

State-to-State

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Summer/Fall 2008

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Coming up!

Boston CLE!

SCHEDULE

Tuesday
October 1, 2008

Florida Law at The John Adams Courthouse – Boston
11 a.m. - 3 p.m.

Reception to follow in the courthouse
3 p.m. - 4 p.m.

Out-of-State Division Executive Council Meeting
John Adams Courthouse
4 p.m. - 5 p.m.

Details: pages 8 & 9.

President's message:

It is about you!

by Allyn D. Kantor, President



A. KANTOR

In my first letter to the members of the Out-of-State Division, let me tell you that I am honored to have been elected as your president, and I look forward to serving you in the coming year.

When I became more familiar with the role that our Division plays in The Florida Bar, I was astounded to learn that of the 13,000 out-of-state lawyers having a license to practice in Florida, less than 10 percent of them are members of the Division. That is a lot of missed opportuni-

ties, not only for those lawyers who are not members, but also for those of us who are members.

For example, I primarily practice in the state of Michigan. A week does not go by before another member of our firm is looking to refer work to a lawyer in another state. It would be so easy to check our website and contact a Division member in the jurisdiction where we need work done. Similarly, lawyers practicing in Florida need counsel in other states. If these lawyers knew about us and thought we could serve them, it would mean real business opportunities for us. If no other reasons existed for joining our Division, business opportunities alone provide

See "President's message," page 2

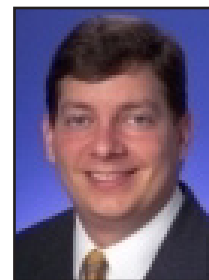
Choosing the best bankruptcy venue: 'Why pay more?'

by Thomas M. Messina and David Neal Stern



T. MESSANA

"Why pay more?" is a question that Madison Avenue has asked the American consumer for more than 50 years. The answer is obvious, but the question generally expects consumers to gloss over distinctions that can be as subtle as shades of gray or as stark as apples-and-oranges. Whether consumers can do so is often reflected, for example, in whether coffee is purchased from one brand or another. In making those purchase decisions, dis-



D. STERN

cerning consumers often are persuaded to pay a higher price based on perceived product differences. Whether those differences are real or merely perceived due to better marketing is unclear.

Although it might be surprising to some, elements of the actual quality vs. perceived quality debate come into play when a company chooses where to commence reorganization proceedings

See "Why pay more?" page 2

President's message, from page 1

sufficient cause to do so.

But there are a number of other reasons to join. Did you know that membership in the Division provides you with an opportunity to stay updated on issues of professional interest to you, such as practice certifications, multi-jurisdictional practice, ethics opinions and advertising rules?

As Past President Tim Chinaris mentioned in his message in the spring edition of *State-to-State*, the Division provides its members with annual Florida ethics law updates, a

\$30 cost to non-division members, but *free* to our members. So, for the cost of membership dues (\$30), you have free access to annual ethics updates, a \$30 value ... another good reason to join.

Finally, to keep members abreast of current legal issues that may impact your practice wherever you have your office, the Division sponsors seminars in Chicago, New York and other cities where the Board of Governors holds its annual out-of-state meetings. This year, the BOG will meet

in Boston, Mass., the first week of October. On Oct. 1, the Division will host a reception and a CLE program for out-of-staters at the John Adams Courthouse. We expect to feature very prominent speakers. More on that later.

In short, this *is* about you. If you are not a member of the Division, we want you to join us. If you are a member, then take advantage of the opportunities of membership.

Meanwhile, I look forward to seeing you in Boston in October.

Why pay more?, from page 1

under Chapter 11 of the United States Bankruptcy Code. Applicable law affords some businesses options from which to choose when deciding where to commence a bankruptcy case. For this reason, it is not uncommon for Florida-based companies to commence their bankruptcy cases elsewhere. Destinations of choice include Delaware, New York City and Chicago. On what basis are such venue decisions made? As with the other choices, sometimes such decisions are based on differences in actual quality and sometimes based on perceived differences. Although the concept of bankruptcy venue "marketing" to decision-makers seems odd, certain bankruptcy courts have been known to welcome suggested changes to their local rules that might help attract complex or "mega" cases.

In considering whether to file its bankruptcy case in a particular district like one of the three federal districts in Florida, a company might consider a variety of factors such as the existence of particularly favorable

or unfavorable case law that has been widely adopted by the local bankruptcy judges or established in that district by appellate precedent, and the odds of drawing a judge that might not be likely to side with the debtor on discretionary matters such as the reasonableness of professional fees.

