ANews

President's Message

Dear ACREL Fellows,

It has been my honor to serve as your President this past year. It has been a busy year. The Executive Committee members have been incredibly supportive, committed and energetic. All of the Administrative Committees and the Task Force have worked diligently at their assigned tasks and the Substantive Committees have been engaged in providing information of value to their committee members. There follows, in no particular order, a summary of what has transpired during the year:

1. Meetings – We had two terrific in-person meetings this year. Three hundred people attended the Spring Meeting at the Grand Del Mar in San Diego – 210 Fellows and 90 guests. In October, 459 people – 327 Fellows and 132 guests – attended the New York meeting at the Waldorf Astoria. The New York meeting had the highest attendance in ACREL history. The programs at both meetings were excellent, and receptions and special tours were enjoyed by all. Kudos to the Programs Committee and to the Meetings Committee and staff for these successful meetings! Our next meeting will be in Austin March 30-April 2, 2017. After that we will be in Los Angeles October 19-22, followed by Orlando in the Spring of 2018 and New Orleans in the Fall of 2018. Please mark your calendars now and plan to attend. Please note that there will be an ACREL CARES project in Austin, organized by the ACREL Cares Committee and Austin Fellows.

2. Meetings Survey – We received a 40% response to the Meetings Survey that was sent out in early summer. The Meetings

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Committee, under the leadership of Susan Talley, spent a considerable amount of time both designing and reviewing results of the Survey. As a result of responses received to the Survey, the Executive Committee has decided to experiment with moving the "Saturday night" dinner to Friday night – at the New Orleans meeting in the Fall of 2018--and to reduce the registration fee for spouses of Regular Fellows for the Austin meeting by at least $100. These are both experiments – to see if they result in higher meeting attendance by our Fellows. Many thanks to Susan and her committee members for all of their time and counsel.

3. ACREL eCLE – In addition to the two meetings this year, the Programs Committee, under the leadership of Chair Ann Waeger and the Vice Chair of eCLE, Jack Fersko (together with Lee Chilcote and Marie Moore), ACREL produced six ACRELive programs this year, two ALI-eCLE programs and four eCLE programs jointly with the ABA Section of Real Property, Trust & Estate Law (RPTE), which is a new initiative. Several ACREL Fellows—Scott Willis, John McNearney, Marie Moore, Nancy Little and Roger Winston--have been involved in organizing the ACREL/RPTE programs both on the ACREL side and the RPTE side. It is important to ACREL's revenue sharing that all ACREL Fellows signing up for the ACREL/RPTE programs (and the members of their firms) do so through ACREL rather than the ABA so we can establish the benefits ACREL brings to the table. ACREL Fellows and their firms are able to take advantage of discounted fees for both the ACREL/RPTE programs and the ALI-eCLE programs produced by ACREL. The ACRELive programs are free to Fellows and their firm colleagues. Thank you to all of those who have worked to make these eCLE programs successful.

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Meetings Calendar

2017 Mid-Year Meeting
March 30-April 2, 2017
The Four Seasons Hotel
Austin, TX

2017 Annual Meeting
October 19-22, 2017
InterContinental Hotel
Los Angeles, CA

2018 Mid-Year Meeting
March 22-25, 2018
Waldorf Astoria
Orlando, FL

2019 Annual Meeting
October 16-20, 2019
Westin Hotel
Montreal, Canada

STAFF BOX

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Editor
Jill H. Pace
Executive Director

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4. New Fellows –ACREL admitted 43 new Fellows in the Spring. All 43 accepted and 31 attended the New York meeting. I hope you will all welcome the new Fellows. Many thanks to Rebecca Fischer and the members of the Member Selection Committee for their thoughtful and diligent work during the member selection process. This Fall we have had 45 nominations for admission as new Fellows. Voting will start December 12. Please VOTE! Our Member Selection Committee—now chaired by Toni Wise–needs to hear from you about the nominees. Also, please nominate candidates for admission to ACREL. Nominations can be sent to the office or to the Member Development Committee year-round. No need to wait until next September. The Member Development Committee, under the leadership of Bill Sklar, can assist with the nomination process. The Member Development Committee works to identify prospects and works with identified prospects to assist them in meeting "give-back" requirements and also assists with finding nominators and seconders in all jurisdictions. The Member Development Committee has a diversity initiative and a small states initiative. Please be in touch with Bill if you have prospects for admission.

5. Orientation and Integration – The Orientation and Integration Committee, chaired by Jo Anne Stubblefield, organized mentors for each of the 43 new Fellows and reached out to the new Fellows to orient them to ACREL. The Committee also encourages Fellows to organize local gatherings. At least five local gatherings have been held this year.

6. Member Selection Guidelines – The Member Selection Committee recommended that the Member Selection Guidelines be modified to provide that candidates who are deferred be deferred until the second member selection cycle after the deferral decision rather than in the year immediately following. The Board of Governors approved that change at its meeting in October. There are also several clarifications and two additional substantive changes that the Member Selection Committee recommended, and that were adopted by the Board. The first is adding the word "adoption" in Section 2 of the Guidelines. The other change was made in Section 4.c. in the context of a potential candidate for membership who is a distinguished practitioner with many years of practice, with the requisite give back, but has been a managing partner in a firm for the past few years so has not had "five of the requisite ten years of substantial experience in real estate law during the five year period immediately preceding nomination." That provision was amended to give the Member Selection Committee more discretion when considering the currency of the candidate's experience. The revised Guidelines are posted under the Membership tab on the ACREL website, www.acrel.org.

7. Task Force on the Admission of Canadian Lawyers—In response to a request by some Fellows to amend the By-Laws to admit Canadian lawyers, I appointed a Task Force, chaired by Jay Epstien and consisting of Marilyn Maloney, Mark Mehlman and Andrea Geraghty, to consider the issue. The Task Force interviewed over 50 Fellows but did not reach a consensus on the issue of whether to expand eligibility for membership in the College to Canadian lawyers. The report of the Task Force is posted on ACREL SHARES under ACREL Docs. The Board of Governors determined not to take any action at this time. Thank you to the members of the Task Force for the time they spent interviewing Fellows and considering the issues.

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8. RPTE/ACREL Scholars Program – The College was approached by the ABA Real Property Trusts and Estates Section (RPTE) to participate in the RPTE Fellowship Program. The Program encourages active involvement and participation by young lawyers in RPTE Section activities while, at the same time, developing future leaders. Applicants apply to the Program and, if selected, are appointed for two years. The RPTE Fellows must be younger than 36 or have been admitted to the bar less than 10 years, among other criteria. The Fellows receive up to $2750 annually to attend RPTE meetings. They work with designated Committee Chairs, who serve as mentors, and get involved in a substantive project, which can include writing for a RPTE publication or speaking at a Section CLE event. Each year there are typically 5 real estate Fellows and 5 trust and estate Fellows. ACREL has been asked to fund an extension of the Fellowship Program for current RPTE Fellows --five young real estate lawyers-- following the two -year period. The Executive Committee voted to contribute $5000 to underwrite a one-year extension of the Program for fiscal year 2017. We see the following benefits: (1) ACREL is sharing in net revenue from the ACREL/RPTE eCLE programs so funding the Fellowship program is a way to evidence our good faith commitment to the overall relationship; (2) Participating in the program will raise ACREL's profile with young, up and coming real estate lawyers and within the broader RPTE Section as a result of the acknowledgement that we expect to receive as a result of this support; (3) While the Fellows are young, it is possible that we could generate new prospects that the Member Development Committee could nurture for future nominations; (4) The Fellowship Program maintains a strong commitment to diversity which is an objective of ACREL as well; and (5) The RPTE Fellows who receive ACREL financial support will be called RPTE-ACREL Real Property Scholars and will work with ACREL Committees to submit articles or edit news articles, assist in editing program materials and assist with presentations. ACREL will evaluate the program at the end of the 2017 fiscal year to determine whether or not to continue its support. Jay Epstien has been working closely with Ira Meislik, among others at RPTE, to make this a successful program for both organizations. There will be more news about the RPTE/ACREL Scholars in the next edition of ACREL Notes.

9. ACREL Notes – The Communications Committee under the leadership of Peggy Rolando produced the first two editions of ACREL Notes. The ultimate goal is 4 editions of ACREL News and 6 editions of ACREL Notes each year. Please think about informative items to contribute. They don't have to be law review articles or even on legal topics—local gatherings, honors, items related to Meeting venues are all welcome. We welcome your feedback concerning format, content and medium – let us know what you think.

10. Substantive Committees – Roger Winston, Jay Epstien, Rick Mallory and Ann Cargile had two rounds of calls with the leaders of the Substantive Committees. A member of the Programs Committee and Communications Committee joined each call. These calls have been held twice a year for the past several years and have proven to be a great way to stay in touch with the Substantive Committees. Discussions with the Committee leaders address possible programming and Notes/News ideas, identifying "hot" topics within the purview of each committee, encouraging engagement of newish Fellows, and addressing committee leadership succession.

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President's Message

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11. By-Laws – The By-Laws Committee, co-chaired by Ken Jacobson and Tom Kaufman, worked for eight months on comprehensive revisions to the ACREL By-Laws, which the Board of Governors approved in October, and which will be presented to the Fellows for adoption at the Austin meeting. A "red-lined" draft of the approved By-Laws is posted on ACREL SHARES under ACREL Docs. The revisions are intended to reflect current practice and to provide flexibility in the future. The other members of the hard-working committee are Linda Striefsky, Ann Saegert and Richard Newman.

12. Senior Counselors – An enthusiastic senior counselors group, under the leadership of Bob Wright, has met twice, in San Diego and New York, and looks forward to an even more enthusiastic gathering in Austin.

13. Press at Meetings – The Executive Committee approved adoption of the Chatham House Rules for Press Coverage of our Meetings. The Chatham House Rules provide that representatives of the press may use information from the meetings but are not allowed to reveal who made any comment.

14. New Data Base – Jill, Henri and Julie have been very busy all spring and summer installing new data base software and loading all of our data into it. We are now part of the 21st century and can register for meetings on-line. Jill is investigating the meeting app that is associated with the data base software to see if it is more beneficial than the current Crowd Compass version.

15. Audit – The Audit Committee of Steve Waters, Doug Bregman, Andy Herz, Ray Truitt, and David Weiss, reviewed the 2015 audit and recommended its approval. It was accepted by the Executive Committee and presented to the Board at the October meeting. It is posted on ACREL Shares.

16. Budget and Finance – Last, but certainly not least, at the recommendation of Treasurer Steve Waters, the Executive Committee and Board approved a balanced budget for 2017. A key to the balancing is the terrific work of the Finance Committee in raising sponsorships. If you have ideas for companies that might be interested in being a sponsor of ACREL, please let Marilyn Maloney or Steve know. Also part of the budgeting process is the work of the Compensation Committee, led by Dick Goldberg. Thank you to all for your work on behalf of ACREL.

All of us on the Executive Committee will be delighted to hear from you with regard to any of the above topics or any other suggestions you may have. Please be in touch if you have comments or questions. Thank you for your participation.

A HUGE thank you to all committee officers and members and Governors for your hard work and support this past year and a special thank you to the Executive Committee and to Jill, Henri and Julie. We bid Henri a very fond farewell and wish her the best as she sets forth on retirement.

All the best,

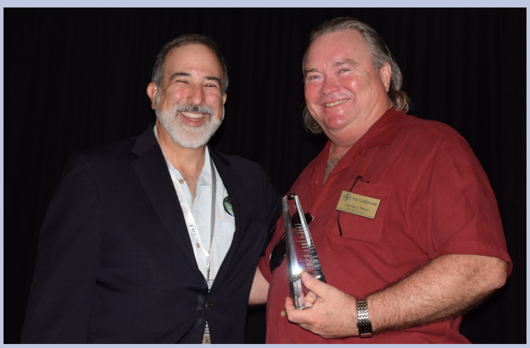
Kathy Murphy

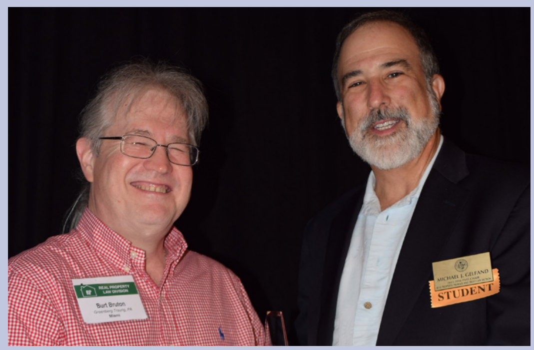
ACRELades

Larry Bensignor was named USA Real Estate Lawyer of the Year by Finance Monthly magazine, as part of its 2016 Global Awards. Earlier this year, the New York Stock Exchange named Larry as one of five national finalists for its Distinguished General Counsel Award, as part of its Governance, Risk and Compliance Awards.

At the Annual Meeting of the American College of Mortgage Attorneys (ACMA), **Nancy Little** was elected President and **Jake Reby** was elected Treasurer.

