

Hearsay

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If you have questions about the newsletter, or would like to submit an article for a future issue, please contact one of the co-editors.

MSBA



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Greetings From The Chair

By: Rebecca Rhoda Fisher

The bar association year is well under way. We have had a couple of great NLS meetings with some new faces and lots of enthusiasm. The section created three new committees: 1) CLE chaired by Jennifer Daugherty; 2) social/membership chaired by Lacey Anderson; and 3) community service projects chaired by Deanna Daily.

CLE update:

The section offered an elimination of bias CLE on October 20, 2005 which was presented by Joan Biblehausen, the executive director of Lawyers Concerned for Lawyers and an active member of the Life and Law Committee. We are in the process of planning two more free CLEs for January and March of 2006.

Social/Membership Update:

The section was present at the MSBA booth for the October 28, 2005 Minnesota swearing in ceremony where we provided information on the section and benefits to new members.

The section, along with HCBA, has planned a social event for December 6, 2005 at Cosmos, which will start at 5:30 pm following HCBA's Nuts and Bolts CLE for New Lawyers. Please join us for free appetizers, drinks, and great company.

We plan to work with the law schools and the MSBA membership committee to put together a function with the law students early next year.

In addition, the social/membership committee will be working on the spring social with HCBA and RCBA. The committee will also be planning the social event for the MSBA Annual Convention at Madden's in June.

Community Service Project Update:

The section donated funds to and sold tickets for the Attractive Nuisance Tour which was held on October 14, 2005 at First Avenue. The benefit was extremely successful selling over 1200 tickets and raising a net donation of over \$40,000 for Minnesota Justice Foundation and Hennepin County Bar Foundation.

The section participated in RCBA "Rake A Difference" on November 6, 2005 where we raked yards of elderly residents in St. Paul.

The section is working with HCBA, MTLA and many other organizations to start and promote the ABA YLD "Jury Project" program in local high schools.

We are asking for volunteers to help with the MSBA mock Trial Program as coaches or judges for the competition after the first of the year.

We are working with the Criminal Law Section on a methamphetamine awareness education program to take into the high schools in spring.

REMINDER

Join us for:

1. 12-06-05 MSBA HCBA social at Cosmos (601 First Avenue North, Minneapolis)
2. KSTP Lawline the fourth Tuesday of every month at KSTP studios on University Avenue in Minneapolis.
3. NLS meetings the third Thursday of every month. 5:30 p.m. at the MSBA offices.

We are also working with MSBA Katrina Relief Infrastructure Subcommittee, HCBA, RCBA and other affiliates to set up donation locations in the Twin Cities and Affiliate areas for furniture and office supply donations to go to four legal aid organizations affected by Hurricane Katrina.

As always, the KSTP Lawline is the Fourth Tuesday of every month at KSTP studios. Join us for lots of interesting calls from those who need assistance with legal issues.

Check the MSBA NLS website and watch for e-mails on upcoming meetings and events. I encourage each of you to participate in the section some way this year whether it's attending meetings, volunteering to serve on a committee, volunteering to help with a community service project, or attending a CLE. Watch for opportunities and announcements in Bench and Bar or on the MSBA website. Our

meetings are the third Thursday of the month at 5:30 p.m. at the MSBA offices in Minneapolis. Hope to see you all there!



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Considerations in Estate Planning

By: Christopher Burns

In recent years I have often been told that the demise of the estate tax will mean the demise of my estate planning practice. As someone who focuses his practice on estate planning, estate administration and elder law, this strikes me as scarier than the Halloween costumes I observe as I write this article.

Current federal exemption amounts and tax rates are below:

| Calendar Year | Estate Exemption Amount | Highest Estate Tax Rate |
|----------------|-------------------------|-------------------------|
| 2005 | \$1,500,000 | 47% |
| 2006 | \$2,000,000 | 46% |
| 2007 | \$2,000,000 | 45% |
| 2008 | \$2,000,000 | 45% |
| 2009 | \$3,500,000 | 45% |
| 2010 | \$0 | N/A |
| 2011 and later | \$1,000,000 | 55% |

Historically, the federal estate tax and the state estate tax have been unified. Minnesota did not follow the federal government lead when the federal estate tax exemption

amount was increased. Instead Minnesota's exemptions are as follows:

| Calendar Year | Estate Exemption Amount |
|----------------|-------------------------|
| 2005 | \$950,000 |
| 2006 and later | \$1,000,000 |

I used to lose sleep thinking about repeal. Following the tragedy of Hurricane Katrina and with recent reports indicating that the federal deficit is growing by \$1,000,000,000 a day, outright repeal no longer seems like something with the broad support to be politically viable.

An exhaustive recitation of all the reasons for clients to do estate planning is beyond the scope of what can be done in an article. Instead, in this article I will cover a few non-tax and a few tax related considerations to think about when helping clients with their estate plans.

Planning for Disposition of Assets.

For an unmarried person, dying intestate with adult children means that Minnesota Statutes Section 524.2-103 will provide for an equal outright distribution to that person's children. If this person comes to you for estate planning,

this may or may not be appropriate. For example, your client may want to reconsider that decision (or consider for the first time) if your client has a child who is going through a divorce, has a difficult marriage, is experiencing creditor problems, suffers from chemical dependency or other afflictions, has become disabled, or has accumulated wealth of his or her own. In those situations the client may consider leaving that child's share of his estate in trust, bypassing that child and leaving gifts to grandchildren or leaving a gift to charity. In addition to considering federal estate, gift, income, and generation-skipping transfer (GST) tax laws, as well as state estate tax and other state law considerations, advising this client will require a thorough knowledge of the legacy that the client wishes to leave.