Another factor that is worthy of discussion involves the quality of the local bankruptcy practitioners. Rightly or wrongly, consumers of goods and services generally associate paying a higher price with an assurance of receiving higher quality. While this association might make sense in many contexts, it tends not to do so when the services are those of legal professionals. When compared to their competitors in other markets (some of whom are breaking the \$1,000 per hour mark), the hourly rates of Florida corporate insolvency practitioners are relatively low. The rate disparity cannot reasonably be ascribed to differences in lawyer quality, as evidenced by the frequency with which out-of-state bankruptcy practitioners relocating to Florida find that

they must significantly lower their hourly rates to remain competitive. For example, a bankruptcy lawyer recently dropped his rate more than \$100 per hour after relocating from Washington, D.C. Absent a supernatural phenomenon with which we are not familiar, quality professionals do not become less qualified by moving down a few lines of latitude. This anomaly is, of course, not limited to Florida's bankruptcy professionals, but is instead reflective of a broader truism that hourly rates are more a reflection of market conditions other than the experience, training and innate smarts of legal professionals, particularly when rates are compared between direct competitors in different geographical markets.

We do not believe or suggest that attorneys handling Chapter 11 reorganizations or other sophisticated litigation or transactional matters are fungible. But we do believe that the hourly rates of legal professionals, like coffee prices, are not always reflective of differences in actual quality. So, in many ways, the question for sophisticated consumers of legal services who contemplate retaining Florida counsel to handle complex matters often can be summed up as "Why pay more?"

This series of articles is coordinated by Hon. Catherine Peek McEwen, United States Bankruptcy Judge, Middle District of Florida.



Ethics Questions?

Call The Florida Bar's ETHICS HOTLINE

1/800/235-8619



Meet the OOSD leadership

Allyn D. Kantor, OOSD president, of Miller, Canfield, Paddock and Stone PLC in Ann Arbor, Mich., practices in the areas of business litigation, employment litigation, defense of legal malpractice claims and complex civil litigation. He has served the State Bar of Michigan as a member of its Representative Assembly and of its Board of Commissioners. He was the 2002 recipient of the George Bashara Award for Service to the ADR Section. He is an adjunct professor of ADR at the University of Michigan Law School. He has been listed in "Best Lawyers in America" since 1997. He can be reached at 734/668-7625 or kantor@millercanfield.com.

William A. Lee III, OOSD president-elect, is the managing partner of O'Donnell, Lee, McCowan & Phillips LLC, a general practice firm in Waterville, Me. He is a graduate of the University of Florida School of Law and a member of the Florida, Maine and Washington State Bars, the Federal District Court in Maine and the First Circuit Court of Appeals. He is a member of the Florida Bar Real Property, Probate and Trust Law Section. His practice is concentrated in municipal law, civil litigation, estate planning and probate. He is also a part-time professor in the Government Department at Colby College. He can be reached at 207/872-0112 or walee@olmplaw.com.

Mike Busenkell, OOSD secretary, has substantial experience representing trustees, debtors and creditors in bankruptcy cases and out-of-court restructurings. He has appeared on behalf of clients in federal courts throughout the United States on a range of bankruptcy issues. He represents plan administrators, liquidation

trustees and Chapter 7 trustees in all aspects of litigation. He focuses his practice on Chapter 11 business restructurings, advising fiduciaries and managers for distressed enterprises, bankruptcy acquisitions and transactions, committee representations, debtor-in-possession financing, representation of secured and unsecured lenders to bankruptcy or distressed companies and bankruptcy-related litigation. He has extensive experience in trial practice, having served as an assistant state attorney in Miami, Fla., where he managed large felony caseloads and conducted numerous jury trials. He can be reached at 610/864-7093 or mbusenkell@eckertseamans.com.

Ward P. Griffin, OOSD treasurer, is an attorney with the U.S. Merit Systems Protection Board, Office of General Counsel, in Washington, D.C. Admitted to practice law in Florida and D.C., his practice focuses primarily on labor and employment litigation, supporting the agency's legislative and regulatory functions and ensuring compliance with final agency orders. He also serves as a member of the Board of Governors for The Florida Bar Young Lawyers Division and as secretary of the Florida Bar Government Lawyer Section. He received bachelor's degrees in finance and history from the University of Florida and his J.D. from the William and Mary School of Law in Williamsburg, Va. He can be reached at 202/653-6772, ext. 1412, or ward.griffin@mspb.gov.

Timothy P. Chinaris, OOSD past president, is associate dean for information resources and professor of law at Jones School of Law at Faulkner University in Montgomery, Ala.,

where he teaches courses in legal ethics and other subjects and directs the law library. He previously served in a similar capacity at Florida Coastal School of Law in Jacksonville, Fla. He was ethics director of The Florida Bar from 1989-1997, where his responsibilities included overseeing the Bar's popular "ethics hotline" service, which answers more than 20,000 phone calls per year from Florida Bar members. He has a bachelor's degree in business administration from Florida State University, received his J.D. with honors from the University of Texas School of Law and earned his master's degree in library and information studies from Florida State University. He is admitted to practice law in Florida and Texas. He can be reached at 334/386-7214 or tchinaris@faulkner.edu.