Two ACREL Fellows were recognized for their outstanding service to the legal profession and their communities by the Florida Bar's Real Property Probate and Trust Law Section: **George Meyer** of Tampa was awarded the Robert C. Scott Memorial Award, and **Burt Bruton** was awarded the William S. Belcher Lifetime Professionalism Award. *Photos: Fellows George Meyer and Burt Bruton receiving outstanding service awards, presented by Fellow Michael J. Gelfand, Immediate Past Chair of the Florida RPPTL Section.*

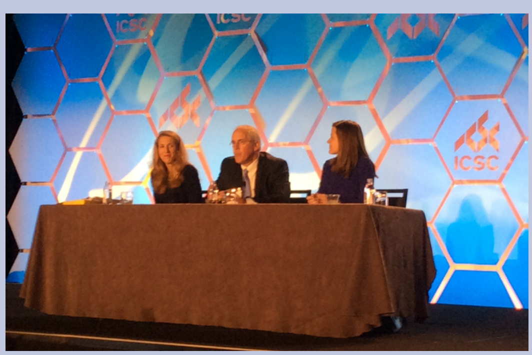




Greg Stein stepped down in August 2016 after serving for seven and one-half years as Associate Dean for Faculty Development at the University of Tennessee College of Law. He is spending the fall 2016 semester on a research leave and will return to full-time teaching in January 2017.

Ann Waeger became the 58th inductee into the CREW Foundation's Women of Vision program at the CREW Network Convention and Marketplace in New York City in October.

Pam Westhoff and **Kevin Shepherd** leading a packed ethics session at the 2016 ICSC Law Conference.



Send us your news for future issues!

No Good Deed Goes Unpunished: A Harsh Lesson on Multi-Jurisdictional Practice

*by John G. Cameron, Jr.**

In a decision that many will find surprising, the Minnesota Supreme Court recently held that engaging in e-mail communications with people in Minnesota may constitute the unauthorized practice of law in Minnesota, in violation of Minn. R. Prof. Conduct 5.5(a), even if the lawyer is not physically present in Minnesota.[1] In this sad case, the Colorado lawyer involved represented a Minnesota couple (his in-laws) with respect to a Minnesota judgment and attempted to negotiate, via e-mail, the satisfaction of that judgment with a Minnesota lawyer.[2] Many lawyers, perhaps even some ACREL fellows, may unwittingly engage in similar practices.

Now a more careful approach may be warranted. Many practitioners may not realize that in most jurisdictions being sanctioned out of state triggers a duty to self-report to all jurisdictions admitted and may then result in "hometown" disciplinary proceedings. Discipline may also trigger ACREL sanctions. And unauthorized practice is unlawful in many jurisdictions.[3] Just because others may do it, or that the counseling may, to you, be *de minimus*, that may not satisfy a bar that is "foreign to you"!

Before 1998, many attorneys assumed that unauthorized practice in a state required some degree of physical presence in the state.[4] The *Birbrower* decision changed that. What, then, is the present state of the law on the subject of contacts sufficient to subject a lawyer to the jurisdiction of a state's rules of conduct and disciplinary proceedings under them? In other words, what constitutes "entry" into a state by a lawyer sufficient to constitute the practice of law there?

The best known decision in this arena is indeed *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119; 949 P.2d 1 (1998). In this case, the California Supreme Court held that an out-of-state law firm, not licensed to practice law in California, violated California law when it performed legal services in California for a California-based client under a fee agreement which stipulated that California law would govern all matters in the representation. *Birbrower* is the seminal decision discussing the unauthorized practice of law under these circumstances.

California's Business and Professions Code Section 6125 provided that "[n]o person shall practice law in California unless the person is an active member of the State Bar." In the early 1990's (prior to the prevalent use of e-mail), three attorneys from a New York law firm, each licensed in New York and not in California (none of the firm's attorneys were licensed in California), performed "substantial work"

* Mr. Cameron is a member of Dickinson Wright PLLC and practices out of its Grand Rapids, Michigan, office. He is a member of the Illinois, Michigan, Colorado and North Carolina bars. The assistance of Christina K. McDonald and Nicholas Curcio, Grand Rapids member and associate, respectively, of Dickinson Wright PLLC, is gratefully acknowledged.

[1] *In re Charges of Unprofessional Conduct in Panel File No.* 39302, 884 N.W.2d 661 (Minn. 2016).

[2] That Minnesota lawyer reported the Colorado lawyer to the Minnesota disciplinary authorities. About the only solace coming out of this decision for the Colorado lawyer is the court's conclusion that the appropriate disposition for this misconduct was an admonition. It is unclear whether the lawyer will be subject to discipline in Colorado.

[3] *See, e.g.,* HRS §§ 605-14, 17; MCL 600.916.

[4] *See* S. Wechsler, "Professional Responsibility," 53 Syracuse L. Rev. 737, 741-43 (2003).

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for a California client under California law. 17 Cal 4th at 124-125. The attorneys traveled to California several times in their representation of the client, and in those meetings, they unquestionably practiced law through the giving of recommendations and legal advice and even filing an arbitration demand in California. *Id.*

The client subsequently sued the law firm for legal malpractice, alleging, among other claims, that the firm practiced law without a license in California, making its fee arrangement unenforceable. *Id.* at 126.

The California court discussed at length the definition of the statutory phrases to "practice of law" and "in California." *Id.* at 127-128. It concluded there was no doubt that the firm was practicing law, but noted that there was no authority on what it meant to practice law "in California." The court said:

> the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.' The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

Id. at 128. Thus, the concept of "sufficient activities" was raised, though not specifically defined.

The court adopted a case-by-case approach, noting that an unlicensed lawyer's physical presence in the state is only one factor in deciding whether a person engaged in the unauthorized practice of law. "For example, one may practice law in the state . . . although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means," rejecting "the notion that a person automatically practices law 'in California' whenever that person practices California law anywhere or 'virtually' enters the state by telephone, fax, e-mail or satellite." *Id.* at 128-29.

The court ultimately held that the law firm engaged in the unauthorized practice of law in California. In making its decision, the court said "[a]lthough we are aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states, we do not believe these facts excuse law firms from complying with section 6125."
Id. at 124-25.

The Minnesota court, in evaluating the Minnesota lawyer's allegations of the unauthorized practice of law, leaned on the Birbrower analysis. "Appellant contacted 'D.R.,' a Minnesota lawyer, and stated that he represented Minnesota clients in a Minnesota legal dispute. This legal dispute was not interjurisdictional; instead, it involved only Minnesota residents and a debt arising from a judgment entered by a Minnesota court." 884 N.W.2d at 666.

A brief review of decisions around the country reveals that other courts have on other facts also found "sufficient contact" to implicate their rules of conduct:

• *In re Williamson,* 838 So.2d 226 (Miss. 2002): Here, the Mississippi court reviewed the lower court's denial of an out-of-state lawyer's motion for admission *pro hac vice.* The lawyer, who was not licensed in Mississippi, had participated in more than five cases in Mississippi within the immediately preceding one-year period, in violation of Mississippi's rules governing the unauthorized practice of law. The Mississippi court held that the lawyer was engaged in the unauthorized practice because he advertised legal services in Mississippi and retained clients specifically to represent them in

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litigation in courts of that state, but then used local counsel to handle the actual court appearances in an attempt to circumvent the state's practice of law requirements.

• *In re Babies*, 315 B.R. 785 (Bankr. N.D. Ga. 2004): This decision provides a cautionary tale for lawyers who believe they are appropriately seeking local counsel for their out-of-state clients following preparation of documents or similarly limited representation. In this case, Illinois lawyers who were not licensed in Georgia were retained by debtors through a credit counseling referral service. The Illinois lawyers prepared their bankruptcy filings for the debtors and found local counsel in Georgia to represent them. The Georgia counsel filed the bankruptcy papers and appeared as the debtors' sole counsel. After learning that the debtors had paid Illinois counsel for preparing their papers, the court brought all counsel in to determine whether Illinois counsel was engaged in the unauthorized practice of law in Georgia. The court held that the Illinois counsel had engaged in the unauthorized practice of law, but admitted them *pro hac vice* to eliminate any sanctionable conduct, finding that they had operated in good faith in obtaining Georgia counsel. Interestingly, the court held that the Illinois attorneys had performed legal services in Georgia through their use of the telephone and the mail.

• *In re Tonwe*, 929 A.2d 774 (Del. 2007): In this case, a Pennsylvania lawyer was found to have engaged in the unauthorized practice of law in Delaware. She represented Delaware residents in connection with their personal injury claims under Delaware insurance policies from her Delaware office. The lawyer lived in Delaware, was active in networking with church groups in Delaware, and actively recruited clients in that state.

• *In re Ferrey*, 774 A.2d 62 (R.I. 2001): In this case, a Massachusetts attorney actively practicing law before the Rhode Island Energy Facility Siting Board sought *pro hac vice* admission, *nunc pro tunc*, to the Rhode Island bar. However, the Board before which he had been practicing did not have the authority to grant the attorney permission to practice before it, so the lawyer sought admission through the courts. The court refused to admit the attorney *nunc pro tunc* because he was not authorized to practice law in Rhode Island and did so unlawfully, but did permit a prospective *pro hac vice* admission.

Thus, *Birbrower's* "sufficient-contact" analysis seems to be consistent with the way most courts analyze cases involving contact (i.e. emails,[5] phone calls, etc.) emanating outside of their state. The two key factors seem to be: (1) whether the attorney advises the client on the law of the state or engages in conduct, like negotiations, that might require knowledge of the law; and (2) whether the client is located in the state where the attorney is unlicensed.[6] Where the answer to both of those questions is "yes," courts tend to find unauthorized practice in the state. But where the answer to at least one of those questions is "no," courts tend find that the attorney did not engage in unauthorized practice in the state.

Two decisions illustrate the latter point:

In *Fought & Co. v. Steel Eng'g & Erection, Inc.*, 87 Haw. 37; 951 P.2d 487 (1998), the law firm at issue, that consulted with the Hawaiian counsel that was in charge of their common client's litigation, was located outside of Hawaii and did not appear in any Hawaii court on Fought's behalf. Its services in connection with the Hawaii litigation did not constitute the unauthorized practice of law because Fought and the law firm were both located in Oregon; hence, the law firm did not represent a Hawaiian

[5] Notably, all of the cases discussed above involve a sustained pattern of communications being sent into the state. None of the cases deal with a situation where an attorney sent but a single email message.
[6] Indeed, the behavior that is most likely to subject an attorney to discipline is the engagement of a new client in a state where the attorney is not licensed, and advising that client or negotiating on behalf of that client in a way that relates to the law of the state where the attorney is not licensed.

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client, all services performed by the law firm were in Oregon, and the law firm did not draft or sign any papers filed during the appeal, did not appear in court, and did not communicate with counsel for other parties on Fought's behalf.

According to the Hawaii court, the following did amount to the practice of law, but because none were conducted in Hawaii members of the Oregon firm were not subject to discipline there:

• Consultation with Fought and Fought's Hawaiian counsel regarding an appeal
• Preparation of Fought's statement of position in anticipation of mediation
• Assisting Fought's Hawaii counsel with legal research, analysis of briefs and papers submitted by other parties
• Resolution of issues pertaining to the posting of bond
• Planning Fought's strategy for the appeal
• Reviewing and critiquing briefs and other papers prepared by Fought's Hawaiian counsel

El Gemayel v Seaman, 72 N.Y.2d 701; 533 N.E.2d 245 (1988), involved an attorney admitted to practice in Lebanon and working as a Middle Eastern law consultant in Washington, D.C., who sought fees incurred in New York in connection with a Lebanese legal matter. His contacts with New York were deemed incidental and innocuous:

• Client residing in New York sought his advice on whether Lebanese courts would honor a Massachusetts custody decree
• He made frequent phone calls to client in New York to report on progress of the case
• He made a single visit to New York to return luggage client had left in Lebanon (although they did discuss the bill he was owed during that visit)
• He mailed his bill to New York

The lawyer had contacts in places other than New York:

• He rendered his opinion in a letter addressed to clients in Massachusetts
• The bulk of plaintiff's services were performed in Lebanon
• He accompanied client and her Massachusetts attorney to a Massachusetts court to obtain copy of judgment
• He authenticated documents so that they could be used in Lebanon
• He helped client complete a power of attorney form and in applying for a Lebanese visa

It is important to remember that the rules in many states expressly allow an out-of-state attorney to "occasionally" or "temporarily" represent clients in the state, if the representation arises out of that attorney's authorized practice in his home state. *See* AMA Model Rule 5.5; 8.5. Like the "sufficient contact" test itself, these exceptions seem to turn in large part on whether the client is located in the state where the attorney is unlicensed to practice. *See, e.g., In re Babies*, 315 B.R. 785 (Bankr. N.D. Ga. 2004) (lengthy discussion of when it is appropriate for an attorney to continue advising an existing client in another state).

Finally, although this is not the unanimous opinion of members of the ACREL Committee on Professional Responsibility, it seems that states generally are not concerned with attorneys who represent out-of-state clients with respect to out-of-state matters while vacationing or visiting. See comments to Florida Rule 4-5.5; Maine Professional Ethics Opinion #189. The same two factors that courts consider with respect to extraterritorial activities seem to also be the most relevant when the out-of-state attorney is physically present in the state. ■

[7] The lawyer arguably engaged in the practice of law in Massachusetts, but that wasn't an issue in this case.

What We Have Learned from the 2016 Meetings Survey

by James N. Candler, Vice Chair, Meetings Committee

Last May, the Meetings Committee asked for your input to assist us with planning future meetings that will better serve the College. We thank you for your many constructive comments and suggestions and we continue to review them carefully, but we cannot elaborate on them here. What follows is a statistical summary of the responses, as well as the ranking of stated preferences for meeting locations, without comment regarding the myriad practical considerations that impinge on whether they might serve as a suitable meeting site. Two significant departures from 2012 survey results are noted.