Treating one child differently than another may make sense but you should proceed with caution. The client should recognize that treating one child differently might be viewed as favoring one child over another. This may lead to strife and family disharmony after the passing of your client (who may have been the "glue" who held the family together) and before drafting documents treating children differently you should be very careful to make sure that your client appreciates what is likely to happen when they are no longer available to hold the family together.

Planning for Disability.

In addition to talking to your clients about what will happen to their assets when they die, another important conversation to have involves what the client wants to happen if he or she becomes incapacitated. It is important to make sure that your client has specified his or her wishes about medical care in a health care directive and provided for someone to take care of financial matters with a power of attorney. As Jill Pearson covered these instruments in detail in a prior *Hearsay* article, I will not cover them in detail here.

Aside from these important instruments, other things your client may want to consider when planning for disability include a revocable trust, transferring assets to a spouse, making gifts to children, prepaying funeral expenses and the purchase of assets that are exempt for medical assistance purposes. Whether your client is making gifts in contemplation of qualifying for medical assistance or out of generosity (or both), you should carefully review the frequently changing medical assistance eligibility rules when advising clients with small to medium sized estates about gifts. (Note: as this article goes to press changes at the federal level to medical assistance eligibility appear imminent. Also note, that for all clients making gifts to another person of \$11,000 or more in 2005 (\$12,000 or more in 2006) a gift tax return may be required, whether or not a tax is due.)

Charitable Giving.

A study by the National Committee on Planned Giving indicated that 8% of people leave a bequest to a charity in their estate plans. Crafting a gift to charity often involves lawyers working with their clients and various other advisors to help the client make the gift in the most tax efficient or practical way. Depending on a number of factors it may be beneficial for the client to consider remembering a charity in her will or it might, depending on the client's circumstances, be more beneficial to make this gift during the client's lifetime or to designate the charity as a beneficiary of a retirement account. For example, Shelli has given to her alma mater for years. Her alma mater has a new initiative that Shelli is fond of, and she has talked with the planned giving staff regarding the options she may have to make a gift. Shelli is interested in leaving one-half of her estate to her alma mater and the other one-half in equal shares to her two children. Let's assume that Shelli's gross estate is \$6,000,000 and consists of \$3,000,000 IRA and \$3,000,000 in securities. If Shelli gives her children the IRA and gives the securities to charity, each child will each receive approximately the amount determined below:

| | |
|------------------------------|-------------|
| ½ IRA balance at death | \$1,500,000 |
| Less: Estate Taxes* | \$600,000 |
| Balance after estate taxes | \$900,000 |
| Less: Income taxes payable** | \$360,000 |
| Balance to daughter | \$540,000 |

(*Assumes combined federal and state estate tax rate for this client of 40%. Actual estate taxes may be greater or less depending on year of death, prior gifts and other considerations.)

(*Assumes child in 40% tax bracket and ignores deduction child receives for income tax deductions for estate taxes paid with respect to IRA.)

If Shelli instead gave her IRA to her favorite charity and the securities to her children, the charity would receive the full \$3,000,000 and, while the assets distributed to Shelli's children would still be reduced by estate taxes, these gifts would not be reduced by the income taxes that had accrued on the IRA. Accordingly, the right beneficiary designation may save \$720,000 in income taxes and result in an additional \$360,000 being distributed to each child.

Changes in Assets.

I often joke with clients that if they win the lottery I should be one of their first phone calls. I have yet to have a client

take me up on that offer. While that sort of change in a client's assets would open up some unique planning opportunities, the change in client's assets does not need to be that dramatic to require a change in his or her estate plan. For example, John had an estate of about two hundred thousand dollars. His portfolio has done well and is now worth four hundred thousand dollars. His current estate plan provides for an outright distribution of his estate to his daughter upon his death. When John had an estate of two hundred thousand dollars, his daughter receiving that amount outright did not bother him. In fact, John figured a gift of this amount would allow his daughter to pay off her mortgage and buy a nice car. Now, John is concerned that an inheritance of this size would discourage his daughter from being productive. John has a number of options available. Perhaps he structures the inheritance so that his daughter receives it over time or perhaps he explores other options.

If, after reading this article and the disclaimer that follows, you decide to become an estate planning lawyer, I believe

you will enjoy the feeling of helping clients deal with death, taxes and other very difficult issues. I also encourage you to proceed with caution as there are many traps for the unwary.¹

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Notes

¹ The purpose of this article is to raise and address various issues regarding the use of basic estate planning tools. These materials are not intended or written to be used and cannot be used for the purpose of avoiding any federal tax penalties. The impact of federal estate, gift, income, and generation-skipping transfer (GST) tax laws, as well as state law considerations, client goals, and other factors, should be carefully weighed before using or relying upon any portion of any article on estate planning, including this article.

Seemingly Simple, Surprisingly Difficult: A Primer on Choosing Strong Trademarks and Avoiding Unproductive Conflict

By: T. Michael Davis

Assisting a client with trademark needs may appear simple, but, in fact, is usually a bit more complex – and dangerous – than we would like to believe. Practitioners in the area of trademarks see both attorneys and their clients repeatedly make mistakes in choosing and trademarks.