Donald A. Workman, OOSD *State-to-State* editor, is a partner in the Business Group and head of Baker Hostetler's bankruptcy and creditors' rights practice in the Washington, D.C., office. He has been rated AV by Martindale-Hubbell for preeminence in his field and his ethical standards. His practice areas include business bankruptcy, creditors' rights, debtor reorganizations, general insolvency, stockbroker liquidations and commercial litigation. He has experience in representing constituencies around the country and overseas involved in major reorganizations and workouts, including creditor committees, secured creditors, debtors, trustees, DIP lenders and asset purchasers. He also counsels entities and individuals in the specialized area of distressed debt arbitration matters. He can be reached at 202/861-1602 or dworkman@bak-erlaw.com.

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The pictures tell the story: Division happenings at the Bar's Annual Convention in June



From the top: Allyn Kantor (left) presents Tim Chinaris with an award from the Division for his contributions as president of the Division for the 2007-2008 year.

Immediate Past President Tim Chinaris passes on the gavel and responsibility for the Division's business to President Allyn Kantor.



President Frank Angones swears in the 2008-2009 slate of officers for the Out-of-State Division. Left to right: Florida Bar President Frank Angones, OOSD Immediate Past President Timothy Chinaris, OOSD President Allyn Kantor and OOSD President-elect Bill Lee



Out-of-State Division Executive Council

Officers

President – Allyn Kantor, Ann Arbor, MI

President-elect – Bill Lee, Waterville, MA

Secretary – Mike Busenkell, Wilmington, DE

Treasurer – Ward Griffin, Washington, DC

Executive Council

Scott Atwood, Atlanta, GA

E. Duffy Myrtetus, Richmond, VA

Bard Brockman, Atlanta, GA

John Voorn, Palos Heights, IL

Philip Sprinkle, Richmond, VA

Victoria Wu, Silver Spring, MD

Board of Governors Members

Brian Burgoon, Atlanta, GA

Ian Comisky, Philadelphia, PA

Eric Meeks, Cincinnati, OH

Richard Tanner, Upper Montclair, NJ

State-to-State Newsletter Editor

Don Workman, Washington, DC

Young Lawyers Division Liaison

Mindi Wells, Ada, OH

Board of Governors Liaison

Eric Meeks, Cincinnati, OH

Gary Leppla is Ohio Bar president



LEPPLA

Dayton attorney Gary J. Leppla became the Ohio State Bar Association's (OSBA) president July 1, 2008. He was officially recognized at the association's annual convention in Columbus with the "passing of the gavel" from Rob Ware of Cleveland.

As president of the OSBA, Leppla plans to focus on energizing participation and education through outreach to the media, public and under-represented member groups, including promotion of the professional support and diversity initiatives through the OSBA. He intends to aggressively engage the public and media in a dialogue concerning the nature of the work undertaken by attorneys and judges in Ohio's system of justice.

"Important issues for the OSBA to tackle include the public's perception that campaign contributions influence judicial decisions in Ohio. We also need to provide the public with accurate information about how the legal system operates and explain the role of lawyers and judges in that system. The association can provide a significant public service by helping Ohioans better understand the duties, responsibilities and limitations placed on lawyers and judges as they carry out their sworn duties. The OSBA will continue to be proactive by engaging in public and private debate of these issues," comments Leppla.

Leppla, born in Cleveland and educated in parochial schools in the Dayton area, has spent nearly 30 years in the litigation-oriented practice of law as the principal attorney at Leppla Associates, with continuous service to the public and profession throughout his career. He is a longtime member of the OSBA Legal Ethics and Professional Conduct Committee. He has worked closely with Ohio's metropolitan bar leadership, as an elected out-of-state member of The

Florida Bar Board of Governors, as a continuing legal education speaker in multiple states, as president of the Dayton Bar Association and as chair of the Dayton Bar Association Certified Grievance Committee. He is a member of the Ohio Academy of Trial Lawyers (OAJ), the Association of Trial Lawyers of America (AAJ), the Academy of Florida Trial Lawyers (FJA) and the Miami Valley Trial Lawyers Association. Leppla is a fellow and trustee of the Ohio State Bar Foundation, a fellow of The Florida Bar Foundation and is past president of the Dayton Bar Foundation. He is also a newly elected member of the board of trustees of the Ohio Legal Assistance Foundation.

Leppla's professional activities include active casework for the Volunteer Lawyers Project (VLP) and acting as chair of the Campaign for Equal Justice for Legal Aid and VLP. He was an early promoter of the Dayton Bar Association's Diversity Dialogue and

was a founding advocate for the Equal Opportunities Law Section of The Florida Bar. Leppla has served three Ohio attorneys general as special counsel, has been designated an Ohio Super Lawyer and is an AV-rated litigator.