Member Attendance at Meetings

79.7% of respondents have attended at least one meeting in the past five years and 51.5% have attended more than three. Those who have not attended or have attended only a few meetings in the past five years have identified the following reasons (in descending order of times mentioned): location (85), time away from office (79), scheduling conflicts (78), cost of registration (65), cost of hotel (61), no direct flight (55), employer reimbursement policy (54) and cost of flight (44). 43% of these decision criteria are directly a function of cost and presumably all but scheduling conflicts are a function of or affected by choice of location.

Guest Attendance at Meetings

39.4% of respondents usually bring a guest, 34.3% sometimes do, and 26.3% never do. The three most cited reasons for not bringing a guest are cost (42.4%), family obligations (41.5%) and job obligations (27.3%). 55.6% of those bringing guests regularly register them, 16.1% sometimes do, and 28.3% do not. The two reasons most cited for not registering guests are cost of registration (66.7%) and no guest interest in ACREL activities (30.0%). When asked what might best be eliminated to reduce the cost of guest registration, 67.5% of respondents said the hospitality suite and 46.1% said guest breakfasts. A smaller number suggested that the guest charge for the Saturday night dinner be reduced and broken out as an optional registration item.

Saturday Night Dinner

52.3% of respondents usually attend the Saturday night dinner, 31.3% sometimes do, and 16.5% do not. The reasons most cited for not attending are family and job obligations, leaving after the Saturday Program to avoid additional hotel expense, the late night schedule making Sunday morning flights more problematic and not wishing to attend the dinner if not accompanied by a guest.

Moving the Dinner to Friday Night

In the 2012 survey, 62% of respondents indicated they did not want to switch nights. In the 2016 survey, however, 40.9% of respondents said they favor the switch, 32.1% said they have no preference, and only 27.0% remain opposed. There is little concern that attendance at the Saturday morning program would be affected by the switch, as the survey results confirm that the educational programs are far and away the most important meeting component. However, a significant attrition of Saturday night room occupancy would have cost implications for the College, as the discounted group room rate enjoyed by all those who attend is conditioned on guaranteed minimum amount of guest room revenue. If there is a shortfall, a significant portion of it is charged back to the College. Given a switch of the dinner to Friday night, 22.4% of the respondents said they would be inclined to continue to stay through Saturday night, 29.1% said no, and 48.5% said, “it depends” on such things as location, travel logistics, whether the Fellow brings a guest and the variety and quality of tours and other interesting things in the vicinity to do and see on Saturday.

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All of these criteria are impacted by the meeting location, so we proceed cautiously with implementation. As was announced at the Annual Meeting in New York, we will try it out at the 2018 Annual Meeting in New Orleans, bolstered by the expectation that most of the attendees will want to sample the special events and activities occasioned by the city's 300th anniversary celebration.

Lower Cost Accommodations

44.5% of respondents indicated that they would be interested in considering three or four star hotels for future meetings, i.e., not a Four Seasons, Ritz-Carlton, St. Regis, Peninsula or the like, 29.7% said no, and 25.8% had no preference. 53.4% indicated that they would favor having both luxury and affordable options for a meeting, 10.7% said no and 25.9% had no preference.

Location Preferences

In 2012, 94% of respondents indicated that they prefer a continuation of alternating fall meetings in cities and spring meetings in resort locations. 64% of respondents indicated interest in having meetings in smaller cities, the four most frequently mentioned being Austin, Nashville, Minneapolis, and Baltimore. As you know, we have since met at Baltimore and will meet at Austin next spring. In 2016, 54.2% of the respondents support continuation of the pattern of alternating city and resort meeting locations, 8.2% do not, and 37.6% have no preference. As between city and resort locations, 29.6% favor cities, 21.2% favor resorts and 49.2% have no preference.

The meeting locations most mentioned as "favorites" are San Francisco (98), New York (96), Chicago (79), Boston (62), Washington (51), San Diego (41), Vancouver (33), New Orleans (27), Seattle (25), Scottsdale (24), other Arizona resorts (23), Charleston (23), Miami (23), Toronto (22), southern California resorts (20), Naples (18) and other Florida resorts (15). The following were most mentioned in response to a question requesting interest level in 17 specified cities: Charleston (243), Montreal (220), New Orleans (187), Santa Barbara (181), Nashville (166), Palm Springs (145), and Minneapolis (113). New Orleans has since been firmed up for October 2018 and Montreal for October 2019. ■

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"Bad Boy" Guarantees and the IRS: A Risk to Qualified Nonrecourse Financing Tax Status

by Joseph Philip Forte, Jack A. Garraty, and Gregory M. McKenzie,
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In a nonrecourse real estate loan to a partnership, the loan documents will often provide that if specific trigger events occur (a "nonrecourse carve-out"), personal liability will be imposed on the general partner or managing member and on a guarantor under a separate nonrecourse carve-out guarantee (a '"bad boy' guarantee"). A highly controversial IRS ruling on this common real estate financing feature recently caused concern in the real estate finance industry because the ruling called into question well-recognized tax rules relating to the use of nonrecourse debt in most real estate financing transactions. Following strong opposition from the industry, the IRS withdrew its ruling. This article summarizes the background and significance of the ruling and why the IRS decided to reconsider.

Section 1.752-2(b)(4) of the Treasury Regulations states: "If a payment obligation would arise at a future time after the occurrence of an event that is not determinable with reasonable certainty, the obligation is ignored until the event occurs." Tax practitioners have viewed nonrecourse carve-out provisions that are triggered by the voluntary "bad acts" of a borrower, which include fraudulent actions or voluntary actions that adversely affect the value of collateral, impair or reduce its cash flow, or impede or delay a lender's foreclosure of a mortgage, as within the scope of this provision, and therefore ignored until the triggering event occurs.

The IRS Office of Chief Counsel released legal memorandum 201606027 (the "IRS Memorandum" or "Memorandum") that called into question two fundamental and well-established aspects concerning the tax treatment of investors in real estate limited partnerships and limited liability companies that utilize nonrecourse financing. The Memorandum concluded that a customary "bad boy" guarantee given by an LLC member in connection with the LLC's real estate nonrecourse financing was sufficient to cause the financing (a) to constitute a "recourse" liability for purposes of determining the members' tax basis in the LLC and (b) to fail to be a "qualified non-recourse financing" under the at-risk investment rules. As a consequence, the non-guaranteeing members of the LLC were deprived of the necessary tax basis and at-risk investment to claim losses from the LLC in excess of their capital contributions. If this position had become established law, real estate investors would have had to recapture billions of dollars in losses from previous years and would not have been able to share in losses in excess of their equity capital going forward.

Background

To claim tax losses from a partnership (including an LLC taxed as a partnership), a partner must have sufficient tax basis and "at-risk" investment in his partnership interest. In a typical real estate partnership, a partner's tax basis and at-risk investment is derived from his equity contribution plus his share of partnership "recourse" liabilities and his share of "non-recourse" liabilities (in the case of computing tax basis) and his share of "qualified non-recourse financing" (in the case of computing at-risk investment). Recourse liabilities are those for which a partner bears the economic risk of loss, whereas non-recourse liabilities are those for which no partner bears the economic risk of loss. Likewise, a qualified non-recourse financing is a financing meeting certain conditions, including that no partner has personal liability for its repayment. Recourse liabilities are allocated only to the partner who bears the risk of loss with respect to the liability, while non-recourse liabilities and qualified non-recourse financings are generally allocated among the partners in accordance with the manner in which they share partnership profits.

For purposes of determining whether a partner bears the economic risk of loss with respect to a partnership liability under the tax basis rules of

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Section 752 of the Internal Revenue Code of 1986, as amended (the "Code"), and the Treasury Regulations thereunder, all statutory and contractual obligations relating to the liability are taken into account, including, for example, a partner guarantee of partnership debt. However, a guarantee obligation will be disregarded "if, taking into account all the facts and circumstances, the obligation is subject to *contingencies that make it unlikely that the obligation will ever be discharged.*" Treas. Reg. § 1.752-2(b)(4) (emphasis added). Further, if an "obligation would arise at a future time after the occurrence of an event that is not determinable with reasonable certainty, the obligation is ignored until the event occurs." Treas. Reg. § 1.752-2(b)(4). Before the release of the IRS Memorandum, it was well-settled that a "bad boy" guarantee was a "contingent liability" and should be disregarded for purposes of determining whether the guarantor bore the economic risk of loss for the underlying debt because in practice it is unlikely that the guarantee would ever be triggered. [1]

Most real estate partnerships use a combination of equity and non-recourse financing to fund their real estate acquisition and/or development activities. In this context, non-recourse financing means the lender will look only to the assets of the partnership and not to the partners to repay the loan, except that the lender often requires the sponsoring or managing partner to give a so-called "bad boy" guarantee. A "bad boy" guarantee is triggered only upon the occurrence of certain events that would jeopardize the lender's ability to be repaid from the partnership's assets and that are within the control of the sponsoring or managing partner. "bad boy" events often include the partnership's voluntary bankruptcy filing, the managing partner's filing of an involuntary bankruptcy petition against the partnership, etc. In practice, "bad boy" guarantees are rarely triggered because the trigger events are within the control of the party providing the guarantee, and it generally would make no sense for the guarantor to voluntarily expose himself to full liability on the loan.

IRS Memorandum 201606027

Facts

The IRS Memorandum dealt with the following facts. An LLC, treated as a partnership for tax purposes, and its subsidiaries borrowed funds from a lender on a non-recourse basis to support their real estate activities. One of the LLC's members (the "NRG Member") provided a customary "bad boy" guarantee, obligating him to repay the loan in full if the LLC failed to obtain the lender's consent before obtaining subordinate financing or transferring the secured property, if the LLC filed a voluntary bankruptcy petition, or if the NRG Member colluded or cooperated in an involuntary bankruptcy petition of the LLC.

Analysis of IRS Memorandum 201606027

The Memorandum is dated October 23, 2015 and was released by the IRS on February 5, 2016. It was authored by the IRS Office of Chief Counsel. The Memorandum ignored customary real estate industry practice and concluded that for purposes of allocating partnership tax basis among the LLC's members, the NRG Member's guarantee caused the LLC's financing to constitute a recourse liability under Section 752 of the Code, thereby requiring the liability to be allocated entirely to the NRG Member and therefore depriving the LLC's other members of any share of the liability in computing their tax basis in the LLC. The IRS Memorandum also concluded that the NRG Member's guarantee caused the LLC's financing not to constitute a "qualified non-recourse financing."

In reaching its conclusion that the LLC's financing constituted a recourse liability under Section 752, the Chief Counsel reasoned that the mere enforceability of a guarantee under local law is generally sufficient to cause the guarantor to be treated as bearing the risk of loss for the guaranteed liability and that

[1] *See, e.g.,* McKee, Nelson & Whitmire, Federal Taxation of Partnerships and Partners, 4th Edition, Volume 1, p. 8-12 ("For example, an otherwise nonrecourse real estate loan is not transmuted into a recourse debt with respect to which the partners bear the economic risk of loss simply because they agree to pay the loan if the partnership . . . makes a voluntary bankruptcy filing.").

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because the NRG Member could potentially be called upon to discharge his guarantee obligations before an actual payment default by the LLC, the trigger events contained in the guarantee *were not "conditions precedent" that had to occur before the lender was entitled to seek repayment from the NRG Member.* [2] While it may be true that a trigger event under the guarantee could occur, and thus the NRG Member's payment obligation likewise triggered, before an actual payment default by the LLC, it is difficult to see how the trigger events should not be viewed as conditions precedent to the NRG Member's payment obligations because in the absence of the occurrence of any trigger event, the NRG Member would not be obligated to make a payment, and the NRG Member had every incentive not to cause a trigger event since by doing so he would voluntarily expose himself to full personal liability on a troubled loan. The Chief Counsel attempted to bolster its position by arguing that even under Section 1.752-2(b)(4) of the Treasury Regulations (dealing with contingent obligations), the trigger events do not constitute "contingencies" that would make the NRG Member's payment obligation unlikely to occur. [3] It failed, however, to address the second part of that regulation, which requires a contingent payment obligation to be disregarded if it would only arise at a future time after the occurrence of an event that is not determinable with "reasonable certainty." [4] Given that "bad boy" guarantees, including the one at issue in the IRS Memorandum are triggered, if at all, only upon the occurrence of specified future events, which industry experience reveals rarely occur, it is unclear why further analysis was not given to this provision. For example, voluntary bankruptcies and collusive involuntary bankruptcies almost never occur now because of a guarantor's full recourse liability under standard "bad boy" guarantees.

In reaching its conclusion that the LLC's financing *did not* constitute a "qualified non-recourse financing" under the at-risk rules of Section 465 of the Code, the Chief Counsel stated:

> "When a member of an LLC treated as a partnership for federal tax purposes guarantees LLC qualified nonrecourse financing, the member becomes personally liable for that debt because the lender may seek to recover the amount of the debt from the personal assets of the guarantor . . . [and] the debt is no longer qualified nonrecourse financing . . . It should be noted that this conclusion generally will not be affected by a determination that the guarantee is a 'contingent' liability within the meaning of section 1.752-2(b)(4). Instead, the question is simply whether the guarantee is sufficient to cause the guarantor to be considered personally liable for repayment of the debt, based on all the facts and circumstances . . ."

Reaction to IRS Memorandum

Although the IRS Memorandum was not precedential authority and could not be relied upon by the IRS in other cases, it was released by the National

[2] This reasoning appears to run counter to the conclusion reached in Example 8 of Section 1.752-2(f) of the Treasury Regulations, where a general partnership (and its general partners) agreed with the lender that an otherwise non-recourse loan to the partnership would become recourse (and thus an obligation of the general partners) if the partnership failed "properly to maintain" the property financed with the loan. The Example concludes that because there was no "reasonable certainty" that the partnership and its partners would have any liability resulting from the partnership's failure to maintain the property, no partner bore the economic risk of loss with respect to the loan and the loan was therefore a non-recourse liability.

