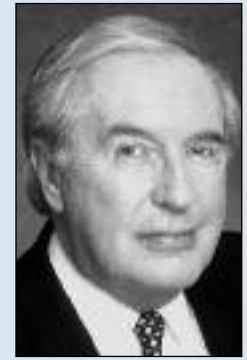


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Fall Prologue



“The workings of a government, when that government really works, is always rooted in mystery: its organic balance is too complex and delicate for the discursive understanding for the rough template of schematization. But we Americans have never been deterred thereby from making the attempt to comprehend our political institutions, and we continue to use, as we must, such means of insight as come to hand.”

These words, written almost fifty years ago by the late Charles L. Black, Jr. of Yale Law School, have a conspicuous relevance in today's society.

In our lead article, *James Madison and the Struggle for the Bill of Rights*, Professor Richard Labunski deftly provides new and compelling insight as to the historical depth of the “struggle”—as well as the centrality of contingency—to the ultimate realization of our iconic Bill of Rights.

At the center of the struggle stands James Madison. His is certainly a familiar name in the lexicon of “Founding Fathers” but somehow, historically, is always clothed with a kind of vague anonymity when compared with others in the Pantheon: Washington, Jefferson, Hamilton. Readers, perhaps for the first time, will come away with a new and profound admiration for the man. Without question, to paraphrase Justice Frankfurter, Madison, indisputably, is the “one alone” to be chosen if the attainment of the Bill of Rights were to be represented by a single figure. In stature Madison stood only five feet, two inches in height and, as depicted by Labunski, was “shy, soft spoken, and scholarly.” However, in the crucible of battle, forensic or otherwise, he consistently demonstrated deep reserves of knowledge, prescience, and a courageous indomitability which bordered on the incredible—accompanied always by a pervasive personal integrity which, sometimes grudgingly, won him almost univer-

sal respect. It is not overstatement to suggest that without his efforts, frequently at great personal sacrifice, there would have been no Bill of Rights. And, anomalously, by extension, as Labunski so persuasively writes, without the Bill of Rights, there would have been no Constitution and George Washington would not have assumed the Presidency.

Today we familiarly assume that the Constitution and the Bill of Rights received a universally warm approval. In reality nothing could be further from the truth. Before the Constitution was enacted, it had to come before thirteen states for ratification. Passionate opponents, such as Patrick Henry and George Mason, fought it at every turn. Only with the promised addition of an explicit Bill of Rights—and the tireless work of Madison to attain this end—was ratification finally achieved.

Considered in their entirety, the ten amendments in the Bill of Rights seek to guarantee the most compendious protection of individual freedom ever written. However, they were not even a part of the original Constitution.

From the outset of our nation, long before the ratification of the Constitution, no issue was more provocative or evoked more passion than the appropriate role of the states in the new nation. A pervasive fear filled the land that the proposed central government, however cabined and curtailed, would eventually lead to tyranny. Today, in a host of permutations, no issue is more controversial than the role of executive power. An idea current in the land is that presidential power has grown to the point where it is a threat to democracy.

At the dawn of our nation, as it is today, it is the Constitution and the Bill of Rights to which we look in establishing the safeguards of liberty, whatever the context of the controversy. Without a strong Bill of Rights and an independent, progressive Supreme Court, it is quite

(Please see **Prologue** page 44)

Honorable Francis J. Larkin is Chair of the Experience Editorial Board.

FALL 2007/EXPERIENCE



LEADING REMARKS

The Lady Who Started It

BY THEODORE A. KOLB

Kathleen Casey-Kirschling is the name of the lady who started the greatest demographic shift this country has ever experienced. She is the first baby boomer to take early retirement Social Security at age 62. She will be followed by 3.2 million boomers in the year 2008, at the rate of approximately 365 people per hour.

The impact on Social Security, Medicare and Medicaid for these 80 million Americans of the boomer generation has been discussed, analyzed, reported on, and completely ignored since the 1960s.

It is only recently that the upcoming cracks in the Social Security system have become a little more well-known. The prior feeble attempts to correct Social Security have amounted to increasing the payroll tax, minimizing benefits, and taxing the benefits that are received—not exactly the security that most Americans thought they were promised.

This financial strain on our country from Social Security pales in comparison to the looming fiscal nightmare of Medicare. Currently, the Medicare hospital insurance fund now pays out more than it takes in, a financial discrepancy that cannot be maintained. As the boomer demographic marches on, both government and private sector actuaries project that the hospital insurance fund will run out of money in the year 2019.

An abundance of retirees and the shortage of workers present unique challenges not only in terms of finance, but also in terms of services. In the 1940s, there were forty-two workers participating in the system for every retiree receiving benefits. In 2007, there are three workers paying into the system for every retiree. In less than 20 years, it will be two workers to support every retiree. In addition to this system being unsustain-

able financially, it also has dire consequences for our retiree population.

As the population ages there is a greater need by the elderly, particularly the frail elderly cohort, for more services and assistance with the activities of daily living. With the current population of America today, it is literally impossible for the generations behind the baby boomers to produce the classic “guns and butter” economy and at the same time provide the services that our aging citizens will require.

Another way to put this looming crisis in perspective is to compare the projected deficits for Social Security and Medicare. Keeping in mind that Washington has known about this problem for decades, currently, in order to make Social Security relatively solvent, the choices are higher taxes or cut spending. That translates to a 16 percent increase in the payroll tax or a 13 percent cut in benefits. By comparison, to make Medicare solvent would require an increase of 122 percent in the payroll tax or a 51 percent reduction in spending just for hospital care. As the politicians, from both sides of the aisle, jockey to be elected, the situation only becomes worse.

What can be done and who can advise the seniors and the boomers who are going to be the casualties in this upcoming crisis?

Some of those who are in the best position to advise and counsel these families are members of the Senior Lawyers Division who have already met many of these challenges and the Elder Law attorneys who counsel seniors and their families. For those who are familiar with these issues, it is easy to see the storm clouds brewing. The first years of retirement, usually between five and fifteen years, are the golden years. There is much more free time, perhaps part-time work, perhaps volunteer work, and a lot

Theodore A. Kolb is Chair of the Senior Lawyers Division.

(Please see Leading Remarks page 43)

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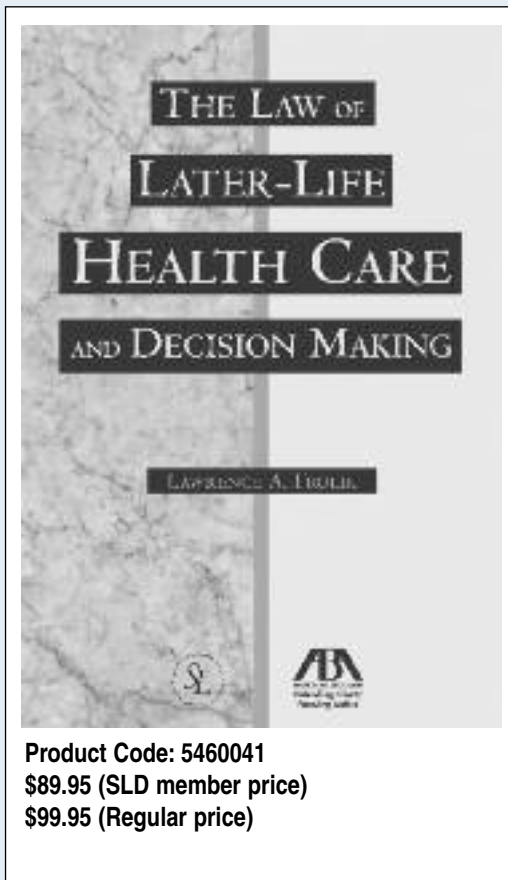
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From the ABA
Senior Lawyers Division

The Law of Later-Life Health Care and Decision Making

By Lawrence A. Frolik

Today's aging population presents new challenges and unique legal questions in many areas of the law, but none more so than in health law and in the legal consequences of decision making for those of diminished mental capacity. *The Law of Later-Life Health Care and Decision Making* takes a close look at the manner in which the law regulates and reacts to health care and personal decision making for the elderly. Professor Lawrence Frolik's groundbreaking scholarly work in the area of guardianship and elder law has earned him recognition as a national expert on the legal issues of older Americans. Here, he guides the reader through the many ins and outs of what can be a complicated and confusing mixture of federal and state statutes and case law.

Topics covered include:

- Paying for Health Care
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- Legal Implications of Mental Incapacity: Guardianship, Conservatorship, and Powers of Attorney
- End of Life Decision Making

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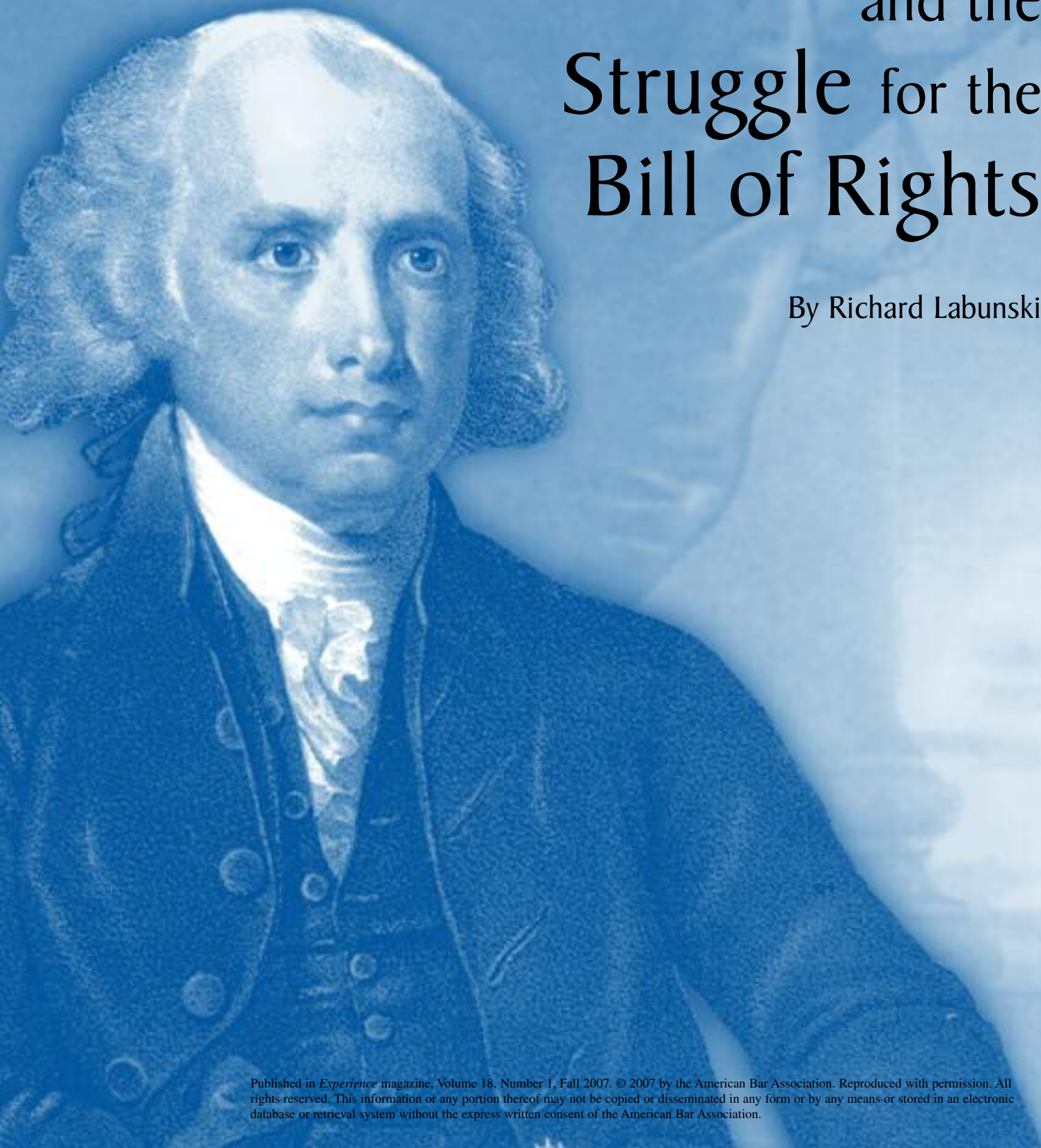
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A monochromatic blue-toned portrait of James Madison, showing him from the chest up. He has long, wavy hair and is wearing a dark coat over a white cravat. The background is a light blue gradient with faint, illegible text.