This short article will describe two easily avoidable missteps made by clients and attorneys alike: failure to conduct a proper trademark search and analysis and choosing trademarks that are difficult to protect. After reading this article counsel and clients should be better prepared to avoid these pitfalls – and most importantly – to assist clients in finding, registering, using, protecting, and maintaining a strong trademark in the marketplace.

The following are two short examples of the spectrum of clients' awareness – or lack of awareness – of these issues.

Recently, I was contacted by a clothing designer. That company had already chosen a mark, had formed a company, developed product, and begun preparing marketing

materials. They then contacted me to file a trademark application on their behalf. A simple search showed a handful of previous users: one in New York, a few others around the U.S., and one in Australia, all using the mark in relation to clothing products. Since the client had merely assumed that they would be able to use the marks they had chosen, the information and lack of understanding regarding conflicting marks caused the client some problems and significantly set them back in their planning.

On the other hand, in a less typical example, I was also approached by a group in New Jersey, the principals of which had been involved in the management of two of the larger and better known toy retailers in the country. The new group's team had chosen a mark, yet due to their experience had begun looking into trademark issues four months prior to forming a company. After some simple searching, it was quickly found that there were other users of their desired mark and the group was advised to look into other developing a more distinctive mark. As a result of their foresight, the company saved time and money and, in the

long run, will possess a trademark that will be far more distinctive and much easier to protect in the market place.

Clearly, preparation is key. One very common mistake made by attorneys and business owners alike is to register a corporate name without first performing a trademark search to see whether that corporate name is being used by another company and, if desired, whether it can be used as a trademark. Thus, a client or its attorneys often registers the name with the state, where it is available, only to find that there are either common law uses of the corporate name as a mark – or even sometimes a federal registration of the mark. Not so seldom, even the mere filing of such a document can result in the client being sued for trademark infringement in federal court. This can occur even in the case where the allegedly infringed mark has not been federally registered, but is merely “used in commerce” by another company. Unregistered marks that are being “used in commerce” are protected under 15 U.S.C. § 1125(a)(1) of the Lanham Act.

In a case as above, where the allegedly infringing act was the mere registration of a corporate name with the secretary of state, though the damages to earlier users of the trademarks may be negligible, as a defendant suddenly involved in such litigation the company would now be required to spend precious resources and time to extract itself from the proceeding. Had a proper trademark search been carried out and analyzed by a qualified trademark attorney, the client could have avoided these troubles altogether. However, were a lawsuit never to arise, a prior user may still make itself known. In such a case, going forward, our latter-using client may be unwillingly forced to assume a d/b/a for the newly formed company in order to avoid conflict with the pre-existing mark.

Again, had a qualified trademark attorney carried out and analyzed a trademark search, this situation might have been avoided altogether. The cost of a trademark search, depending upon how quickly one would like the results, will cost between \$505 - \$ 1,300, plus the trademark attorney’s fees for reviewing the search and providing an opinion. In certain cases, a far less expensive search via the Internet alone can provide sufficient information regarding whether one should adopt or simply forgo use of a proposed trademark. Due to the global nature of the present-day market place, attorneys and their clients who are or will be active internationally, should include in their trademark strategy a preliminary search in potential foreign jurisdictions as well as develop thoughts on whether to file a Madrid Protocol, CTM (EU), or other national trademark applications.

Another common and dangerous mistake made by clients who desire to begin using a new trademark is choosing a trademark that does not adequately distinguish the client’s

goods or services and that will be difficult to protect. Often clients and non-IP attorneys gravitate toward choosing marks that describe the goods or services that will be provided. Such marks are among the weakest and most difficult to protect. In order of rank, from those best able to be protected and registered, a trademark is measured on a scale which runs from, at strongest, “arbitrary and fanciful” to “suggestive,” and, at second weakest, from “descriptive” to “generic” marks, which are fully unable to be protected. The difference between a suggestive and a descriptive mark is quite small. In short, a suggestive mark requires some imagination or thought to reach a conclusion about some feature or characteristic of the product. With a descriptive mark, no imagination or thought is required.

Unfortunately most clients choose and become set on a trademark without first understanding the factors upon which the ability to protect a trademark and the strength of that mark are based. As a result, most clients choose, with little thought, descriptive and, at worst, generic trademarks. As stated, these types of trademarks are the most difficult, or as in the case of generic marks, completely impossible to protect. Examples of marks that are descriptive or generic would be marks that, respectively, either describe the goods and services or are the actual word for the goods and services, such as “apple” for the sale of apples. On the other hand, those that are the best trademarks and are easiest to protect are those that are simply made-up (that is, “arbitrary and fanciful”) and, therefore, suggest no meaning, such as Kodak, Polaroid, Apple (for computers) and Xerox.

Helping a client early on in the process of choosing a trademark or company name to understand the benefits and disadvantages of choosing an appropriate mark can be key to helping the client distinguish itself and become more easily recognized over competitors. Avoiding suggestive and descriptive marks can also help clients avoid cancellation, opposition, and litigation proceedings. Such proceedings are most often brought by registered and common law users of other similar marks that use one or more common suggestive or descriptive elements that may be found in a proposed mark.

Some clients, of course, may choose to ignore negative information regarding a proposed trademark and proceed to use or even register such a mark, thereby risking being sued for trademark infringement. The Internet has increased the level of this type of danger. Due to massive marketing and publicity on the Internet, the likelihood of prior users discovering a new user half-a-world away is very high. In the case where a company ignores prior users, having earlier become aware of those prior users, the latter user’s infringement may be deemed willful, and, as a result, punitive damages could possibly be assessed.

