

And Then There Are the Comments

Beyond Rule 4.4(b) itself, all of the New York Rules have Comments. As a general matter, these Comments "are intended as guides for interpretation" *only*; the "text of each Rule is authoritative."[11] With respect to Rule 4.4(b), two key Comments have hidden in them two huge *red flags*.[12] In the fourth sentence of Comment 2, for example, the Rule drafters wrote the following:

> Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to **court-imposed sanctions, including disqualification and evidence-preclusion.**

And in the third sentence of Comment 3, the Rule drafters wrote the following:

> **[S]ubstantive law** or **procedural rules** may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the sender, or both.

Thus, if all one reads is the "authoritative" Rule, but not the *red flagged* Comments, the unsuspecting (but Rule-compliant) lawyer might be "ethical," but she could be facing some pretty unhappy consequences for blithely following the Rule.[13]

What If the Materials Are Privileged?

A few years ago the legal powers that be (with the assistance of Congress) made some changes to protect lawyers who are imperfect in dealing with the production of documents and emails.[14] First, the Federal Rules Advising Committee adopted Fed. R. Civ. P. 26 (b)(5) (and analogs to it in Rules 16, 33, 34, and 37); and Congress thereafter adopted Rule 502(b) of the Federal Rules of Evidence. The rules codify that an "inadvertent disclosure" of privileged material does not operate as a waiver so long as (i) the privilege holder took "reasonable steps to prevent disclosure;" and (ii) the privilege holder took "reasonable steps to rectify the error." Whether this "reasonableness" approach has led to the promised land is unclear.[15]

> *"The rules codify that an 'inadvertent disclosure' of privileged material does not operate as a waiver so long as (i) the privilege holder took 'reasonable steps to prevent disclosure;' and (ii) the privilege holder took 'reasonable steps to rectify the error.'"*

As part of these "reforms," Fed. R. Civ. P. 26 (b)(5) put specific obligations onto the receiving lawyer once she is made aware of the production of privileged information: (i) she "must promptly return, sequester, or destroy" the material(s); (ii) she "must not use or disclose the information until the claim is resolved"; and (iii) she "must take reasonable steps to retrieve the information if the [receiving] party disclosed it before being notified." About half of the states have imposed similar obligations on litigating lawyers in their jurisdictions;[16] importantly, for readers of this distinguished *Journal*, New York State does *not* have the same or similar obligations in the Civil Practice Law and Rules.[17] So New York litigators in New York federal courts would seem to have *very* different responsibilities with regard to inadvertent production than they would in New York State courts.[18]

In addition, the above-mentioned federal protocols have left some open issues for all lawyers governed thereby. [19] For example, does the receiving lawyer have an affirmative obligation to notify the sender or may she wait until she is "notified" of the inadvertent disclosure? And can the receiving attorney read the inadvertent privileged material and/or share it with her client?[20] Finally, what about privileged or confidential information that is overheard? (None of these rules seem to cover that scenario.)

How Have the Courts and Bar Authorities Dealt with This Evolving Situation?

Perhaps not surprisingly, the jurisprudence enforcing these protocols differs depending upon time and jurisdiction. Let us first look at New York.

- New York and "Finders Keepers":
  - *Matter of Weinberg*, 517 N.Y.S. 2d 474 (1st Dept. 1987). Court approved the sanction of disqualification where an attorney acquired privileged information through the improper use of discovery devices.
  - *Lipin v. Bender*, 597 N.Y.S. 2d 340 (1st Dept. 1993). Court approved the sanction of disqualification where an attorney used documents containing an adversary's work product that had been improperly obtained.
  - *American Express v. Accu-Weather, Inc.* 1991 WL 346388 (S.D.N.Y. June 25, 1996). Court sanctioned attorneys who ignored sending counsel's instructions to return a not-yet-opened package of documents which contained a privileged communication. [*Note*: The court relied upon ABA Opinion 92-368.]
  - *United States v. Rigas*, 281 F. Supp. 2d 733 (S.D.N.Y. 2003). Defense counsel application for an order authorizing them to retain and use the government's work product inadvertently produced in discovery was denied. [*Note*: The court relied on ABA Opinion 92-368 in rejecting defense counsel argument that they were being punished for promptly notifying the government lawyers and not reviewing the materials: "The Court finds this argument wholly unpersuasive. Attorneys, of course, bear responsibility for acting in accordance with ethical norms of the legal profession."].[21]
  - *People v. Terry*, 1 Misc. 3d 475 (County Ct.,

Monroe Co. 2003). The court precluded a prosecutor from using documents inadvertently sent by defense counsel.

– *Galison v. Greenberg*, 2004 NY Slip Op. 51538 (Sup. Ct. N.Y. Co. 2004). Citing, *inter alia*, the New York City Bar's Formal Opinion 2003-04, the court cautioned that any attorney who receives information the attorney knows or should reasonably know contains privileged information must be aware of her ethical obligations and promptly adhere to them "in order to avoid sanctions."

– *MNT Sales, LLC v. Acme Television Holdings, LLC,* Index No. 602156/2009, NYLJ, p. 42, col. 5 (Sup. Ct. N.Y. Co. April 29, 2010). The court held that the "spirit" of the New York City Bar's Formal Opinion 2003-04 had been violated by the plaintiff's lawyer, who had been asked to destroy an inadvertent email and had then refused to do so. As a sanction to "remediate the egregious conduct," the court denied the plaintiff's motion to be allowed to use the email.

• Other Jurisdictions and "Finders Keepers":

– *In re Richard E. Lee*, 06-DB-22 (Louisiana Attorney Disciplinary Board, April 2, 2007). Discipline was not ordered because the inadvertently disclosed document did not appear (on its face) to be privileged or confidential.

– *Rico v. Mitsubishi Motors Corp.,* 171 P.3d 1092 (Cal. 2007).[22] The court held than an attorney may read only as much as necessary to determine if documents are privileged; once it is so determined, the attorney must notify opposing counsel immediately and attempt to resolve the situation promptly, either by agreement or by seeking judicial intervention. In this case, where one of the plaintiffs' attorneys used his opponent's work product and also shared it with his expert and co-counsel, the court disqualified the plaintiffs' attorneys and their experts.[23]

– *Burt Hill Inc. v. Hassan*, 2010 BL 19879 (W.D. Pa. Jan. 29, 2010). The court questioned the ethics advice a law firm had received—that it could keep and use its opponent's confidential documents that had been received from an anonymous source.

– *Merits Incentive LLC v. Eighth Judicial District Court*, 262 P.3 720 (Nev. 2011). The court denied a motion to disqualify a law firm that received confidential information about an opponent from an anonymous source. The court noted that the firm had followed the notification requirement of Rule 4.4(b), even though the rule deals with inadvertent disclosure and *not* intentional but unauthorized disclosure.

– *Lund v. Meyers*, No. CV-12-0349-PR (Arizona Sup. Ct. July 16, 2013). Attorneys moved to disqualify opposing counsel because they had "read, kept, and distributed" privileged documents inadvertently produced. The litigated issue to the Supreme Court was the interplay between Rule 4.4(b) and Arizona's Rule of Civil Practice 26.1(f)(2): the procedure for providing documents to the trial court, their status during that process, and when any in camera review for privilege should take place.

– *Jablow v. Wagner*, 2015 BL 103103 (N.J. Super. Ct. App. Div. April 18, 2015). The plaintiff's lawyer, who kept and used for several months his opponent's privileged documents—which he had received from an anonymous source—was properly disqualified for breaching his duties under Rule 4.4(b).

– *Foss Mar. Co. v. Brandewiede*, 2015 BL 297104 (Wash. Ct. App. Div. 1, Sept. 17, 2015). Washington trial courts must apply a four-factor test in determining whether to disqualify an attorney who receives her opponent's privileged information: (i) prejudice to the sender; (ii) sender counsel's fault (or lack thereof); (iii) receiving counsel's knowledge that the materials are in fact privileged; and (iv) whether lesser sanctions are appropriate. The lower court's disqualification of the receiving lawyer was remanded expressly to apply the four factors before entering any disqualification order.

So What Is Next?

Many who have looked at this indisputably confused state of affairs have argued that the ethics gurus should go back and re-articulate, at a minimum, the standards articulated pre-Rule 4.4(b) in Formal Opinions 92-368 and 94-382.[24] And in July of 2011, New York's Committee on Attorney Professionalism proposed something along these lines to the State Bar's Committee on Attorney Standards and Conduct. But there was significant pushback to going that route—on the ground that such a step "would be a step backwards"; according to one commentator, "[a] profoundly important argument for limiting the scope of lawyers' ethical obligations in these situations is the unfairness of making the 'innocent' lawyers who receive such communications potentially subject to professional discipline in situations" not of their making.[25] Thus, according to the pushback argument, "vagueness is preferable to…any broader rule."[26]

For me, I am not sure who is right in the aforementioned debate (which, as things currently stand, is unresolved). What I do know is that this is one mighty big and tricky area. Hopefully, readers of this distinguished *Journal* will now be forewarned of the dangers that lurk if they ever get air-dropped into one of these unfortunate situations.