[3] The Chief Counsel points to Section 1.752-2(b)(1) of the Treasury Regulations, which sets forth the framework for determining generally whether a partner bears the economic risk of loss for a liability by asking whether if, following a hypothetical liquidation of the partnership, the partner would be obligated to make a payment to any person because that payment becomes due and payable and the partner would not be entitled to reimbursement from another partner. The Chief Counsel reasoned that under a hypothetical liquidation of the LLC, it would be more likely than not that one or more of the trigger events would occur. According to the Chief Counsel, therefore, the trigger events do not constitute contingencies under Section 1.752-2(b)(4) of the Treasury Regulations.

[4] The IRS also suggests that the language of the guarantee would require the guarantor to satisfy its payment obligation merely upon a payment default by the partnership, without regard to whether any of the trigger events in the guarantee had occurred, perhaps puzzled over language in the agreement that described the guarantor as a "primary obligor." See Footnote 2 of the IRS Memorandum.

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Office of the Chief Counsel, so it signaled that the IRS may have intended to take a more aggressive approach in its treatment of "bad boy" guarantees.[5] And if the IRS did not withdraw the Memorandum, real estate investors would face uncertainty that goes to the heart of the economics of many investments. Investors could have ignored the Memorandum on the theory that it was illogical, contrary to standard practice in the real estate financing market and unlikely to be sustained by the courts. They could also could have pressured lenders to forego "bad boy" guarantees, but that might have been difficult since lenders also consider such guarantees to be standard industry practice. They could have considered structuring guarantees that are arguably distinguishable from the IRS Memorandum, such as obtaining a guarantee from a non-member manager that has no interest in partnership or LLC profit and loss, although since such a manager is likely to be an affiliate of a transaction party, this approach might be vulnerable. Or they could have attempted to structure "bad boy" guarantees as being limited to the actual loss incurred by the lender resulting from the trigger event, rather than full recourse on the loan, which might have resulted in only a portion of the loan being treated as a recourse liability. Negotiating such a position, however, was unlikely to be successful, as lenders would have insisted on full recourse liability with respect to Special Purpose Entity violations, voluntary and collusive involuntary bankruptcy filings, and impermissible transfers and encumbrances of the secured property.

This position would have prevented the non-guaranteeing members from being able to deduct partnership/LLC losses in excess of their equity contributions. Such a result would obviously have had a huge negative tax impact on thousands of past, present and future real estate partnerships and LLCs.

In response to the Memorandum, a small task force from the Real Estate Roundtable, including Joe Forte of Kelley Drye & Warren LLP, drafted an industry position paper and met with IRS Chief Counsel William Wilkins to share the real estate community's concerns. The meeting was held on March 8th at the IRS in Washington, and was attended by Mr. Wilkins and eight other attorneys from the IRS. At the meeting, Joe Forte described the legal and practical evolution of the particular "bad boy" guarantee at issue in the Memorandum. The participants explained to the IRS, among other matters, that the "bad boy" guarantee is a device to prevent the borrower from taking certain voluntary actions, such as a bankruptcy filing, and the guarantor is very unlikely to ever take any of the prohibited actions or have liability on the guarantee.

We believe the IRS was concerned that this admission of insolvency provision, which is included as a matter of course in the boilerplate language contained in most commercial loans, could be construed as giving a lender a "back door" means of enforcing recourse liability on the borrower or guarantor, without a voluntary "bad boy" action on the part of the borrower. The Real Estate Roundtable consulted with market participants and practitioners involved in negotiating and drafting nonrecourse carve-out provisions, including the admission of insolvency provision, to understand why it is in loan agreements, how the provision is understood by the parties and how it is enforced.

Since before the Great Depression, the admission of insolvency provision has been routinely included as a specific event of default in mortgage loan documents as the state insolvency law analogue to the provision that makes filing a voluntary federal bankruptcy petition an event of default.[6] Since the mid-1980s when the life insurance industry first introduced nonrecourse carve-out provisions for voluntary borrower bankruptcy filings into their loan documents, an admission of insolvency, as well as bankruptcy filing, have been among the voluntary bad acts of borrowers enumerated in nonrecourse carve-out clauses that trigger recourse to borrower and "bad boy" guarantors.

[5] Speaking at a conference on February 23, 2016, an attorney-advisor for the Treasury Office of the Tax Legislative Counsel stressed that the Memorandum was limited to the particular taxpayer to whom it was issued and said that it was her understanding that the IRS focus in the Memorandum may have been on the specific carve-out exception relating to assignments made for the benefit of creditors or admitting to insolvency or inability to pay debts as they become due, although the Memorandum did not focus its analysis on this carve-out.

[6] *Barth v. Backus,* 140 N.Y. 230, 35 N.E. 425 (1893).

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The essential bargain between borrower and lender that permits nonrecourse financing is that the lender agrees not to pursue recourse liability directly or indirectly against the borrower or its principals provided that the lender can comfortably rely on the assurance that the value of the financed property will not be diminished or impaired, or the cash flow from the property disrupted, or the lender's realization on the property delayed or prevented by "bad acts" of the borrower.

As the admission of insolvency provision is the state insolvency law equivalent of the "bad boy" clause which acts as a disincentive to borrower's voluntary bankruptcy filing, its principal purpose is to disincentivize the borrower from initiating a state-level insolvency proceeding under state statutes. An admission of insolvency by the borrower generally is a prerequisite to initiating a state law receivership, and the language in the admission of insolvency clause is similar or identical to the language found in state insolvency laws. As the term insolvency is not considered to be susceptible to exact definition and has been recognized as having several distinct meanings, it is often defined within a specific statutory scheme.[7] Moreover, in the absence of an ability to obtain a discharge of its obligations under an insolvency statute, it is unlikely that any borrower would seek protection under state law instead of filing for bankruptcy. In the absence of an express, voluntary action on the part of the borrower, we do not believe that this provision is designed or intended to create a mechanism to force recourse liability on the borrower or any nonrecourse guarantor. We are aware of no case law in which a borrower or a "bad boy" guarantor was held liable for a debt under this provision. [8]

The mere fact that a borrower may be insolvent or unable to pay its debts does not trigger recourse liability under the admission of insolvency provision -- it requires a voluntary written express statement of the borrower to the effect that it is insolvent or unable to pay its debts as they become due. [9] In Zwirn, delivery of a financial statement showing liabilities exceeding assets was not considered such an admission. Thus, an admission of insolvency by the borrowers must be a voluntary affirmative act, similar to filing for bankruptcy protection.

On April 15, 2016 the IRS Office of Chief Counsel released a new memorandum ("New Memorandum") reversing the position taken in the original Memorandum. The New Memorandum acknowledged that a "carve-out" or "bad boy" guarantee is a device to prevent the borrower from taking actions which violate the terms of the loan in a manner which might harm the value of the property or interfere with the lender's exercise of remedies. The IRS concluded that the adverse financial impact to the guarantor resulting from the prohibited acts would be contrary to the guarantor's self-interest, making the acts and resulting personal liability very unlikely to occur. The IRS acknowledged that the "bad boy" acts were all voluntary acts of the guarantor, not matters which a lender could use to enforce personal liability in the absence of specific voluntary actions. Therefore, the New Memorandum concludes that a "bad boy" guarantee does not cause a non-recourse loan to become recourse unless one of the enumerated "bad boy" acts actually occurs. Although withdrawal of the original Memorandum had been anticipated by the real estate industry as a result of the meeting with the IRS, issuance of the New Memorandum removes a cloud over the tax treatment of "bad boy" guarantees. Nonetheless, lenders counsel creating new "bad boy" full recourse guarantee events, and borrower and guarantor's counsel reviewing "bad boy" full recourse carve-out events in proposed loan documents should consider the possible ramifications of the new guarantee provision on the qualified nonrecourse financing tax status of the transaction and possible heightened risk of borrower bankruptcy. ■

[7] *See* 30 N.Y. Juris. 2d § 193, p. 229 (2006).
[8] *See D.B. Zwirn Special Opportunities Fund, L.P. v. SCC Acquisitions, Inc.*, 902 N.Y.S.2d 93 (App. Div. 2010).
[9] *See Magten Asset Mgt. Corp. v. Bank of N.Y.,* 15 Misc. 3d 1132(A) (Sup. Ct. 2007).

Co-opdominium:
A Path to Affordable Condo Unit Ownership

by Brian Meltzer, Meltzer, Purtill & Stelle, LLC, Schaumburg, IL

Background

For decades, condominium developers made a profit by splitting the ownership of multifamily buildings into individual units and selling them at retail for significantly more than it cost to acquire or build the building. After the housing crash of 2007-2008 and continuing into 2016, circumstances were reversed, at least as it relates to those condos which fall into the category of what I will refer to in this article as "LMI Condos".

For purposes of this article an "LMI Condo" is a condominium in which the units are occupied by tenants or owners who fall into the category of "low and moderate income households". There is limited unit loan financing or refinancing available for an owner/occupant of a unit in an LMI Condo, especially if the percentage of units owned by owner/occupants is less than 51% of the total units.

For the foreseeable future, the way to add value to an LMI Condo is to return the units to single ownership and either operate the building as a rental project or convert the building into what I call a Co-opdominium ("Co-opdo" for short). This article explains how to set up a Co-opdo and how it can be used to promote stable and affordable home ownership in multifamily developments.

The growth of the condominium form of ownership in the United States began with the passage of Section 234(c) of the National Housing Act in 1961 which authorized FHA to insure mortgages on condominium units. The intent of Section 234(c) was to encourage the use of the condominium concept to promote individual ownership of units in multifamily buildings through mortgages insured by FHA. In order to create a condo in a given state, the state needed to adopt a statute which permitted the owner of real estate to create a condominium by submitting the real estate to the state's condominium act. Within several years after the passage of Section 234(c), every state passed a form of condominium enabling act that provided for individual ownership of units in multifamily buildings, particularly those in a typical multi-story apartment building where the airspace of one unit extends over the airspace of another unit. The concept caught on big time and over the next forty years the condominium form of ownership became a major vehicle for home ownership, particularly in urban areas.

Meanwhile, the concept of cooperatives had existed long before condos came on the scene. Condos and coops differ from each other in several respects. The basic difference is in the form of ownership. In a typical coop, a corporation owns the real estate on which the coop building is located and the shareholders of the corporation have the legal right to use and occupy their units under "proprietary leases" from the corporation. In a condo, each unit consists of a volume of airspace and the owner of the unit has title to the airspace, together with an undivided interest in those portions of the real estate which are not part of a unit. Coops generally receive one real estate tax bill for the entire coop property and are often financed with a loan to the coop entity which is secured by what is referred to as a "blanket mortgage" on the building. In a condo, each unit receives an individual real estate tax bill and is able to be financed with a separate mortgage on the unit. Both condos and coops assess their member/owners for the cost of insuring and maintaining the building.

It was generally believed that because condo owners were not required to share the risk of a co-owner's default on mortgage and real estate tax obligations, condo ownership was less risky than coop ownership. In addition, because condos could be individually financed and refinanced, they were more marketable. Indeed in the 1970s through the early 2000s it was much easier to finance a condo unit than

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it was to finance a comparable unit in a coop, especially where the value of the unit was rising while the balance of the coop's blanket mortgage loan on the building attributable to the unit was declining through monthly payments. For many years it was not uncommon to see coops that had "converted" to condo in order to make owners less financially interdependent and to permit their units to be more easily financed, thereby permitting the units to increase in value and be more freely marketable.

FHA, VA, Fannie Mae and Freddie Mac (sometimes referred to herein as government related enterprises or "GREs") became the major players in the "secondary mortgage market". FHA insured and VA guaranteed home loans (sometimes referred to as "government loans"), while Fannie Mae and Freddie Mac purchased loans that were not insured by FHA or guaranteed by VA (sometimes referred to as "conventional loans"). The secondary mortgage market facilitated the availability of home loans by insuring or purchasing loans from originating lenders, thus permitting the lenders to sell the loans and lend the money out again to other borrowers. In order for a condo unit loan to be eligible for FHA insurance and/or sale in the secondary mortgage market, the condo project needed to be approved by Fannie Mae, Freddie Mac, FHA and/or VA . Each entity had standards and procedures for approving condo projects. For a number of reasons, the GRE programs tended to encourage primarily owner/occupied condos. A consequence of this policy was to discourage the mixing of owner/occupied units with rental units in the same project. For example, before a condo project could be approved by the GREs, the project had to satisfy a "presale" requirement that a certain percentage of the units be sold or under contract for sale to owner/occupants. The percentage varied from 51% to 70%, but it was significant. Although the existence of rental or investor owned units in a condo was not prohibited, if a condo had what was believed to be too high of a concentration of rental units (generally over 25%), the GREs may not approve the project.

Many condos in urban areas prohibited or restricted the leasing of units, presumably as part of an effort by the condos to maintain GRE approvals and the continued availability of GRE financing for its units. It also may have been a reflection of a belief held by some owner/occupants that renters were inferior to owner/occupants and that having too many renters in a condo undermined the values of the units in the condo.

The Problem

The housing market crash exposed serious flaws in the condo concept, at least as it applies to LMI Condos. The consequences of the crash and the issues that flowed from it include the following:

1. Where there were severe declines in unit values, a large percentage of condo unit owners found themselves underwater on their mortgage loans.

2. Lenders tightened underwriting standards and procedures to the point where it became very difficult to obtain a home mortgage.