In addition to a descriptive mark's lack of ability to distinguish goods and services, a descriptive mark or a latter application to register a descriptive mark federally will not be allowed to be registered on the Trademark Office's principle register. Instead, a mark that is found by the Trademark Office to be descriptive will only be allowed registration on the "supplemental register," which, in fact, provides no protection for the mark. In order to protect the mark in the future, one must formally show that the mark has developed "secondary meaning." This means that the mark has allegedly become distinctive and is now capable of and does, in fact, distinguish the client's goods or services in the marketplace. This can usually be shown by providing evidence of marketing investment, sales volume, consumer recognition, and breadth of use, among other factors.

Suggestive marks on the other hand, are inherently distinctive and are entitled to be registered on the "principle" register at the USPTO. They are similar to descriptive marks, however, because some suggestive marks are the most obvious choice to assist consumers in identifying a company's goods and services, thus they are also the most likely type of marks to be chosen by others. The greatest problem, therefore, is that such marks will be difficult for a client to enforce. In many cases, there can be numerous

others who have been using and who will choose to use similar marks that use similar terms. Generally, when this occurs, a client will likely have a very difficult time in getting prior users to halt use or in preventing future users from utilizing similar marks using similar terms. Of greatest concern may be that any one of those prior users may feel infringed by the newer user's use of a similar mark and file suit. This, in turn, can result in significant expenditures in litigating or settling the case.

As we have seen above, there are some pitfalls that, with simple guidance from a qualified trademark attorney, can help clients and their attorneys avoid unnecessary conflict and choose trademarks that will be both strong and easy to protect and register. Simple steps and proper analysis of the client's situation can save clients significant time and resources in the long run and add to their success in the marketplace.

T. Michael Davis of SCANDIA-GERMANIA-DAVIS, PLLC is an IP attorney whose practice is focused primarily on the areas of trademarks, copyrights, licensing, and the litigation of trademarks, copyrights, and patents. He regularly represents clients from the Scandinavian, German-speaking, and U.S. markets. He is admitted to practice in Minnesota, New York, and New Jersey.

Rainmaking

By: Danielle Shelton

If you are a newer attorney, chances are that you have never heard your firm's senior attorney specifically tell you that you are expected to be a rainmaker—or bring in clients—to the firm early in your career. However, just because these words have not been said to you does not mean it is not expected. Below is an introduction to the basics you should know in order to become a successful rainmaker at your firm.

What is rainmaking?

Rainmaking is a euphemism for the act of bringing in a substantial amount of clients to a business. At its core, rainmaking is really professional relationship building, or the cognizant development of relationships ultimately for a specific professional purpose. Building relationships are within everyone's grasp. You have relationships with your family, your family friends, the friends you have made from all your school years, and the personal friends you continue to make. These people encompass your "immediate network." The difference between your immediate net-

work and the "professional network" you want to develop is effort. Developing your immediate network requires minimal effort and time. However, your professional network requires a lot of effort and time. The good news is that you have been training to be a rainmaker for decades.

Who should be developing their rainmaking skills?

You should (or at least anyone who wants a long and successful career).

When should you begin rainmaking?

Now. It is never too early to start. If rainmaking encompasses the cognizant development of relationships ultimately for a specific professional purpose, this should have begun in law school when you and your classmates had much common with regard to your potential careers. The majority of your classmates became attorneys. Your differing practice areas now open doors to client referrals, which is an attorney's life blood. Like everyone else, though,

when you attended law school you were not focused on rainmaking. Unfortunately, your biggest single and most comfortable opportunity to develop a portion of your professional network has passed. Therefore, you must attempt to recoup that loss right away. It is easy, but not comfortable and not exactly fast.

The rainmaking checklist: how to build relationships and bring in clients

1. Don't believe that you do not have to be a rainmaker.
2. Always do above-average legal work for your clients. People who like you refer you.
3. Send out announcements or a brief letter with business cards enclosed informing others of where you work and what you do. I believe short letters serve the purpose better than one page announcements. A letter allows you to convey to the reader what exactly you do and where, and how excited you are about what you do. The letter should also commit you to a follow-up phone call to connect, remind, and explain to people what you are doing. Do not be afraid to ask for their referral help.
4. Follow-up with a phone call to your entire immediate network, based on the letter. Your friends and family want to congratulate you. You want to talk with all of them to catch up on their lives, and tell them about your exciting and interesting job.
5. Send an alumni update to your law school, and college publication naming where you work, describing your area of practice, and where it is located. Do not follow the large firm lead of placing an announcement, stating the practice area, not explaining it, and not indicating where your firm is. Make it easy of the reader of the announcement - give them all of the information.
6. Go to every function (personal and professional) that you are invited to and interested in attending. If you are not interested in attending, you will not be really interested in socializing a getting to know people. Save your networking best for the optimal environment. Remember that being nervous to attend an event is different from not wanting to attend.
7. When you go to personal and professional functions, introduce yourself to everyone there. Tell them who you are and what you do. Be the one to break the ice.
8. Send out personal thank you notes for referrals - whether the referred client retains your services or not. Your professional network sent you the referral, you are the ultimate closer. Sending out personal thank you notes can be time consuming, but they are not forgotten.
9. Send out congratulatory notes to classmates when you read an announcement about their achievement, whether you personally know them or not. This is a great way to start a connection. Follow-up with a phone call because the recipient will not have forgotten your note, if not for the sure fact they did not know who you were when they read the note.
10. Don't be afraid of the phone. Many attorneys, believe it or not, are afraid of the phone. Maybe because we do the majority of our real communications via paper or e-mail. A very successful businessman told me that the phone is the most powerful tool you have. He is right. It is direct contact that garners an immediate response, good or bad. Use the phone.
11. Join a bar association committee that interests you, and attend as many of their meetings as possible. Bar association committees are a great place to meet and get to know other attorneys who practice in different areas of law in order for cross referrals. Attorneys refer clients to other attorneys.
12. Join college or law school alumni organizations that interest you, and attend as many of their meetings as possible.
13. Teach a class and/or give seminars regarding your area of practice. The exposure garnered from these things can be minimal to great. It will expose you to new people who will have immediate identification of you with your practice area.
14. Shy and hesitant? Take a speech class. The best practice you could have is forcing yourself to speak in front of people you do not know in a safe, organized atmosphere.
15. Start a weekly marketing checklist. Building professional networks is essentially marketing your business. *The Lawyer's Guide to Marketing Your Practice* published by the American Bar Association has a checklist to maximize referral sources. Read it, modify it, and tailor it to your needs to make sure you are building relationships on a weekly basis.