Endnotes

1. *See* "Elvis for Everyone" (RCA Victor August 1965) (reached number 10 on the Top Pop Albums chart). While completing this article I discovered that fourteen years ago a law student at Temple had used this same title (albeit without involving Elvis) for a student note on the same subject: *See* David Stanoch, " 'Finders Keepers, Losers Weepers?': Clarifying a Pennsylvania Lawyer's Obligations to Return Inadvertent Disclosures, Even After a New ABA Rule 4.4(b)," 75 *Temple L. Rev*. 657 (2002). Professor Emeritus Joseph J. Simeone of the Saint Louis University School of Law has also used this title, albeit on a different topic: " 'Finders Keepers, Losers Weepers': The Law of Finding 'Lost' Property in Missouri," 54 *Saint Louis Univ. L.J.* 167 (2009) (again, however, with no reference to the King of Rock and Roll).
2. "Burning Love" (written by Dennis Linde) (RCA Studios August 1972). Elvis's cover of this song (originally sung by Arthur Alexander) was his last #1 hit (Cashbox's Top 40 Charts).
3. In 2012, the ABA amended the rule to specifically reference "electronically stored information."
4. To date, New York State has not amended the rule to specifically reference "electronically stored information."
5. *See* R. Simon, *Simon on New Rules: Rules 4.1 through Rule 8.6* (December 2009).
6. E.g., District of Columbia, Iowa, Kentucky, Louisiana, New Hampshire, New Jersey, Maine.
7. E.g., Alabama, Arizona, Colorado, Maryland.
8. E.g., Florida, Indiana, Kansas, Minnesota, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Washington, Wisconsin.
9. E.g., California, Georgia, Hawaii, Illinois, Massachusetts, Michigan, Missouri, South Dakota, Texas, Vermont, Virginia, West Virginia, Wyoming.
10. *See* C.E. Stewart, "Lawyers and the Border Patrol: The Challenge of Multi-Jurisdictional Practice," *NY Business Law Journal* (Summer 2011). Just how idiosyncratic the disparate jurisdictions can be was recently highlighted by Opinion 1871, issued on July 24, 2013 by the Virginia State Bar Standing Committee on Legal Ethics. In that opinion, the Virginia bar authorities wrote that an attorney who receives privileged materials inadvertently is *not* ethically obligated to return the materials to the sender if "the confidential information [was] received in the discovery phase of litigation" rather than "[o]utside of the discovery process."
11. *See* N.Y. Rules of Professional Conduct Preamble, 13.
12. "Huge," of course, is one of Donald Trump's favorite words. *See* Jimmy Fallon and Donald Trump —Huge Huge Huge —YouTube (September 18, 2015).
13. This calls to mind the searing lesson taught to all students of the incomparable Cornell Law Professor Rudolph Schlesinger on the third day of Civil Procedure in September of 1974, when he rebuked a classmate who was unable to proceed in a Socratic dialogue because of an unfortunate confession to not having read the footnotes in the case at hand. With his finger pointing at the offending student (it shook, due to his advanced age), Professor Schlesinger ominously intoned: "Lawyers who do not read footnotes…[dramatic pause], their children will *starve*!"
14. *See* C.E. Stewart, "Thus Spake Zarathustra (and Other Cautionary Tales for Lawyers)," *NY Business Law Journal* (Winter 2010).
15. "Reasonableness" appears to be in the eye of the judicial beholder. *Compare Rhodes Industries, Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008) *with Sitterson v. Evergreen School District No. 114*, 196 P.3d 735 (Wash. Ct. App. 2008), *with Mt. Hanley Ins. Co. v. Felman Prod. Inc.*, 2010 WL 1990555 (S.D. W. Va. May 18, 2010), *with Edelen v. Campbell Soup Co.*, 265 F.R.D. 676 (N.D. Ga. 2010). Interestingly, the claw-back safe haven provided by F.R.E. 502(d) has not appeared to have had much effect in obviating the risks of the "reasonableness" standard. *See Spicker v. Quest Cherokee*, 2009 WL 2168892 (D. Kan. 2009). *See also* John Rosans, "6 Years In, Why Haven't FRE 502(d) Orders Caught On?," *Law360* (July 24, 2014).
16. E.g., Alabama, Arizona, Arkansas, California, Idaho, Indiana, Iowa, Kansas, Maryland, Minnesota, Montana, New Mexico, North Dakota, Ohio, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wyoming.
17. *See* CPLR §§3101 & 4503. With respect to the "reasonableness" standards adopted by F.R.E. 502(b), New York courts have traditionally followed those standards. *See, e.g., New York Times v. Lehrer McGovern Bovis*, 752 N.Y.S. 2d 642 (1st Dept. 2002); *Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 522 N.Y.S. 2d 128 (4th Dept. 1987).
18. Presumably, to attempt to enforce such obligations, where none are specifically set forth, one would have to proceed under CPLR §3103(c) (protective orders: suppression of information improperly obtained).
19. Beyond the Federal Rules themselves, lawyers also need to be on the lookout for the local rules of specific federal courts. *See, e.g.,* U.S. District Court of Western District of Pennsylvania, Local Rules of Court 16.1(D).
20. As set forth above, there are a number of states that require a lawyer to stop reading the inadvertent document as soon as she realizes it is privileged or confidential. *See supra* notes 6 & 7 and accompanying text. Of course, "[o]nce [the receiving lawyer] ha[s] acquired the information…, he cannot purge it from his mind." *Aerojet-General Corp. v. Transport Indemnity Inc.*, 18 Cal. App. 4th 996, 1006 (Cal. App. 1st Dist. 1993).
21. For other cases where courts have not been quite as nice to the government in this situation, *see United States v. Gangi*, 1 F. Supp. 2d 256 (S.D.N.Y. 1998); *SEC v. Cassano*, 189 F.R.D. 83 (S.D.N.Y. 1999).
22. When it has no ethical rule to govern a situation (*see supra* note 9), California looks to the ABA Model Rules. *See* W.L. Patrick, "Inadvertent disclosure and the attorney-client privilege," *California Bar Journal* (August 2011).
23. Presumably, *State Comp. Ins. Fund v. WPS. Inc.*, 82 Cal. Rptr. 2d 799 (Cal. Ct. App. 1999), is no longer good law in California. There, the receiving lawyer (i) failed to notify the sender lawyers of the inadvertent production of privileged materials, and (ii) immediately sent the materials on to his expert (who then sent them on to another law firm that had also retained him). On appeal, the appellate court lifted the trial court's sanction on the receiving lawyer, on the ground that California's ethics rules were not clear. *See also Clark v. Superior Court*, 125 Cal. Rptr. 3d 361 (Cal. Ct. App. 2011) (court disqualified receiving lawyers who reviewed privileged materials and then used them to advance their client's case).
24. Practitioner James Altman has been particularly "vocal" in this regard. *See* "Model Rule Should be Amended," *Professional Lawyer*

Vol. 21, No. 1 (2011); "Inadvertent Disclosure and Rule 4.4(b)'s Erosion of Attorney Professionalism," *NYSBA Journal* (Nov/Dec 2010). Indeed, Mr. Altman has prepared a revised Model Rule 4.4(b):

> A lawyer who receives a document in connection with the representation of a client and has reasonable cause to believe that the document may contain confidential information that may have been inadvertently disclosed,
>
> (1) shall not read or examine the document or, if the lawyer already has begun to do so, shall stop reading or examining the document;
>
> (2) shall notify the author or sender of the document of its receipt;
>
> (3) shall promptly return, sequester or, to the extent appropriate and reasonably practicable, destroy the document and any copies of it;
>
> (4) shall not use or disclose the confidential information contained in the document until permitted by a court order; and
>
> (5) shall take reasonable steps to retrieve any copies of the document that the lawyer disclosed before having reasonable cause to believe that the document contained confidential information.

25. *See* Anthony Davis, "Inadvertent Disclosures —Regrettable Confusion," *New York Law Journal* (November 7, 2011).

26. *Id.*

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This article originally appeared in the Summer 2016 issue of The NY Business Law Journal*, published by the Business Law Section of the New York State Bar Association.*

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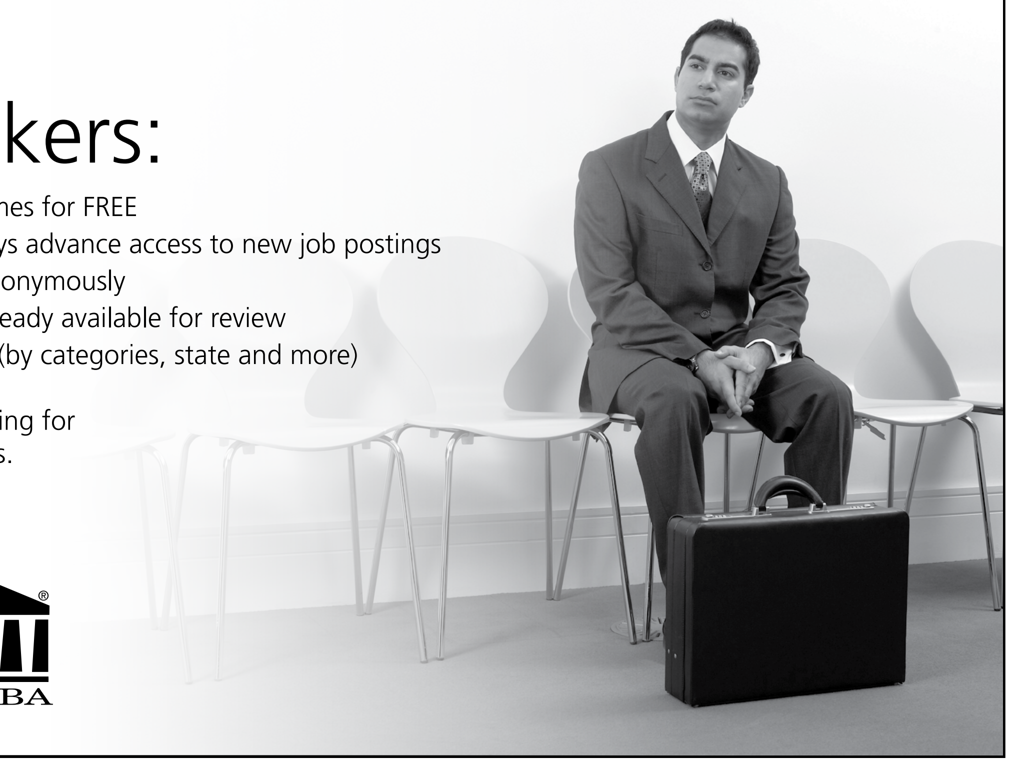

NYSBA

Digital Assets in the Real World: Challenges and Opportunities

By Linda Meltzer

Introduction

Increasingly, our lives and those of our clients are becoming digitized. More than 50% of adults over 65 use the Internet.[1] The typical person has 25 digital accounts ranging from email to social media to online banking accounts, according to a 2007 Microsoft study, yet few wills and other estate planning documents are fully addressing these assets.[2]

The existence of these digital assets poses challenges and opportunities for elder law and estate planning attorneys. A national survey finds that only 44% of adults report they have wills, even though 60% believe all adults should have estate plans.[3] Most wills are largely silent with regard to how digital assets should be accessed, managed or distributed by fiduciaries to loved ones in the event of incapacity or death. The ease and benefits of going paperless in paying our bills, sharing photos or banking online can become overly complex for families and fiduciaries when the person is incapacitated or has died.

There has been progress, albeit slow, on the legal front through the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA—the "Act") which, after revision, was approved in July 2015 and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws. The "Act" is designed to provide a framework for states to adopt rules to give fiduciaries the authority to manage digital assets and to appease privacy concerns raised by third party providers of electronic communications while respecting the user's wishes and intent. Conflicts with third party vendor agreements formed between users and custodians, notably Internet service and social media providers, will remain a tough barrier for the foreseeable future. As attorneys, we have a role and a responsibility to mitigate those conflicts through proper estate planning with our clients.

Legal Background

Certain federal laws were enacted in 1986 that restrict fiduciaries and third party providers from accessing computers and electronic records. The RUFADAA defines these third party providers as custodians that carry, maintain, receive and store digital assets. The custodians of digital assets, at their sole discretion, have choices for disclosing those assets to fiduciaries. A custodian may determine the level of control, by granting fiduciaries full or partial access to the user's digital account. A custodian could simply choose to send a copy of all the user's digital assets to the fiduciary. The Computer Fraud and Abuse Act (CFAA), specifically 18 U.S.C. § 1030(e) (2), makes it a criminal offense to access computers or records of the U.S. Government or financial institutions.[4] It essentially criminalizes computer hacking, raising concerns for fiduciaries wishing to access the bank records of the deceased or incapacitated. The Electronic Communications Privacy Act (ECPA) and its accompanying Title 2, the Stored Communications Act (SCA) "prohibit public providers of electronic communications and remote computing from knowingly divulging to any person or entity the contents of any communication which is carried or maintained on that service"[5] § 2702 (a) (2).

The federal laws predate the explosion of Internet use and development of internet service providers and social media networks such as Facebook and Google. The laws require users to agree to "Terms of Service" agreements (TOS). Many users simply click their agreement without consideration of the terms and its consequences. Some providers, notably Facebook and Google, have updated their TOS agreements to allow users some control over their account when they die or become incapacitated. The user may designate a family member or friend to take control of the account, if the user wanted a so-called "legacy account," or close down the account altogether. It is unclear how many users opt in for this control over their account. Most TOS agreements do not provide for access to the digital assets after a user is deceased or incapacitated. Hence the need for updating the laws. The New York State legislature has been slowly moving to amend the Estates, Powers and Trusts (EPTL) law in relation to fiduciaries' powers to control digital account and assets. The proposed A7869/S5775 bills seek to amend fiduciary control over digital assets and are likely to be modeled after RUFADAA. The Health Insurance Portability and Accountability Act (HIPAA) passed in 1996, and its Privacy Rule added in 2003, have served as a guideline for restricting access of "*covered entities*," generally health care clearinghouses, employee sponsored health plans, health insurers and medical service providers. The Privacy Rule protects individually identifiable health information about a decedent for 50 years following the date of death of the individual. The health information balances privacy interests of surviving relatives and other individuals with a relationship to decedent with the needs of archivists and historians.[6]

The RUFADAA defines the term "*digital asset*" as an electronic record in which a person has a right or interest but does not include an underlying asset or liability unless the asset or liability is itself an electronic record.[7] We note these records currently exist in both traditional or non-electronic and electronic forms and anticipate that in the future we may only have electronic records, such as a bank account online. Digital assets refer to any assets which exist in digital form. It will also likely refer in the future to technology we can't imagine today. Digital assets may be messages, photos, music, video, recordings, domain names, blogs, documents, files, online gaming and gaming credits, loyalty awards, financial and bank accounts. The assets may be stored in many locations such as on our mobile devices, computers, cloud based storage systems (e.g., Dropbox), for business, personal, or a combination of uses. We pay our bills online, we bank online, we share our documents online, we play games online, and ultimately information about our lives is increasingly online.