James Madison and the Struggle for the Bill of Rights

By Richard Labunski

uring the final weeks of the Philadelphia Convention of 1787, George Mason and Governor Edmund Randolph of Virginia, along with several other prominent delegates, strenuously objected to forwarding the proposed Constitution to the states for ratification without a bill of rights. Mason, the principal author of the Virginia Declaration of Rights, declared that he would “sooner chop off his right hand than put it to the Constitution as it now stands.” (*Notes of Debates in the Federal Convention as Reported by James Madison*, 566).

James Madison and Alexander Hamilton argued that the new government would be one of limited powers, and since it would have no authority to abridge individual freedom, it was unnecessary to include a list of protections in the document.

The supporters of the Constitution, known as Federalists, soon realized how badly they had miscalculated. During the ratification debates at state conventions, it became clear that the American people would accept the Constitution only if the First Congress agreed to propose such amendments.

Eventually Madison, with the encouragement of Thomas Jefferson who wrote from Paris, strongly embraced the need for a bill of rights. He was determined to keep the promise made to the American people.

After Madison persuaded delegates at the Virginia Ratifying Convention to approve the Constitution—defeating Patrick Henry, who vigorously opposed ratification—Madison sought election to the First Congress so he would have the chance to offer the amendments.

Henry believed the new government would be dangerously powerful. Using his control of the Virginia General Assembly as a member of the House of Delegates, he first shut Madison out of the U.S. Senate by arranging the election of two Anti-Federalists. (State legislatures elected senators then.)

That meant Madison would have to run for the U.S. House. Led by the vindictive Henry, the state legislature created a sprawling, eight-county district, teeming with Anti-Federalists, where Madison would have to seek election. Henry helped recruit James Monroe, Madison’s friend and Revolutionary War hero, to run against him.

On February 2, 1789, Madison was elected by 336 votes. Federalists won most of the seats in the House and Senate. At that point, Madison might have thought that with overwhelming majorities in each house, there would be strong support for a bill of rights in the First Congress.

Instead, he found many of his colleagues were opposed to adding amendments. On June 8, 1789, he stood on the House floor in Federal Hall in New York City, the temporary seat of government, to begin the difficult task of convincing two-thirds of the members of the House to approve the amendments and send them to the Senate.

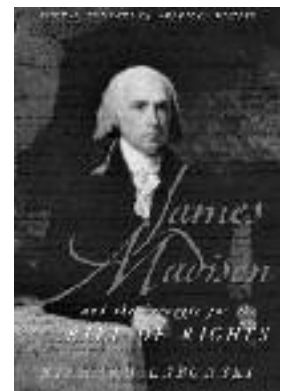
For the exceedingly shy Madison, who had a quiet voice and, at five-foot-four, was small in stature, debating in a large forum before a packed gallery was far from the ideal environment.

Before outlining the amendments, Madison offered a statement of deference to his colleagues: “I am sorry to be accessory to the loss of a single moment of time by the house.” He said that if “congress will devote but one day to this subject, so far as to satisfy the public that we do not disregard their wishes, it will have a salutary influence . . . and prepare the way for a favorable reception of our future measures.” Madison promised to confine his list of proposed amendments to those which are “intrinsically proper . . . or proper because [they] are wished for by a respectable number of my fellow citizens.” (*Documentary History of the First Federal Congress*, 11:818–820).

As he introduced the amendments, Madison explained, as he had during the months leading up to the congressional election, that “I have never considered this provision [a bill of rights] so essential to the federal constitution, as to make it improper to ratify it.” But now, he added:

I will candidly acknowledge that . . . the Constitution may be amended; that is to say, if all power is subject to abuse, that then it is possible the abuse of the powers of the general government may be guarded against in a more secure manner than is now done . . . We have in this way something to gain, and, if we proceed with caution, nothing to lose . . . The people of many states, have thought it necessary to raise barriers against

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This article is excerpted from James Madison and the Struggle for the Bill of Rights, by Richard Labunski, published by Oxford University Press, 2006. Used with the permission of Oxford University Press, Inc.

FALL 2007/EXPERIENCE



Patrick Henry

power in all forms and departments of government, and I am inclined to believe, if once bills of rights are established in all the states as well as the federal constitution, we shall find that altho' some of them are rather unimportant, yet, upon the whole, they will have a salutary tendency. *Id.*

Madison's list of amendments included enlarging the size of the House; protecting freedom of religion, speech, and the press and the right to trial by jury in both civil and criminal cases; and prohibiting arbitrary searches, excessive bail, and double jeopardy. Many of these were drawn from the two hundred amendments recommended by Massachusetts, South Carolina, New Hampshire, Virginia, and New York, which, when duplicates were eliminated, offered about 75 distinct amendments. (*Creating the Bill of Rights*, 14–28).

Not surprisingly, Madison drew heavily on the amendments suggested by his

state's ratifying convention and those listed in the Virginia Declaration of Rights. He did not propose amendments that would alter the structure of the Constitution; he believed that the amendments he recommended would be the least objectionable and the most likely to be approved by Congress and the states.

Madison's address demonstrated his knowledge of government, his sense of what was needed to make the new constitutional system work, and his commitment to republican principles. But it also showed that he was not infallible, as he made one of the most serious misjudgments of his career.

Madison recommended that the list of rights he presented on June 8 be incorporated into the body of the Constitution and not added at the end. He believed that if amendments were added at the end, it would not be clear which sections of the Constitution had been modified. In his view, a supplemental list of amendments would not be treated as a permanent part of the Constitution but would instead be a potentially ignored appendix, leading to an endless debate over whether the amendments had actually altered the Constitution. He argued that because each amendment would modify a specific section of the Constitution, the new language should be inserted in the relevant section itself.

The long-term implications of his proposal were troublesome enough. In the short run, Madison's plan of interpolating the amendments would surely have made it more difficult to secure the approval of both houses of Congress. With the two-thirds requirement, there was little room for error. Many of Madison's colleagues in the House were firmly opposed to altering the document by adding amendments at all. They would certainly have found the idea of tampering with its original language even more disturbing. For all of Madison's political instincts, it remains one of the few, but also one of the most conspicuous, examples of how wrong he could be.

Madison's failure to choose the best place for amendments notwithstanding, his speech of June 8 was thorough, impressive, and compelling, and it laid the groundwork for the eventual debate on the Bill of Rights. He admitted that "paper

barriers” were sometimes too weak to protect individuals against a determined government, but he also believed that the rights included in his list of amendments would have a “tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community.” Madison added that highlighting these rights in the Constitution might serve to “controll the majority from those acts to which they might be otherwise inclined.” (*Documentary History of the First Federal Congress*, 11:823).

Madison outlined the major advantages of enacting a bill of rights. He believed it would persuade Anti-Federalists finally to give up their opposition to the new government: “It will be a desirable thing to extinguish from the bosom of every member of the community any apprehensions, that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled.” (*Ibid.*, 819.) He was careful not to impugn the motives or integrity of those who still opposed the Constitution, but he believed that they would appreciate the “spirit of deference and concession” of those who controlled the government if a bill of rights was offered.

Madison considered one amendment to be especially important. He knew that state constitutions often failed to provide realistic protection for unpopular speech and religious practice. He had tried at the Philadelphia Convention to include in the Constitution authority for the new Congress to “negative” all laws enacted by state legislatures that Congress considered contrary to the federal Constitution. (*Documentary History of the First Federal Congress*, 11: 88–89, 92, 304–305, 518). Such a “veto” power, in Madison’s view, could be used to prevent states from interfering with the indispensable right of citizens to freely exchange information and criticize government, and to learn through the press what the government was doing, all of which were essential if the people had to replace unresponsive or oppressive public officials.

Although his proposal was defeated in Philadelphia, Madison saw the chance to resurrect it on a smaller scale in the First Congress. The fifth article in his list of

amendments read in part: “No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” (*Documentary History of the First Federal Congress*, 11:826). In other words, these fundamental rights would be protected not only against abuses by the national government but against abuses by state governments as well. The states would thus be prohibited from interfering with rights that would eventually become part of the First Amendment and the right to a jury trial in criminal cases. Although his House colleagues eventually gave their support, the amendment was deleted by the Senate.

This had been one of the most important speeches in the nation’s history. If Madison had any sense of the eventual importance of the bill of rights, he would have expected at least some approbation from his colleagues. He had put his heart and soul into this address, having worked so hard to get elected to the First Congress and then preparing for months for this moment. How disheartening it must have been for him that, after engaging the attention of his fellow House members for several hours, Madison had barely resumed his seat when one member after another denounced his propos-

*The fifth article in his list read in part:
“No state shall violate the equal rights
of conscience”*

als—primarily arguing that amendments were unnecessary, premature, and certainly less important than other legislative business.

He had heard many of the same comments earlier in the day, before introducing the amendments. Now, as those arguments were repeated, it was as if his colleagues had already decided not to consider the potential value of the amendments themselves. Representative

James Jackson, a Federalist from Georgia, immediately stated that he was “against inserting a declaration of rights in the constitution . . . and if such an addition is not dangerous or improper, it is at least unnecessary.” He asked why Madison would seek to protect freedom of the press: “[P]ray, how is this in danger? There is no power given to congress [in the Constitution] to regulate this subject as they can commerce, or peace, or war.” (*Documentary History of the First Federal Congress*, 11: 827-28).

Jackson was especially concerned about the message a prolonged debate about amendments would send to foreign nations

Jackson was especially concerned about the message a prolonged debate about amendments would send to foreign nations, which would view with alarm additional delays in creating a stable government. He noted that such nations will

treat us with the contempt we have hitherto borne by reason of the imbecility of our government. Can we expect to enter into a commercial competition with any of them, while our system is incomplete? and how long it will remain in such a situation, if we enter upon amendments, God only knows. Our instability will make us objects of scorn. (*Documentary History of the First Federal Congress*, 11: 828).

The influential Roger Sherman of Connecticut spoke next. He was firmly against considering amendments because he did not see how they could, at this point, improve the Constitution. He argued that since the plan of government had been approved by most ratifying conventions without recommendations for amendments, it was viewed favorably by a majority of citizens. Because the nation

had so little experience with the Constitution, no one could know, Sherman argued, how to improve it. He urged his colleagues to find a way to “get rid of the subject,” and he recommended against sending it to a special committee, presumably hoping that the committee of the whole would put an end to the discussion. (*Documentary History of the First Federal Congress*, 11:834).

As the afternoon wore on, it must have seemed to Madison that the House might not even take up amendments in its first session, much less approve any of them by a two-thirds vote. Yet if he was dismayed by the resistance of his Federalist colleagues, he might have taken heart that his effort attracted support from some who had earlier opposed the new government. Elbridge Gerry of Massachusetts had objected so strongly to the proposed Constitution that he refused to sign it at the Philadelphia convention. Now he considered the matter to be of great urgency. Gerry agreed with Madison that if the First Congress did not seem serious about considering amendments, more state legislatures would join the call of New York and Virginia for a second constitutional convention. Despite his earlier opposition, Gerry had pragmatically concluded that the current Constitution was as good as the new nation was likely to get: “I am not, sir, one of those blind admirers of this system, who think it all perfection; nor am I so blind as not to see its beauties. The truth is, it partakes of humanity; in it is blended virtue and vice, errors and excellence.” (*Documentary History of the First Federal Congress*, 11:830–831).

Another Anti-Federalist who rallied to Madison’s cause was Thomas Sumter of South Carolina. Sumter, who had opposed the Constitution at his ratifying convention, said, “I consider the subject of amendments of such great importance to the Union, that I should be glad to see it undertaken in any manner.” He believed that referring the subject to a select committee would be “treating the applications of the state conventions rather slightly,” and he preferred the full House consider the subject. Sumter worried about what would happen if amendments were not proposed: “I think it will give fresh cause for jealousy; it will rouse



Federal Hall, at the corner of Wall and Nassau Streets, in lower Manhattan. It was here that the First Congress met and the Bill of Rights was proposed.

the alarm which is now suspended, and the people will become clamorous for amendments.” At that point, Sumter added, people would no longer apply to Congress for amendments; they would “resort to the other alternative [a convention] pointed out in the constitution.” (*Documentary History of the First Federal Congress*, 11:834–35).