Leppla earned his undergraduate degree (Phi Beta Kappa) and his law degree from The Ohio State University, and he serves on The Ohio State Marching Band's Board of Governors as its alumni legal chair. He has been an active member of the League of Women Voters for 25 years and is a life member of the NAACP. Non-legal activities include the founding of a newspaper, reclamation and restoration of a historic opera house, and appointment to a Judicial Nominating Commission by Ohio Governor Ted Strickland.

Leppla and his wife of 31 years, Patricia, a speech pathologist, live in German Township in Montgomery County outside Dayton. They have three adult children.

Mark Your Calendar!

September 30 - October 3, 2008

The Florida Bar Board of Governors Meeting
Boston, Massachusetts

October 1, 2008 • 11 a.m. - 3 p.m.

Boston CLE

John Adams Courthouse

Tour from 3 - 4 p.m. – Reception to follow tour
Boston, Massachusetts

February 21, 2009

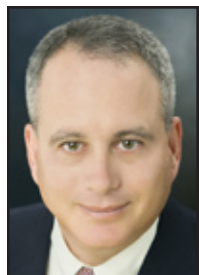
New York CLE – St. Johns Law School, Manhattan Campus
New York, New York

June 24-27, 2009

The Florida Bar Annual Meeting
World Center Marriott – Orlando, Florida

Beneficiary and fiduciary liability for income, gift and estate taxes

by Marc J. Soss



It can be either a blessing or a curse to be appointed as the personal representative of an estate or the trustee of a trust (collectively a “fiduciary”). One of the most overlooked aspects of the job is the fact that the decedent may leave assessed and unpaid taxes at death. As a result, the U.S. Government will maintain a “general tax lien” on all estate and trust property, and a “special tax lien” for estate taxes.

Liability for income and estate taxes

Internal Revenue Code (IRC) §6012(b) holds a fiduciary responsible for filing the decedent’s final income and estate tax returns. Under IRC §6321, when the tax is not paid, an IRS lien is filed. When an estate or a trust possesses insufficient assets to pay all of its debts, federal law requires the fiduciary to first satisfy any federal tax deficiencies before any other debt (31 U.S.C. §3713 and IRC §2002).

A fiduciary who fails to abide by this requirement will subject him or herself to personal liability for the amount of the unpaid tax deficiency (31 U.S.C. §3713(b)). An exception will arise only when an individual has obtained an interest in property that would prevail over the federal tax lien under IRC §6323 (*United States v. Estate of Romani*, 523 U.S. 517 (1998)). When there are insufficient estate or trust assets to pay a federal tax obligation as a result of the fiduciary’s actions, the IRS may collect the tax obligation directly from the fiduciary without regard to transferee liability (*United States v. Whitney*, 654 F.2d 607 (9th Cir. 1981)).

Prerequisites for fiduciary liability

A fiduciary will be personally liable for a federal tax liability under the following conditions: 1) the U.S. Government has a claim for taxes; 2) the

fiduciary has a) knowledge of the tax liability or is placed on inquiry notice, and b) paid a “debt” of the decedent or distributed assets to a beneficiary; 3) the “debt” or distribution must have been paid at a time when the estate or the trust was insolvent or the distribution created the insolvency; and 4) the IRS has filed a timely assessment against the fiduciary personally (*United States v. Coppola*, 85 F.3d 1015 (2d Cir. 1996)). For purposes of IRC §3713, the term “debt” includes the payment of 1) hospital and medical bills; 2) unsecured creditors; 3) state income and inheritance taxes (conflict between *U.S. Blakeman*, 750 F. Supp. 216, 224 (N.D. Tex. 1990) and *In Re Schmuckler’s Estate*, 296 N.Y. 2d 202, 58 Misc. 2d 418 (1968)); 4) a beneficiary’s distributive share of an estate or a trust; and 5) the satisfaction of an elective share. In contrast, the term “debt” specifically excludes the payment of 1) a creditor with a security interest; 2) funeral expenses (Rev. Rul. 80-112, 1980-1 C.B. 306); 3) administration expenses (court costs and reasonable fiduciary and attorney compensation) (*In Re Estate of Funk*, 849 N.E.2d 366 (2006)); 4) family allowance (*Schwartz v. Commissioner*, 560 F.2d 311 (8th Cir. 1977)); and 5) a “homestead” interest (*Estate of Igoe v. IRS*, 717 S.W. 2d 524 (Mo. 1986)).

To collect the federal tax deficiency, the IRS has the option to either file a lawsuit against the fiduciary in federal district court, pursuant to IRC §7402(a), or issue a notice of fiduciary liability under IRC § 6901(a)(1)(B) and commence collection efforts. The statute of limitations for issuing a notice of fiduciary liability is the later of one year after the fiduciary liability arises or the expiration of the statute of limitations for collecting the underlying tax liability (IRC § 6901(c)(3)).