However, when we become incapacitated or die, access to these accounts may be subject to TOS agreements with third-party providers (such as Facebook, Google, Amazon, Delta Airlines) and access becomes restricted or eliminated for our entrusted fiduciaries. Users of these websites, when initiating their accounts, agree to varying TOS agreements without considering the implications of their accounts and whether they terminate upon their death. Recently a widow, Peggy Bush, whose husband, David, passed away in August 2015, needed a court order in addition to her husband's death certificate to access an Apple card game app on the couple's iPad device so she could continue playing. Ms. Bush knew the password for the iPad device itself, but not her husband's Apple ID.[8] This is one of the many examples where barriers confound families and fiduciaries with time-consuming and costly detours. Instead, a will with clear authority for the fiduciary to handle such digital assets may have helped Ms. Bush. Among the goals of the legislative efforts by RUFADAA and in New York, is to enable digital assets to be treated like other assets, that is, create "*asset neutrality*" so fiduciaries can have the same authority as they do for traditional assets.

What Should Elder Law Attorneys Do to Help Their Clients?

Given the unsettled legal landscape in New York, attorneys can guide their clients through traditional estate planning documents and supportive documents to incorporate digital assets that have meaningful monetary or sentimental value. A survey by McAfee put an average value of digital assets at about $35,000.[9] Determination will need to be made as to what digital assets are of importance to the clients, whether the assets are owned and belong to the clients, or are assets that are under the control of third party contracts that would require access to be granted to fiduciaries. By making arrangements in advance, clients can proactively protect their assets to the greatest extent possible.

An astounding $41.7 billion of assets are currently held by states, according to the National Association of Unclaimed Property Administrators, including $14 billion in New York State alone.[10] Unclaimed property that escheats to state treasury accounts will likely rise further with the rapid increase in digital assets. Notably, electronic only bank accounts may escheat if digital account ownership can't be easily identified. Not only can these valuable assets remain hidden, but personal debts may rise for the estate as bills, previously paid online by the decedent go unpaid, causing creditors to slap late financing fees on top of owed amounts if they are unaware of the holder's death or incapacity. Dormant bank accounts are particularly vulnerable to identity theft, if untended to. According to the Bureau of Justice Statistics, an estimated 17.6 million persons, or about 7% of the U.S. residents ages 16 years or older, were victims of identity theft in 2014.[11]

Increasingly, clients are spending more time online on personal computers, work computers, and smartphones. They have numerous usernames and passwords for many accounts. To prevent potential fraud and identity theft, attorneys need to discuss how to best safeguard the myriad of user names and passwords that accompany these accounts for the potential task of marshaling and disposing of digital assets to beneficiaries by personal representatives, guardians, executors, agents, and trustees.

Digital accounts with sentimental value may be even more difficult to access but may be just as important for family members who wish to understand an unexpected death by viewing a loved one's emails or postings on a social media site such as Facebook. Many third party sites and TOS agreements (due to the requirements of federal law) have their own procedures and policies for purposes of privacy and safety concerns. Many of these providers make it very difficult or even impossible for family members to gain access to social media accounts. In the case of *In re Estate of Ellsworth*,[12] the parents of Justin Ellsworth, a U.S. Marine who had died in Iraq in 2004, struggled with Yahoo! to gain access to their son's email account which he had used while on tour of duty. Yahoo! disallowed access due to its terms of service and to protect their son's privacy. Ultimately the Michigan probate court directed Yahoo! to provide the family with the emails. Many other struggles like that of the Ellsworths reflect the complexity of digital property, privacy and contracts with email and social media platforms.

The case of *Ajemian v. Yahoo!*[13] reveals the difficulties families face when requesting access to emails owing to restrictions imposed by TOS. Siblings were appointed administrators of the estate of their brother, John Ajemian, who had died tragically in 2006. Using privacy concerns covered by the Stored Communications Act, Yahoo! refused to give the family access to their brother's personal email account. Initially, the siblings wanted to find information to invite friends for a memorial service for their brother. Later, as administrators, they sought access to the emails as a means of finding their brother's assets. What followed were lengthy negotiations with Yahoo! and lengthy court battles. With a court order, the siblings were offered basic email header information by Yahoo! but not the contents of the emails. Yahoo! raised a forum selection clause issue in their TOS (to require the suit to move to California from Massachusetts) to dismiss the case. The court refused to do so, remanding the case to the probate court for determination as to whether decedent John Ajemian's digital assets are part of his estate. The court's decision questioned Yahoo!'s TOS and reflected on the lack of reasonable construction

A Practical Approach

Elder law attorneys should:

- work to raise client awareness of the need to identify and to add digital assets to estate plans;
- consider designating an executor that has the digital expertise to gain access to digital accounts and/or specifically authorizing a fiduciary (trustee, executor, agent under power of attorney) to retain a person or entity with digital expertise;
- develop an exhaustive digital asset inventory list, and incorporate the authority to handle digital assets in documents, notably, powers of attorney, wills, and trusts.

> *"If these documents are largely silent with respect to digital assets, clients should update their planning documents and create a digital inventory by key categories which can have passwords."*

and clarity on the some terms in the contract. As these controversies have risen, Facebook and Google have updated their policies. Both companies have added options for Legacy Accounts allowing users to decide ahead of time to determine what do with their social media accounts, and have provided online tools so that users could set privacy controls for their accounts during their lifetime.

Suggested "*best practices*" for TOS agreements of online accounts are:

(1) clearly authorize a duly appointed fiduciary to access to a user's online account during lifetime or after death for purposes of exemption from state and federal criminal laws including the Computer Fraud and Abuse Act;

(2) clearly confirm that the user is providing "lawful consent" within the meaning of the federal SCA to divulge the user's online account contents to a duly appointed fiduciary; and

(3) clearly state what happens to the user's account itself and the user's account contents after death.[14]

As digital accounts proliferate, elder law attorneys need to adapt their standard procedures to address the digital estate in all key draft documents and inventory gathering. At the same time, attorneys can address the client's need to provide direction of their intentions regarding access, transfer and disposition of key digital assets in absence of clear laws and mitigate the potential for conflicts down the road for clients and their proposed fiduciaries and beneficiaries.

Attorneys should understand their clients and their backgrounds and learn what digital accounts they use in their personal lives. Clients should be apprised of the risks of online accounts on computers and smartphones owned by their employers that may be less accessible by a fiduciary. Attorneys need to understand their client's profiles to the extent they have digital assets that have monetary value, such as fledging small businesses that involve their own websites, with client lists, domain names, blogging, YouTube accounts, online auctions, frequent flyer accounts, stock or currency trading accounts or even speculation in bitcoins. I recommend that attorneys incorporate language in planning documents to encourage their clients to identify their wishes and help fiduciaries carry out those intentions. We, as attorneys, also need to counsel our clients of the current uncertain state of the law.

Attorneys may suggest to their clients that they consider appointing more than one agent as power of attorney that can either act separately or together. The second agent or co-agent can be authorized to take on the responsibility for access to digital accounts, such as bank records, a separate person as co-agent to handle the digital assets (digital agent), separate from traditional assets, and that these individuals be technologically more knowledgeable with online accounts, TOS, and websites. It should be stressed that no passwords or security questions should ever be noted in any planning documents but rather kept separately whether in a safe deposit box or another secure place.

Estate planning documents should always be reviewed periodically every few years and when there are life-changing events. If these documents are largely silent with respect to digital assets, clients should update their planning documents and create a digital inventory by key categories which can have passwords. Also the client can have sensitive information on this list but take care to be stored carefully or shared with a trustworthy person.

A suggested practical approach for elder law attorneys could entail the following list to better work with their clients:

1. explore their wishes and intentions with respect to their digital profile;
2. discuss the need to develop a detailed digital inventory list including digital assets of meaningful financial and sentimental value, with passwords, access codes and security questions stored securely;
3. suggest options to update power of attorney, will, trusts to address digital property, decide whether there will be a separate digital fiduciary, notably, digital agent or digital trustee;
4. emphasize the importance of indicating their wishes as to access, distribution or deletion of these digital accounts;
5. create a clear authorization to fiduciaries to access respective hardware devices, such as smartphones, tablets, computers, storage devices, data and cloud accounts;
6. grant specific authority to fiduciaries to reset passwords if needed; and
7. authorize fiduciaries to obtain court orders if required by third party providers to gain contents of any and all electronic communications.

Powers of Attorney

In the N.Y. S. Statutory Short Form Power of Attorney, attorneys can use "(g) Modifications" to make additional provisions.[15] This optional section can include language to limit or supplement authority granted to the agent spelling out the agent's power to use, manage, terminate, transfer or have full access to digital accounts, name the type of accounts including email accounts, digital music, video, photos, software licenses, e-commerce accounts and bank /financial accounts, whether access includes passwords, access controls. Digital assets should detail what is included and whether there are any limits. Also, the POA should name whether the agent is specifically a digital agent.

Wills

Typically, wills designate an individual to serve as executor who will have the authority to manage property. Attorneys can add language to enable the executor to have authority to manage, handle, access, use, distribute, control and dispose of digital property, including and not limited to all named digital assets, digital accounts, social media accounts and include obtaining digital files from any and all Internet service providers. It should be noted that New York State does not allow for a separate "digital executor" at this time. The will should never contain any passwords or sensitive information because of the risk of the will becoming part of the public record once the will is admitted to probate. Attorneys should consider referencing an external list of digital assets with relevant usernames, access codes, security questions and passwords in a separate document. The following sample language serves as an example:

> I have prepared a memorandum with instructions concerning my digital assets and their access, handling, distribution and disposition. I direct my executor and beneficiaries to follow my instructions concerning my digital assets.[16]

The will should include the specific powers to handle digital assets and provide an all-encompassing definition of digital assets. The will should identify what devices files may be stored on, refer to current and advancing technologies and include all types of digital accounts which reflect the client's usage currently and in the future. Attorneys can be guided in part by the client's digital inventory list but need to consider less active accounts as well as future usage not currently envisioned.

Trusts

Trusts can stand on their own, by highlighting digital assets, and can set forth the authority granted to the trustee to handle the digital assets. If digital assets are of significant value a Digital Asset Trust can be created. The information in the trust does not become part of the public record as in the case of a will if admitted to probate. Alternatively, a testamentary trust can be folded into a will and contain only the digital assets. Similar to an executor, the trustee can be granted authority to manage, access, use and take control of digital assets.

Digital Asset Inventory

Clients should be encouraged to create an inventory of all of their assets. Traditionally, assets would be listed according to real property (e.g., primary and second homes) and personal property, including valuables such as art, antiques, rare books, jewelry and such). Clients should be organizing their digital property as well. Some digital assets have monetary value or point values while other digital assets are sentimental in value. A list of all digital assets and accounts should be categorized and referenced in a document. Everplan's *Digital Cheat Sheet*[17] provides an outline and can be customized for each client in the following categories:

1. **Devices.** Computer hardware, such as computers, external hard drives, flash drives, tablets, smartphones, digital music players, e-readers,

home security systems, smart television, digital cameras and other digital devices;

2. **Online storage at home and work.** Any information or data that is stored electronically, whether stored online, in the cloud, or on a physical device;
3. **Any online accounts**, such as email and communications accounts, social media accounts, shopping accounts, photo and video sharing accounts, Instagram, video gaming accounts, and websites and blogs that you manage;
4. **Domain names** that exist personally and business;
5. **Intellectual property**, including copyrighted materials, trademarks and any code you may have written.

It is clear that in our digitally connected society, elder law attorneys can play an important role in helping our clients address all assets, including the digital assets in their estate plans. The value of these assets can be meaningful yet are often not reflected in planning documents. Digital assets are difficult to access and manage for families and fiduciaries when a loved one becomes incapacitated or dies. The retrieval of these assets can add costs and complexity to an already difficult time. With the legal landscape still unsettled for digital assets, we need to facilitate the wishes of our clients in their planning documents to the greatest extent. Clients need to understand the risks of failing to address their growing portfolio of digital assets properly and the difficulties families may face without clear direction. These challenges can provide opportunities for elder law attorneys in their practices.

Endnotes

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This article originally appeared in the Summer 2016 issue of the Elder and Special Needs Law Journal*, published by the Elder and Special Needs Law Section of the New York State Bar Association.*

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Visit us online at:
www.nysba.org/TheSeniorLawyer

JOINING AND NAVIGATING THE SENIOR LAWYERS SECTION COMMUNITY

1. INTRODUCTION

The Senior Lawyers Section ("SLS") Community is a closed Internet discussion and information sharing site hosted by the New York State Bar Association Senior Lawyers Section and available only to section members.