After the extended discussion on June 8, the House agreed to consider the amendments on July 21. During those five weeks and beyond, the lively debate over Madison’s proposals continued in letters among his colleagues, their friends, and constituents. If Madison had been shown some of the letters written in reaction to the June 8 address, he would have been even more pessimistic about the chances for amendments to make it through the legislature than he was based only on the debate.

Representative George Clymer of Philadelphia, who had attended the Constitutional Convention of 1787, used a derogatory allusion—one of several times it would be used during the discussion of amendments—when writing to a friend. In a letter he began before Madison’s long address, Clymer wondered whether Madison was serious about proposing essential amendments, or if

they were “merely a tub to the whale.” The expression came from Jonathan Swift’s 1704 story, “Tale of a Tub,” and it referred to sailors who, when approached by a whale, would sometimes throw an empty tub into the water to distract and amuse the animal in the hope that it would not damage their ship. (*The Bill of Rights and the States*, 46–60)

In his correspondence, Representative Fisher Ames, who was a strong supporter of the Constitution, applauded Madison’s research in summarizing the amendments proposed by state ratifying conventions, but he saw a selfish motive in his efforts. Ames wrote to a friend that “Upon the whole, it [the bill of rights] may do good towards quieting men who attend to sounds only, and may get the mover [Madison] some popularity—which he wishes.” The next day, Ames wrote to another correspondent that Madison’s amendments had little substance: “It [the bill of rights] will stimulate the stomach as little as hasty-pudding. It is rather food than physic. An immense mass of sweet and other herbs and roots for a diet drink.” (*Documentary History of the First Federal Congress*, 16:748–49; 755–56).

Perhaps no letter would have been more upsetting to Madison than the one written by Representative Theodore



Assembly Room, Independence Hall in Philadelphia: Where the Constitution was written and signed in 1787

Sedgwick, a Massachusetts Federalist and supporter of the Constitution. Just before the House was scheduled to debate the amendments on July 21, he wrote that Madison lacked the courage to see them through their difficult course.

Mr. Madison's talents, respectable as they are will for some time be lost to the public, from his timidity. His is constantly haunted with the gohst [ghost] of Patrick Henry. No man, in my opinion, in this country has more fair and honorable intentions, or more ardently wishes the prosperity of the public, but unfortunately he has not the strength of nerves which will enable him to set at defiance popular and factious clamors.

Sedgwick called the work the House faced on the amendments a "water gruel business," and told his correspondent that "those substantial amendments which would have a tendency to produce a more compleat and natural arrangement of the national union we must despair of attaining at present." (*Documentary History of the First Federal Congress*, 16:1075–76).

If Madison was not haunted by Henry, he certainly was aware that his adversary

in Virginia was corresponding with Virginia's senators and other Anti-Federalists, encouraging them to hold out for substantive amendments that would alter the relationship between the states and the federal government. As early as March 31 [1789], a few days before Congress was supposed to convene, Henry told Senator William Grayson of Virginia that he doubted Congress would consider amendments that would deny the new government the authority to tax citizens directly, or modify the treaty power of the Senate, or make other changes, noting that "whether apprehensions will extort concession to any salutary purpose I . . . cannot guess." (*Documentary History of the First Federal Congress*, 15:168). He was eager to have Grayson tell him what would likely happen on amendments when Congress met.

Shortly after Madison introduced the amendments to the House on June 8, Senator Grayson broke the bad news to Henry: "I am exceedingly sorry it is out of my power to hold out to you any flattering expectations on the score of amendments; it appears to me that both houses are almost wholly composed of federalists." Grayson criticized those who were willing to sacrifice the amendments that

would reduce the power of the federal judiciary, change the taxation power, and other needed alterations, in order to gain amendments affecting “personal liberty alone.” (*Documentary History of the First Federal Congress*, 16:759).

Henry was not impressed with Madison’s amendments.

The public was also learning more about Madison’s proposals. Soon after his June 8 address, his amendments appeared in newspapers, such as the *New York Daily Advertiser* on June 12 and the *Gazette of the United States* on June 13. (*The Bill of Rights and the States* 12:219, n. 1). That generated even more attention and inspired more of Madison’s friends and supporters to contact him about the issue.

Madison must have been especially heartened by the effusive comments of longtime supporter Edward Stevens of Virginia. He told Madison that “It affords me no small pleasure to inform you, that your proposition of amendments to the Constitution, among all my acquaintances that I have had communication with, gives general Satisfaction, and I trust if adopted will shut the mouths of many.” (*The Bill of Rights and the States* 12:261).

Madison would have about six weeks to prepare for the next round. As he headed back to his boardinghouse, he must have worried that not enough of his colleagues in Congress would agree to

propose amendments and keep the promise that had been made to the American people. Madison had confronted unpromising situations before, from the Constitutional Convention to the election in Virginia that brought him to Congress, and his intellect and energy had prevailed. But now he was facing the challenge of securing a two-thirds vote in each House, as required by the Constitution that he helped write two years before. He could hardly have imagined then that he would be in this kind of situation.

On August 24, 1789, the House forwarded 17 amendments to the Senate. The senators combined some, eliminated others, and after the two bodies eventually agreed on 12 amendments, they were sent to President Washington so he could forward them to the states for ratification.

Patrick Henry worked behind the scenes to persuade Virginia to reject the amendments. Although he was not a member of the legislature, his supporters in the state senate delayed their consideration for two years. As fate would have it, Virginia would have the deciding vote on the proposed amendments. If it said no, ratification would fail.

On December 15, 1791, after voters had replaced senators who refused to support the amendments, Virginia ratified, and the Bill of Rights became part of the Constitution. ■



Illustration courtesy of the National Archives

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Identity Theft and Frauds Against Senior Citizens

“Who’s In *Your* Wallet?”

By Stephen N. Maskaleris

Two of the most common scourges of financial health, happiness, and well-being in old age are identity theft and frauds perpetrated on senior citizens.

These scams try to steal your identity, money, and property, not to mention your good name and credit rating.

Your birth date, mother's maiden name, driver's license number, and Social Security number form the basis of your identity persona and you should guard them carefully by not giving out this information except to those authorized to request it, such as your banker or doctor. Never give out such information on the Internet. Once these valuable markers are stolen they can be sold, flashed over the Internet, and put into the public domain for use by any scam artist or crook who wishes to use them.

The types of scams and frauds are many and morph daily into ever more sophisticated frauds. The one constant, however, is that you will always be the loser unless you take action and protect yourself by (1) not giving your private information to anyone without being absolutely certain they must have it; and (2) being certain that the information will be protected by them, in compliance with all laws, as valuable, confidential, and private information.

What these frauds are and what we can do to avoid them is the theme of this article.

Identity Theft: "What's In Your Wallet?"

New forms of identity theft arise daily and affect senior citizens primarily in the areas of financial solicitations, e-mail scams, cell phone marketing, charities, and the like.

Just imagine arriving in the United States from a pleasant overseas trip and being arrested because someone had stolen your identification while you were away, used your Social Security number, and committed a crime. Believe it or not, this is a frequent occurrence—and until matters get straightened out, you can be held in jail, without bail, for a week or more.

Or a ne'er-do-well offspring deep in debt takes your Social Security number and runs up large debts in your name in an ATM machine. This is the most frequent identity theft crime committed every day, because it is easy to do and you don't expect a family member to commit it.

The Identity Theft and Assumption Deterrence Act, 18 U.S.C. §1028(a) (7), defines identity theft as a criminal offense that occurs when a person knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit or to aid or abet any unlawful activity that constitutes a violation of federal law or that constitutes a felony under any applicable state or local law.

Last year alone, almost 10 million Americans were victims of identity theft, a crime that cost them roughly \$5 billion. The U.S. Postal Inspection Service says that exact numbers are hard to pin down because different law-enforcement agencies classify ID theft crimes differently, and reports may involve other scams such as credit card fraud, Internet fraud, or mail theft, among others.

Self-help steps include reviewing your consumer credit reports annually or even more frequently if you suspect something is amiss; shredding and destroying unnecessary documents that contain your personal information; depositing your mail into a U.S. post office mailbox; and **not** leaving mail in your mailbox overnight or on weekends to be stolen.

Report lost or stolen credit cards immediately and sign your new ones immediately—before someone else does. Memorize your Social Security number, and don't use your birth date as a password or PIN number. Other simple steps include not leaving transaction receipts at ATM machines or other places where you do business and **never** disclosing credit card or other financial account numbers on a Web site unless the site offers a secure transaction and you are sure that it is secure.

The Postal Inspection Service further advises that the expiration dates on your credit cards should be closely monitored; if you do not receive replacement cards before their expiration dates, you should call the issuing company. The same holds true for your monthly statements and bills—if you don't get them when expected, contact the provider immediately.

And of course, never, **never** give your personal information or financial account numbers to any telephone solicitor offering you a prize or award. This is a popular—and successful—scheme that usually

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employs a friendly, smooth-talking person who is in no hurry to hang up, will listen to an older person's stories and complaints, and is so charming that he couldn't possibly be one of those nasty thieves.

Con men are still seeking a quick buck the old way: by using snail mail. The U.S. Postal Inspection Service investigated over 38,000 cases of mail fraud last year, scams that cost victims millions of dollars. Complaints of lottery mail fraud—a request for a cash payment to collect an international lottery or sweepstakes prize—are common. Once you send the money, though, you can consider it gone. Prosecutions are rare even though these international lotteries are illegal. The Post Office does its part whenever it gets wind of such scams by obtaining court orders to destroy millions of pieces of illegal bulk mailings before they reach their targets. New Jersey's state Web site (www.state.nj.us/lps/ca/consumerinfo/seniors.htm) provides information on elder fraud and bogus sweepstakes.

A request to send a cash payment to collect an award should always be met with skepticism. These mail solicitations to seniors may look convincing, but they

are out-and-out frauds.

If you believe you are a victim of a U.S. mail fraud crime, contact your nearest Postal Inspection Service office immediately. Also, call the three major credit bureaus and request each to place a "fraud alert" on your credit file. At the same time, check whether any fraudulent accounts were opened in your name without your knowledge or consent. If you are put into this position, close some or all of your current accounts and, at the very least, change your PIN codes and passwords immediately.

For additional help or information, visit the following Web sites:

U.S. Postal Inspection Service:
www.usps.com/postalinspectors

Federal Trade Commission:
www.consumer.gov/idtheft

U.S. Secret Service:
www.secretservice.gov

Department of Justice:
www.usdoj.gov/criminal/fraud/idtheft.html

Are You in Safe Hands?

- On May 1, 2007, the *Wall Street Journal* reported that JPMorgan Chase put trash bags full of personal client financial information, credit cards, Social Security numbers, and ID information into its regular trash, jeopardizing thousands of accounts.
- JetBlue employees were recently busted for using passengers' credit cards to live the high life. Instead of providing assistance, these passenger agents ripped off the passengers.
- The U.S. Agriculture Department had to remove the Social Security numbers of tens of thousands of people who received financial aid from two of its agencies after an Illinois farmer stumbled across the information on its Web site.
- A JPMorgan Chase computer tape containing account information and Social Security numbers for thousands of its Chicago-area, high net-worth clients

went astray while being transported in a locked container from a bank location to an off-site facility.

- A counterfeiting ring consisting of waiters in restaurants from Connecticut to Florida skimmed credit card information from customers and used it to make counterfeit credit cards and forged drivers licenses. They did this by secreting handheld devices in their pockets and recording the information encoded in the magnetic strips of the credit cards.
- By mid-2007, 108,000 Americans had reported their passports either stolen or lost; 310,000 were reported lost or stolen in 2006. Many were stolen by highly skilled pickpockets in overseas countries visited by tourists.
- Some 100 federal plaintiff lawsuits seeking class action status were filed against leading U.S. retailers Rite Aid, Wendy's International, FedEx, TJX, and

Federal Deposit Insurance Corporation: www.fdic.gov/consumers

In addition, call and file a theft report with your local police department.

The author is grateful to Dennis M. Allocco, Postmaster of the Town of Morristown New Jersey, dennis.allocco@usps.gov, for his wisdom and assistance in the gathering of the information for this most important topic of great interest to senior citizens, the most frequently bilked victims of these crimes.

Senior Citizen Fraud

Aside from being in good health, having enough money to live out their retirement years heads the list of senior citizen concerns as they age, because it seems that everybody is out to scam and defraud them.