Preference requirement and knowledge of outstanding tax obligations

While the IRS may pursue collection of an estate tax deficiency from the beneficiaries, the fiduciary will only

retain a right of subrogation if the IRS elects to pursue collection of the tax deficiency against him or her. Under IRC §6324, the IRS may seek collection of the federal tax deficiency from the fiduciary in possession of the assets on which the tax applied, not to exceed the value of the assets transferred to any beneficiary. However, if the fiduciary had no knowledge of the debt, he or she will not be liable for more than the amount distributed to the beneficiaries or other creditors, or for taxes discovered subsequent to any distributions (Rev. Rul. 66-43, 1966-1 C.B. 291).

The burden of proof will then rest with the fiduciary to prove his or her lack of knowledge of the unpaid tax (*U.S. v. Bartlett*, 2002-1 USTC ¶60,429 (C.D. Ill. 2002)). Once this element is established, the burden will shift back to the IRS (*Villes v. Comr.*, 233 F.2d 376 (6th Cir. 1956); *Estate of Frost v. Commissioner*, T.C. Memo. 1993-94). If the liability pertains to income or gift taxes relating to years before the decedent’s death, a court may require the fiduciary to have actual or constructive knowledge of the liability before holding him or her personally liable for the unpaid tax (*U.S. v. Coppola*, 85 F.3d 1015 (2d Cir. 1996)).

Statutes of limitation

Under IRC §6901 and §6501, the statutory period for assessing personal liability against a fiduciary follows the same track as the underlying tax. The limitation period is 1) three years from the date of a tax return filing or the date the tax return is due (if filed early); 2) six years if there is a substantial omission (25% or more) of gross income, gift or estate assets; or 3) no limit if the IRS can prove fraud. Under IRC §6502(a), once the IRS makes a tax assessment, it has 10 years to collect the tax.

Methods for reducing fiduciary liability

Income and gift taxes: A fiduciary may file IRS Form 4810, Request for Prompt Assessment, to obtain a

review and prompt assessment of all tax returns filed by the decedent with the IRS. The filing of Form 4810 will shorten the statute of limitations period to 18 months from the date of its filing with the IRS. However, the shortened statute of limitations period will not apply to 1) fraudulent tax returns; 2) unfiled tax returns (IRC §6501(c)); 3) any tax return with “substantial omissions” (IRC §6501(e)); or 4) a tax assessment described in IRC §6501(c).

Once the decedent’s federal income tax return(s) has been filed with the IRS, the fiduciary may file a written application requesting release from personal liability for income and gift taxes. The IRS will then be limited to nine months (the “notification period”) to notify the fiduciary of any tax deficiency. Under IRC §6905, upon expiration of the notification period, the fiduciary will be discharged from personal liability for any tax deficiency thereafter found to be due and owing.

Estate taxes: A fiduciary administering an insolvent estate or trust may file, pursuant to 28 U.S.C. §2410(a), a federal district court quiet title action against the U.S. Government. In *Estate of Johnson v. U.S.*, 836 F.2d. 940 (5th Cir. 1988), a Texas fiduciary argued that he had a right to a quiet title action to determine if administration

and funeral expenses had priority over federal tax liens. However, fiduciaries should be cognizant that any quiet title court order may not protect them from an IRS assertion of personal liability under §3713(b).

Discharge from personal liability

Income and gift taxes: IRC §6905 provides the means for a fiduciary to be discharged from personal liability for the income and gift taxes of a decedent. The fiduciary must make written application (filed after the tax return with respect to such tax is made) on IRS Form 5495 for release from personal liability. Upon payment of the tax or expiration of a nine-month period (if no notification is made by the secretary during this period) after delivery of the application for release, the fiduciary will be discharged from personal liability and will be entitled to a written acknowledgment (IRS Form 7990A for gift taxes) of such discharge.

Estate taxes: IRC §6903 provides that a judicial discharge is insufficient to relieve a fiduciary of subsequent estate tax liabilities. However, IRC §2204 authorizes a fiduciary to submit a written request for discharge from personal liability from the federal estate tax. The IRS will

have nine months from the filing of the request, when filed after the estate tax return, to notify the fiduciary of any estate tax due. Upon payment of the tax (the IRS will issue Form 7990) and after expiration of the nine-month period, the fiduciary will be discharged from personal liability for any estate tax deficiency.

Transferee liability

Gift taxes: Under IRC §2501, a donor (party making a gift) will bear primary responsibility for paying any tax liability associated with a gift. This will not preclude a donee, under IRC §6324, from being held liable for the applicable gift tax. Transferee liability will hold the donee personally liable for the applicable gift tax (the donor’s tax deficiency) up to the value of the gift, even if the gift received did not contribute to the unpaid gift tax liability (*U.S. v. Botefuhr*, 309 F.3d 1263 (10th Cir. 2002)).

IRC § 6324 further provides that the tax lien shall remain in place for 10 years from the date the gifts are made. The liability will immediately arise once the donor fails to pay the applicable gift tax (*Poinier v. Commissioner*, 858 F.2d 917 (3d Cir. 1988)).