In the Community you can:

- Share information and start discussions with other members
- Ask for advice, forms, recommendations and referrals
- Easily read all posts on an issue
- Upload documents, articles or forms to a SLS library that other members can read and download
- Establish a personal profile so that members will know more about you and you can find (and contact) other SLS members
- Learn about SLS events and programs

2. JOINING THE COMMUNITY

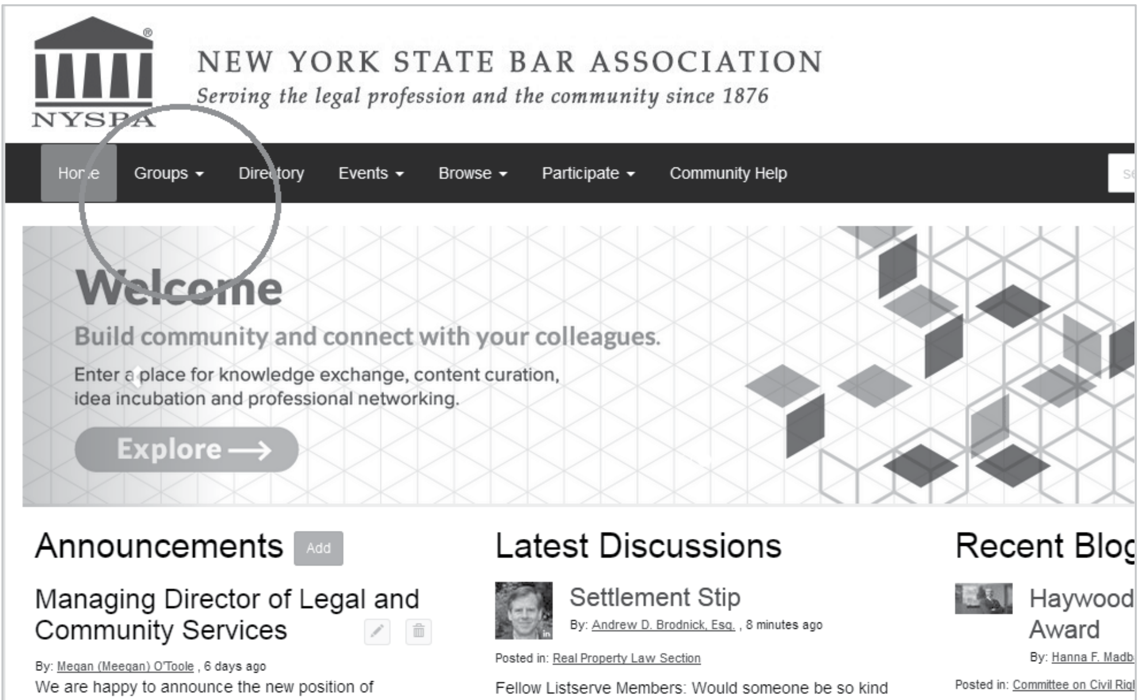
All existing members of the section have been auto-subscribed to the Community. We suggest that you log in to the Community to learn more about it and select your preferences. By default, you are subscribed to receive a daily digest of posts to the Community, but you may update your preferences if you wish (see 4a below).

1

3. GETTING TO THE COMMUNITY

Start by having available your user name and password for the NYSBA web site. If you don't have this information (or don't know it), call the NYSBA Member Resource Center at 800-582-2452 (8am-4:45pm, M-F) for help.

Next, go to the web address http://communities.nysba.org and click on the "Groups" tab in the upper left, then "My Groups." You will be asked to sign in using your user name and password. Groups and Communities are synonymous.



You will then come to a page that lists all of your existing Communities. The Senior Lawyer Section should be shown as well as other Communities of which you are a member (Note: You may see a number of Communities of which you are already a member by virtue of your NYSBA profile, e.g. Non-Resident.)

You can also get to the My Groups page by logging in at the NYSBA Internet site (www.nysba.org) and then clicking on the Communities tab at the top.

Next, enter the Senior Lawyer Section Community by clicking on "Senior Lawyers Section."

2

4. ENTERING YOUR PREFERENCES AND PROFILE

The next step is to configure your email notification settings and, if you do not yet have a NYSBA Community profile, creating one.

a. Selecting Your Email Preferences

This is how you receive discussion posts from other Section members. You can receive email notifications of all discussion posts on the Community, *if you want to receive them*. If you are a member of more than one Community you can have a separate notification preference for each.

You have four choices for notification. You can either:

(1) Get posts via email in real time as they are made, or

(2) Our most popular option--Get one daily email with all discussion posts for that day (if there were no posts that day, you will not receive an email), or

(3) Get posts via email in text only format (this version strips out images and is most similar to the classic listserve format), or

(4) Opt to receive no Community emails at all, in which case you can read discussion posts whenever you log in and enter the Community page online.

To configure your choice, click on the "Settings" button next to the Community's title on the Senior Lawyer Section Community page. Under "Email Notifications" click on the dropdown box and choose which of the alternative notifications you want.

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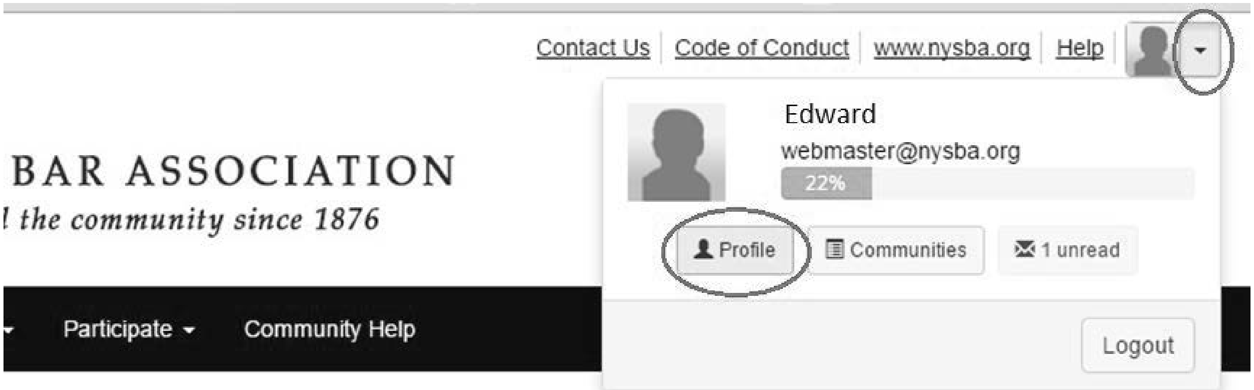
You can also select your email preferences directly from your Profile Page (see below).

b. Creating/Modifying Your Profile

In the upper right corner of the Communities page there is a greyed-out figurehead with a drop-down arrow. Click on the arrow and then click on Profile.



This will take you to your Profile Page. You can manually insert your profile or, if you have a LinkedIn profile that you want to start with, you can import it directly. Your Profile can be as expansive or narrow as you prefer. You can change or update your profile in the same manner. To edit your basic NYSBA contact information click on the box to the left on Contact Details (light grey with a pen). Note that this changes the information in your NYSBA record overall (e.g., for mailing purposes). If you wish to change only the information that appears in the Community itself, see the Privacy section below.

You can also use your Profile page to manage your email notifications (located under “My Account,” then select “Community Notifications”).

c. Privacy and Limiting Access to Your Profile

Do you want to limit who can see your profile and how you are listed? If so, go to your Profile page (see above). There are four tabs: click on the “My Account” tab, and then click on “Privacy Settings.”

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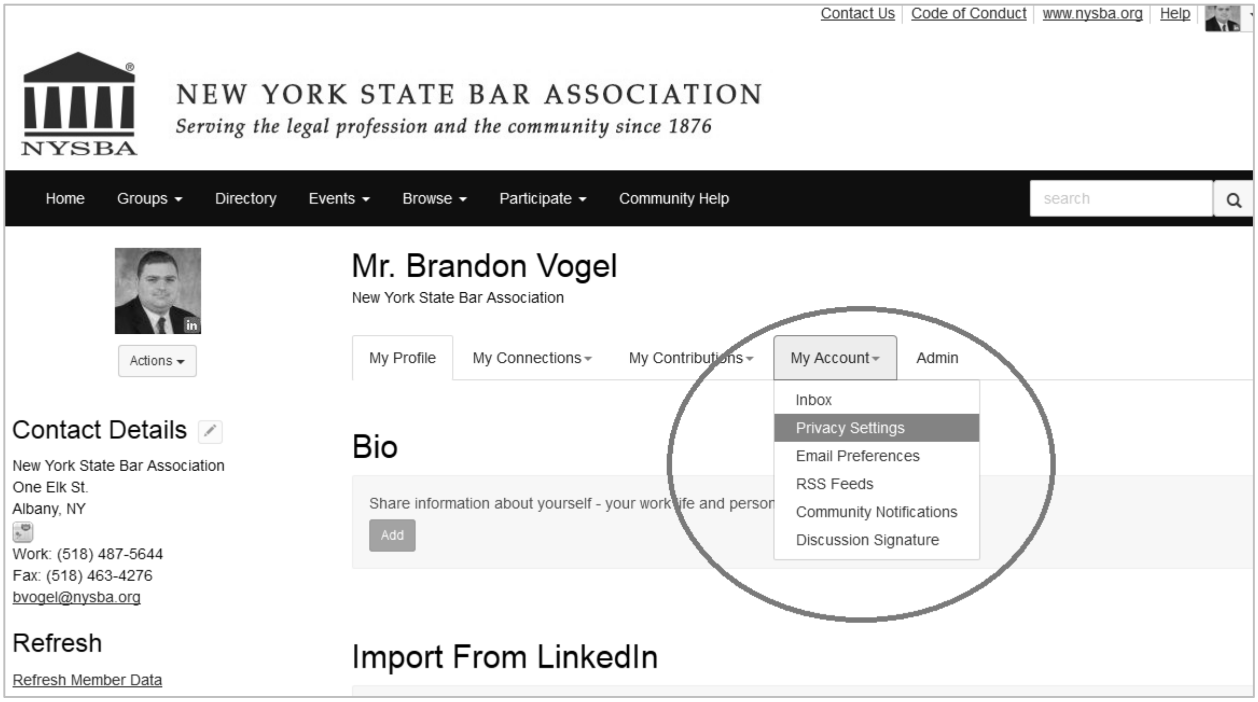
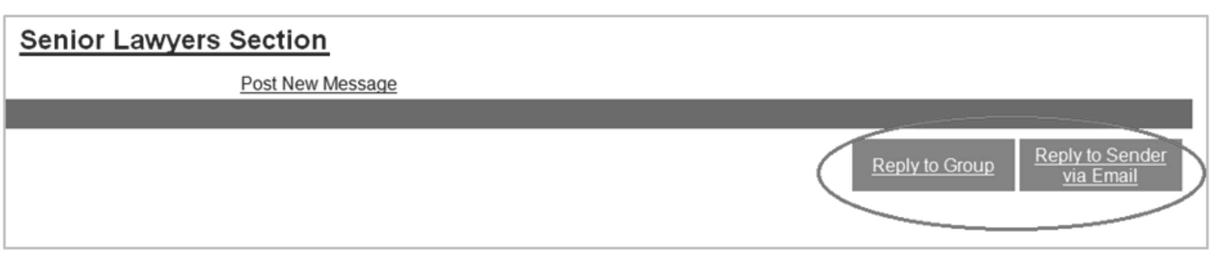


You can select exactly which parts of your profile you want to be seen by others. Remember, the names of all members of the Section will be listed with information as you want it shown. If you wish to remain anonymous in the Community, you may click the "Yes" button next to "I would like to be included in the member directory and community rosters" to change it to "No." Once you have made your changes, be sure to scroll down to the bottom of the page and click "**Save Changes**."

5. REPLYING TO A DISCUSSION POST

There are two ways to reply to a Community discussion post.

a. **Reply from Your Email:** If you have received a Community post via email and wish to respond, click the "Reply to Group" button which appears next to the message thread in your email (this posts a reply to the Community, which is generally recommended); or click "Reply to Sender via Email" to reply to the person individually.