3. Between presale requirements, restrictions on the percentage of units that could be owned by investors, limits on the number of delinquencies and other restrictions that applied to condo projects, it became much more difficult to obtain a mortgage on a condo unit than on a single family home or a non-condo townhome unit.

4. The lack of availability of financing made it extremely difficult for condo units to be sold and/or refinanced. Those sellers who were able to get a buyer who could get financing or pay cash had to either come to closing with cash to pay off the balance of the mortgage or convince the holder of the mortgage to agree to a short sale, or both.

5. Restrictions on, or prohibitions of, leasing of condo units made it difficult for an owner/occupant who needed to move to be able to rent his or her unit

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to at least get some income to pay the unit's ownership costs.

6 .Many owner/occupants faced with the problems mentioned above and located in a jurisdiction with an archaic and/or cumbersome foreclosure system opted to remain in their unit for months, even years, without paying mortgage service, real estate taxes or assessments, and then sometimes strip and/or trash the unit when they finally were required to move out.

7. The rise in assessment delinquencies created serious financial issues for condos and their unit owners.

8. Historically, many condo associations have had trouble getting owners to participate in the governance of the association. Often the persons who did get elected to serve on condo boards became overzealous in the adoption and enforcement of rules, resulting in unnecessary tensions among the residents. The leadership of LMI Condos came under great stress at the very time when qualified, strong and focused leadership was most needed.

The Opportunity for Affordable Unit Ownership

The housing crash resulted in dramatic declines in home values in many areas. By 2016 home prices were recovering in some areas. However, in many areas, the values of condo units, particularly those in low and moderate income neighborhoods, have not recovered and may not recover any time soon.

One result of this situation is that the continued depressed values of condo units, especially in low and moderate income neighborhoods, have made condos more affordable for purchase or rent by low and moderate income households than they have been for years. The comparison of rent to own in a condo is more easily made than a similar comparison of single family homes because the comparison can be made "apples to apples", that is, between units in the same condo project, where the rent for one unit can be compared to the mortgage service, plus real estate taxes and assessments on a comparable owner/occupied unit. For low and moderate income households, where the monthly housing cost is a major concern, to be able to own a unit in a condo for a monthly cost of less than what the rent would be for a comparable unit in the same building is significant. This becomes even more compelling when the owner who is paying less than what he would otherwise pay in rent can build up equity in the unit through principal reductions on the mortgage loan and, possibly, appreciation in value. In addition, increases in the cost of ownership of a unit would primarily be limited to assessment increases or real estate tax increases, which would likely be less than rent increases.

For many years it was thought that lower income households would primarily be renters for most of their lives. Then the subprime mortgage arrived and many lower income households were lured into ownership of homes that they could not afford. When the bubble burst, many of those owners lost their homes to foreclosure.

However, a significant segment of low and moderate income households, continue to aspire to home ownership, despite scary memories of the housing market crash. With values and costs of ownership down to affordable levels, at least in certain areas, the current challenge for low or moderate income persons who desire to purchase a home is to qualify for a loan and to come up with a down payment.

I believe that there is a way to help low and moderate income families become homeowners so that they can have the pride of ownership and the opportunity to build up equity and generally pursue the American Dream. I call it the Co-opdominium, or "Co-opdo" for short.

The Co-opdomimium Concept

Candidates for Co-opdo would include a rental project that is not yet a condo or a condo project where

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one entity acquires, or controls, title to a significant number of the units, particularly in an LMI Condo.

For purposes of this article, the entity which holds or controls title to an apartment building or a substantial number of the units in a condo and which creates the Co-opdo will be referred to herein as the "Co-opdo Converter". The Co-opdo Converter would set up the Co-opdo as follows:

1. The property would be subject to the applicable state's condo act, but the Co-opdo Declaration will contain some significant deviations from what has historically been found in condo declarations

2. The Co-opdo Converter would subject all of the units which it owns to what is commonly known as a "blanket mortgage". The blanket mortgage would be non-recourse, i.e. no personal liability to a unit owner. It will be a long term, fixed rate, self-amortizing mortgage. As mentioned above, this type of mortgage is common in a coop situation.

3. In a deviation from the typical coop model, the blanket mortgage in the Co-opdo would permit and provide for the release of a unit from the lien of the blanket mortgage upon payment to the holder of the blanket mortgage of a sum equal to the portion of the mortgage debt which is attributable to the unit. This amount, commonly referred to as the "release price", will be determined by multiplying the outstanding principal balance of the blanket mortgage loan by a fraction, the numerator of which is the unit's percentage interest in the condo and the denominator of which is the total percentage interests of all units then subject to the lien of the blanket mortgage. The release price will decline as amortizing payments under the blanket mortgage are made and the principal outstanding under the blanket mortgage decreases. A unit owner's equity in the owner's unit will increase over time due to the combination of (a) the (hopefully) rising market value of the unit and (b) the reduction of the portion of the blanket mortgage attributable to the unit as periodic payments of principal are made.

4. In a typical coop situation, this increase in equity can only be financed through a "share loan", or a loan secured by the owner's interest in the cooperative entity which owns the building. Such loans are not readily available in many markets. However, condo unit loans are available in most markets, although, as mentioned above, such loans are currently more difficult to obtain than they were prior to the housing market crash. The ability to either refinance a Co-opdo unit or to sell the unit to a buyer who can finance the purchase with a first mortgage on the unit where the proceeds are used to obtain a release from the blanket mortgage will greatly enhance the marketability and market value of units in these Co-opdos. As will be discussed more fully below, the blanket mortgage likely will not permit partial releases unless and until the Co-opdo satisfies the then applicable requirements of the secondary mortgage market for the insurance or purchase by the secondary mortgage market of loans on units in the Co-opdo.

5. In a Co-opdo where the market values of units are not increasing, where the interest rate on the blanket mortgage is favorable, and/or where a buyer otherwise chooses to pay cash above the portion of the blanket mortgage which is attributable to the unit, the fact that the blanket mortgage is non-recourse to the individual owners will make it much easier to transfer ownership of a unit subject to the blanket mortgage. However, the Co-opdo Converter and the holder of the blanket mortgage will still likely need to approve the buyer's credit.

6. The lender which makes the non-recourse blanket mortgage will need to underwrite the loan based on the value of the real estate and may require a relatively low loan to value ratio. However, going through effort to acquire title to, or control of, all of the units in an LMI Condo could add enough value to the units in the resulting Co-opdo to satisfy a conservative loan to value ratio for a blanket mortgage.

7. In another deviation from the typical condo setup, the Co-opdo documents should provide that each owner will be required to pay monthly to the

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Co-opdo association the following with respect to the owner's unit: (a) the monthly assessment, (b) monthly deposits of real estate taxes, and (c) the monthly mortgage service under either the blanket mortgage or any mortgage put on the unit in place of the blanket mortgage. The Co-opdo association would then make the necessary mortgage service and real estate tax payments as they become due on behalf of each owner. The payment of mortgage service and real estate taxes is something that coops ordinarily do but condos have not done in the past. By centralizing this function in the Co-opdo association, the association will get an early warning when an owner may be experiencing financial difficulties.

8. The Co-opdo association's budget should include reserves to cover delinquencies as well as major repairs and replacements. If properly funded, the reserves could help cover the hopefully brief periods when payments with respect to a unit are disrupted and avoid delinquencies on the blanket mortgage or real estate taxes.

9. In some jurisdictions, including Illinois, a condo association has the power of forcible detainer to deal with a delinquent owner. What this means is that if an owner of a unit in a Co-opdo becomes delinquent, the association will be able evict the occupants of the unit and rent the unit out in order to generate the cash flow necessary to pay the monthly amounts due with respect to the unit. Although it may take some time to evict a delinquent owner or the owner's tenant, it likely will take a lot less time than it would take to get possession in a foreclosure action.

10. Until a significant percentage of the units have been refinanced and released from the blanket mortgage, the holder of the blanket mortgage and the Co-opdo Converter should have a significant role in the administration of the Co-opdo. In particular, the mortgage holder and the Co-opdo Converter will want a system in place that screens each potential owner to maximize the likelihood that the owner will meet his or her financial obligations to the Co-opdo association. The use by the Co-opdo Converter of installment sale contracts to sell the units (discussed more fully below) would also help protect against, and better deal with, defaults by owners. Other protections can be written into the declaration or the blanket mortgage and may include review and meaningful input into the budgeting process and involvement in decisions that could affect the interests of the holder of the blanket mortgage and the Co-opdo Converter, at least until a significant number of units are no longer subject to the blanket mortgage.

11. In a departure from the current practice of only allowing unit owners or their designated representative to serve on the association board, tenants should be granted to right to serve on the board, at least those tenants who have been in residence at the building for a significant amount of time, say in excess of three years. Tenants should also be permitted and encouraged to serve on committees.

Application to LMI Condos/Creating Ownership Opportunities for Low and Moderate Income Households

I believe that the Co-opdo approach can be effectively used to convert an apartment project to Co-opdo or recycle an LMI Condo and create ownership opportunities for low and moderate income households. The first step as it relates to an LMI Condo, would be for the Co-opdo Converter to acquire clear (free of liens) title to, or control over, more than 75% of the units in the condo. This could be accomplished through purchases on the open market or, in some jurisdictions, use of eminent domain. Once title more than 75% of the units is acquired by the Co-opdo Converter, the Co-opdo Converter would be in a position to amend the condo declaration to create a Co-opdo, as described above. A Co-opdo would be set up as follows:

1. The blanket mortgage would be at least in an amount necessary to pay the cost of acquiring the units.

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2. The blanket mortgage will provide for unit by unit releases from the blanket mortgage for a "release price" equal to the balance outstanding from time to time on the blanket mortgage multiplied by the ratio of (a) the percentage interest of the unit in the Co-opdo to (b) the aggregate percentage interests of all units in the Co-opdo which are then subject to the blanket mortgage. As mentioned above, units should not be released from the lien of the blanket mortgage until secondary mortgage market approvals have been obtained with respect to the Co-opdo.

3. Buyers of units in a new conversion and former owner/occupants of units in an LMI Condo who desire to remain in occupancy and return to ownership and who meet the financial standards established by the holder of the blanket mortgage and the Co-opdo Converter, will be sold their unit pursuant to what is commonly referred to as an "installment sale contract".

4. Under the installment sale approach, the buyer would enter into a contract to purchase a unit from the Co-opdo Converter for a price at or above the portion of the blanket mortgage attributable to the unit. The buyer would take possession of the unit and would pay monthly installments of principal and interest on the purchase price under the contract and would also be responsible for paying the real estate taxes on the unit and the assessments payable to the Co-opdo association. As of early 2016, because of the low interest rates and increased demand for rental units, the monthly cost to own a unit is often less than the cost to rent a comparable unit in the same condo or in a comparable rental project, especially in an LMI Condo. For example, a family with annual income of $50,000 which spends 30% of its income, or $15,000 per year ($1,250 per month), on housing, can purchase a condo unit that costs about $145,000, assuming a 95% loan with an interest rate of 5%, real estate taxes of $2,400 per year and assessments of $2,400 per year. To rent a comparable unit in today's market in the Chicago area could cost as much as $1,500-1,600 per month. Accordingly, at least as of early 2016, the sale price under an installment sale contract may be able to be set so that the monthly cost of ownership of the unit will be equal to or less than the current market rent for comparable rental units in the area.

5. The installment sale contract will provide that the buyer will be conveyed title to the buyer's unit when the buyer either refinances the unit and pays the balance of the purchase price in full or sells the unit and uses a portion of the proceeds of sale to pay the balance then due under the contract. The reason for suggesting the installment sale approach is twofold. First it creates an "owner/occupant" for purposes of satisfying the GRE presale requirements without actually conveying the unit to the buyer. Second, in certain jurisdictions the foreclosure system is burdensome and allows delinquent owners to remain in possession of their home without paying anything for months, even years. However, in some jurisdictions, it is easier to terminate an installment sale contract than to foreclose. In Illinois, for example, where the buyer has not yet paid at least 20% of the purchase price under an installment sale contract, the seller can terminate the contract and evict the buyer without going through a formal foreclosure proceeding. 735 ILCS 5/15-1106.

6. Other qualifying occupants who desire to remain in occupancy but do not want to own, or do not qualify to buy, their unit should be given the option to rent their unit from the Co-opdo Converter at a market rent which, as mentioned above, in the current market, may be greater than the monthly ownership costs of a buyer who purchases his or her unit through an installment sale contract.

7. The units which are not sold will be owned by the Co-opdo Converter, which will rent the units. Over time, as demand for owner/occupied units increases and values go up, the Co-opdo Converter may sell units under installment sale contracts to qualifying buyers as described above. After the secondary mortgage market approvals are obtained for the Co-opdo, the Co-opdo Converter will be able to sell units to buyers (without use of the installment sale contract) and use a portion of the proceeds of sale to obtain a release of the unit from the blanket mortgage.

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8. Selling units using the installment sale approach will enable persons who would otherwise not be able to purchase and finance the purchase of their unit (under current secondary mortgage market rules) to become homeowners. Hopefully the owner/occupants' pride in ownership and a stake in the success of the Co-opdo will stabilize the Co-opdo and result in more people desiring to become owners, thus increasing the market value and marketability of the units.

9. The buyer under an installment sale contract is considered an owner/occupant under current GRE rules. Currently the GREs will not insure or buy loans in a condo project unless at least 51% of the units are sold, or under contract of sale, to "owner/occupants". Hopefully the owner/occupancy requirement will be attained through the use of installment sales contracts, at which time contract will become eligible for GRE mortgages which would permit the buyer to pay the balance of the purchase price then due under the installment sale contract and receive a deed for the unit.