Estate and trust taxes: Every estate and trust beneficiary (heir, See “Fiduciary liability,” page 10

Author! Author!

We want your articles related to subjects of general interest to legal practitioners with multi-jurisdictional practices. Articles are best when relevant to issues impacting a number of jurisdictions, not just local issues.

Please send documents in MS Word format (.doc) via email to editor@ctf.nu.

Include a brief (two or three sentence) biography and include a photo (digital preferred). If you don’t have a digital photograph, please mail a print to The Florida Bar, OOSD, 651 East Jefferson Street, Tallahassee, FL 32399-2300. Your photo and bio will be kept on file and need only be submitted once.

Contributing authors

The Out-of-State Division appreciates the articles submitted for this edition by our contributing authors. These attorneys can serve as a resource to fellow division members who might have a question regarding these authors’ areas of expertise or if a referral is needed.

Thomas M. Messana and David Neal Stern are partners in the firm of *Messana, Weinstein & Stern PA*. The firm counsels and represents businesses and individuals seeking to resolve troubled situations through means that include negotiation, litigation, corporate reorganization and bankruptcy. The firm maintains offices in Fort Lauderdale and Miami. They can be reached at 954/712-7400.

Marc J. Soss is a director in the Estates and Trusts Group of the *Cohen & Grigsby* law firm. His practice areas include estate and tax planning; probate trust and guardianship administration and litigation; corporate and commercial transactions; and IRS tax controversies. A member of The Florida Bar since 1992, he is based in *Cohen & Grigsby’s* Bonita Springs, Fla., office. He can be reached at 239/390-1900 or msoss@cohenlaw.com.

John Voorn practices in *Orland Park, Ill.* A portion of his practice is in the area of elder law. He is a member of the Elder Law Section of The Florida Bar and serves on the Executive Council of The Florida Bar Out-of-State Division. He can be reached at 708/403-5050 or jcv@hdoml.com.



THE
FLORIDA
BAR
CLE

The Florida Bar Continuing Legal Education Committee and the
Out-of-State Division present

Florida Law at the John Adams Courthouse — Boston

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

Live Presentation: October 1, 2008

John Adams Courthouse - One Pemberton Square - Boston, MA 02108
(617) 557-1000

Course No. 0805R

10:30 a.m. – 11:00 a.m.

Late Registrations

10:55 a.m. – 11:00 a.m.

Welcome and Introductions

11:00 a.m. – 1:00 p.m.

The Investigation and Trial of a White Collar Case: Navigating Around the Land Mines

Panel: Steve Dettelbach (Partner, Baker Hostetler), Bruce Dubinsky (Managing Director, Duff & Phelps), Erik Laykin (Managing Director, Duff & Phelps), Don Workman (Partner, Baker Hostetler)

Investigating and trying a white collar case is a complicated process that requires a specialized multi-disciplinary team approach unlike most other types of litigation. A panel consisting of a forensic accountant, a criminal defense attorney, and a former white collar criminal prosecutor, along with a panel moderator will examine such issues as retention, privilege and work product claims, the computer forensic and E discovery specialist, Jenks discovery, Daubert and opposing experts, trial preparation, and trial execution.

12:00 p.m. – 12:10 p.m.

Lunch (Included) – Return to Panel Discussion

1:00 p.m. – 1:50 p.m.

Attorney Advertising: A National Re-examination

Gary Leppla, President, Ohio State Bar

Notwithstanding a lack of recent case developments, the legal profession has undertaken a new look at the legal and aspirational aspects of attorney advertising and marketing. The new audience is white collar, uninjured and capable of paying fees. Can the Bar demonstrate new aggressiveness? As usual, Florida leads the way, but the debate is nationwide.

OUT-OF-STATE DIVISION

Allyn Kantor, Ann Arbor, MI — Chair
Bill Lee, Waterville, MA — Chair-elect
Eric Meeks, Cincinnati, OH — Program Chair

CLE COMMITTEE

Patrick L. Imhof, Tallahassee, Chair
Terry L. Hill, Director, Programs Division

1:50 p.m. – 2:40 p.m.

How to Avoid a Disciplinary Complaint and What to Do If You Receive One; Reciprocal Discipline

Kenneth Marvin, The Florida Bar, Tallahassee, FL

This presentation focuses on a discussion of adequate communication and documenting that communication as well as the importance of written fee agreements, and how to respond to a Bar complaint. The second part of this presentation provides a summary of how reciprocal disciplines work and the limited defenses available.

2:40 p.m. – 3:00 p.m.

Trusting Your Trust Accounting Recordkeeping

Eric Meeks, Eric Meeks Law Firm, Cincinnati, OH

This information-packed program is designed to sharpen your skills in one area that haunts many attorneys each year by discussing the responsibilities of a Florida lawyer holding client funds in a lawyer's trust account. Learn how to identify typical trust accounting weaknesses, anticipate problems, help protect your client from bank failures, and how to take action to protect yourself from charges of trust accounting negligence in Florida.