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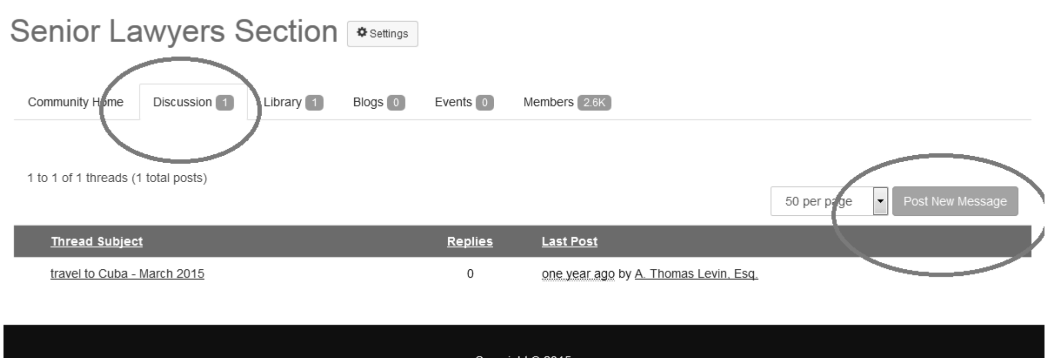
b. **Reply Online:** If you are accessing the Community online, go to the Community online (see #3 above) and click on the "Discussion" tab. Click on the appropriate thread subject, then click "Reply to Discussion." Enter your message, and then be sure to scroll down and click "Send." This will post your reply to the Community.

6. STARTING A NEW DISCUSSION OR ASKING A QUESTION

If you want to start a discussion or ask a question of the members, there are two ways to do so.

a. **Post a New Message Online:** Log on to the Senior Lawyers Section Community site (see #3 above), click on the "Discussion" tab, and you will see a green button to "Post New Message." Click on that and start your message. Click "**Send**" at the bottom of the page when you are finished.



b. **Post a New Message by Email:** You can also start a discussion without logging on by sending an email directly to the Community email address – **nysba-seniorlawyers@connectedcommunity.org**. The subject line of your email will become the title of your post and the entire text of your email will become the body of the post.

To maintain security and the closed nature of the Community, direct email posting will

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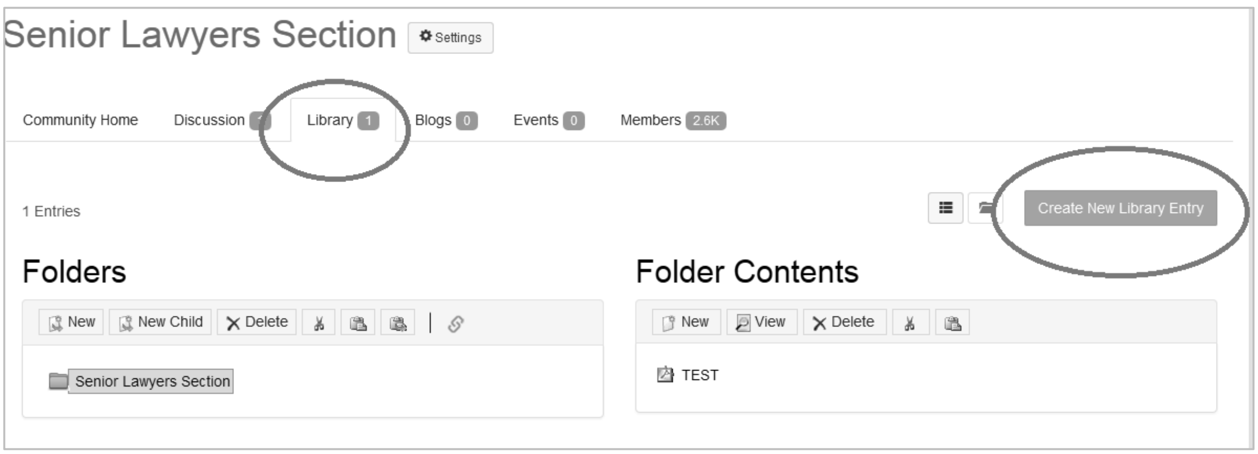
work only if you are sending the email from the email address you have registered with NYSBA. If you use a different email address, your post will be rejected.

If you post a message the signature block will be your contact information as it appears on your profile, subject to your Community privacy setting choices.

7. UPLOADING DOCUMENTS

If you want to add a document or article to the Community library, click on the "Library" tab in the Community and then click on "Create New Library Entry."



Fill in the information about your library item, then click on "Next," attach your file and upload it by finishing the process.

If you are posting a message to the Community via email (see #5a and #6b above), you may simply attach the document to the email and it will be automatically posted to the library.

8. COMMUNICATING WITH OTHER SLS MEMBERS INDIVIDUALLY

You can send emails via the Community to other section members. All section members are listed in the Members section of the Senior Lawyers Section Community. To reach one of them, go to the Senior Lawyers Section Community (see #3 above) and click on the "Members" tab towards the top. You will then see a search screen that allows you to search for members by first name, last name, law firm/company name or email address.

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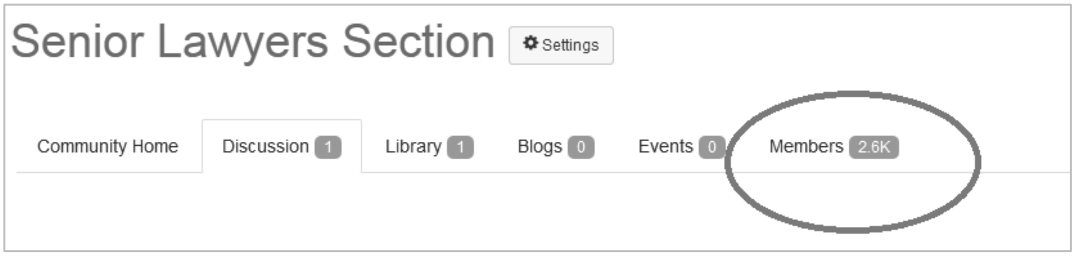

You can click on each member by name and look at his or her profile. You will be able to send them a direct email message by clicking on "**Send Message**." As you can see, having your own complete profile will help other members know more about you and contact you when appropriate.

9. APPS ANYONE?

There is a mobile app which you can use to access the Community on your smart phone. Go to the Apple or Google Play Store, search for NYSBA Communities, load the app and then and select your Community. Entries will appear on your phone in order of posting rather than as a thread. Some of the instructions in this document will apply differently when accessing the Community from the app. You can also access the Community from NYSBA's LawHUB at www.nysba.org/lawhub.

CODE OF CONDUCT:

For the code of conduct that governs NYSBA Communities, please visit http://communities.nysba.org/codeofconduct.

QUESTIONS?

For additional information, contact Brandon Vogel at (518) 487-5644 or bvogel@nysba.org, or post questions or issues on the SLS Community.

The *New* New York State Estate Tax Regime, a Trap for the Unwary

Proposed Will Language to Save Estate Taxes and Obtain Direct Pecuniary Benefit for Beneficiaries (Santa Clause)

By Paul S. Forster and Laurence Keiser

Chapter 59 of the New York Laws of 2014 (Part X) made significant amendments to the New York State estate tax effective for estates of individuals with dates of death on or after April 1, 2014. Prior to these amendments, the New York State estate tax was the maximum amount allowed on the federal estate tax return as a credit for state death taxes.

Among other things pertinent to this article, Chapter 59 increased the New York State estate tax return filing thresholds as follows: effective for decedents who died on or after April 1, 2014 ($2,062,500), effective April 1, 2015 ($3,125,000), effective April 1, 2016 ($4,187,500), effective April 1, 2017 ($5,250,000), and effective January 1, 2019 (the federal basic exclusion amount then in effect). The federal basic exclusion amount, insofar as presently is known, is $5,450,000 for decedents who die on or after January 1, 2016 and is subject to increases (indexed) thereafter based on inflation.

Under Chapter 59, the estate tax is computed based on the New York taxable estate using the following tax table:

If the New York taxable estate is	**The tax is:**
Not over $500,000	3.06% of taxable estate
Over $500,000 but not over $1,000,000	$15,300 plus 5.0% of excess over $500,000
Over $1,000,000 but not over $1,500,000	$40,300 plus 5.5% of excess over $1,000,000
Over $1,500,000 but not over $2,100,000	$67,800 plus 6.5% of excess over $1,500,000
Over $2,100,000 but not over $2,600,000	$106,800 plus 8.0% of excess over $2,100,000
Over $2,600,000 but not over $3,100,000	$146,800 plus 8.8% of excess over $2,600,000
Over $3,100,000 but not over $3,600,000	$190,800 plus 9.6% of excess over $3,100,000
Over $3,600,000 but not over $4,100,000	$238,800 plus 10.4% of excess over $3,600,000
Over $4,100,000 but not over $5,100,000	$290,800 plus 11.2% of excess over $4,100,000
Over $5,100,000 but not over $6,100,000	$402,800 plus 12.0% of excess over $5,100,000
Over $6,100,000 but not over $7,100,000	$522,800 plus 12.8% of excess over $6,100,000
Over $7,100,000 but not over $8,100,000	$650,800 plus 13.6% of excess over $7,100,000
Over $8,100,000 but not over $9,100,000	$786,800 plus 14.4% of excess over $8,100,000
Over $9,100,000 but not over $10,100,000	$930,800 plus 15.2% of excess over $9,100,000
Over $10,100,000	$1,082,800 plus 16.0% of excess over $10,100,000

Chapter 59 of the Laws of 2014 (Part X) also provides an applicable credit for certain estates.

New York State Department of Taxation and Finance Technical Memorandum TSB-M-14(6)M provides a summary of all of the amendments to the New York State estate tax effective April 1, 2014.[1] The applicable credit is allowed against the estate tax when a New York taxable estate (including gifts) is not greater than 105% of the basic exclusion amount and cannot exceed the tax imposed.

If the New York taxable estate is less than or equal to the basic exclusion amount, the applicable credit amount will be the amount of tax that is computed on the taxable estate. The applicable credit is phased out as the New York taxable estate approaches 105% of the basic exclusion amount and cannot exceed the tax imposed.

If the New York taxable estate is greater than the basic exclusion amount but not greater than 105% of the basic exclusion amount, then the applicable credit is equal to the estate tax that would be due on an amount computed by multiplying the basic exclusion amount by one minus a fraction.

The numerator of the fraction is the New York taxable estate less the basic exclusion amount, and the denominator is five percent (5%) of the basic exclusion amount. This requires careful parsing of the language in order to create the correct algebraic equation.

Pernicious Effect of the *New* New York Estate Tax Regime

The purpose of this article is to explain the pernicious effect of the new New York State estate tax regime as a trap for the unwary, and to suggest some language in the form of a "Santa Clause" to protect clients and their beneficiaries.

The following is an example of how the "credit" is applied, and how the "Santa Clause" language would favorably affect the amounts received by the beneficiaries.

Our example is based upon the estate of a decedent who dies between April 1, 2015 and March 31, 2016 with a taxable estate of $3,200,000. The applicable credit is available because the taxable estate exceeds the basic exclusion amount ($3,125,000) which applies during that period by an amount ($75,000) that is less than or equal to 5% of the basic exclusion amount ($156,250).

The credit against the tax is equal to the estate tax that would be due on an amount that is computed by multiplying the basic exclusion amount ($3,125,000) by one (1) less a fraction, the numerator of which is $75,000 ($3,200,000 less the basic exclusion amount of $3,125,000). The denominator of the fraction is five percent (5%) of the basic exclusion amount, or $156,250 (5% x $3,125,000).

In our example, the credit would be $75,925, calculated as follows:

($3,125,000 x (1-$75,000/$156,250)) = $3,125,000 x (1-.48) = $3,125,000 x .52 = $1,625,000. The credit would be the tax on $1,625,000, which is $75,925.