10. Over time the Co-opdo will reach equilibrium between owner/occupants and renters. In the process the Co-opdo Converter will pay off the blanket mortgage and no longer take an active role in the administration of the Co-opdo.

Conclusion

Before the housing bust, a converter could get a construction or conversion loan that permitted unit by unit releases as units were sold. That approach worked fine as long as unit loans were available and plentiful. That is no longer the case, at least for the foreseeable future. The challenge for condos in today's market is obtaining secondary mortgage market approvals and getting enough qualified buyers to satisfy the presale requirement. The Co-opdo proposal provides a mechanism that allows persons with low and moderate incomes to become owners of affordable homes, even if they do not strictly qualify for a loan that is insurable or saleable in the secondary mortgage market. As home owners in a Co-opdo, these persons with low and moderate incomes will have the opportunity to benefit economically from increases in the equity of their unit by being able to eventually refinance or sell their unit, thus allowing them to participate in the American Dream that was snatched from them by the housing bust.

I believe that the Co-opdo approach can effectively be used immediately to stabilize LMI Condos and make affordable units available to low to moderate income owners or renters. I also believe that as the housing market continues to recover from the crash, the Co-opdo approach can be used to create successful low and moderate income housing developments in which (a) persons who may not qualify for secondary mortgage market financing can become owner/occupants, (b) owner/occupants and renters will coexist, and (c) controls will be in place that will give the Co-opdo association tools that will help it avoid the disasters that resulted from the housing crash, due in part to the structural flaws that continue to exist in the condo concept. ■

Should Your Client Ever Grant a Right of First Refusal?

by Carl J. Circo, Ben J. Altheimer Professor of Legal Advocacy, University of Arkansas School of Law

The email message from Greg Stein on behalf of the ACREL Professors—Law School Teaching Committee interested me in part because I was eager to have another opportunity to speak at an ACREL meeting and in part because I was feeling a bit guilty for not maintaining an active role in the committee after my term as co-chair ended. (The committee was only a working group during my term.) Whatever it was that motivated me to volunteer for a panel being planned for the spring 2016 meeting in San Diego, the result was serendipity.

The topic surprised me—rights of first refusal, rights of first offer, and options to purchase. What, I wondered, was there to say to ACREL Fellows about these rather common devices? I was certain (and still am) of ACREL Fellows' familiarity with what real estate lawyers need to know about preferential purchase rights. ACREL Fellows certainly know that an option agreement should be supported by consideration, that it should include all the material terms of the potential sale contract, and that there are strong legal and practical reasons to avoid or tightly structure options that have extended durations. ACREL Fellows also long-ago mastered the most important aspects of rights of first refusals (ROFRs, which I learned to pronounced ROWF-ERS) and rights of first offer (ROFOs—ROWF-OHS). They recognize that the agreement should clearly specify what events will and will not trigger the pre-emptive right (think package deals, business mergers and acquisitions, transfers that effect changes in control but not record title, gift transactions, and so on), as well as the importance of carefully negotiating the procedures for exercising or terminating the rights.

Little did I know how much interest the topic would elicit at and after the meeting, nor how much I would learn. Our panel presentation in San Diego seemed to go over well, and our breakout sessions attracted large numbers. That was just the beginning; there have been sequels. First, there was an ACRE-Live conference call led by our panel in June, then I received an invitation to write a short piece based on my ACREL paper for the California CLE publication, Real Property Law Reporter (edited by ACREL's Roger Bernhardt). In November, at the invitation of ACREL's Wilson Freyermuth, our panel reprised the topic for a well-attended ABA Professors' Corner webinar. In the meantime, I wrote a derivative article about ROFRs and ROFOs for the Villanova Law Review. How did I not know that this was a hot topic? Maybe that's what 13 years in an ivory tower will do to a real estate lawyer.

My purpose now is to offer some reflections, from my perspective as a law professor, on what I learned through this experience, and to preview some of the conclusions I draw and recommendations I make in the Villanova Law Review article. That piece will not appear in its final form until late in 2017. (Yes, the law review process really can take that long.) The full paper (sans student edits, which should mostly affect the footnotes) is available without charge at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850590. I'll be delighted if you read it, but I won't hold it against you if you don't. And, of course, ACREL News readers who wish can access the panel papers via the ACRELShares site. I'll start with what I've learned.

ACREL membership is good for law professors. This is not a new lesson, but it's a good one to acknowledge and promote. I'm not kidding about those 13 years away from practice. We all know about the gap between what goes on in the classroom and what happens in actual deals and disputes. Because real estate transactions continue to evolve and become more complex, it can be hard for a full-time professor to stay in touch with the practice and to help students begin to acquire the practical skills they'll need. This is a much more important point now than

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ever before because recent changes to law school accreditation standards place a greater emphasis on practice competencies. It's not that the law or practical considerations relating to preferential purchase rights have changed that much in the past 13 years. No, the problem is simply that it's hard after that much time away from handling deals to retain a truly practical focus for the benefit of the students. Even though I practiced commercial real estate law for over 2 decades, I know I've lost some of that practical edge. And many professors are at an even greater disadvantage because they may have very little relevant experience. I hope that ACREL will maintain its efforts to recruit more law professor members, keep the Professors Committee active, and continue to supply enthusiastic adjunct professors to law schools around the country.

Law students need to learn how important checklists are. For this reminder, the credit goes to Beat Steiner, who served as our panel's coordinator and moderator. The drafting checklist that Beat prepared as background for the panel members' preparation, and that he subsequently updated for a Colorado CLE program, goes on for 13 pages and covers everything from how to choose the best preferential right for the situation, to the controlling legal rules, the exercise of rights, and lender issues. I resolve to expose my students to more practice checklists and to help them appreciate that not even the most experienced lawyer can think of all the relevant considerations on the fly while structuring, negotiating, drafting, and advising clients in today's fast-paced environment.

Just as money can't buy you love, legal theory can't buy you title insurance. Here, a nod goes to Wilhelmina (Willie) Kightlinger, who presented the title insurer's analysis for our panel. The Restatement (Third) of Property: Servitudes thoughtfully assigns ROFRs, ROFOS, and options logical places in the best theoretical framework that legal minds can conjure. I had hoped that the Restatement might at least be relevant to some of the title insurance issues. (See Conclusion #2 below.) But title companies are not all that impressed with legal abstractions because insurers need to rely on probabilities, not theory. Given the amount of litigation generated by options, ROFRs, and ROFOS (see my next point), the title industry is rightfully cautious about offering coverage or assurances concerning preferential purchase rights.

Litigators are endlessly creative. The credit on this one goes to Kathryn (Kappy) Allen and, indirectly to ACREL's Bill Locke. Bill persuaded Kappy, of his firm's litigation department, to provide the trial lawyer's perspective for our panel. For me, the big takeaway—again not a new lesson, but an important one to keep in mind—is that skilled litigators can convince judges and juries to upset even the most customary, rational, and theoretically sound transactional structures and language. Actual results in litigation over preferential purchase rights simply cannot be predicted with a comfortable level of certainty. While the same can be said about almost any kind of litigation, the problem is exacerbated here because preferential purchase rights are intended to help manage an otherwise uncertain future.

Alternatives to ROFRs and ROFOs are more interesting than practical. During the breakout sessions following our panel presentation in San Diego, we spoke of rights of last refusal, first rights of negotiation, and an owner's commitment to offer the property for sale during a designated period, if at all, only via auction. All of these alternatives to ROFRs and ROFOs have attracted some attention from economists and commentators. The ACREL Fellows who participated in these discussions seemed largely unimpressed. In fact, the suggestion that a party negotiating for a preferential purchase right might instead accept the owner's agreement to sell only through an auction generated so much scoffing that I felt obliged to insist that I was only the messenger, not an advocate for the idea. Gap between the academy and practice indeed. That's it for the reflections. I'll conclude with—well, with some conclusions, and also with an academic recommendation. These tie into the themes I develop in the upcoming law review article that I mentioned earlier.

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Conclusion #1—ROFRs and ROFOs impose troublesome burdens on marketability, especially when the rights survive for long terms. It seems that clients, and probably some lawyers who are not real estate specialists, often see ROFRs and ROFOs as relatively low-risk frills that can help them make the bigger deals to which these rights are often appended. Somebody in the deal wants a first opportunity to acquire a piece of property if and when the current owner decides to sell. What's the big deal? What could possibly go wrong? The quantity of litigation, the inconsistency of the cases, several economic studies, the title insurance perspective, and the input of ACREL Fellows at our breakout sessions at the San Diego meeting all point to the conclusion that almost everything can go wrong, and that it often does. With respect to this conclusion, it's worth emphasizing that both the experience of many ACREL members and the implications from some economic studies confirm that ROFRs and ROFOs significantly depress third-party interest in the affected property.

Conclusion #2—the Restatement helps a little, but not much. The Restatement (Third) of Property: Servitudes purports to provide principles to govern options to purchase, rights of first refusal, and rights of first offer in most of the circumstances relevant to real estate transactions. As you might guess from the title of this particular Restatement, the assumption here is that these preferential purchase rights fit into the category of rights and interests that real property law knows as servitudes. You remember servitudes—the most common examples of which are easements and covenants running with the land. I'm not convinced that the fit is all that comfortable. In many respects, the most troubling issues that preferential purchase rights present in practice have more to do with contract law than with the real property law of easements and covenants running with the land. In particular, the Restatement does not offer much help for courts called on to interpret and apply the terms of preferential purchase rights agreements in many of the common situations that lead to disputes. On one recurring issue, however, the Restatement provides an important and salutary rule that several courts (but not all) have found persuasive: The Rule Against Perpetuities should not apply. I only wish that the Restatement's approach concerning the rule governing restraints on alienation were as helpful. I won't go into the details on this point, but I will say that I think the Restatement glosses over an important problem (see Conclusion #1) when it declares that ROFRs (and by inference, ROFOs), even those with indefinite durations, do not significantly affect alienability. While I don't argue that the ancient rule against unreasonable restraints on alienation should often operate against ROFRs and ROFOs, I do believe that some special principles of interpretation should apply when pre-emptive rights last for decades and beyond and thereby burden marketability (as contrasted to legal alienability) in a nettlesome practical sense. The main situation that the Restatement inadequately addresses is how to interpret pre-emptive rights agreements when circumstances develop that the parties did not anticipate. That turns out to be a central problem contributing to much litigation, especially disputes arising from ROFRs of long duration.

Conclusion #3—comprehensive drafting helps a great deal, but is only a partial solution. Ideally, the lawyers who negotiate and document preferential purchase rights of all kinds should have ACREL-level experience, knowledge, and skill. Many disputes that come before the appellate courts could have been avoided if the parties had had the best possible legal representation. But the reported cases show that this often does not happen. No doubt, one of the reasons this is so is because the transactions involved cannot bear the legal fees. This does not, however, explain the large number of cases that arise out of high-dollar transactions. Moreover, not even the most experienced and careful lawyers can anticipate all of the quirky situations that come up, especially when ROFRs and ROFOs continue into a distant future that is full of surprises. Model agreements, checklists, CLE programs, and even a Restatement of the law can help, but not when the parties cannot afford the right counsel or simply do not appreciate the risks.

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A recommendation for courts interpreting ROFRs and ROFOs in the face of unanticipated circumstances. The main argument of my piece in the Villanova Law Review is that courts should move away from the relatively rigid rules of contract interpretation that they traditionally apply to disputes involving ROFRs and ROFOs. I believe that this is especially important when a dispute erupts many years after the right was granted and, as a result, the parties are arguing about how to apply the terms of the agreement to changed circumstances that no one contemplated back in the happy days of deal-making. Contemporary contract law allows for courts to use a contextual framework in such situations, and one provision of the Restatement even seems to endorse such an approach. But so far as the reported appellate opinions show, including many of the most recent ones, courts typically resort to relatively rigid rules in these situations that tend to discourage interpretations that might lead to more logical results.

Should your client ever grant a ROFR? Sure, but never with a light heart. ■

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Digitus Impudicus: The Fickle Finger of Fate?*

by John C. "Jack" Murray, Senior Counsel, First American Title Insurance Company

Introduction

I didn't spend seven years in college for nothing! As a semi-retired lawyer with more than 40 years of corporate real-estate practice, including authoring more than 200 articles, manuals, chapters, texts and treatises on commercial real-estate, bankruptcy, financing, title-insurance, leasing, foreclosure, and loan-workout topics, my fondness (obsession?) for legal research is still paying off these days. Because a friend recently asked me if I had any idea of the origin and history of the ubiquitous "middle finger" salute, and because I had sufficient time and the appropriate curiosity to research this fascinating issue, I have prepared the following discussion and analysis for consideration by all those who may be interested in such an important topic. (I'm sure my former professors and employers would be proud of me.)

The Robbins Article: Going to the Source

In his exhaustive scholarly 2008 law review article entitled *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. DAVIS L. REV. 1403 (April, 2008) ("Robbins Article"), Prof. Ira P. Robbins discusses and analyzes the origin, history, and scope of the ubiquitous middle finger -- with 530 footnotes!