3:00 p.m. – 4:00 p.m.

Networking Reception

4:00 p.m. – 5:00 p.m.

Out-of-State Division Executive Council Meeting (all welcome)

CLE CREDITS

CLER PROGRAM

(Max. Credit: 5.0 hours)

General: 5.0 hours

Ethics: 1.0 hour

CERTIFICATION PROGRAM

(Max. Credit: 1.0 hour)

Criminal Trial: 1.0 hour


Seminar credit may be applied to satisfy CLER / Certification requirements in the amounts specified above, not to exceed the maximum credit. See the CLE link at www.floridabar.org for more information.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar News or available in your CLE record on-line) you will be sent a Reporting Affidavit if you have not completed your required hours (must be returned by your CLER reporting date).

HOW TO REGISTER

 **ON-LINE:**
www.floridabar.org/CLE

 **MAIL:**
Completed form w/check

 **FAX: 850/561-5816**
Form w/credit card info.

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Register me for the "Florida Law at the John Adams Courthouse — Boston" Seminar

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Liability

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legatee and devisee) must be appraised of their potential for personal liability for unpaid estate taxes under IRC §6901(a)(1) (probate estate) and §6324(a)(2) (non-probate assets included in the decedent's gross taxable estate). Pursuant to IRC §6901, the liability of a transferee is similar to that of the transferor under §3713. A beneficiary's transferee liability will be limited to the value of assets transferred to them (*Commissioner v. Henderson's*

Estate, 147 F.2d 619 (5th Cir. 1945)).

Florida probate law

Under Florida law, a claim for federal taxes (income, estate or gift) will not be subject to any statutory restriction (F.S. §733.702, or §733.710) or the requirement that a creditor claim be filed in probate proceedings (*U.S. v. Stevenson*, 2001-2 USTC 50,371 (M.D. Fla. 2001)). The IRS can provide notice of the tax liability to the fiduciary by sending Form 10492. A federal tax obligation will receive preference over all other claims against and obligations (state inheritance taxes and other expenses)

of an estate (Rev. Rul. 79-310, 1979-2 C.B. 404). As a result, even if the IRS fails to file a claim against an estate, the fiduciary should actively assert the U.S. Government's priority under IRC §3713.

Florida statutes: To protect him or herself, a fiduciary may use Florida Statutes §733.801 and §733.802 to limit the circumstances under which he or she will be required to either pay or deliver a devise or distributive share to a beneficiary. The limitations include 1) not earlier than five months after the granting of letters of administration; and 2) compelled, prior to final distribution, to pay a devise in money or deliver specific personal property, unless the personal property is exempt personal property. If the administration of the estate is not completed before the entry of an order of partial distribution (devise, family allowance or elective share), a court may require the beneficiary to post a bond with sureties and require him or her to make contribution, plus interest, if it is later determined that there are insufficient assets.

Homestead property: Federal tax law, except as provided under IRC §6334, Property Exempt From Levy, will preempt Florida's exempt property statutes and constitutional homestead protection laws. The preemption will allow the IRS to impose a federal tax lien or levy on personal assets of an estate or a trust for collection (*In Re Garcia*, (S.D. Fla. 2002) or homestead property (*Busby v. IRS*, 79 A.F.T.R. 2d 97-1493 (S.D. Fla. 1997)). IRC Section 6331 permits the United States to collect taxes of a delinquent taxpayer by levy on all property and rights to property unless exempt under Section IRC §6334.

Under Florida law, a fiduciary is obligated to notify the county property appraiser of a decedent's death and termination of the property's eligibility for the homestead tax exemption. F.S. §193.155(9) provides for an assessment of penalties and interest. In addition, if the property was not entitled to a homestead property tax exemption, the statute provides for the imposition of 1) a lien against the real property; and 2) imposition of taxes, interest and a penalty equal to 50 percent of the unpaid taxes resulting from the incorrect classification.

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Book review by John Voorn:

To Survive Caregiving

A Daughter's Experience, a Doctor's Advice on Finding Hope, Help and Health (2007)

Author: Cheryl E. Woodson, M.D., FACP, AGSF

Serving as a caregiver is a daunting task. As noted in a *Wall Street Journal* article, there are an estimated 45 million people who provide care for a loved one, including those with the most devastating diseases, such as cancer, Alzheimer's and Parkinson's. Studies are increasingly showing that caregiving responsibilities can exact a drastic emotional, physical and financial toll, with caregivers experiencing high rates of depression, stress and other physical and mental health problems (*More Resources Help Caregivers Help Themselves*, Laura Landro, Nov. 28, 2007).