Seniors are trusting, friendly people but, unfortunately, trust is no longer an attribute that should be used when seniors deal with strangers. All major purchases, repairs, and money transactions should not be consummated without reflection; better yet is to discuss the matter with a

family member or someone you trust.

Frauds against seniors is everywhere, when you're out and about doing the shopping or even when you're sitting home minding your own business. A worker may knock on your front door to tell you something is wrong with your roof, chimney, or driveway and then, when you go outside to look, signal a confederate to enter your house and steal your valuables. Home repair persons, perhaps the most dangerous potential scammers seniors come in contact with, know that isolation makes people easier to victimize. The isolated are lonely and want someone to talk to them—they may welcome strangers into their homes. A favorite ploy of a home repair scammer involves approaching the victim and telling her he is working in the neighborhood and has noticed that her chimney appears damaged. Since he has a long ladder with him, he offers, it would be simple to take a look—and while doing so he breaks the chimney and charges the victim for repair.

A similar ruse of working in the neighborhood may also work exceedingly well

Inter Ikea Systems BV, accusing them of printing excessive payment card information on customer receipts. Under the 2003 Fair and Accurate Credit Transactions Act, only the last four digits of a credit or debit card account number can appear on electronically printed customer receipts, and expiration dates may not be included.

- A popular pitch known among fraud-busters as the “419 scam” is currently circulating the Internet. An incoming e-mail claiming to be from a foreign bank employee gives as the reason for contacting you the death of rich depositor who died leaving millions in a personal account with no heir. The money, reads the e-mail, can be claimed by anyone—especially you—if you can get it out of the country and also disclose a little personal information, along with your bank account number. . . . Well, you can guess the rest.

— By Stephen N. Maskaleris



for unneeded roof repairs. Once the con man gets into the house, he surreptitiously sprays water on the ceiling and convinces the homeowner the roof must be fixed to stop the leak. Many claim to need payment in advance for their labor and materials and insist that the homeowner go to the bank (usually accompanied by the con man) and cash a check for this. Once the money transfers hands, however, the con man is likely never seen again.

The people pulling off these scams are hardened criminals and should be in the penitentiary. Illinois was the first state to have a senior citizen fraud unit to pursue con men; if convicted of home repair fraud, a con artist may spend up to seven years in jail. Other states have since followed Illinois's lead.

Other popular scams to be aware of include the following:

- Fake automotive repairs. You may be charged for them during a standard maintenance check, for example, even though such "repairs" have never been made. Always ask for the old parts to be returned to you. Shoddy repairs and predatory lending practices fall in the same category.
- Copying your driver's license. Anyone doing this can provide access to everything about you that you did not want them to know about, including your financial information. The same holds true for your Social Security number. Never give it out.
- Shred all financial documents before throwing them away. Use a confetti (cross-cut) shredder, which makes documents impossible to read. A good shredder costs about \$120, or even less with a manufacturer's discount.
- Sign your checks only with an Uni-ball Gel Impact pen. It contains the only type of ink that is impervious to acetone or other chemicals used in check "washing," which removes anything that is not printers ink from your checks.
- Be careful on the Internet. Don't "phish" with strangers who try to steal your password, credit card numbers and other vital information by using a phony e-mail saying your

No Worries— I'm Insured

According to the FTC and the Insurance Information Institute (www.iii.org), more than 160,000 cases of identity fraud were reported in 2002.

Identity theft insurance provides reimbursement to crime victims for the cost of restoring their identities and repairing credit reports. Some companies now include it as part of their homeowner's insurance policy. Others sell it as either a stand-alone policy or as an endorsement to a homeowner's or renter's insurance policy.

On average, these policies cost between \$25 and \$50 for \$15,000 to \$25,000 worth of coverage. Identity theft insurance provides reimbursement for expenses such as phone bills, lost wages, notary and certified mailing costs, and sometimes attorney fees with the prior consent of the insurer.

— By Stephen N. Maskaleris

account needs to be updated or verified or the like. This applies to online auction scams as well.

- Every day new instances of identity theft are reported on television or in the newspapers. They become mind numbing after a while, but the message is clear—you cannot allow yourself to drop your guard or you will become another statistic.
- On March 5th, 2007, the *Today Show* reported that 6 people a minute have their identities stolen. When you do the multiplication, this comes out to 3,153,600 stolen identities per year. My suspicion is that even more identities are stolen than *Today* reported.
- On March 27th, 2007, NBC's *Dateline* reported that once every 4 seconds thieves hack into business computers, steal their files, and put this information out on the Internet. Much like its successful programming to stop child pornography and catch perpetrators

in the act, *Dateline* is now out to catch identity thieves, even going to the extent of setting up fake Internet-only sales companies and a delivery company to make deliveries to the addresses given. This credit card information, including pin numbers, is sold for as little as \$5.00 and, once sold, *Dateline's* computers track the Internet to see who is buying what, for how much, and at which delivery address, which is usually a drop for later transshipment to the real buyer, somewhere overseas.

Once this stolen information is flashed across the Internet, within seconds purchases can be seen being made on computer screens in such far off places as Chile, Bombay, Mombassa, Singapore, etc. *Dateline* is currently honing in on the U.S. drop shipment buyers. It is fascinating television.

Other Examples

If you are a veteran or an active duty military member or the spouse or child of one, your name, birth date and Social Security number may be among the data of more than 27,000,000 Americans stored in a lap top computer stolen from the home of a U.S. Department of Veteran Affairs employee last May.

If you are a shopper at the TJ Maxx discount retail chain or Marshall's, be forewarned that a computer security breach by a hacker has accessed driver license numbers and the names and addresses of thousands of customers, necessitating banks nationwide, to reissue debit and credit cards to guard against further fraud. Florida authorities suspect credit card numbers stolen from a TJ Maxx database were used to buy \$1 million in merchandise by gift cards purchased from WalMart stores and were used to acquire electronics and jewelry at WalMart and Sam's Club warehouse stores.

Medical identity theft has become a major problem for providers, insurers, and patients. Medicare ID cards are copied and through medical identity theft, victims may find that their health insurance has been exhausted by others using their information.

Fraudulent telemarketing has caused seniors to lose their retirement accounts, life savings, and homes, even though many of these victims are well educated, have above average incomes, and are socially active. Usual scams include "investment opportunities" with a promise to increase your savings, and lottery or sweepstake scams where you are assured that you are a winner. You might try telling a caller soliciting money from you to give you their home telephone number so that you can call them back during their supper hour. Hanging up is even better.

One of the newest frauds has your cell phone as its centerpiece, and particularly the list of callers programmed in the phone. One lady's handbag was stolen. Twenty minutes later, she called her hubby from a pay phone telling him what had happened. He responded, I just received your text asking about our pin number and I replied a little while ago. When they rushed down to the bank, the bank staff told them that all their money had already been withdrawn from their accounts. The moral is not to disclose the relationship between you and the persons in the contact list. Avoid using, *home, hubby, sweetheart, Dad, Mum*, and very importantly, when sensitive information is being asked through text, confirm by calling back.

Risk is also embedded in the new e-passport being issued by the State Department which contains a controversial computer chip in the back cover with the holder's name, photo, birth date and other vital information. This new passport is to help speed travelers through check points by beaming their personal information to immigration officials' computers when the passports are opened. The trouble is, however, that the wireless chip can be easily hacked by any terrorist or identity thief standing nearby with a chip-reading device. Privacy groups are now lobbying the U.S. government to abandon this new e-passport rollout. Many people are smashing the computer chip with a hammer to disable it. Wireless, no matter how secure, is still beaming information through the air.

Telephone fraud involving jury duty is now a common fraud. Individuals pretending to be court employees telephone

citizens advising them that they have been selected for jury duty and ask them to verify their names, addresses, and Social Security numbers. The judicial system does not contact people telephonically and ask for personal information. If you receive one of these phone calls do not provide any personal or confidential information. This is an attempt to steal or use your identity and potentially apply for credit or credit cards or other loans in your name. It is an attempt to defraud you and you should contact your local FBI office or police at once.

House Bill 605, introduced by Representative Hayes of North Carolina, seeks to amend Title 18 of the U.S. Code to provide an increase in the maximum penalty for telemarketing fraud targeting seniors. This proposed law and others introduced in state legislatures seek to punish those who obtain money under false pretenses

and/or by identity theft fraud.

Civil liability to gain restitution can help repair the damage. The February 2007 issue of *Trial*, the journal of the American Association for Justice, formerly ATLA, outlines steps that should be taken immediately upon learning one's identity has been compromised, including immediately closing any account that has been affected and contacting the fraud department of any one of the three major credit reporting agencies to have fraud alerts placed on their credit files. New Jersey is one of several states that have enacted statutes that create a civil cause of action for identity theft, some of which allow victims to recover treble damages and attorney fees.

An identify theft victim may, in addition to suing the perpetrator, also sue third parties for negligent security of personal information, negligent sale of information,

What Is Identity Theft?

Committing personal identity theft starts with obtaining a person's name, Social Security number, credit card numbers, and other information. Once this personal information is obtained, the person's identity is assumed to fraudulently charge merchandise, obtain cash from accounts, take out loans, or otherwise commit theft. Similarly, a person or entity that steals a business identity, including its name, address, and bank account and taxpayer identification numbers, can use this information for the same purposes.

Even if you think you don't have much to lose, you should ensure that both your business and personal data are secured. Fighting identity theft begins with properly safeguarding personal and business information. As an employer, you must safeguard business, personal, and employee records, and divulge sensitive personnel information only to trusted third parties, such as payroll services and credit card companies. Employees who handle sensitive personal information must understand the harsh penalties associated with revealing such infor-

mation to unauthorized people.

Warning Signs

Signs of personal identity theft include unauthorized telephone charges, unauthorized changes of address for credit card statements, questions to or from creditors regarding charges you did not make, and statements you receive for new card that you did not request. Warning signs of identity-related business fraud include invoices for unauthorized good or services, unexplained charges on a business credit card, a notice from a collection agency about an unfamiliar debt, unusual telephone charges, and any unauthorized changes of address.

What to Do

If you are a victim of identity theft or suspect that you have been a victim, your response should include the following steps.

- Contact relevant credit bureaus. For personal identity theft, contact the three major credit

Courtesy of Citi Smith Barney, Kansas City Missouri, and Citi Smith Barney Financial Advisor and Guided Portfolio Manager Lance F. Thompson, who can be reached at 800-821-6119.

failure of a bank to prevent identity theft or to mitigate damages, and liability of credit reporting agencies for failure to prevent or remedy incidents of fraud.

Computer Security

To operate your computer as safely as possible, computer consultants have established a list of do's and don'ts which should hopefully keep you current and safe.

1. Do not open e-mail attachments or download programs unless you are certain of the source and content because you subject yourself to a total invasion of privacy and risk of identity theft. Some of these programs can actually use your address list to distribute bulk mail under your name, change the URL address of updated programs, redirect them to look like clone sites and cause other damage. To reduce this risk, just do not open bulk or forwarded e-mail.

bureaus: Equifax, Experian, and TransUnion. For business identity theft, contact Experian and Dun & Bradstreet.

- Contact creditors, such as credit card, mortgage, and finance companies with whom you have loans, credit cards, or lines of credit.
- File a police report and contact the Federal Trade Commission at 877-IDTHEFT (438-4338).
- Stop payment on any stolen checks.
- Remove fraudulent phone charges by contacting your state's public utilities commission, and remove fraudulent cell phone charges by calling the Federal Communications Commission at 888-Call-FCC (225-5422).
- Report the theft of your Social Security number to the Social Security Administration at 800-722-1213.
- Notify the state department of motor vehicles to ensure that someone doesn't take out a driver's license or register a car using your identity.

— By Stephen N. Maskaleris

2. Do use your browser of IP service providers programs to prevent bulk mail, spam, and pop-ups. Then delete the bulk mail without opening it, as hackers use these mass distribution options to send e-mails to millions if only to reach a few.

3. Do have a firewall and use the features. This will prevent some, if not all, from communicating with others on the net.

4. Do have an anti-virus program.

5. Do have adware protection programs. These programs use an evolving data base of data miner program tags to find those already downloaded to your system, usually after surfing the net.

6. Do have spyware protection programs. spyware attempts to steal passwords and other personal information. Versions are actually sold to the public for use by spouses and parents to track usage activity.