The last word on rainmaking.

You become a rainmaker by being genuinely interested in

people, and being really excited about what you do. If you are not genuine in these two things, people will know it. You will not build a professional network. Optimism, interest, and excitement are contagious. In the beginning, it will be uncomfortable to do the suggested ideas in this article, even frightening at times. Being the rainmaker requires optimism, patience, consistency, and follow-through. However, it will be one of the best things you will do for yourself professionally to ensure a

successful career.

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The Servicemembers Civil Relief Act

What you need to know about the legal protections for our nation's protectors

By: Eric K. Hanson, Captain, U.S. Army Judge Advocate General's Corps and Benjamin Tramposh, Cadet, Washington University (St. Louis) Army ROTC

It has long been recognized that military service can interfere with servicemembers' ability to fulfill various financial obligations and assert many legal rights. Accordingly, Congress passed the Soldier's and Sailor's Civil Relief Act ("SSCRA")¹ in 1940 to accomplish a dual purpose: 1) to offer soldiers a measure of protection from certain adverse legal consequences they might incur as a result of military service, and 2) to protect the Government's investment in its military personnel by helping to ensure they are not distracted from their military mission by specific types of legal matters. Faced with ongoing conflict in Iraq, Congress determined that the law was outdated, and on December 19, 2003, President Bush signed the new-and-improved Servicemembers Civil Relief Act ("SCRA")². Your knowledge of this law will be increasingly important to your practice as reserve troops – who may be your clients or adversaries – continue to be called to active service and deployed abroad for months or years at a time.

In addition to clarifying ambiguities and incorporating SSCRA case law, the revision significantly expands and strengthens protections for active duty servicemembers ("SMs") and their dependents. It encompasses all civil and administrative proceedings (often with onerous specificity), but as the name implies, the SCRA is not applicable to criminal actions. In addition to covering all active duty personnel from any branch of service, the SCRA also applies to Reservists from the date they receive orders to perform military duties³ and all National Guard members who are activated to full time duty for over 30 consecutive days.⁴ Some provisions also extend to an SM's family⁵ and some continue for an extended period after the term of active duty service.⁶ While by no means

comprehensive, the following survey should serve to generally familiarize you with the basic nature and variety of civil relief rights and protections available to American military personnel.

General Civil Litigation Relief

Parties seeking civil judgments against an SM between the date an SM receives orders and 90 days after the period of military service ends must file an affidavit regarding the SM's military status.⁷ In the SM's absence, no judgment⁸ may be entered until an attorney is appointed to represent the SM. No action taken by the appointed attorney is binding if the SM cannot be reached,⁹ and any default judgment against an SM during or within 60 days of completing military service may be set aside upon a showing that service precluded the SM's ability to effectively present a defense.¹⁰

A stay of not less than 90 days is automatically provided if the SM cannot be reached.¹¹ An SM who has notice of the proceedings is also entitled to this stay upon showing that the SM is on active duty and his or her ability to appear is materially affected¹² by service requirements.¹³ This application must also state a date when the SM can appear¹⁴ and must be supplemented by a letter from the SM's commanding officer substantiating the requisite information. If the length of the stay granted is not long enough, the soldier may reapply later by providing the same information. Should a subsequent request be denied, the Court must appoint an attorney to represent the SM's interests if the SM continues to be unable to appear.¹⁵

An important departure from the SSCRA is that the SM's application for a stay does not constitute an appearance¹⁶ and does not waive objections to personal jurisdiction. If the SM is a co-defendant with others who are not entitled to the protections of the SCRA, the plaintiff can still proceed against the other defendants, but the claim against the SM will remain suspended.¹⁷

Fines and penalties from contracts entered before active duty service or deployment cannot accrue against an SM during a stay granted pursuant to the SCRA.¹⁸ Additionally, failure of an SM to perform disputed contractual obligations may not trigger fines or penalties if the court determines the nonperformance was due at least in part to service obligations.¹⁹ A SM is also entitled to a vacation of judgment or stays of execution upon a showing that military service impairs compliance with the Court's order.²⁰

The SCRA's provision tolling statutes of limitations on civil actions is a bit more of a two-way street than other protections. Whether plaintiff or defendant, all statutes of limitations applicable to the SM are tolled during the SM's period of duty.²¹ Ordinarily, if a non-military client in Minnesota intends to sue for personal injury due to negligent conduct, the individual has two years from the date of the accident to do so. An SM injured while on active duty has two years from the date he leaves active duty. Conversely, the statute of limitations on a cause of action *against* an SM is also tolled during military service. If an SM is injured or causes injury before entering active duty, the prescriptive period stops running on the day he enters full-time service, and resumes the day he is released. Under § 526(c), the SCRA does not toll the statute of limitations on federal tax litigation, presumably because Congress does not think military service should preclude the prompt resolution of tax disputes.