At a recent office conference, a new client explained in considerable detail the struggles she experiences and the toll it is taking as she cares for her Alzheimer's afflicted husband. I mentioned to her that there is a resource (*To Survive Caregiving*) to assist her in managing the many responsibilities that come with being a caregiver. The author, Dr. Cheryl E. Woodson, is uniquely qualified to write such a book since she is geriatrician. The book is based on her personal experience as a caregiver to her mother during her mother's 10-year struggle with Alzheimer's disease and is supported by the author's more than 20 years of practice in the field of geriatric medicine.

There is no better authority on caregiving than one who has been a caregiver and who advises caregivers in her profession. Woodson knows the stress involved in caring for a loved one while maintaining her marriage, raising two children and operating a medical practice. The book's theme is that the caregiver is the care recipient's most valuable asset, and if the caregiver does not take care of him or herself, he or she will be unable to provide proper care. The book consists of many anecdotes from the author's personal experience (omitting the identifying details). I

found the anecdotes to be a valuable complement to the helpful advice interwoven within the pages. The book also contains a list of references and resources, including agencies and organizations that a caregiver can access for information.

The author explores the current crisis in caregiving, which is due to today's caregivers being responsible for an increasing population of elders who are living longer and who are

The book is based on her personal experience as a caregiver to her mother during her mother's 10-year struggle with Alzheimer's disease and is supported by the author's more than 20 years of practice in the field of geriatric medicine.

often afflicted with more serious illnesses, all while resources to assist caregivers have been shrinking. We are mindful of the problems caregivers encounter in taking care of care recipients, fulfilling family responsibilities to a spouse and raising children, all while trying to work and plan for retirement. Woodson's book provides guidance and assistance on how to manage those responsibilities.

In the chapter on seeking help from professionals, she addresses the frequent barriers in recognizing that the elder needs help, e.g., denial and ageism. Topics include assistance that a geriatrician can provide, what is involved in a geriatric assessment, the

role of geriatric care managers, what constitutes the level of care prescription and how to develop a productive relationship with the elder's physician. An important point made by the author is that to survive caregiving, the caregiver must enlist assistance from professionals and others. The author stresses the importance of getting help early in the caregiving process and how to obtain help from family and friends.

Another chapter addresses protecting the primary resource of the loved one, the caregiver, and advice is provided on what the caregiver needs to do to promote his or her own physical, financial, emotional and spiritual well-being throughout the caregiving process.

The chapter about the burdens of caregiving on the caregiver's marriage and family contains helpful insights, and the author clearly sets forth the priorities that should be maintained.

Her considerable experience in counseling caregivers is evident in her chapter addressing the difficult decisions of how to approach an elder who can no longer drive safely or live independently. In addition, the issue of confronting admission to a nursing home is also discussed. It is not uncommon to hear of loved ones seeking a promise that they will never be placed in a nursing home. The author discusses how the spirit of that promise is for the caregiver to always provide the best care. Nursing home placement may be the fulfillment of that promise. When admission to a nursing home needs to occur, guidance is given on how to manage the many issues that arise.

A good discussion of end-of-life care issues addresses the three fallacies that people tend to believe:

1. Death is optional.

continued, next page

Book review

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2. Technology is God.
3. Death is failure.

Hospice care receives attention from the perspective “to transform dying into the last act of living well.” It is the author’s experience that the benefits of hospice are often lost due

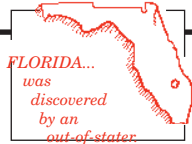
to belated entry into the program. Failure of the caregiver to provide the benefits of hospice to the care recipient at the appropriate time denies the individual all that hospice can offer. Advice is provided to caregivers on dealing with the grief that often begins long before the ailing loved one passes away.

A final chapter addresses the failure of public policy. The author makes the case that the current healthcare system in this country fails both se-

niors and their caregivers. Important issues are raised in that chapter about the future of the American healthcare system as it addresses the needs of our seniors.

To Survive Caregiving is a valuable resource for any caregiver. Elder law attorneys will also find it is helpful to assist in counseling their clients. The book gives advice to the caregiver on the many issues that, if not properly addressed, can overwhelm and exhaust the caregiver. As Woodson states, the caregiver is the “senior’s most important asset” (page 153). This book advises the caregiver on how to maintain a healthy and balanced life. In addition, Woodson says, “You cannot give care, supervise care, advocate for anyone when you are physically ill, financially strapped, emotionally exhausted or spiritually bankrupt” (page 154). Attorneys who counsel caregivers will serve their clients well by providing them with a copy of this book. It is an easy read, and the anecdotes alone keep the reader’s interest in turning the pages.

TO SURVIVE CAREGIVING—A Daughter’s Experience, a Doctor’s Advice on Finding Hope, Help and Health (2007) by Cheryl E. Woodson, M.D., FACP, AGSF. Published by Infinity Publishing.Com, 1094 New DeHaven Street, Ste. 100, West Conshohocken, PA 19428-2713, 877/BUY BOOK and 610/941-9999. ISBN: 0-7414-3725-2, 168 pages, \$18.95.



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