Accordingly, the estate tax on $3,200,000, for a decedent dying between 4/1/15 and 3/31/16 would be $124,475, calculated as follows:

Taxable estate	$3,200,000
Tax computed	$200,400
Credit	$75,925
Estate tax due	$124,475

But wait a minute—if the taxable estate is $3,200,000 and the tax is $124,475, the net estate distributable to the beneficiaries is only $3,075,525. If the taxable estate were only $3,125,000 there would be no tax due and the beneficiaries would get $3,125,000. With an estate that is $75,000 ***greater***, they get $49,475 ***less***. How can this be? It is because the manner in which the credit is calculated phases out the credit in such a way as in our example the "marginal" rate is 1.66%, or greater than 100%.

During our April 1, 2015 to March 31, 2016 period, the credit phases out between a taxable estate of $3,125,000 and $3,281,250 (3,125,000 x 1.05%), a difference of $156,250. However, the estate tax at the upper boundary of the range is $208,200, as against an increase in the taxable estate of only $156,250, still a marginal rate of 1.33%.

It is not until the taxable estate reaches $3,338,717 that an increase in the taxable estate actually results in additional sums passing to the beneficiaries. Put another way, the beneficiaries of a taxable estate of $3,338,717, on which the estate tax is $213,717, end up getting only $3,125,000, which is the same amount that they would get on a taxable estate of $3,125,000 which would be exempt from tax. That means that the beneficiaries get no benefit of any portion of the additional $213,717.

In a more extreme scenario, because of the way the credit phases out, on estates between $3,125,001 and $3,338,716, the beneficiaries get ***less*** than $3,125,000, the so-called "exempt" amount.

For the estates of decedents dying between April 1, 2016 and March 31, 2017, the estate tax exemption amount is $4,187,500. The credit phases out between $4,187,500 and $4,396,875. It is not until the taxable estate reaches $4,526,014, however—$338,514 more than the exempt amount—that an increase in the estate will result in the beneficiaries getting more, and on estates between $4,187,501 and $4,526,013, as the credit phases out, the beneficiaries actually get ***less*** than $4,187,500, the so-called "exempt" amount.

Similarly, for the estates of decedents dying between April 1, 2017 and December 31, 2018, the estate tax exemption amount is $5,250,000. The credit phases out between $5,250,000 and $5,512,500. It is not until the taxable estate reaches $5,728,182, however—$478,182 more than the exempt amount—that an increase in the estate will result in the beneficiaries inheriting more, and on estates between $5,250,001 and $5,728,181, as the credit phases out, the beneficiaries actually get ***less*** than $5,250,000, the so-called "exempt" amount.

To paraphrase Senator Dirksen, at $213,717, $338,514, and $478,182 for the respective periods, you are talking real money!

The "Santa Clause"

All is not lost, however. It is proposed that the "Santa Clause" described below be included in all Wills or trusts in which the taxable estate is likely to fall within the respective ranges.

Put simply, the effect of a "Santa Clause" is to authorize the executor of an estate within the ranges to make a charitable gift of so much of the estate as will reduce the taxable estate to the exempt amount.

A proposed Santa Clause would read as follows:

"In the event my estate is taxable for New York State Estate Tax purposes, then, and in that event, I give, devise, and bequeath to: (choose one of following three (3) alternatives)

1. particular named charity (ies);
2. my executor hereinafter named to be distributed by him to, between, or among the following named charity (ies);
3. my executor hereinafter named to be distributed by him to, between, or among such charity (ies), distributions which are eligible to be deducted for estate tax purposes as may be designated by him;

the maximum portion of my estate as will result in a reduction of my New York State Estate Tax which equals or exceeds the amount so distributed.

Once the taxable estate exceeds the upper bounds described above during the pertinent periods, any such charitable distributions would exceed the tax imposed, and the "Santa Clause" would not apply, since there is no credit and the marginal rates applied would be 9.6%, 11.2% and 12%, respectively, which are only fractions of any amounts distributed."

Effect of Use of "Santa Clause"

Under examples 1, 2 and 3 of the proposed Will (or trust) clause above, in an estate of a decedent dying between April 1, 2015 and March 31, 2016, in which the taxable estate otherwise would be $3,200,000, a gift to charity of $75,000 would save the estate approximately $124,475.

The benefit to the beneficiaries ($49,475) is calculated as follows:

(A) Will as written:

Taxable estate: $3,200,000

Estate tax: ($124,475)

Net distributable: $3,075,525.

(B) Will with Santa Clause:

Charitable gift: $75,000

Taxable estate: $3,125,000 ($3,200,000-$75,000)

Estate tax: $0

Net distributable to non-charitable beneficiaries: $3,125,000.

The authors hope that this analysis sheds some light on this complicated subject and provides some helpful guidance to avoid the trap this estate tax regime lays for unsuspecting practitioners.

Endnote

1. This can be found at the Department's website (www.tax.ny.gov).

This article originally appeared in the Spring 2016 issue of the Trusts and Estates Law Section Newsletter, *a publication of the Trusts and Estates Law Section of the New York State Bar Association.*

ABOUT THE SENIOR LAWYERS SECTION

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

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

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

To join this NYSBA Section, go to www.nysba.org/SLS or call (518) 463-3200.

Should They Go or Should They Stay? Issue-Spotting for the New York Lawyer Whose Clients May Be Considering a Change in Domicile to Florida

By Joanne Fanizza

With all that warm weather, sunshine and lack of state income tax, Florida has become one of the prime destinations for New Yorkers who are looking to retire to another state that will be less of a drain on their fixed incomes. There certainly are benefits to making that move, most notably the tax system (or lack thereof), but those benefits come with trade-offs, like a paltry Medicaid system. Florida cannot afford to provide New York-style Medicaid benefits when it collects a fraction of New York's tax receipts (despite almost equal populations), due to its Constitutionally limited ability to raise funds and balanced-budget requirement.[1]

The differences between New York and Florida are considerable, and unless you are both admitted to practice in Florida and routinely practice there, you should consider consulting with Florida counsel to ensure you are giving your clients the best and most accurate advice possible. Meanwhile, if one of your clients advises you that he or she is considering a change in domicile to Florida, keep in mind the issues below. They may make or break the client's decision:

☺	☹
No state income tax, Article VII, Section 5, Florida Constitution	You get what you pay for (see Medicaid section)
No state estate tax, Article VII, Section 5, Florida Constitution	You get what you pay for (see Medicaid section)
Sun!	Hurricanes!
Homestead protections (3): Article X § 4 and Article VII § 6, Florida Constitution; Fla. Stat. § 732.401-.4015	Restrictions on devise of homestead, Fla. Stat. § 732.401-.4015
Bar on creditors' claims 2 years after death Fla. Stat. § 733.710	Smart creditors file caveats and force estates open within 2 years of death
Legal process is simpler and faster	(I don't see any downside to this)

Homestead

Florida's unusual homestead laws are perhaps the most difficult to understand, and the area in which many attorneys commit malpractice—*both* those admitted to The Florida Bar and those not but who nevertheless insist on advising clients on Florida legal issues. Keep in mind that Florida is considered a debtor's state that will not allow your home to be taken away—so long as you pay the mortgage, taxes and association maintenance fees.[2] If you do, then you and certain of your heirs will enjoy the benefits of that property, even if you don't want them to.

> *"Florida's unusual homestead laws are perhaps the most difficult to understand…"*

There are three types of homestead protections in Florida, one of which affects estate planning. The others affect taxation of homesteaded property (off-the-top exemption of $25,000 value from real property taxes, plus some additional exemptions, if qualified)[3] and valuation of homesteaded property (annual caps on increases in valuation).

The most important homestead protection for estate planning purposes is found in Article X, § 4 of the Florida Constitution, which gives homeowners who declare homestead (you must apply!) protection from the claims of creditors, including from forced sale, Medicaid liens and all other creditors except the lender who financed the loan to purchase the property, taxing authorities, and materialmen.

Article X, § 4 states as follows:

(a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement, or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:

(1) a homestead, if located outside a municipality, to the extent of one hundred sixty acres of contiguous land and improvements thereon, which shall not be reduced without the owner's consent by reason of subsequent inclusion in a municipality; or if located with a municipality, to the extent of one-half acre of contiguous land, upon which the exemption shall be limited to the residence of the owner or the owner's family;

(2) personal property to the value of $1,000.

(b) These exemptions shall inure to the surviving spouse or heirs of the owner.

(c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

In essence, this means that a homestead passes to a *spouse or lineal descendant* free from the claims of creditors. But it also states that a homesteader is restricted from devising that property upon death if the homesteader is survived by a spouse and/or minor child. In other words, Florida does not allow a testator to leave a spouse or minor child without a roof over their head. For example, if a decedent owned the homestead in his or her name only, upon death was married and/or had a minor child, yet attempted to devise their homestead in his or her will to a third party (e.g., a paramour), that devise is modified under the law: The spouse and/or minor child receives a life estate in the property, with the remainder to go to the ultimate devisee.

If a decedent has creditors, no spouse or children but other lineal descendants, the homestead will still pass free from creditors' claims to a more remote descendant. But if the decedent wishes to devise that homestead to some other third party (i.e., someone who is not a lineal descendant), that can be done if there is no spouse or minor child, but the property will not pass free from the claims of creditors. The idea is to protect those who relied upon the decedent for support.

There is similar protection for "exempt property" as defined in Fla. Stat. § 732.402, but only to a spouse or child, not all lineal descendants. Exempt property generally consists of household furnishings up to $20,000 in value, two motor vehicles, qualified 529 plans, and certain teacher benefits.

"If a decedent has creditors, no spouse or children but other lineal descendants, the homestead will still pass free from creditors' claims to a more remote descendant."

Practice point: If you are drafting a will for a New York domiciliary who may be moving to Florida in the near future, do NOT call for the homestead to be sold upon death. That destroys the homestead protection and frees the assets for creditors' claims.[4] Also, if your New York domiciliary is survived by a spouse and/or minor child, any testamentary clause that attempts to force a sale of the property, or devise it to someone else, will be modified by the Florida courts. Attorneys admitted in New York but not admitted in Florida should not draft wills that they know are intended to be effective in Florida. Clients should be advised to see a Florida-admitted attorney at this time or after the move to Florida.

Estate Planning and Administration

In many ways, Florida is more protective of its seniors than other states, which protections are reflected in the Florida Probate Code.

Florida recognizes and allows for the probate of a will executed under another state's laws so long as it meets that state's laws at the time of execution.[5] It does *not* recognize holographic (handwritten or self-made) or nuncupative (oral) wills. *Id.* But it also does not consider a self-made will to fall under the ban **if** it is prepared with the formalities of execution required by Florida law.

Some additional differences:

☺	☹
More options to avoid probate by proper homestead planning, etc.	You must file will, notice of trust and death certificate upon death if no probate, Fla. Stat. §§ 732.901, 736.05055
In terrorem clauses are unenforceable, Fla. Stat. § 732.517 (and for trusts, too, Fla. Stat. § 736.1108)	Full-blown will contests allowed (because litigation is streamlined, cases move)
Separate writings allowed to dispose of personal property, Fla. Stat. § 732.515	Possible problems with fraud or forgery? (I've never seen that happen)
Not stuck on staples and "dog and pony show" formalities of execution	Proper drafting is paramount, with proper page breaks and initials and dates on every page
Advanced directives can be merged for simplification (e.g., health care proxy, living will and medical power of attorney), Chapter 765, Parts I, II and III; however, DNRs require very specific execution, including color of paper	No downside to the advanced directives; DNRs are usually not adhered to by EMTs, for example (thought is, if someone called for emergency medical help, the individual no longer wanted to adhere to a DNR)
Durable powers of attorney are not as complicated as NY's, Chapter 709; no more springing POAs as of October 1, 2011, Fla. Stat. § 709.2108(2)	New requirements make them more complicated than in years past, adding some NY-like clauses, such as gifting, Chapter 709, Fla. Stat. §§ 709.2201, 709.2202
Legal process is simpler and faster (including Guardianship)	You generally must complete probate within 12 months of issuance of letters

To explain some of the items in the chart above:

Homestead planning, revocable living trusts, joint titling of property (real or otherwise) will allow your client to avoid probate (which is the only term used; it includes testate and intestate estates and the petitions are for administration). Even if your client can avoid probate, original wills and death certificates must be filed upon death, and Notices of Trust must be filed, too.[6] The purpose of these formalities is to give creditors an opportunity to find the estate or trust assets in order to make valid claims.