7. Do have update services for these and other protection programs or realize you are not protected from the most recent attack methods.

8. Do erase temporary files and cookies often and especially after visiting unfamiliar sites or opening e-mail attachments.

9. Do not offer personal information on the net unless you are certain that the site is who it says it is and transmissions are secure (encoded). Even then, data security has been found wanting and hackers can steal identity information at will.

10. Do not type your Social Security number at all. The encryption process is still faulty.

To understand the attackers, data miners use "cookies" to assign a code to your computer when you open a file or an e-mail attachment. Key loggers actually track and record your key strokes, which are then transmitted to a collection site for analysis of such kinds of content as passwords, user IDs, Social Security numbers, etc. Pop-up ads can contain "cookies." Virus and worm threats contain packets of programming language that can affect and invade your computer programs and over time affect your software.

E-mail scams, better known as "phishing," or unsolicited e-mail requests from what appears to be a legitimate government agency, bank or other company requesting you to update or verify your

Four Simple Steps

Although being successfully targeted by a polished scammer may not be completely within your control, you can take several steps to make your personal information less easily accessible to outsiders.

1. Buy a shredder. Make it a point to shred all those credit card solicitations you receive in the mail as you get them; don't just throw them in the trash. Also, shred all your outdated personal documents, bank statements, credit card information, etc. Protect yourself—if you don't, no one else will.

2. Guard your credit cards. Don't give any information from your credit cards to anyone unless you are absolutely sure that the requester has a valid reason for needing it. Watch salespeople, wait staffs, and service people around your house, who may try to steal your information by processing your card several times or who act suspiciously when they have your card in their possession. This applies to *all* instances when you give out your card to anyone!

3. Beware of the Internet. Most identity theft occurs on the Internet, which has a myriad of electronic vulnerabilities. Try to use the telephone whenever possible when dealing with your personal financial infor-

mation. Once your personal information is stolen via the Internet, you may become vulnerable to the global online world.

4. Don't give out your Social Security number without good reason. Although the government says your Social Security number is not a national identifier, it is. Avoid giving it out unless you are sure it will not be misused, and always be sure you know why the requester is asking for it. Protect it at all costs.

The Social Security Administration reminds pensioners that they can better safeguard their money and identity by using direct deposit for any government or monthly Social Security checks they receive. It is safe—and it protects you from fraud and identity theft. It is convenient, because the payment goes straight into your bank account on the first of every month, and you are in complete control, with no worry about how or when you'll be able to deposit it, as you might be with checks received through the mail. Obtain additional information about the "Go Direct" campaign, in which major banks, corporations, and agencies participate, at www.godirect.org or at your local branch bank.

— By Stephen N. Maskaleris

personal information should be avoided at all costs. The first line of defense is not to open the e-mail. The responses are sent to a drop number and not the official number of the legitimate concern and your identity is stolen.

Fraudulent e-mails that appear to come from the Internal Revenue Service directing recipients to a Web link that requests personal and financial information such as Social Security and bank account numbers is the latest scam reported in *USA Today* on April 3, 2007. The IRS never sends unsolicited e-mails and does not ask for detailed personal or financial information. So beware.

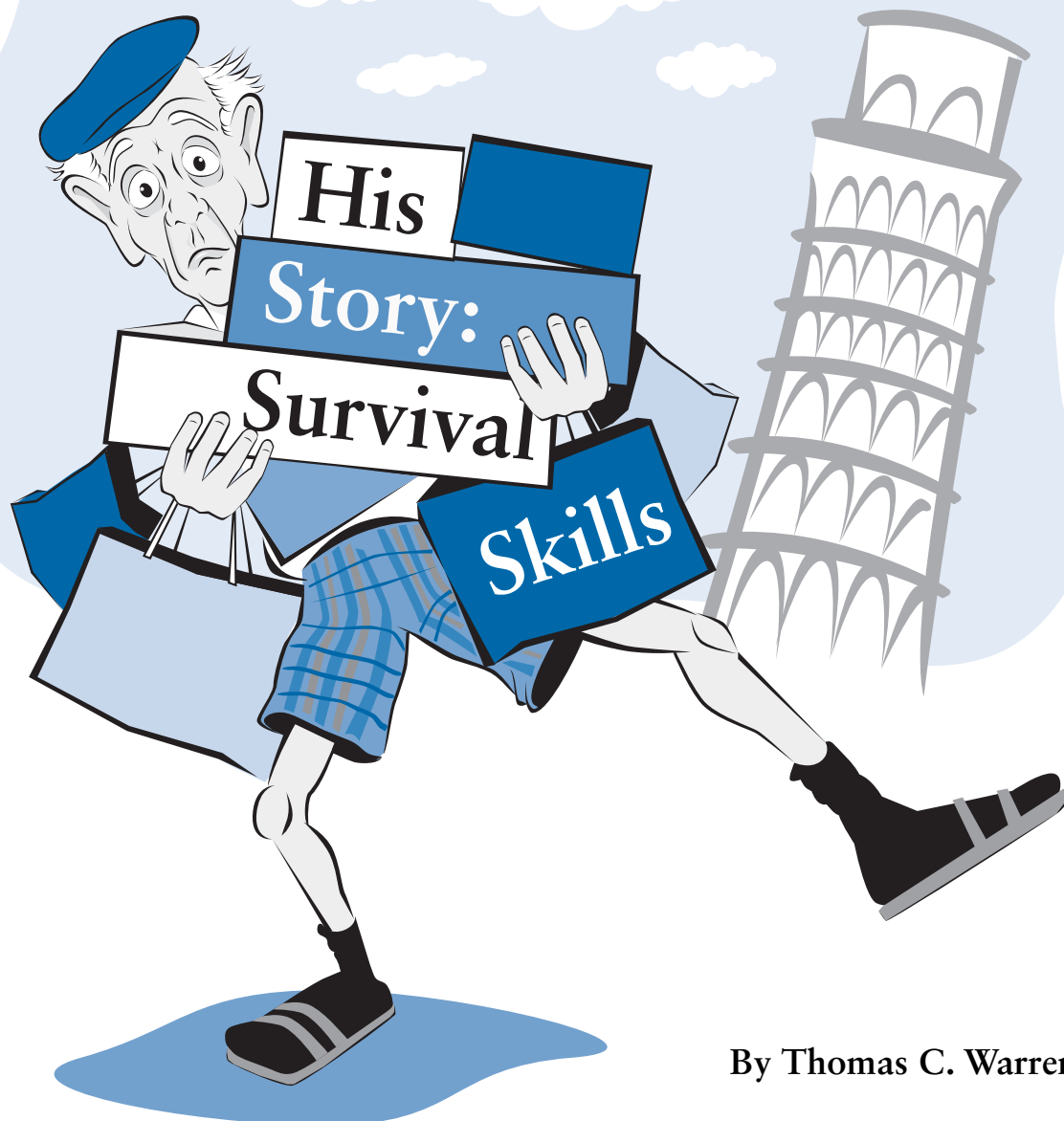
Also be careful of programs that secretly install themselves on thousands or even millions of computers, band these computers together into an unwitting army of zombies, and use the collective power of the dragooned network to commit Internet

crimes. These systems are called "botnets" and are blamed for huge spam invasions, fraud, and data theft because they automate and amplify the effects of viruses and other malicious programs.

The *New York Times* of January 7, 2007, in a front page article entitled "*Attack of the Zombie Computers is a Growing Threat Experts Say*," points out the precision with which some of these programs can scan computers for specific information, like corporate and personal data and drain money from on-line bank accounts and stock brokerages. "It is the perfect crime, both low risk and high profit."

Our thanks for much of the above information goes to Newww-Way Consulting, Bruce Brown, MBA, who can be telephoned directly at 714-501-2932 for more information. Also, read your

(Please see **Identity Theft** page 34)



By Thomas C. Warren

There are a lot of things you can do while traveling: Visit historic and cultural sites. Soak up the sun on the beach. Just lay back and recharge. Take day trips to explore the country. All these are wonderful ideas, but if you are married to the world's greatest shopper, the plan is to really explore the shopping. It doesn't matter whether it is a high-end women's store or a grocery market. I suddenly realize I am just along for the ride.

Absolutely take along a book to read—and grab a chair as soon as you enter the

store. Particularly if you are in a women's clothing store and your spouse is trying on clothes, you can blow a lot of time. The book won't solve the damage to the credit card, but it does help the time pass. If you definitely do not want to agree to a purchase, don't even go into the store, just lean against the wall outside and tell her you want to absorb local culture by people watching. Even better—plan a solo event so you can go do something by yourself, such as visiting the Podunk Military Museum to check out the uniforms and weapons from the

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thirteenth century, thus avoiding the shopping thing.

Realize that if there is something *you* want to buy, anything goes. Unless you really enjoy the search for perfect office staff gifts, don't ever begin bringing back those cute little native crafts, magnets, local candies, and so forth. It can be mind wracking and very stressful to find 20 cheap things that don't fill up the suitcase.

Don't ever agree to a big purchase when you are halfway around the world. No giant clay pots, large paintings with huge frames, complete sets of dishes, or so forth—unless it is definitely going to be shipped home. When in Bethlehem (Israel, not Pennsylvania), my wife (on the second day of a 14-day trip) bought a perfect olive wood crèche scene that weighed about 40 pounds. Had we had it shipped, it would not have arrived in

time for Christmas, so I had to keep lifting the box (which I am now sure actually weighed 60 pounds) in and out of buses, hotel rooms, and airplanes. Just put your foot down. Exercise your rights—no more huge (in retrospect I think it might have been 80 pounds) travel purchases.

Try to reach an agreement with your spouse that you don't have to do all of the Christmas shopping on this one trip. Remember—moderation. Stepping over the quantity line can become a very large problem. It seemed like such a good idea at the time to buy everyone (and her uncle and related siblings) an Irish sweater when exploring western Ireland. There must have been a dozen sweaters that we had to figure out how to pack for the return trip. The good news was that at least they didn't weigh anything close to the 90-pound crèche. ■

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Her Story: Cultural Education

By Mary Ann Warren



When traveling, if you simply visit just the museums and the churches, you learn only about the history of the country. However, if you visit the supermarket, you find out how the people shop, what they eat, and much about how they live. I admit I do usually have at least one day when I am serious about shopping. On this day I am looking for local items that will make for unusual Christmas gifts for the family, as well as items that will remind me of the trips we have taken. (I would like to note that those inexpensive unframed works of art that are so easy to take home can end up being very expensive by the time they are framed.) The rest of the time I am merely enjoying the active and very different life styles of people from around the world—I am *not* shopping. How can you understand people who live in England if you don't spend a fair amount of time at Harrods? It would be like going to Ireland and never eating in a pub or buying a sweater.

(By the way, to put Tom's comments about shopping into perspective, the crèche was purchased on the fifth day of a two-week trip, stayed on the bus most of the time, and weighs ten pounds.) ■



Lawyers, Depression, and Exercise

By John M. Parr

This article, based upon my personal experience, discusses the illness of depression and the benefits of physical exercise in recovering from depression and maintaining general mental health.

Although this is my story, it isn't about me. It is about all of us who hold ourselves out to the service of others. Our lives are hectic. We are perfectionists, and we take ownership of our client's problems. We are constantly juggling professional and personal needs. Our minds overload. My hope is that this article will give readers an opportunity to rethink how they live and will hold out the possibility that change is very real. My journey back to health began when I learned that "the world I viewed was a vision of my mind." Knowing this allowed me to begin the process of refocusing on the pieces of my life.

I am 61 years old. In 1974 my wife and I returned to our home town, where I started my private practice of law. For 26 years I was the perfect hunter, going forth from my hearth every day to bag the biggest game and to solve every problem that came my way.

One Friday afternoon in early December of the 27th year, I was sitting at my desk organizing files for the following week when a cloud of darkness filled my mind. I have come to refer to this dark and confusing time and place as "bewilderment." The doctors called it a major episode of depression.

My life was turned upside down. I couldn't sleep. My anxiety increased as I struggled to "think my way" back to health. I needed medicine to ease my depression and anxiety. For a year I was

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Our profession experiences depression at a higher rate than other professions and the general public.

on an antidepressant roller coaster. Each new antidepressant medicine I tried required a minimum of 14 days to see if it worked; if it didn't work, 14 more days were required to clear my system before I could try another medication. Even now I can name the five blanks I fired.