Leases and Loans

Without a court order, landlords charging less than \$2534.23 per month may not evict an SM or SM's dependants from real estate under lease contracts signed before the SM entered active military service.²² A landlord violating this requirement or subjecting the premises to distress is subject to federal misdemeanor prosecution.²³ Similarly, no other property being paid for under an installment contract may be repossessed if it was contracted prior to the beginning of active duty service.²⁴ If the proprietor makes an application to the court to be permitted to evict, the general provision for a stay on the action still applies.

With regard to interest rates, the SCRA is more lenient than its predecessor. It requires that lenders reduce interest rates on loans to SMs to six percent, effective the date the

SM is called to active duty.²⁵ The protection extends to debts jointly held by a SM and his/her spouse, and the SM is not required to prove how or whether military service impairs his/her ability to pay a higher interest rate.²⁶ However, as before, this cap applies only to liabilities incurred prior to active duty entry. To enforce this provision, the SM must provide creditors with a copy of military orders establishing the period of service, along with written notice of the interest rate reduction and forgiveness not later than 180 days after release from active duty. Lenders do not particularly like this requirement and frequently try creative statutory interpretations to avoid compliance.

An even more drastic departure from the SSCRA allows an SM to terminate her residential lease on 30 days' notice if deployed abroad for at least 90 days, or assigned to a new permanent duty location (in military jargon, known as "permanent change of station," or "PCS").²⁷ Likewise, an SM may terminate an automobile lease without penalty if he will be deployed for 180 days or more, or "PCS" into or out of the continental U.S.²⁸ Also, if a self-storage facility holds a lien on the property of an SM who has leased a unit for storage, the owner cannot foreclose on the lien without a court order.²⁹ In the event of such court proceedings, the SM would enjoy the protection of all the notice, representation, and stay provisions of the SCRA described above.

Servicemembers must carefully follow all procedures outlined in the statute when exercising these rights. Many SMs are not well-versed in lease and loan provisions, many state and local jurisdictions are not aware of the SCRA's protections. This makes competent and timely legal assistance critical in avoiding confusion and enforcing the SCRA protections that Congress has given to our men and women in uniform.

Taxes

Under the new SCRA, a tax jurisdiction may not use the military compensation of a non-resident SM to increase the tax liability imposed on other income earned by either an SM or the SM's spouse.³⁰ This scenario is triggered, for example, when an SM from Minnesota is sent to an out-of-state military base (automatically retaining Minnesota residency), then begins up an odd job on the side and/or brings a spouse along who earns taxable income. Further, if an SM's ability to pay income tax is materially affected by service, upon notice to the IRS and/or tax authority of the state, the collection of tax on his income due before or during service is deferrable for up to 180 days after release from active duty. As with the contract provisions, no interest or penalty shall accrue during this deferment.³¹ This may be particularly important for SMs who are called away from lucrative jobs to relatively low-paying military jobs.

Waiver of Rights

Several provisions of the Act are designed to ensure servicemembers have the ability to enforce their SCRA rights. An SM does not waive any of the afforded protections unless specific conditions are met. The waiver must be in writing that is in at least 12 point type, separate from the underlying obligation, and executed during or after the SM's period of service.³² In other words, any purported waiver of SCRA rights before the rights actually attach cannot be enforced. Waiver clauses built into leases and other contracts while the SM is in civilian status are unenforceable. Additionally, third parties are strictly prohibited from retaliating against SM's who invoke their SCRA rights.³³

Conclusion

This is a far from comprehensive outline of the protections and benefits afforded under the sweeping SCRA legislation. It is intended only as an introduction and to encourage your own study of the SCRA. Whether you find occasion to invoke the esoteric SCRA provisions on anything from mining claims³⁴ to mineral permits³⁵, it is almost beyond doubt that you will encounter clients somehow affected by the SCRA. Whether the case involves a sailor being sued over a car accident, the spouse of a National Guardsman in Iraq trying to cope with three young children and a mountain of debt, or a landlord trying to collect from a military tenant who has not paid rent in three months, your knowledge and understanding of the SCRA will significantly contribute to your ability to deliver accurate legal advice.

Additional information about the SCRA can be found at:

www.jagcnet.army.mil
<http://www.abanet.org/genpractice/magazine/janfeb2005/scra.html>

Eric Hanson graduated from the University of Minnesota Law School in 2003 where he was a founding member and producer of Theatre of the Relatively Talentless (TORT), the law school musical. He is now an Army JAG attorney stationed at Fort Monroe, Virginia.

Ben Tramposh is an Army ROTC Cadet and senior at Washington University (St. Louis). Ben contributed to this article while serving as a 2005 summer legal intern at Fort Monroe. He will be commissioned as an Army 2nd Lieu tenant in May 2006, attend law school, and serve as an Army JAG officer

Notes

¹ 50 U.S.C. App. §§ 501-594 (2000).