Florida does *not* enforce *in terrorem* clauses in wills or trusts, even if valid in the state in which the will was drafted.[7] The thinking behind such a policy is that the state does not want to penalize anyone with a legitimate claim. If it turns out the challenge to the will is frivolous, the court will punish the objecting party in another way, such as assessing attorneys fees.[8]

Florida favors separate writings for personal property, giving testators the opportunity to change their mind over time without having to constantly rewrite their wills.[9]

Florida's attitude toward "Do Not Resuscitate" documents is more stringent, erring on the side of life. The form itself must be on bright lemon-yellow paper and signed by a doctor, and any failure to execute it properly will consider it void.[10] If emergency personnel are called to a location where the victim has a DNR, they will still attempt to revive the victim, on the thinking that the victim likely changed his/her mind by calling for help.

If a Florida resident fails to prepare certain advanced directives and loses competency, the *Guardianship procedure* is vastly more streamlined and efficient than New York's procedure under Article 81 of the Mental Hygiene Law.[11] You can have a guardianship in place within a matter of weeks. It is also carefully scrutinized on an annual basis, leaving little room for subterfuge by Guardians who would take advantage of their Wards.[12]

Practice point: It is easy to commit malpractice in Florida regarding will drafting and probate if you are not familiar with the intricacies of Florida law. If you are foolish enough to try to probate an estate in Florida, be advised that judges are proactive and *will* file a complaint with proper authorities against an offending attorney. The unlicensed practice of law has been criminalized in Florida. The courts also will not hesitate to sanction an attorney who does not meet the time and substantive filing requirements.

Real Estate

Florida has very clear requirements for the proper execution of deeds that are much different from New York. They are designed to avoid fraud, and they succeed greatly in doing so. (Requirements of witnesses, color of ink, pagination, etc.) Recording clerks are required to take your papers and record them, so long as they meet basic requisites (color of ink and notarization, except for promissory notes); they do NOT pass judgment on whether your documents meet any legal tests. They leave that to the malpractice carriers. So if you prepared a deed for a Florida property that was accepted and recorded by a clerk, do not think that you did the job right. I cannot tell you how many times I have found completely invalid deeds recorded by New York lawyers who simply committed malpractice. Those problems rear their ugly heads later on, when the chain of title is broken and their clients have difficulty conveying the property.[13]

Practice point: If you are a New York lawyer who prepares a Florida deed, watch out! You have likely committed malpractice. Worse, you have committed a third degree felony by practicing Florida law without a license.[14] Why take a chance on such a small fee? Please retain Florida-licensed counsel!

Medicaid

Florida's Medicaid budget is paltry compared to New York's due to limitations on Florida's revenue-raising constraints. The Florida Constitution bars a state income tax and estate tax,[15] and Florida has ended state corporate income taxation and taxes on securities and other similar intangible property. Florida's Constitution also requires the state budget to be balanced every year, so there is never any government borrowing to make ends meet.[16]

Political will also dictates the expansiveness—or lack thereof—of entitlement programs. Florida is one of the states that opted out of Medicaid expansion, and it refuses to set up health insurance exchanges. That type of mentality, combined with limited revenues, severely hampers the provision of social services and entitlement programs.

Perhaps the easiest way to capture the differences between Florida's Medicaid program and New York's is by using a comparison chart. These are the figures for 2015:

Florida	New York
Asset limit = $2,000	Luxury accounts! $14,850
Income cap = $2,199/month	Income level = $825/month
Monthly personal allowance: Was $35, rose to $105.00 as of July 1, 2014	Monthly personal allowance: $50
CSRA = $119,220	CSRA = $119,220
MMMNA = $2,931	MMMNA = $2,980.50
No Community Medicaid! At-home and ALF waiver programs have lengthy waiting lists of 10,000 or more; at home, 4 years wait; ALF, 2+ years wait; if lucky enough to qualify, services are limited	Ambitious Community Medicaid program
Look-back period started late due to legislative confusion: Full 5-year look-back began in December 2014	Look-back period is 5 years with onset of DRA 2006 on Feb. 6, 2006
Penalty divisor = $7,995 statewide	Penalty divisor = from $8,768 central to $12,390 LI
More willing acceptance of Personal Services Contracts, although they are undergoing state agency review; accepts promissory note planning	Hates Personal Services Contracts; accepts promissory note planning
Can shelter excess income into a Qualified Income Trust or Miller Trust	Can shelter excess income into a pooled trust

If you are counseling clients about a potential move to Florida, you should consider discussing the following issues:

1. If they became ill in Florida, would they stay? Or would they move back to New York to be closer to their children or extended family? This will affect how the homestead might be handled and the calculation of penalties for transfer purposes.
2. What is their monthly income? How does that affect their ability to private pay for a nursing home in Florida versus returning to New York and having to go on Medicaid?
3. Which state's planning tools are more helpful, e.g., Florida's personal services contract? New York's community Medicaid program? Which state's penalty divisors are more helpful?

These are a few ideas, and there are likely many others. But at least you now know how to spot the issues for your clients who are considering a move to Florida.

Endnotes

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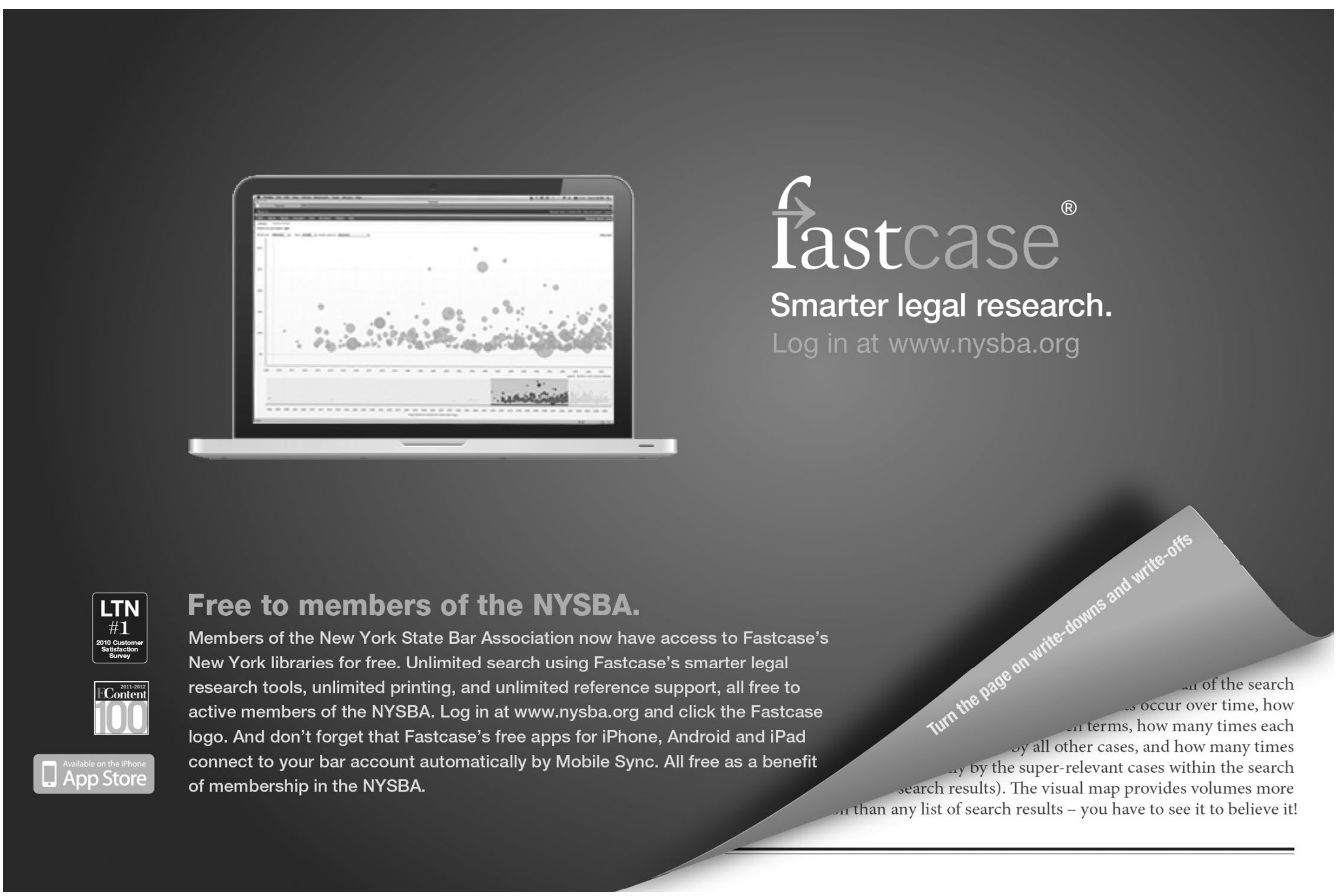
2. Article X § 4, Florida Constitution; *see also,* Chapter 222, Florida Statutes.
3. Article VII § 6, Florida Constitution.
4. *Estate of Price v. West Florida Hospital,* 513 So.2d 767 (Fla. 1st DCA 1987).
5. Fla. Stat. § 732.502(2).
6. Fla. Stat. §§ 732.901, 736.05055.
7. Fla. Stat. §§ 732.517 and 736.1108.
8. E.g., Fla. Stat. § 57.105.
9. Fla. Stat. § 732.515.
10. Do Not Rescuscitate Orders are executed under the "informed consent" provision of the Health Care Advance Directives Section of the Civil Rights Law, Fla. Stat. § 765.101(9), and may be executed by health care proxies or agents pursuant to a power of attorney.
11. *See, e.g.,* Chapter 744, Florida Statutes; Part III, Florida Probate Code.
12. *See,* Fla. Stat. §§744.3675, 744.3678, 744.368, 744.3685 and 744.369.
13. For the requisites of Florida deeds, see Chapter 689, Florida Statutes.
14. Fla. Stat. § 454.23.
15. Art. VII § 5, Florida Constitution.
16. See note 1, supra.

This article originally appeared in the Winter 2016 issue of the Elder and Special Needs Law Journal, *published by the Elder and Special Needs Law Section of the New York State Bar Association.*



Have We Got It All Wrong? Rethinking the Fabric of Estate Planning

By Avi Z. Kestenbaum and Amy F. Altman

As estate practitioners, our mission is to provide our clients with an estate plan that maximizes the transfer of wealth to specified heirs in a way that will improve their life courses.[1] But, what if this goal is impossible to meet? What if, by maximizing the transfer of wealth, we aren't improving, but instead are diminishing, the life courses of our clients and their heirs, as well as deteriorating society in the process? To this end, the more important questions that we seek to analyze are ones that every estate planner should pose to his clients: Would you prefer to pass as much wealth as possible to your descendants? Or, would you rather give your heirs the greatest chance of truly being happy, well adjusted, self-fulfilled and successful?

Whose Objectives Are Being Served?

Let's consider, from a psychological and philosophical point of view, exactly whose objectives are being served when wealth transfers occur. Three possibilities are: (1) the client's; (2) the beneficiaries' for whom the plan is being created; and (3) society's at large (including government and charities).[2]

The client. In our experience, many clients assert that the act of creating an estate plan is a purely selfless endeavor and exclusively for the benefit of their descendants. This belief may stem from the fact that they won't be living when estate taxes will be due or when certain estate assets will be transferred. However, estate planning may not be purely altruistic. Planning and implementing wealth transfers may fulfill the clients' psychological and emotional needs to be prudent about the assets they've worked so hard to maintain and to assure their legacies after death. Also, many clients who claim to create estate plans purely out of love for their heirs add contingencies before their heirs can benefit from their assets. Thus, even after their deaths, their preconditions take effect, a phenomenon commonly referred to as "dead hand control."[3]

The psychology behind dead hand control stems from a variety of sources, including the desire to be relevant forever and fear of death. By controlling the estate even after death, the client is able to fantasize about what life will be like after he dies, and how, even after death, he can exert great influence.[4] Additionally, this exercise may have the effect of easing his mind about the future. For others, the need to control may be connected to pride in the assets earned over their lifetimes.