I have no idea why anyone (let alone a law professor) would invest such an inordinate amount of time and effort on a scholarly treatment of the "bird," but the Robbins Article is meticulously researched and well written, and certainly is the definitive treatise with respect to the case law in this area -- and remains the only law-review article ever written on "the finger." The preface to the Robbins Article notes that:

> The middle finger is one of the most common insulting gestures in the United States. The finger, which is used to convey a wide range of emotions, is visible on streets and highways, in schools, shopping malls, and sporting events, in courts and execution chambers, in advertisements and on magazine covers, and even on the hallowed floors of legislatures. Despite its ubiquity, however, a number of recent cases demonstrate that those who use the middle finger in public run the risk of being stopped, arrested, prosecuted, fined, and even incarcerated under disorderly conduct or breach-of-peace statutes and ordinances.

Id. at 1403. [Footnotes omitted.]

With respect to the origin of the middle-finger gesture, the Robbins Article notes, at 1413, that:

> The weight of historical evidence suggests . . . that the middle finger gesture actually originated more than 2500 years ago. According to one commentator, it is the "most ubiquitous and longest lived insulting gesture" in the world, appearing as far back as ancient Greek texts. [Footnote omitted]

The Robbins article also notes, at 1417, that "The middle finger gesture is used throughout the world; its offensive message crosses cultural and linguistic barriers; and, at 1415, that "Possibly the first recorded use of the gesture in the United States occurred in 1886 when a joint baseball team photograph of the Boston Beaneaters and the New York Giants showed a Boston pitcher giving the finger to the Giants."

* Nothing in this Article is to be considered as the rendering of legal advice for specific matters or cases, or creating an attorney-client relationship, and readers are responsible for obtaining such advice from their own legal counsel. This Article is intended for educational and informational purposes only, and no warranty or representation is made as to the accuracy or completeness of the information contained herein. The views and opinions expressed in this paper are solely those of the Author.

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The Robbins Article amusingly quotes, at 1405, the following comments from a 1990 Seinfeld episode with respect to the middle finger:

> It seems like such an . . . arbitrary, ridiculous thing to just pick a finger and you show it to the person. It's a finger, what does it mean? Someone shows me one of their fingers and I'm supposed to feel bad. Is that the way it's supposed to work? I mean, you could just give someone the toe, really, couldn't you? I would feel worse if I got the toe, than if I got the finger. 'Cause it's not easy to give someone the toe . . .

Seinfeld: The Robbery (NBC television broadcast June 7, 1990), available at http://www.seinfeldscripts.com/TheRobbery.htm.

The Robbins Article further notes, at 1407, that, in *Spruance v. Comm'n on Judicial Qualifications*, 532 P.2d 1209, 1216 n.9 (Cal. 1975) (en banc), "a California municipal judge was removed from office for misconduct after, among other inappropriate acts, he gave the finger to a tardy defendant during a traffic court proceeding." But the California Supreme Court in Spruance noted that, if the judge's "giving the 'finger' to a defendant and his use of an obscenity during a telephone conversation with a deputy district attorney were the only charges brought against him, censure would be the appropriate discipline, since [the court found] little risk of the recurrence of such conduct." *Id*. at 1225.

The Robbins Article discusses, at 1406, another infamous "finger" case, Mitchell v. State, 580 A.2d 196, 198 (Md. 1990), stating that:

> At the conclusion of a sentencing hearing, as he was being shackled and handcuffed by prison guards, criminal defendant Timothy Mitchell turned to the sentencing judge, raised his hands, and gave the middle finger gesture to the judge. The outraged judge held Mitchell in contempt and sentenced him to *five years* in prison, with the sentence to run consecutively with the fifteen-year sentence for felony theft he had just received. Two weeks later, the judge reduced Mitchell's contempt sentence to five months and twenty-nine days.
> [Emphasis added.]

There are numerous other examples of cases discussing and analyzing the middle-finger "salute" in the Robbins Article, certainly too many to mention in this article. The Robbins Article argues, at 1403, that "although most convictions are ultimately overturned on appeal, the pursuit of criminal sanctions for use of the middle finger infringes on First Amendment rights, violates fundamental principles of criminal justice, wastes valuable judicial resources, and defies good sense."

The Robbins article also cautions, at 1411, that:

> While the preceding stories may seem innocuous and perhaps even humorous, they illustrate the alarming fact that individuals who use the middle finger run the risk of arrest, prosecution, fines, and possibly incarceration, despite the fact that the gesture often serves as a nonviolent means of releasing stress or expressing frustration.

Definition; Similar Hand Gestures; Urban Legends

The "finger" gesture was so popular among Romans that they bestowed it with a special Latin title: digitus impudicus, meaning the "shameless, indecent or offensive finger." Merriam–Webster defines "flip off," at http://www.merriam-webster.com/dictionary/flip%20off, as a transitive verb meaning "to hold up the middle finger as an obscene gesture of contempt." "Giving the finger," or "flipping the bird," has a long if not noble history, and no-one can doubt its secure place in world history and common usage.

See, e.g., Bad Frog Brewery, Inc. v. New York State Liquor Auth., 134 F.3d 87 (2d Cir. 1998). This

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case involved a beer manufacturer whose label depicted a middle-finger-waving frog. According to the court:

> The membranous webbing that connects the digits of a real frog's foot is absent from the drawing, enhancing the prominence of the extended "finger." Bad Frog does not dispute that the frog depicted in the label artwork is making the gesture generally known as "giving the finger" and that the gesture is widely regarded as an offensive insult, conveying a message that the company has characterized as "traditionally ... negative and nasty [footnote omitted]." Versions of the label feature slogans such as "He just don't care," "An amphibian with an attitude," "Turning bad into good," and "The beer so good ... it's bad." Another slogan, originally used but now abandoned, was "He's mean, green and obscene."

Id. at 91.

The court in *Bad Frog* concluded that the New York State Liquor Authority had, on First Amendment grounds, unlawfully rejected Bad Frog's application for approval of its labels. The court stated that:

> The possibility that some children in supermarkets might see a label depicting a frog displaying a well known gesture of insult, observable throughout contemporary society, does not remotely pose the sort of threat to their well-being that would justify maintenance of the prohibition pending further proceedings before [the New York State Liquor Authority].

Id. at 102.

The court in the *Bad Frog* case also noted that:

> Hand gestures signifying an insult have been in use throughout the world for many centuries. The gesture of the extended middle finger is said to have been used by Diogenes to insult Demosthenes [citation omitted]. Other hand gestures regarded as insults in some countries include an extended right thumb, an extended little finger, and raised index and middle fingers, not to mention those effected with two hands [citation omitted].

Id. at 91 n.1.

An offensive Greek hand gesture, the "moutza," has become famous because of monthly moutza awards bestowed on deserving individuals by John Kass, a columnist with the *Chicago Tribune*. According to Mr. Kass, "The moutza is the refined ancient [Greek] hand signal for disgust. All you do is aim your palm, spread your fingers wide, and say "Nah!" ("Here") or "Parta" ("Take them!") or my favorite "Feesah etho" ("Blow right here"). See, e.g., http://www.pressreader.com/usa/chicago-tribune/20151002/281552289675565/TextView for the award of the Moutza of the month for October, 2015 by Mr. Kass (*Too many deserving rivals for just 1 Moutza*).

One of the strangest (and totally false) explanations of the origin of the "finger" first appeared as a message on the internet as early as December 1996 and quickly gained wide circulation. According to one version of this apocryphal account:

> The History Of The Middle Finger
>
> Well, now……here's something I never knew before, and now that I know it, I feel compelled to send it on to my more intelligent friends in the hope that they, too, will feel edified. Isn't history more fun when you know something about it?
>
> Before the Battle of Agincourt in 1415, the French, anticipating victory over the English, proposed to cut off the middle finger of all captured English soldiers. Without the middle finger it would be impossible to draw the renowned English longbow and therefore they would be incapable of fighting in the future. This famous English longbow was

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> made of the native English Yew tree, and the act of drawing the longbow was known as "plucking the yew" (or "pluck yew").
>
> Much to the bewilderment of the French, the English won a major upset and began mocking the French by waving their middle fingers at the defeated French, saying, See, we can still pluck yew!
>
> Since 'pluck yew' is rather difficult to say, the difficult consonant cluster at the beginning has gradually changed to a labiodentals fricative F', and thus the words often used in conjunction with the one-finger-salute!
>
> It is also because of the pheasant feathers on the arrows used with the longbow that the symbolic gesture is known as "giving the bird."
>
> IT IS STILL AN APPROPRIATE SALUTE TO THE FRENCH TODAY!
>
> And yew thought yew knew every plucking thing!

But the aforementioned "History of the Middle Finger" is nothing more than a totally false and fabricated "urban legend." As noted on https://www.truthorfiction.com/pluck-yew/:

> Not much needs to be said about this fanciful tale except that it's nonsense. This is not the authoritative history of giving the "finger" or of the origin of the F-word. It's a piece of humorous writing that has been circulated for years, apparently by some who believe that it is true.

And as also noted on http://www.snopes.com/language/apocryph/pluckyew.asp, with respect to the aforementioned "pluck yew" explanation:

> The above-quoted account purporting to offer the historical origins of the obscene middle-finger extended hand gesture (variously known as "flipping the bird," "flipping someone off," or the "one-finger salute") is silly, and so obviously a joke that shouldn't need any debunking.

And as further noted on http://urbanlegends.about.com/od/errata/fl/Pluck-Yew-The-Origin-of-The-Finger.htm.:

> Pay no attention to the pseudo-academic bluster above concerning pheasant pluckers, labiodental fricatives and the English longbow. The text is a clever and amusing spoof, not meant to be taken seriously.

Case Law: Targeting Authority Figures; Road Rage Incidents

Case law with respect to the digitus impudicus often seems to occur in connection with actions directed at law-enforcement or other authority figures, or in connection with "road rage" incidents, and the decisions are fact-specific and depend on the surrounding circumstances. *See, e.g., State v. Anonymous*, 34 Conn. Supp. 575 (1977). In this case, the defendant, a high-school student, flipped "the bird" to a state trooper driving behind the school bus in which the defendant was a passenger. The trooper then boarded the bus and proceeded to arrest the defendant. The trial court found the defendant guilty of being a "youthful offender" under Connecticut law for making an obscene gesture. But the Connecticut appellate court reversed the trial court and ruled that the alleged obscene conduct was "not offensive nonverbal conduct but offensive expression. Without its opprobrious connotation, extending one's middle finger is a neutral act." *Id*. at 544. According to the court:

> To be obscene the expression must be, in a significant way, erotic [citation omitted]. It must appeal to the prurient interest in sex or portray sex in a patently offensive way [citation omitted]. It can hardly be said that the finger gesture is likely to arouse sexual

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> desire. The more likely response is anger. Because the charge and the proof were limited to making an obscene gesture the defendant's conviction cannot stand.

Id. at 577-78.

In a more recent case, *Swartz v. Insogna*, 704 F.3d 105, 111 (2nd Cir., 2013), the federal Second Circuit Court of Appeals held that "giving the finger" alone did not establish probable cause for a police officer to believe that a disorderly conduct violation had occurred under New York law. The Second Circuit vacated the decision of the District Court, which held that probable cause existed, and remanded the case for further proceedings. (There is no further published record of the ultimate disposition of this case.) The Second Circuit noted that, amazingly, "The charge remained pending for several years, during which [the accused plaintiff] made three court appearances." *Id*. at 108.

For further analysis of the Swartz v. Insogna decision, see Richard W. Millar, Jr., *Saluting the Police*, 55-MAR ORANGE COUNTY LAW 40 (March 2013). In this brief article, the author offers the following cogent comments with respect to this case:

> In a *de novo* review, the appellate court observed that the first officer (the recipient of the finger salute) gave conflicting testimony as to why he pulled in behind Mrs. Swartz inasmuch as there was no traffic violation. The best he could come up with was that he thought that Mr. Swartz was trying to get his attention and that Mrs. Swartz was in distress.
>
> With no little irony, the court said, "Perhaps there is a police officer somewhere who would interpret an automobile passenger's giving him the finger as a signal of distress ... but that the universal recognition that this gesture is an insult deprives such an interpretation of reasonableness." Even if an officer interpreted it as "an ill-advised signal for help" it was preferable to ignore it rather than judicially approve the stopping of every vehicle "from which a passenger makes that gesture." The court held that "such a gesture alone cannot establish probable cause to believe a disorderly conduct violation has occurred."
>
> As always, there is something to learn from these cases. If you are ever stopped for giving an officer "the Ancient Insult," just tell him he was mistaken. You were just giving him the old St. Johnsville [the town where the alleged violation occurred] signal for distress.

Id. at 40.

See also *People v. Fassinger*, 975 N.Y.S.2d 602, 604-05 (2013) (defendant yelled to police officer to "'arrest me,'" "and made obscene gestures, including giving two middle fingers and grabbing her crotch"; court held that such conduct did not constitute disorderly conduct under New York law because "The brief exchange between the Defendant and the officer did not create a risk that the incident would become a potential or immediate public problem").

In another even more recent case, *Brown v. Wilson*, 2015 WL 416841 (U.S. Dist. Ct., W.D. Tex., July 9, 2015), the defendant, a Sheriff's Office deputy, stopped the plaintiff motorist for giving the deputy the "finger" and cited him for violation of Texas's disorderly conduct statute. The plaintiff filed an action alleging his constitutional rights had been violated. The U.S. District Court held in favor of the plaintiff, ruling that his action did not constitute "fighting words" as required for violation of the statute, because they did not inflict injury and were not likely to provoke a violent reaction.