² 50 U.S.C. App. §§ 501-596 (2004).

³ *Id.* app. § 516(a).

⁴ *Id.* app. § 511(2).

⁵ *See, e.g., id.* app. §§ 531(a)(1)(A), 534(b), 535, 538, 561(e).

⁶ *See, e.g., id.* app. § 516(a).

⁷ *Id.* app. § 521(b).

⁸ The Veterans Benefits Improvement Act of 2004, Pub. L. No. 108-454, 118 Stat. 3598, included several amendments to the SCRA as passed in 2003. Among those changes, the definition of "judgment" was clarified to encompass "any judgment, decree, order, or ruling, final or temporary §511(9)." Hereinafter, discussion of the SCRA will apply to its most recent form, which includes the amendments.

⁹ *Id.* app. § 521(d).

¹⁰ *Id.* app. § 521(g).

¹¹ *Id.* app. § 521(d)(2).

¹² "Materially affect" will usually be geographic or operational. *See, e.g., Lackey v. Lackey*, 278 S.E.2d 811 (Va. 1981); *Cromer v. Cromer*, 278 S.E.2d 518 (N.C.1981).

¹³ *Id.* app. § 522(b)(1).

¹⁴ *Id.* app. § 522(b)(2).

¹⁵ *Id.* app. § 522(d).

¹⁶ *Id.* app. § 522(c).

¹⁷ *Id.* app. § 525(b).

¹⁸ *Id.* app. § 523(a).

¹⁹ *Id.* app. § 523(b). Note that based upon the SCRA's definitions of the terms Servicemember and Military Service, this provision does not extend to Reserve or Guard troops wishing to claim that routine drill requirements prevented timely or complete performance of contracts. *See, id.*, app. § 511(2).

²⁰ *Id.* app. § 524.

²¹ *Id.* app. § 526.

²² *Id.* app. § 531.

²³ *Id.* app. § 531(c).

²⁴ *Id.* app. § 532(a).

²⁵ *Id.* app. § 527.

²⁶ *Id.*

²⁷ *Id.* app. § 535.

²⁸ *Id.* app. § 535(b)(2). This provision cannot be invoked by an SM who will "PCS" to a different location within the continental U.S.

²⁹ *Id.* app. § 537.

³⁰ *Id.* app. § 571.

³¹ *Id.* app. § 570(a).

³² *Id.* app. § 517.

³³ *Id.* app. § 518.

³⁴ *Id.* app. § 564.

³⁵ *Id.* app. § 565.

Hennepin County Affiliate News

By: Lori Semke

HCBA NEW LAWYERS SETTLE IN FOR A BUSY WINTER

The HCBA New Lawyers Section has been busy enjoying fall events and planning for a busy winter. This past fall the New Lawyers served meals at the People Serving People shelter in Minneapolis, and did lawn work for a homebound senior in St. Paul. We have also been working in conjunction with the RCBA and MSBA New Lawyers to organize and facilitate a furniture and office supply drive for the Minnesota Task Force on Hurricane Katrina Relief. The drive will go until the end of January—feel free to contact Lori Semke for more information if you have not already heard about this exciting project which will help legal services offices and other legal offices in the Gulf region rebuild. This December, the section is working with the United Way on a service project that will benefit families during the holidays. We are also gearing up for the beginning of the “We the Jury Project,” a service project we will implement in conjunction with numerous other legal organizations in our area. Volunteers for the “We the Jury Project” go to area high schools and present an interactive program designed to teach students about the jury system. Finally, HCBA New Lawyers will be visiting area law schools during finals to pass out study kits and interact with our future New Lawyers.

We have several informative CLE and Professional Development programs this fall. We are particularly excited about the upcoming **Nuts & Bolts** CLE program, which will be held from 9 a.m. to 5 p.m. on **December 6, 2005** at the HCBA. Kicking off with a keynote address from Michael V. Ciresi of Robins Kaplan Miller & Ciresi, **Nuts & Bolts** offers a full day of presentations designed specifically for the new lawyer. Topics are geared toward a wide range of practice types and include developing skills such as negotiation, deposition techniques, and thinking on your feet. Also not to be missed is the Judge’s Panel, in which federal and state judges offer their advice for new lawyers from the perspective of the bench. Contact the HCBA at 612-752-6600 to register.

The HCBA New Lawyers took back the trophy at the annual flag-football showdown with RCBA New Lawyers on October 22nd. We have also enjoyed several get-togethers at the monthly New Lawyers Happy Hour, most recently at Martini Blu on November 3rd. We are looking forward to a

joint social event on December 6th with the MSBA and RCBA New Lawyers, immediately following the Nuts & Bolts CLE at Cosmos in Block E. We hope to see you at one of our events soon! For more information on any of the above programs or who to contact to get involved, check out our website at <http://www.hcba.org/programs/newlawyers>.

Lori Semke is the Chair of the Hennepin County Bar Association New Lawyers Section, and can be reached at lsemke@flynn-gaskins.com.

Ramsey County Affiliate News

By: Derk Schwieger

The Ramsey County New Lawyer's Section has started the fall with hosting various social events and outreach programs, and is requesting all new lawyers to participate in future events this year.

Ramsey County has hosted monthly Happy Hours at LoTo in September and the Liffey in October.

We would like to thank Anthony DeGuerre, Esq., and Cultivating Careers for hosting Happy Hours so far this year. If you have a legal vendor who would like to sponsor an event and gain exposure with the legal community, feel free to contact either Ramsey County Co-Chair for a sponsorship opportunity.