Fear and distrust of descendants may be another motivating factor that spawns dead hand control. Some people don't believe their descendants will use the inheritance in a meaningful way or will continue their way of doing things. In many cases, dead hand control may serve an important purpose, especially when the individual is actually correct about his descendants. However, each case is different and requires very deep and thoughtful self-discovery and assessment by the client and his estate planner (and perhaps the client's psychologist).

Whether or not our clients perceive the creation of their estate plans as fulfilling their own psychological need to control, most will agree that it's a prudent endeavor. They also believe that transferring as much wealth as possible to their descendants is the most desired outcome, and as planners, we reinforce this notion with the complex structures we set up to minimize taxes and protect assets. But, is the transfer of the maximum wealth really the most desirable outcome? Or, can an argument be made that maximizing the transfer of wealth actually isn't in the heirs' and society's best interests, and if our clients really believed this theory, they might plan things very differently?

The beneficiaries. On Jan. 9, 2015 *The New York Times* ran an article that discussed the murder of a wealthy "hedge-fund-running" father, Thomas Gilbert, by his 30-year-old son, Thomas Gilbert Jr. The murder occurred over a dispute about Gilbert Jr.'s trust fund allowance. The article raised the question of whether Gilbert Jr.'s behavior stemmed from being raised in an affluent household.[5] It further cited academic research that affluent children have higher rates of depression, anxiety and elevated levels of substance abuse and delinquent behaviors (such as stealing).[6]

Psychological research indicates that wealth can rob young children of their search for their own identity and self-worth; they aren't forced to find out how they can be productive in society because they don't have the need or hunger to do so.[7] As Andrew Carnegie once said, "The parent who leaves his son enormous wealth generally deadens the talents and energies of the son, and tempts him to lead a less useful and less worthy life than he otherwise would."[8] Likewise, research suggests that being in the workforce isn't just about earning a paycheck, but also is a source of personal satisfaction and development, which affluent children may miss out on.[9] It stands to reason that children who grow up expecting wealth without earning it themselves could lack motivation and self-confidence.

Perhaps even more troubling is the research that indicates that affluent children entering adulthood may also be sheltered from the basic everyday frustrations of life, such as changing light bulbs, shoveling snow or making their own meals. This sheltering could likely slow their maturity while they retain unfettered power over people whom they employ, as well as those looking to benefit from their fortune.[10]

Estate planners may argue that outright transfers of wealth are the problem and not transfers of wealth into trusts. Trusts with strict distribution provisions may reduce a beneficiary's lack of motivation because he can't simply secure a distribution from the trust whenever he wants one. Similarly, incentive trusts that set forth required goals and behaviors, which when accomplished, trigger a distribution, may mitigate the potential spoiling of a beneficiary. A settlor may create any rule or contingency he wants, for example, a beneficiary completing higher education, starting a business or maintaining a status quo (such as not committing a crime or using drugs). A settlor may also link distributions to the amount a beneficiary earns through his occupation. This may drive a beneficiary to work harder and motivate him further. However, some practitioners are critical of this planning tool because it may create resentment, is a recipe for litigation and, in some situations, may be difficult to monitor. Furthermore, clients should also be mindful that even trusts that are fully or partially discretionary may work only to protect those assets from creditors' claims, but may not be in the best interests of a beneficiary who feels entitled to live off of the trust at the expense of meeting his true potential.

If large transfers of wealth, whether outright or in trust, have the potential to create generations that lack motivation and maturity, not to mention unhappy individuals with poor self-esteem, it raises the question of whether excessive transfers of wealth should be considered a good estate plan. Perhaps many of the plans we're recommending are harmful for the beneficiaries, as well as society at large.

Society. Aside from clients who are naturally philanthropically inclined, our experience is that the needs of society seldom enter the framework when discussing estate planning with our clients. After all, the primary concern for most individuals is the well being of their own families and not humanity. In contrast, the Buffett-Gates Giving Pledge encourages billionaires to make a commitment to give most of their wealth to philanthropic causes. As of December 2015, 141 billionaires or former billionaires signed the pledge.[11] This begs the question of what will become of the descendants from those families who aren't so philanthropically inclined and the descendants of those who signed up for the pledge, who are still leaving exorbitant amounts to their heirs.

On Jan. 19, 2015, *CNN.com's* top news story stated, "The richest 1% will own more than all the rest by 2016," based on a study by the international agency Oxfam. But, the story didn't discuss what will become of the heirs of this unprecedented wealth. This quandary has become a hot topic for wealthy parents who are now rethinking the way they raise their children. Some have offered their children trips around the world—not for the purpose of exposing them to European cultures—but rather to expose them to poverty, slums and orphanages as a way to gain perspective on their privileged way of life.[12]

In fact, the very purpose of creating the federal estate tax was to prevent massive amounts of wealth from passing between generations.[13] Theodore Roosevelt, who was a believer in estate taxes, said: "We grudge no man a fortune in civil life if it is honorably obtained and well used. It is not even enough that it should have been gained without doing damage to the community. We should permit it to be gained only so long as the gaining represents benefit to the community."[14] The premise underlying the purpose of the estate tax and Roosevelt's statement is that bloated fortunes will do little to advance, and will more likely impair, the beneficiaries' life courses and would be better served aiding humanity.

The Vanderbilts, one of the wealthiest families in America's history, saw their vast fortune disappear within a few generations.[15] William Kissam Vanderbilt, grandson of Cornelius Vanderbilt, who retired to look after his yachts and thoroughbred horses, said, "inherited wealth is a real handicap to happiness.… It has left me with nothing to hope for, with nothing definite to seek or strive for."[16] His sentiments are now bolstered by academic research demonstrating the lack of motivation and incidences of mental health issues in affluent children.

Ways to Mitigate

Hard work and philanthropy may be the two most effective ways to mitigate the perils of prosperity.[17] Work can help level the playing field, ignite descendants' interests, increase their self-worth and help them learn to deal with deadlines and inevitable everyday frustrations. Philanthropy can make heirs see that their fortunes can be used to benefit worthy causes and may help foster a sense of responsibility.

An interesting case study involves Pablo Picasso's granddaughter, Marina Picasso, who lived on the edge of poverty during her childhood and later inherited a significant portion of her grandfather's estate. On Feb. 4, 2014, *The New York Times* published an article regarding her plans to sell off her grandfather's art to broaden her philanthropy.[18] Although most of the article focused on the worries of the art market, it discussed the juxtaposition of her childhood versus her current wealth. She recalled her father Paulo (Picasso's estranged son) begging Picasso for money and admitted that planning the sale is an aggressive effort to "purge herself" of Picasso's legacy. Regarding her difficult childhood, she said: "I think because of it I developed my sense of humanity and my desire to help others."[19] Although she became suddenly wealthy at the age of 21 on the death of her grandfather, her struggles early in life forged her path towards philanthropic giving. Now that her five children are grown (three of whom were adopted from Vietnamese orphanages), Marina devotes her time to humanitarian work.

Communication

The Institute for Preparing Heirs (IPH), an innovative training company that helps financial advisors, estimates that only one-third of wealth transfers are successful. They define "successful transfers" as those in which family harmony is intact after the transfer.[20] The IPH's studies of the so-called "successful transfers" found that those families had a family mission statement and interactive discussions about the overall purpose of their wealth. Thus, according to the IPH, getting as many family members as possible to buy into the family mission, goals and purposes of wealth may elevate the chances of successful transfers.

In "Changing the Playbook,'" Marvin E. Blum discusses the importance of preparing heirs for the responsibilities associated with receiving an inheritance.[21] He uses the analogy of a large mansion resting on a tiny foundation to explain how unrealistic it is to expect unprepared heirs to handle a substantial inheritance. He believes that creating an education strategy will widen the proverbial foundation.

Human Capital

Successful transfers of wealth include a main ingredient far more valuable than money: human capital. "Human capital" is defined as the collective skills, knowledge and other intangible assets of individuals, such as habits, personality attributes and creativity, which embody the ability to perform in the world to produce economic value (that is, skills and experiences that are unique to an individual).[22] It's what a person wants his descendants to know about his life and values; how that information could help the next generations; and the transmission of a skill set, experience and values. A transfer of wealth versus an investment of human capital is analogous to giving a man a fish or teaching a man how to fish.

One of the best examples of the investment in human capital is Walt Disney. Walt was one of five children—four boys and a girl. He lived most of his childhood in Marceline, Mo., where he began drawing, painting and selling pictures to neighbors and family friends. While Walt's family wasn't wealthy, they noticed his ability to draw and cultivated his talent by sending him to take night courses at the Chicago Art Institute to improve his drawing skills.[23] Walt's family gave him the opportunity to create his lasting legacy.

While the maximization of wealth transfers is likely the clients' goal when they meet with estate planners, they may not realize that a more thorough analysis of their values, coupled with an open dialogue with their descendants, could lead to a better overall plan and the transfer of human capital or the skills and life experiences that are unique to them and their family. A mission statement can be one part of creating a successful transfer of wealth and may aid in the transfer of human capital. Transmitting this mission might also include meetings and communications from our clients to their descendants on a variety of topics, including: (1) how to handle life's challenges; (2) general words of wisdom and advice from ancestors; (3) family history and experiences; (4) values and ethics; and (5) religion.

The concept of transferring human capital by means other than traditional estate plans isn't a new phenomenon. Ethical wills have been around for hundreds of years and recently regained popularity.[24] An ethical will is a non-legal document, sometimes referred to as a "legacy letter," in which a client may express an array of personal thoughts and directives, not just about his wealth but also about his personal values and life lessons. It's a way to have family members understand the reasons the client chose to dispense his assets in a certain way and may assist in ameliorating potential conflicts. Although ethical wills started as an oral tradition by the Jewish people[25]—which was later formalized into written documents—they've now entered the 21st century with PowerPoint presentations that include a slideshow of photographs. There's even an iPhone app dedicated to creating ethical wills.[26]

Family mission statements and ethical wills are supplements that can be extremely useful in turning a dry or packaged estate plan into a dialogue about the client's values and ultimately lead to a transfer of human capital from one generation to the next. Ideally, this process should create a fuller understanding for those charged with protecting and fulfilling their legacies.

Timing

Although it's now commonplace, the creation of an estate plan when a person is in good health is a historically new phenomenon. In the Middle Ages, there was a direct personal connection to death due to increased mortality rates and deadly plagues. The phrase, "memento mori," a Latin term that means "remember you must die," was frequently used.[27] In the late 18th century, the creation of death bed wills became more common. As a result, they included more personal and immediate hands-on provisions than the packaged documents of today.[28] Only in recent decades, with increased life expectancies coupled with the prevalence of marketing by the estate-planning industry and the rise of individual wealth, has the mindset shifted towards creating an estate plan well in advance of illness or old age.[29]

Of course, trying to change the course of a family's path later in life when descendants may already be spoiled might be too late. In reality, hard work and philanthropy, as well as investing in human capital, must start when children are very young. But, there's no reason to compound the problems by transferring excessive wealth that might cause more harm than good.

Better Off With Less?

If our clients wish to create the most successful and beneficial estate plans for their families, research suggests that heirs may be better off with less wealth. As planners, we need to be aware of this critical data and raise these issues in candid conversations with our clients. Additionally, more learning, focus and research on this topic is necessary. While the greater use of mission statements, ethical wills, incentive trusts, open family dialogue and teaching descendants hard work and philanthropy may help, we must face the reality of what the data suggests: Leaving descendants more assets than is necessary for their basic needs may be detrimental. Instead, the transfer of human capital from one generation to the next may be the link towards a successful transfer of values and long lasting, self-sustaining prosperity, and this transfer should begin long before the estate-planning documents are signed.

Endnotes

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2. Disclaimer: Although we represent affluent clients for whom we structure plans and draft documents with the express goal of maximizing wealth transfers, rethinking the very purpose of estate planning is a worthwhile endeavor for our own knowledge and awareness as professionals. More importantly, armed with this insight, we can educate our clients about the true ramifications of their planning on their loved ones.
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This article was originally published in the February 2016 issue of Trusts & Estates *and the Fall 2016 issue of the* Trusts and Estates Law Section Newsletter*, published by the Trusts and Estates Law Section of the New York State Bar Association. For more information on* Trusts & Estates*, go to www.trustandestates.com.*

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

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PRODUCT INFO AND PRICES

2016–2017 / 268 pp.,
softbound / PN: 41107

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