By December of the following year, I was still adrift. Medication wasn't working, my feelings of helplessness and despair were growing, and I wasn't always sure I could go on suffering such pain.

Electroconvulsive therapy was an act of desperation. I think back on the treatment in disbelief. I really don't know if it helped, but toward the end of the treatments my doctor prescribed an antidepressant used in the early 1950s, and I started to get my feet back on the ground.

During this whole experience I was held together by very fine threads: my loving family and friends, my doctors, my personal trainer, an exhaustive exercise program, and music.

Today I work with my trainer twice a week in the early morning. I do at least one hour per week of intense cardiovascular work. The rest of the week I look for other opportunities to stay active, such as walking around the block during a break or during lunch time.

Many Lawyers Suffer from Depression

Depression is a serious mental problem for lawyers of any age. Studies by researchers at John Hopkins University and other institutions have shown that our profession experiences depression at a higher rate than other professions and the general public. Physical exercise has a positive effect on recovering from depression and on maintaining mental and physical health.

A lawyer's job is challenging and stressful. Out of 105 occupations studied, lawyers ranked first in suffering from depression. One in every four lawyers suffers from stress.

A New York Court system did a study of solo and small legal practices (1–20 lawyers). How did we see ourselves? Here's what we said:

- I am totally disorganized; my office is a shambles.
- Everything is left for the last minute or adjourned.

- Matters slip between the cracks; there is no system for follow-through.
- Even when working 10 to 12 hours a day, I seem to be running in place.
- I have no real idea of what it costs, or should cost, to run a practice.
- Law practice technology is constantly changing and is overwhelming me.

Try on depression by reading "Depression, A Personal Story," in the Missouri Bar newsletter (<http://newsite.mobar.org/3cd0bebe-e1c3-4474-b986-32844a717670.aspx>). In it, an anonymous attorney describes his feelings of helplessness and hopelessness—as well as the resources he found through the bar's Lawyers' Assistance Program.

A recent *Boston Globe* article, "Law and Disorder" (June 27, 2007), details the work of a Boston-based nonprofit, Lawyers Concerned for Lawyers (LCL), a counseling and referral resource for Massachusetts law students, lawyers, and judges and their families who are experiencing emotional distress (www.lclma.org). LCL is seeing more lawyers coming in with depression and is increasing its advertising program and added staff in response to this growing need.

The article identifies heavy law school educational debt, the adversarial nature of law practice, and the achieving personalities of lawyers as partial explanations for such a growing health problem in our profession.

Exercise Can Be Vital

Exercise is recognized as very beneficial to recovering from depression and staying mentally and physically healthy.

Exercise enhances the action of endorphins, chemicals that circulate throughout our body to improve natural immunity and reduce the perception of pain. Endorphins may also be involved with improving a person's moods, as do the neurotransmitters norepinephrine and serotonin, which are stimulated during exercise. Regular exercise lowers blood pressure, can boost self-esteem, and can be a distraction—a positive one. Vigorous exercise can minimize anxiety and negative thoughts and replace them with feelings of exhilaration, exhaustion, and a brief freedom of the mind.

Exercise can lead you to a social experience at a time when you are likely to feel reclusive. It can support lifestyle changes that may lead to modifications in diet, smoking, and even substance abuse.

Lessons

- Seek a balanced life.

There are five focus areas of health.

1. Social needs: communication, family, others' perceptions of us, relationships, status, acceptance—anything to do with others
2. Physical needs: nutrition, hygiene, exercise, physical fitness, sleep, sex, shelter, stress management—anything to do with the physical body
3. Emotional needs: intimacy, love, acceptance, touch—anything to do with feelings and the heart
4. Spiritual needs: values, directions, belief, sacrifice, faith, relationships with the universe, goals, personal perceptions, self-worth—anything to do with where you are and where you are going
5. Intellectual needs: competition, cooperation, challenge, learning, thoughts—anything to do with your brain and thinking

Develop a personal relationship with these areas to balance your life. One of the key elements to my balancing act was music. I would advise you to make music part of your life! Sing, hum, whistle, and listen to music you enjoy. I'm not sure who said the following quote, but I agree with it: "Music in any form is one of the greatest ways in which we can give to ourselves as well as allowing us to give vent to emotions in a positive way. Music opens the heart and nurtures that small voice inside us all."

- Start exercising.
 1. Get your doctor's support.
 2. Identify what you enjoy.
 3. Set reasonable goals.
 4. Don't think of exercise as a burden.
 5. Identify why you don't like to exercise.
 6. Prepare for setbacks and obstacles.
- Consider a personal trainer.

A personal trainer can help you develop an exercise and fitness program. A good personal trainer can offer the following:

1. Guidance in perfecting exercise and weight-lifting techniques
2. Introduction to a variety of exercises to meet your needs
3. Introduction to proper use of equipment
4. Assistance in developing a nutritional and exercise program based upon your available time and level of interest
5. Encouragement

Unless you plan to use a personal trainer for long-term training, make it clear that you want to be educated to train yourself. Some trainers will train you rather than educate you so that you will keep training. Eight lessons are enough to start training on your own.

If you decide to start exercising in a fitness facility investigate those convenient to your home or work. Check with your family and friends who are using local facilities. Check the local newspaper. New facilities, large and small, are being developed as the demand of the "boomers" grows. New facilities usually have discounted joining costs. Take a tour before joining. See if you feel comfortable. Review the "fitness and wellness facility locator" found on the Web site of the International Council on Active Aging (www.icaa.cc).

After you select a facility, get started by setting aside 30 to 60 minutes twice a week and do something simple like walking on the jogging circuit and stretching. Join a beginner's exercise group. Meanwhile, observe the trainers and watch their style. If you see a trainer who interests you, get the name and ask for a free session.

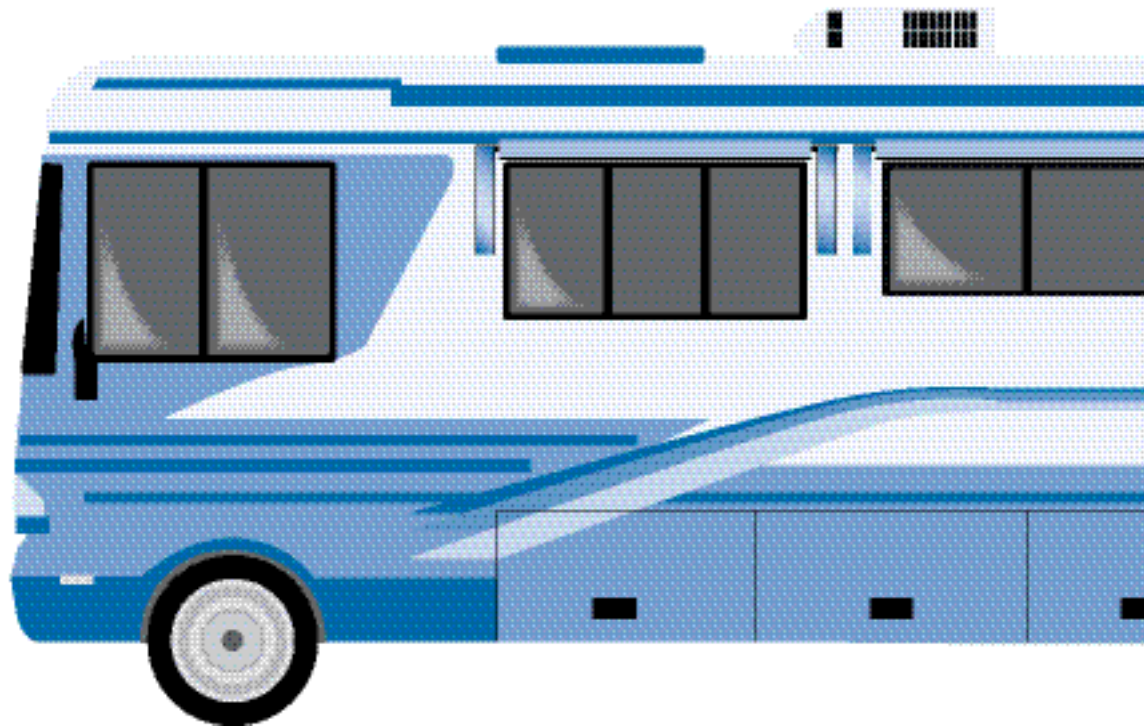
Review the "finding an age friendly trainer" checklist on the ICAA site (www.icaa.cc).

Share Your Experiences

How do you keep the four legs of your stool on the ground?

Write a health brief and share it. What has kept you physically and mentally healthy? What "life event" has challenged you and how did you overcome it? Let's produce a book of valuable health and fitness information based upon our own life experiences to share among ourselves and with others. ■

**Seek a
balanced life.**



Fire in the Hole!

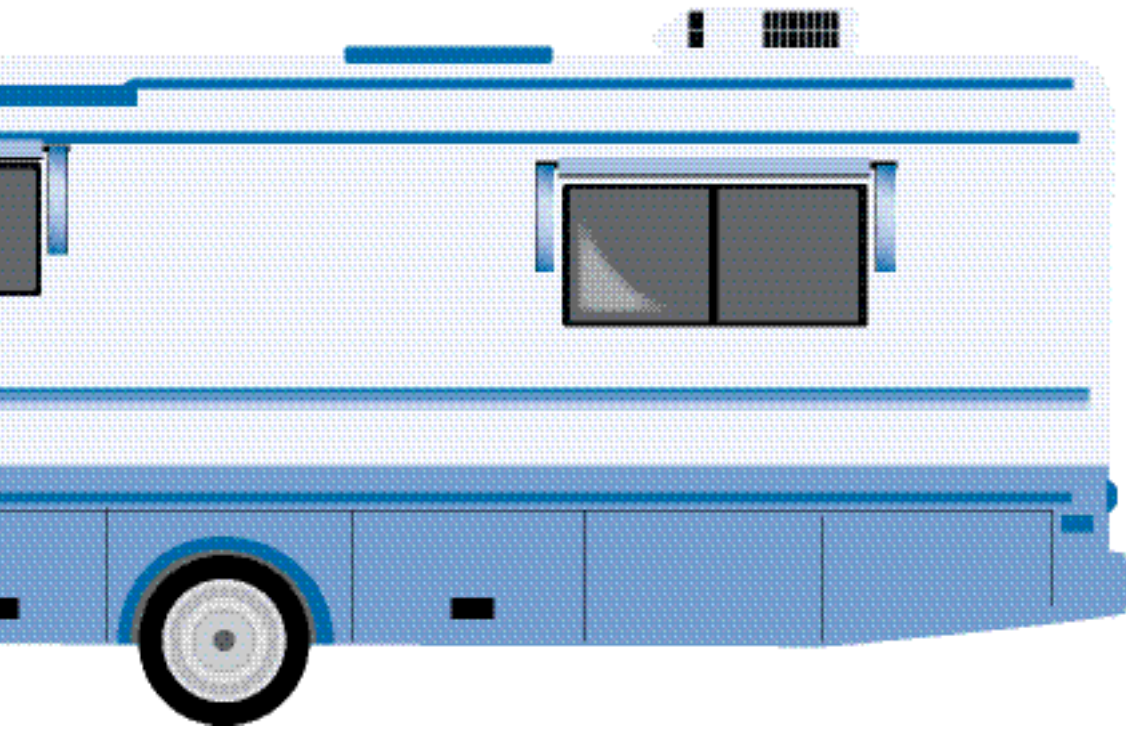
Growing up in the Bronx in the 1950s and 60s was great preparation for life. Intensity, diversity, educational and occupational opportunities, ethnicism, and religion all contributed to a rich, creamy, and occasionally lumpy soup of life. That life, while it made me dream of visiting and camping at faraway green valleys and rocky peaks, did nothing to prepare me for the retirement “RV” experience. As a matter of fact, Bronx life presented two developmental barriers. The first was that as a Bronx kid I was a pedestrian and a public transportation user. We didn’t drive in the Bronx. Oh, some families (real lucky and avant-garde families) had cars—not mine. So, map reading and traffic sign interpretation are not skills I learned as a kid. I am geographically challenged.