Future Happy Hours for this year will be as follows, with all locations in Saint Paul:

January = Kincaids

February = Pazzaluna

March = McGovern's

April = Fabulous Ferns

May = Great Water's Brewing Company

June = undecided at this time

Please invite members of your firm or judges to these events, which are held the second Thursday of each month between 5:00 p.m. and 7:00 p.m.

The New Lawyer's will not be hosting a December Happy Hour as the entire Ramsey County Bar has an annual holiday party on December 13 at DeGidio's.

On October 22, Ramsey County also hosted the annual Flag Football game with Hennepin County, which was held at Highland Park Senior High School, with lunch afterwards at Champps. Unfortunately Hennepin County prevailed this year, but all enjoyed a beautiful fall day.

Ramsey County New Lawyer's also assisted with the Bench and Bar Benefit for Ramsey County which was held on October 29, 2005. The New Lawyer's secured sponsors for a Social Hour during the two hour Silent Auction to raise money for legal charities throughout Ramsey County. We would like to thank our sponsors for this Social Hour, Pat Car & Associates and Robert Half Legal, for making this annual event another big success.

Lastly, the New Lawyer's will be helping with Santa Brings a Lawsuit. You are encouraged to donate used professional clothing at the Ramsey County Courthouse for distribution to the needy. We will be advertising dates and times in the near future.

Information on upcoming events is available at:

Ramsey County Bar Association
www.ramseybar.org

Ramsey County Bar Co-Chairs:

Derk Schwieger
lawdks@qwest.net

Sarah Bashiri
sbashiri@mnfamilylaw.com

Derk Schwieger is the Chair of the Ramsey County New Lawyer's Group and attorney practicing with Derk Karl Schwieger, LLC. He can be reached at lawdks@qwest.net.

Duluth Affiliate News

By: Kim Maki

The Duluth New Lawyers welcomed several new members over the last three months. We have enjoyed getting to know the new members at our monthly lunch meetings and happy hours. Furthermore, the Duluth New Lawyers said goodbye to some of its most active members who left the community for other opportunities. They will be missed.

The Duluth New Lawyers is gearing up to sponsor several holiday charities drives, including its yearly “Santa Brings a Law Suit” drive, which gathers used, but well-kept, professional clothing for donation to organizations that provide the clothing to people of low income so they are able

to dress professionally in interviews and subsequent employment.

After the hustle and bustle of the holidays, the Duluth New Lawyers is planning a volunteer event in January at the Damiano Center, a local soup kitchen. The Duluth New Lawyers volunteered at the Damiano Center last year, and the attendees had a great time cooking for and serving lunch to less fortunate members of the Duluth community.

Kim Maki is the Duluth New Lawyers Chair. She can be reached at kmaki@fryberger.com.

Mankato, St. Cloud, and Willmar Affiliate News

No reports submitted.



MSBA New Lawyers Section Members Deanna Dailey and Robert Hankoff participated in a community service project while attending the ABA Fall Conference in Louisville, Kentucky. The group worked with a local city councilman to refurbish an existing Louisville park by pulling up the grass and replacing it with mulch and repainting the jungle gym.

2005-2006 NLS Liaisons

Alternative Dispute Resolution Section

Darin Allen
dallen@arb-forum.com

Animal Law Committee

Laura Hage
lahagelaw@aol.com

Antitrust Section

Brian C. Fischer
Brian.Fischer@FischerLegal.com

Bankruptcy Section

Megan Blazina
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Elder Law Section

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Environmental Law Section

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General Practice Solo Small Firm Section

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Human Rights Committee

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Immigration Law Section

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Andrew Tatge, St. Thomas Law School
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Wendy Badger, William Mitchell Law School
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Legislative Committee

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Professionalism Committee

Mary Briede
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Tax Law Section

Brendan Tupa
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Women in the Legal Profession Committee

Dana Bartocci
bartocci@umn.edu

NLS Open Liaison Positions

COMMITTEES

Attorney Referral Committee
Bar Media
Community Outreach Committee
Court Rules and Administration Committee
Convention
Diversity Committee
Fair Response Committee
Insurance for Members Committee
Internet Law Committee
Judicial Elections Committee
Law and Literature Committee
Law School Liaison Committee
(University of Minnesota Law School)
Legal Assistance to the Disadvantaged Committee
Legal Education and Bar Admissions Committee

Legislative Coordinator
Life and the Law Committee
Membership Committee
Minnesota Law Related Education
Newsletter Editor
Paralegal Committee
Pro Se Implementation Committee
Publications Committee
Rules of Professional Conduct Committee
Senior Lawyers Committee
Technology Committee

SECTIONS

Administrative Law Section
Appellate Practice Section
Art & Entertainment Section
Children and the Law Section
Communications Law Section
Computer Law Section
Employee Benefits Section
Family Law Section
Food and Drug Law Section
Health Law Section
International Business Law Section
Labor & Employment Law Section
Outstate Practice Section
Public Law Section
Public Utilities Section

As the list indicates there are a number of openings for New Lawyers to become liaisons to various sections in the MSBA. This is a great opportunity to get involved with a substantive or procedural area of law. If you are a new lawyer and interested in becoming a liaison you should contact the New Lawyers Section Chair, Rebecca Fisher at rebecca@rrflaw.com for more information.

2005-2006 MSBA New Lawyers Section Contacts

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