In *Coggin v. State*, 123 S.W. 3d 82, 90-91 (Tex. App. 2003), the Texas appellate court reversed a conviction for disorderly conduct where the defendant showed his middle finger to another driver while passing on a highway. The court cautioned, however, that:

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> We agree that the gesture—repugnant, distasteful, and crass as it is—could tend to incite an immediate breach of the peace in a different context. In some circumstances, it may accompany or be attendant to 'road rage' or reckless driving, which may be prosecuted under Texas law." Id. at 91); *State v. Rivenburgh*, 933 S.W. 2d 698, 701 (Tex. App. 1996) (holding that claim of disorderly conduct based on driver giving middle finger to another driver via rear view mirror did not constitute probable cause to stop driver).

The court also stated, at n.2, that:

> The gesture of extending one's middle finger can be construed as speech because it has a well-known connotation. See *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir.1997) (citing *Spence v. Washington*, 418 U.S. 405, 411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)) ("Nonverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood is great that the message will be understood by those who view it, regardless of whether it is actually understood in a particular instance in such a way.").

The court further noted, at n.1, that:

> This symbolic gesture has come to mean many things to many people in many contexts, including "displeasure" and "mild annoyance." (Citation omitted.) See also the cover of the September 20, 2003 issue of The Economist magazine, depicting a cactus in a desert panorama giving the gesture because of displeasure with the outcome of the Cancún trade talks.

Cf. Favata v. Seidel, 511 Fed. Appx. 155, 159 (3d Cir. 2013) (holding that state trooper had probable cause to charge motorist with disorderly conduct under Pennsylvania law where motorist displayed his middle finger to driver of another vehicle, because of motorist's aggressive driving, exiting his car in order to confront other motorist on highway exit ramp, and engaging in "vehicular brinksmanship"); *Credico v. West Goshen Police*, 574 Fed. Appx. 126, 129 (3rd Cir. 2014) (holding that police officer had probable cause to issue plaintiff citation for disorderly conduct under Pennsylvania statute where plaintiff approached officer after raising his middle finger "in a menacing manner, getting very close to him, and loudly cursing at him – all in the hopes of creating the basis for a lawsuit . . . ., " which actions "caused [the officer] to reasonably believe that [plaintiff] was creating a physically offensive condition with the intent to cause public inconvenience, annoyance, or alarm").

Conclusion

With the exception of the Robbins Article, very little has been written on the "finger" gesture in any domain, and for some reason in recent years there have been fewer cases that have grappled with the meaning or the degree of offensiveness of the middle finger. Is it perhaps because the digitus impudicus is now so common that no-one even bothers giving it a second thought? The Robbins Article may be correct in concluding, at 1409-10, that "Although its meaning has remained relatively constant over time, the middle finger gesture -- like the f-word -- has become part of the American vernacular and, in the process, shed its 'taboo status.'" Martha Irvine, in her article entitled *Is Middle Finger Losing Its Shock Value?* Columbian (Vancouver, Wash., Feb. 26, 2003), available at https://www.highbeam.com/doc/1P2-23229014.html, reached the same conclusion, stating that "the opprobrium of this gesture may be in decline. These days, 'the bird' is flying everywhere—and, in many instances, losing its taboo status, especially among the younger set." ■

Bring Your Own Devices (BYOD): Policy Considerations for Law Firms

by Trev E. Peterson, Knudsen, Berkheimer, Richardson and Endacott, LLP, Lincoln, NE

The issues raised by the Bring Your Own Devices ("BYOD") craze are not new; just different in scope than the issues faced by law firms from the beginning of the use of computers for word processing in the mid to late 1980's. We just did not recognize the problem as a BYOD problem at the time. In the mid-80's, the more tech savvy attorneys took work home on floppy disks carried in their shirt pockets. At home they worked on the documents, saved the new versions on their hard drives on their home desktop and brought the disk back the next day to transfer the newly edited documents to the firm's network. As technology improved, the floppy disk was replaced by the flash drive and then by e-mailing the draft documents from the firm's network to the lawyer's home e-mail address. The lawyer would download the documents from his or her home e-mail address, make revisions, save the documents on their home desktop and then e-mail the revised documents back to themselves at their work e-mail. Few considered the security and ethical problems posed by saving confidential client information on home computers where the attorney's spouse, children or children's friends have access to the home computer. Given the resistance of some users to strong passwords on their office computers, what kind of security do the attorneys have on their home machines? Many users don't know that Word and Adobe come with encryption built in, just press F1 and search "encryption" or "password."

There are advantages to being able to connect with the office at any time. As a "disk in the shirt pocket" user, there is an advantage to me personally in being able to attach to the firm's network from home to check e-mails, draft documents, file pleadings and set appointments. All of this is easier if I can use my own technology. Lawyers with a smart phone, tablet or laptop can check e-mails, set appointments, bill time and keep in contact with clients while traveling or at home. Clients expect us to be able to connect with them at any time.

Smart phones, tablets, laptops, flash drives, portable disk drives all pose potential problems for law firms. From malware to the unauthorized disclosure of confidential client information, lawyers and law firms have to be aware of the risks posed by employees and guests who bring their own devices to the office. Clients expect their attorneys to be available. From cell phones to being able to check e-mails while away from the office to reviewing loan documents while riding on the bus chaperoning a high school band trip, lawyers want and need to be able to maintain contact with the office and to work on client matters. Lawyers are obligated to take reasonable steps to protect client data from unauthorized disclosure, but what about the lawyer who loses her cell phone, the lawyer who leaves his laptop at the airport security checkpoint or the lawyer who leaves her flash drive at the hotel?

Network security is a constant balancing act. The most secure computer network is a network with no users. No users, no security risks. While this may be the goal of firm IT personnel, it is not realistic. Users need access to the firm network to check their e-mails, calendars or to draft documents. Law firms are populated with users with a variety of computer skills, from those who use the computer as a paperweight to those users who use their computers, cell phones or tablets almost constantly. Add to the lawyers your support staff, clients who want Wi-Fi access while at your office for a tedious mediation and outside lawyers who want to connect to their office networks during deposition breaks or meetings and you have a mixture of security issues. If your firm has a personal injury practice, add concerns under HIPPA[1] over protecting the personal health information of injured

[1] The Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §1320d and the regulations promulgated by the Department of Health and Human Services.

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parties, including the health information of opposing parties. If you represent lenders, there are requirements to protect financial information, loan documents, purchase offers, memoranda of understanding for a variety of business transactions, and, if your firm practices securities law, information concerning public offerings or draft SEC disclosures for a publically held client.

Firms also have a significant amount of intellectual property, such as forms, briefs, research, sample agreements that the firm wants to protect from disclosure and use by non-firm members.

There are many reasons to allow BYOD in the work place. First is client service. Clients expect to be able to contact their attorneys all of the time. If the attorney cannot respond to e-mails because the attorney does not have the capacity to send and receive e-mails, the client may be inclined to find an attorney who can respond. Attorneys also want to provide client service and be available, even while travelling, during breaks in a trial, or while on vacation to provide first class client service. All of these uses can and should be accommodated by the lawyer's firm.

The second reason to allow BYOD is the increase in productivity. If you work from home or while travelling, access to the firm network makes working possible and much more efficient. If you can generate finished product, or review documents, the attorney can bill for the time spent working while at home or travelling. Back in the 80's, if you forgot to put a form on the disk you carried home, then you would either have to draft the document without the form or you would have to leave a blank spot in the document and add the missing language when you returned to the office. Today the desktop has been replaced by laptops and by tablets—at home and increasingly at the office—and access to the firm's documents can be available either through the firm's cloud service or through a virtual private network. My Outlook contacts list includes clients, family and friends, my church usher group, assistant scout masters, scouts, members of the church foundation board of directors and a variety of other contacts. My Outlook contacts sync with my phone. If I add a contact from my phone; the contact appears on my Outlook contacts list on my laptop. My calendar syncs to the Outlook calendar function, so I can make appointments while out of the office and have those appointments appear on my office calendar. I can check my calendar on my phone or on my laptop wherever I have either cell phone service or Wi-Fi service. I can also access the firm's forms and other documents from anyplace in the world where I have Wi-Fi service and I can generate work product wherever I have access to the firm's network.

BYOD can be cheaper for the firm than providing laptops or other portable devices to the firm's attorneys. If an attorney has his or her own laptop and the firm provides desktops at the office, providing access on the laptop allows the attorney to use her own laptop to access the firm network, whether she is at home, in a conference room at the office, or at a coffee shop, restaurant or an ACREL meeting. While there are some security risks, the increase in convenience and in productivity offset the risks.

Security is the primary drawback of BYOD. If the firm's IT person cannot control the devices that can be used to access the network, the IT personnel need to be able to limit access of users to protect the firm's network from being infected with a virus or damaged by a disgruntled attorney or employee who plants a virus, deletes files or copies files from the network in preparation for a move to another firm. Loss of the device is another issue that should be addressed in any firm policy regarding BYOD. Software is available that will permit the firm to wipe any lost cellphone. However, flash drives and portable storage devices are not susceptible to being wiped—but encryption is available for most flash drives and storage devices, so if the device is lost or stolen, the finder or thief cannot access the encrypted data.

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Any BOYD policy should include a description of the portions of the firm's data will be made available to the person using the portable device. Do all lawyers need access to the all of the firm's data? If a lawyer's access is going to be limited, a wise policy will limit access in ways that make sense based on that lawyer's practice area. A real estate lawyer may not need access to the case data used by personal injury attorneys, but the real estate lawyer should have access to the real estate, lending and corporate forms. If you have a lawyer who works across many fields, then that lawyer may need access to some information that other attorneys have no need to access. Developing a policy requires that the firm needs to actually inquire about the use made of the firm's network instead of imposing arbitrary limitations by IT consultants who have no clue about what lawyers access on a daily basis.

What about the firm's non-lawyer staff? It is possible that a legal assistant may work for a PI lawyer for part of the day and draft discovery in banking or bankruptcy litigation later the same day. If the legal assistant is working on a BYOD device, he or she may need access rights that are greater than the access rights of the attorneys for whom that the legal assistant works. If the legal assistant is not an exempt employee, she or he may place the firm at risk for violating the wage and hour act if access is provided to the employee and the employee checks e-mails or works of firm projects while at home or over the weekend. There may be little need for the firm's receptionist, librarian, and secretaries or for temporary employees, such as runners or law clerks to have access on their personal devices, but some access, such as e-mail or access to the firm's forms library may be useful even for temporary employees. Temporary employees are probably not exempt under the wage and hours act, so care should be taken before allowing non-exempt employees access when the firm may have to pay overtime for the use made by the employees after their normal working hours.

Ownership of the personal device is also an issue. If the lawyer is using his personal phone for business purposes, what kind of control should the firm exercise over the use of that phone? Requiring that the phone be loaded with software that will permit the firm to wipe the contacts, e-mail and calendar functions if the phone is lost or stolen makes sense, but does the owner understand that his or her personal contacts will also be wiped along with the firm's data? Will the firm check the phone to see who the attorney was calling, or what Internet sites the attorney may have browsed on his or her phone? The policy should be written and should contain a waiver so that the firm can wipe all of the data located on the phone. If the firm wants to examine phone usage, then the policy should permit that as well. If the firm is involved in litigation, personal devices may be subject to litigation holds and may be subject to being turned over in response to discovery requests for forensic examination by expert witnesses. The employee has to either buy a new phone/tablet/laptop or do without a phone/tablet/laptop during the course of the litigation.

The variety of devices is also a concern. The firm should not be expected to provide IT support to every device on the market. The firm should pick a limited number of devices that the firm will support. If the firm will support only iPhones and if someone buys a different type of phone, then the firm has to decide whether to prohibit access or to allow access but the user has to figure out how to access the network or has to reimburse the firm for the cost of the IT consultant to get the different phone to attach to the network. Similar issues arise with the operating systems used on tablets and laptops. The firm has to decide how much "free" support the firm wishes to make available to get the BYOD device attached to the network.

Who pays for the software to wipe the portable device? Who specifies the software? The policy should specify who can specify the software, but the owner of the device may have to buy the program.

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If there is a security breach, who is responsible for reporting the breach? State or federal law may impose a reporting requirements on the firm when an attorney loses a device depending on the kind of confidential information stored on the device. What about changing passwords for employees who leave the office or lose their devices? The policy should specify a protocol for the loss of any device.

The permissible and impermissible uses of the devices should also be defined. Each employee should also acknowledge the potential risks with using personal devices on the firm's network. Once the firm establishes a policy then the firm should enforce the policy.

Who should have access? Lawyers should have access and support staff who need access should have access. The firm may want to consider limiting remote access to the network to e-mail, contacts and calendars for non-lawyers. The outsider groups, clients and non-clients (including opposing counsel) could be limited to Internet access while attached as guests to the firm's Wi-Fi. If a lawyer wants to share documents with a client, consider the use of a drop box site instead of allowing clients onto the firm's cloud or network. If network access is necessary, because the client is a good client and requires the access, then consider creating a special directory where that client's work can be saved and no other matters are saved there. The lawyer (or some tech savvy employee) should login using the client's login name and password and then attempt to look at other, nonpermitted, portions of the firm's site to be certain that the security credentials granted to the client do not allow the client to view work being produced for other clients. Other outsiders have no reason for access other than the Internet and there is no reason to let an outsider to be able to do more than connect to the internet through the firm's WI-FI.

BYOD is here to stay. As lawyers we have to protect our clients' confidential information from unauthorized disclosure. It is impossible to predict when and how a security breach may occur. The best that the firm can do is protect the network and require scans of BYOD for malware or viruses before allowing the BYOD to attach to the network. Educating BYOD users about the risks associated with allowing their access to the network is essential as are policies dealing with loss of BYOD devices and situations where attorneys or staff leave the firm. Watch the Practice Technology Committee ACRELShares! page for additional information as it is developed by the Committee. ■

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