The second barrier is mechanical aptitude. I grew up in a seven-story, seventy-apartment building. The building had a “Super” who lived in the basement. His uniform included a white undershirt,

black chinos, a tool belt loaded with gear, and a fifty-pound tool chest. If anything went wrong with plumbing, heating, electricity, windows, doors, ceilings, you called the “Super.” He was a pleasant German who fixed it all. He grumbled and sweated, but in the end the broken was fixed. As a kid I learned that if something broke, you called the “Super.”

Nor did 35 years as an attorney help to develop skills for the RV life. I guess I learned how to drive. That statement might be soundly contradicted by my wife and kids. My attitude on driving is to “get there” as quickly as possible. Further, I was not a “do it yourself;” my time away from law practice was precious so I hired repair folks to fix the broken things in my material world.

So, when Kate and I decided that we would see America in a recreational vehicle, it was an act of faith. Our twenty-one-foot Winnebago Vista® is an apartment and a car—without the Super. The car is a Volkswagen Eurovan. The



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On Thoughts on RV Adventuring

by Kenneth E. Ackerman

apartment is a twenty-one-foot long, twelve-foot high box. It has plumbing, heating, electricity, air conditioning, kitchen, bedroom, and bathroom. It looks like an ambulance on steroids. When we bought it we got training on how to keep this all working and how to drive it. It might come as a surprise to learn that you can drive any size RV with your regular driver's license. No additional training or higher grade of license is necessary. Isn't that a bit unsettling?

In any event, we were determined to do this RV thing. After two years and 16,000 miles, we became converted and our faith was rewarded. We could do this and have fun, lots of fun.

The RV community is a precious national asset. These folks (many retired military) wander the roads of our country and have learned to share, welcome new friends and pitch in to provide assistance to RVs like me. Many RVs are "365ers" staying on the road constantly.

Kate and I are not 365ers. We travel

around for a few weeks and schedule stops with relatives or at a hotel to break up a trip. I am not sure we could survive one another if our twenty-one-foot box was our only home week after week.

On one of our first trips, Kate and I went to dinner with Dick and Mary Thousand from Fairbanks, Alaska. We parked next to them in campground in Lebanon, Ohio. They had the same RV as we did.

I asked Dick how long it took to get from Fairbanks to Lebanon, Ohio. He said that they left Fairbanks in May. We were eating dinner on an October evening. So, I asked him when he was going back to Fairbanks. "Oh maybe next May or June." Wow!! A year on the road in a twenty-one-foot box! They seemed like happy, well adjusted folks. The longest trip Kate and I took in "the car with a bathroom" (Kate's phrase) was three weeks. This year we plan a several-month jaunt. So stay tuned.

My lack of mechanical skills became obvious on our second RV trip. We drove

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The learning curve is steep, but the joy and friendship are truly remarkable.

south from Syracuse to join an “RV Rally” in Augusta, New Jersey, near the Delaware Water Gap. Kate kept asking me if I had filled our fresh water tank. She was assured by me that we had 20 gallons of fresh, clean water on board. As I write this I can tell you that I was positive the fresh

Ten Tips for Beginning the RV Experience:

1. Rent an RV for a week or two. See how it feels, how you get along with your spouse or partner.
2. Shop around if you choose to buy. There are hundreds of options and all prices are very negotiable.
3. Join an RV club like the Family Motor Coach Association® (FMCA) or Good Neighbor Sam Club®. These associations will give the support you need, and they have “rallies” for you to attend where instruction is given.
4. Go to several rallies before you head out for a long trip in your RV. You will have an opportunity to learn before you are on your own.
5. Get a campgrounds guide like *Woodall’s North American Campground Directory*, which will give you a real sense of how easy it is to find a nice place to spend the night.
6. Call ahead for reservations at campgrounds and get there before 4:00 p.m. so you can set up and be comfortable before dark.
7. Learn to travel light with both gear and food. We found that we were carrying too much of everything at first.
8. Get a portable GPS system. It will give you confidence to get off the major highways and explore the byways.
9. Cable TV and Internet are widely available in the campground world. Bring your computer and use it as a tool to handle money and communications.
10. Be positive. This is an adventure. You are out to have fun, not rushing to the next destination. Read Pirsig’s *Zen and the Art of Motorcycle Maintenance* to get in the right frame of mind.

Happy Trails!

water tank was filled. It wasn’t.

When we got to the dry campsite with no hookups, we unloaded, set up our chairs and tables, and began to relax. When Kate discovered the coach was bone dry, she cross-examined me. I had no answer, the coach was empty—no water. To remedy the matter, I got in the RV, left my wife on her lawn chair and drove around the campground (a large fairgrounds) to find a source for water. When the owner encountered me and my dilemma, he was gracious. He took me to a site under a big tree, with a water source, sewer, and electricity. I was ecstatic, pulling in and hooking up my water, sewer, and power. Oops, I had forgotten that I left Kate sitting on a lawn chair about a mile away. As I was missing my wife, the owner drove up in his truck with several tables and chairs, and one wife. “Looks like you forgot something,” he called as a stern looking Kate jumped down from the truck cab. “Oh well.” Honey, “I was going to get you after I got settled. Anyway, we have water now.”

The next morning Kate was preparing to take a shower and said, “I can’t seem to get any hot water.” No problem, Ken will figure this out. Being a lawyer I consulted my operations guide which is so big it comes in a satchel large enough to take to a disposition.

After ten minutes of my “fixing things” flames are shooting out of the side of the RV. I put the fire out and walked to the owner’s coach. My look must have said it all. He was used to city slickers like me. “What did you forget to do now?” he asked. I told him that I had a flame throwing water heater. Within an hour several RV people from the rally were fixing the water heater and teaching me how to properly run it. I paid one guy who had a truck just full of RV parts \$35.00 for the parts to fix the heater. (Yes, Virginia, there are “Supers” in the RV world.) Kate had hot water and her shower in the early afternoon.

The learning curve is steep but help is omnipresent and the joy and friendship are truly remarkable. If you feel you want to try RVing, go with your feelings. Give it a chance. In the sidebar I have provided ten tips to get started. Remember that there is a big country out there, away from the airports and the cities, and it’s filled with people having fun and sharing adventures. ■



Preserving a Record for Appeal While Keeping the Jury on Your Side

By Theodora R. Lee

*“Use it or lose it” makes all the difference on appeal.
But you have to be very careful about how you use it.*

In the best case scenario, a jury trial will go along in a smooth, satisfying way. Voir dire will be thorough and identify the best potential jurors; the opening statements will be clear, cogent, and illuminating; the direct examination will firmly establish the case theme; cross-examination will flush out inconsistencies and contradictions with precision; the rulings on objections will be correct; closing statements will construct persuasive arguments; and throughout, the trial judge will keep the courtroom and the process under control. But this isn't a perfect world. Things can go wrong—especially in employment cases—so you need to listen for those that do and object to them.

Grounds For Mistrial

The first thing you have to do is to focus on a theory on appeal. The most likely theories, and the ones you can begin to build during trial, are:

- Prejudicial misconduct of counsel,
- Juror misconduct, and
- Judicial misconduct.

Motions In Limine

Motions in limine allow the parties to present arguments and briefing on particular evidentiary issues and not disrupt the trial or taint the jury with inappropriate evidence. Evidentiary issues that may be raised in a motion in limine include:

- Evidence of unlawful intent through discriminatory comments;
- The employer's disparate treatment of other similarly situated employees (“me too” evidence);
- Evidence related to the administrative process;
- Prior bad acts of the parties;
- Limits on the damages issues that a jury may consider in a discrimination case;
- Issues related to harassment against other employees; and

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- Evidence of the sex-related conduct of the alleged harasser or of the victim (Fed. R. Evid. 412).

Preserve the Record

You have to plan for appeal before you ever set foot in the courtroom. Some tips:

- Go into trial planning for the worst outcome.
- Don't worry about whether the judge likes you or not.
- Don't stipulate to get along.
- Be mindful of the record on appeal.
- Be polite but firm.

Attorney Misconduct

Doing something about attorney misconduct is always risky. Handled poorly, it can make you look as bad as the attorney who is engaging in the misconduct. You must timely object and request an admonition, and, if appropriate, request a jury instruction. If you don't do these things, you waive any complaint about attorney misconduct.

Objections: Remember that the Jury Is Watching

Jurors hate to think that something is being kept from them, but they generally understand what objections are for, and they can handle them. When you object:

- Stand up and state the objection firmly.
- Ask for a sidebar.
- Be clear and polite.
- You may have to object multiple times in order to get relief or have a record for mistrial.

What's Sauce for the Goose . . .

Never forget that your own conduct has to rise to the level that you expect from the other side, so:

- Make sure you know the rules and follow them.
- Review the ethical rules, the rules of evidence, and rulings on motions in limine before making a presentation to the jury.
- Win with the truth and without games.
- Fight hard within the rules of the courtroom.

Violation of Rules of Professional Conduct

Violations of the Rules of Professional Conduct may supply the grounds for mistrial. I practice in California, and the key rule is Cal. Rules of Professional Conduct, Rule 5-200, which states:

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member, such means as are consistent with the truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness."

Regardless of your jurisdiction, it is virtually certain that all of the above are prohibited by a relevant ethical rule. Be sure you know which rules apply, and be prepared to raise appropriate objections.

Improper Voir Dire Questions

How do you spot an improper voir dire question? By its purpose. A voir dire question is improper if it is not propounded to find out if jurors can be fair and impartial but to:

- Precondition the jury to a particular result.
- Argue the case.
- Compel jurors to commit themselves.
- Prejudice the jury.
- Instruct or question on the law.

To be raised, each improper question has to be objected to and an admonition requested.

Voir Dire Misconduct

Improper voir dire questions are bad enough. Worse still is outright voir dire misconduct. Here are some egregious and all-too-common examples.

- Attempts to curry favor with the jury:
 - “Juror number seven looks cold, Your Honor. Could we turn up the heat in the courtroom?”
 - “During the trial, if you can’t hear something, just raise your hand and I’ll let the judge know.”
 - “If you want to discuss an answer in private, let me know and I’ll ask the judge to move the discussion to chambers.”
- Attempts to precondition the jury:
 - Watch for questions that aren’t really designed to obtain information regarding the fairness of the juror, but seek to precondition the jury to plaintiff’s case.
 - Watch for questions that precondition the jury to a particular position on a trial issue.
- Commenting on the personal lives of parties or counsel:
 - “Are you sure you haven’t seen my client’s picture in the paper as Volunteer of the Year at the Hospice Center of the East Bay?”
 - “Have you read about XYZ’s fraud conviction?”
- Discussion of the law:
 - It is improper to ask jurors if they agree or disagree with the law, but it is permissible to ask them if they will follow instructions.
 - Misstatements of law during voir dire can be grounds for reversal or new trial but you have to timely object to them.

Mistrial

When misconduct is egregious and can’t be cured by admonition or limiting instruction, it is appropriate to ask that a mistrial be declared. The misconduct that could support such a motion is often cumulative, so object timely and clearly and seek a remedy.

Improper Opening Statement

During the opening statement, listen for and object to any mention of:

- Excluded matters,
- Irrelevant matters,
- Settlement offers,
- Subsequent repairs,

- Insurance, and
- Statements of personal belief or opinion.

Don’t Be Too Quiet

Failure to object is a waiver of misconduct, so think carefully before abandoning proper objections. The record can’t be created after the fact. Jurors are not as troubled by objections as some will tell you. The key is to raise the objections with confidence and to react with dignity if the objections are denied.

Other Curative Measures

When you need to, ask that:

- Improper remarks be stricken,
- The jury be given a curative instruction, and
- Mistrial be declared.

Improper Direct

During direct examination, listen for and object to:

- Leading questions,
- Inadmissible evidence,
- Cumulative evidence, and
- Irrelevant evidence.

Improper Cross-Examination

During cross-examination, listen for and be ready to object to:

- Argumentative questions,
- Questions without an evidentiary basis,
- Questions that ask for cumulative evidence,
- Compound questions, and
- Questions asked in bad faith for the purpose of unduly harassing or embarrassing the witness.

Improper Argument

Whether in objections or motions in the presence of the jury, listen for and object to:

- Inadmissible matters raised in presence of jury, and
- Arguments on the merits or self-serving remarks in the guise of an objection.

Improper Closing

During the closing, listen for and be ready to object to:

- Any argument based on excluded evidence,
- Unsupported inferences,
- Misstatements of evidence,
- Misleading arguments,
- Appeals to passion or prejudice,
- Claims of personal knowledge by the attorney,
- “Rebuttal” arguments that rebut arguments that weren’t raised in the first place.

Other Grounds

Also be on the lookout for:

- Willful concealment of evidence and
- Improper communications with jurors.

Conclusion

This is not a perfect world. Things can—and often do—go wrong during trial.

Counsel may attempt to go on the attack in voir dire. The opening statements might include impermissible arguments or tactics. The direct examination might impermissibly lead the witness. The cross-examination might go beyond direct or misstate the record. The rulings might be wrong. The closing might get into matters that weren’t established through the examinations. The judge might not have been in control of the courtroom. And the jurors might have misbehaved. So always keep these key reminders in the forefront.

- Object, make your record, and ask for admonition and other cures before moving for mistrial.
- Don’t be intimidated by the judge.
- Make objections clearly, politely, but forcefully.
- Warn the client of what might happen if you don’t seek a mistrial, and that, if a mistrial is granted, the case will have to be tried again. ■

Identity Theft

(continued from page 22)

daily newspaper and watch television to keep abreast. It is your life and your money and it is up to you to protect yourself and your loved ones.

Social Security Numbers

Public records have long included Social Security and other related information on their web sites. One by one, however, states and counties have started removing images of documents that contain Social Security numbers or they are blacking out the numbers. The Texas Attorney General issued a legal opinion that county clerks could be committing a crime by revealing Social Security numbers on the internet. A database of compromised numbers that are traded and sold on the internet can be found by searching *StolenIDSearch.com* without cost.

Your Social Security number is the

personal identifier not only for government documents, but for credit applications and medical records, as well as for video and cell phone stores. Today Social Security numbers are almost in the public domain, even though the Social Security Administration says the card was never intended to serve as a personal identification document. Nevertheless, they help track payrolls, loan payments, financial transactions, and income taxes. The numbers are also used by gas, electric, and cell phone companies.

Your numbers are also used to check your credit report status. If you refuse to give it, service will be declined. Caches of Social Security numbers can be found in web chat rooms and *phishing* attacks, and key logging provide others. While banks are secure, your dental office may not be. People like Donald Trump, Kelly Ripa, and Governor Jeb Bush have Social Security numbers which are on the net. Serious business, or, is it monkey business indeed! ■

MAKING TECHNOLOGY WORK FOR YOU

The 2007 *Experience* Guide to Holiday Shopping

BY JEFFREY ALLEN

Well, another year has gone by and we all find ourselves a year older and still (again) trying to figure out what to get as gifts for friends and family (some things never change). Hopefully this guide will make that task a bit easier for you. Possibly, it might even entice you to buy a new toy for yourself, as some of the technology has proven very hard to resist.

Although the ABA publishes this journal, the product comments made in this article reflect the author's observations and do not constitute a position or endorsement by the ABA. The ABA does not make product recommendations.

The Ever-Improving Smart Phones and Accessories.

Over the last several years we have seen considerable improvement in the features included in the converged devices commonly referred to as "smart phones," as well as cell phones in general. Smart phones generally refer to devices that, in addition to basic telephony, have a built-in calendar and contact manager, the ability to access the Internet and email, and a keyboard or thumb board allowing for alphanumeric entries other than the simple telephone pad. Features to look for in top-of-the line smart phones (as well as other cell phones) include Bluetooth capability (short range wireless transmission for communication with computers or accessories such as earphones and separate speakerphones), built-in speakerphones, color displays, and built-in cameras.

The newest, slickest, and hottest of the smart phones is Apple's iPhone. As I have explored the iPhone in an earlier column, I will refer you to the last issue of *Experience* for a more detailed discussion of the iPhone. Briefly, the iPhone provides a novel interface and functions not only as



a telephone with a speakerphone, but also, a calendar, address book, email device, and Internet device that allows you to watch your still pictures and videos. You synchronize it to information on your computer using iTunes. And it will play your music, audio books, podcasts, etc., just like any of the iPod devices. You can also download television shows and other media from the iTunes store. On top of everything else going for it, Apple recently reduced the price by \$200 on the 8GB unit and dropped the 4GB unit from its product list. The 4GB unit lacked sufficient memory and is no great loss. The 8GB unit remains sleek, novel, attractive, innovative, slick as all get out and its new \$499 price tag makes it that much harder to resist. This one you should consider buying for yourself! Note that it only works on the AT&T system.

In conjunction with its renewal of the iPod line, Apple brought out a new version of iTunes and upgraded the iTunes store to allow you to purchase media from



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Editor's Note: *Neither the ABA nor ABA entities endorse non-ABA products or services, and product reviews in Experience should not be so construed.*



iPhone
Courtesy of Apple



Treo 700p
Courtesy of Palm



BlackBerry Pearl
Courtesy of Research in Motion



BlackBerry 8800
Courtesy of Research in Motion

the store through the iPhone.

If you want something a bit less fancy, then you should look at the Palm Treo or one of the three new BlackBerry phones, the Pearl, the Curve, and the 8800 series.

Although Palm has generated a few new models of the Treo, the 700p remains my favorite. The newest versions do not use the Palm operating system, but rather work off of Microsoft's Windows Mobile platform. If you want a device working off of the Windows platform, you have better choices. The 700p, however, while a bit bulky by comparison to some of the newer devices, still provides an unmatched set of features. Note that the 700p only works with Verizon. You can also get an updated version, the 755p that only works on Sprint. I have not tried the 755 out myself. It appears to be substantially similar in function to the 700p with a slightly different design. Its specifications indicate that it has a slightly thinner profile and a minimally slower processor. I am not a fan of the Sprint system, as it has a more limited coverage area than some of the other services available.

The 700p will provide email services, Internet access, basic telephony (with a speakerphone built in), play music, take pictures, display pictures, maintain your calendar and contact information, and even work as a modem for your computer, allowing it access to Verizon's EVDO wireless system. The Palm OS has more programs and interfaces available than any other pocket device operating system. You can add everything from artwork to word processing software to the Palm, allowing you to carry a vast amount of useful information in a very small package. The Treo comes with Bluetooth and infrared wireless connectivity built into its system. It supplies its own wireless Internet connection. It also accepts SD memory cards allowing you to add an almost limitless amount of information and software. You will not want to carry the Treo in a jacket pocket (although if you wear an overcoat, it will fit that pocket more easily). It fits conveniently in a purse or brief case. And a variety of cases exist that let you wear it on a belt or attach it to the strap of a purse or brief case for easy access.

All three of the BlackBerry phones handle email using the traditional BlackBerry

"push" technology, which, in my opinion, works better than any of the other options. When it comes to email portability, the BlackBerry does the best job. The new models have dropped the click wheel in favor of a small spherical navigation device that came out first on the 8100 and served as the basis of its nickname, the "Pearl". The Pearl and the Curve come with cameras (something new for the BlackBerry devices). The 8800 lacks the camera, but comes with a built in GPS receiver (can't have everything—yet). The Curve and the 8800 have full thumb board keyboards, while the Pearl has a special double-letter keyboard that uses half as many keys and True-Type predictive software to make sense out of what you type into it. All three units will fit in your jacket pocket. The Pearl has a considerably smaller footprint, making it easier to carry. It easily fits in a shirt pocket. Trade-offs include a smaller thumb board (and the multi-use keys) and screen and also a smaller battery (less talk time between charges). All three come to you at discounts through most major carriers now. Note that the devices have slightly different numbers for different carriers. For example, the 8800 number comes through AT&T, while the same phone for Verizon goes by the number 8830.

The newest of the three, the Curve (which, officially goes by the number "8300"), gets its name from the curved face that it sports both for appearance and ergonomics. The Curve also comes with a 2MP camera and improved software.

Many have touted Samsung's BlackJack as competition for the BlackBerry. While the BlackJack has many nice features, it suffers from the fact that it operates off of the Windows Mobile platform. While the Windows Mobile platform allows you to do many things, every single device (including the BlackJack) that I have tried that uses the platform uses up battery charges far too quickly. When I got one, the BlackJack came with two batteries (that should have been a big clue as I have never seen any similar device come with two batteries before). Shortly afterwards, a new, bigger, more powerful battery showed up at my office with a new back for the BlackJack to accommodate the new battery. The BlackJack does have a very nice display (not a touch screen display

however). If you want Windows Mobile features and don't mind the battery issue, however, look at the BlackJack. You can get it discounted through AT&T with a service package. As of the present time, you can only get it with AT&T.

A number of phones have come out on the market that we would call "smart phones" but for their lack of an input device other than the standard telephone keypad. These phones have PDA functions, cameras, the ability to display pictures and play music, text messaging, and Internet capabilities. Many can also access email. As a matter of fact, while you can still get some phones that function just as phones, it may prove hard to find one these days.

If you want a new phone, but find the selection process overwhelming, go to http://cellphones.about.com/library/bl_bw_q1.htm and take the test. The answers will result in a selection of phones most closely meeting your ideal based on your responses.

As for accessories, you have many choices available to you from cases, to travel chargers, to automobile chargers to a variety of in-car portable speaker-phones and wired and wireless headsets. A Bluetooth (wireless) headset makes a very nice gift (or a welcome self-purchase). Bluetooth earpieces will cost from \$40-\$180. I like the new, small, barely noticeable versions the best, despite their relatively short battery life. I particularly liked the Motorola (www.motorola.com) Razr H9, the Plantronics Discovery 665; the new Apple earpiece (www.apple.com) released for use with the iPhone looks good and works quite well, especially with the iPhone. Talk about ease of use, Apple's earpiece automatically handles the pairing of the earphone to the iPhone. Motorola, Jabra, and Plantronics have lower priced units available, some of which work quite well. Plantronics also makes a lightweight Bluetooth headset (the Pulsar 590E that fits over both ears, providing stereo reception as well as telephone connectivity. It works quite well, lists for \$139.95, and you can find it for about half that price online.

A number of less well known manufacturers have produced excellent units at lower prices than the units that I men-

tioned, all of which stand at the top of the line. Blue Ant's X3 Micro comes from the land down under, but does a top rate job. You can charge the Micro from a wall outlet or a USB port on your computer. It lists for \$129 but sells for much less online (I have seen it for around \$80).

Cardo (www.cardowireless.com) makes the Scala line of Bluetooth headsets. Its 700 (formerly top of its line) works very well and costs relatively little. Although it lists for \$89.99, I have seen it online for as little as \$35. Cardo also makes a unit designed specially for VOIP (Voice Over Internet Protocol) use and a connector that makes its Bluetooth headsets compatible with many non-Bluetooth cell phones, so that if you have an older or lower tech phone, you can still use the Bluetooth headset.

One unit, the Jawbone (www.jawbone.com), deserves special mention. The Jawbone is larger than most of the others and considerably less stylish. Its size makes it heavier as well. Quite frankly, I had difficulty getting it on my ear with only one hand. It lists for \$119.99 and you can get it from AT&T, Apple, and many other vendors. You can get it online for about \$91. Why would I recommend a heavier, less stylish earpiece? Because it works! The one thing that makes it stand out over many others is the inclusion of noise shield technology that filters out background noise so that your listener can more easily hear and understand your transmission.

Let's Talk Computers

Last year, the holiday season offered a wonderful opportunity to get highly powered computers at good prices. As good an opportunity as the 2006 holiday season presented for computers, the 2007 season looks even better. Virtually every computer manufacturer has upgraded their line since last year, often at no price increase. Many computer manufacturers have both increased the power and number of features of their products and decreased the price.

Intel's Core 2 Duo processor leads the field at the present time. Several iterations of that processor provide a variety of speeds above and below the 2.0 GHz level. While you can still find computers with Core Duo processors and even with Pen-



Discovery 665
Courtesy of Plantronics



Pulsar 590E
Courtesy of Plantronics



X3 Micro
Courtesy of BlueAnt

tium Mobile and Pentium III and IV class processors, I recommend that you stay away from them. Newer operating systems and software will generally work better on the more powerful Core 2 Duo processor. In addition to the Intel processor, you can find computers using work-alikes from other manufacturers. The work-alikes generally provide satisfactory performance and cost less than the Intel Core 2 Duo. Nevertheless, I have a strong personal preference for the Intel processors.

If you have thought about getting a new computer for yourself or for someone else, you might want to do it now. You will likely find more satisfaction with a name brand. Those that stand out in today's market include Lenovo (formerly IBM), HP/Compaq, Sony Vaio, Toshiba Dell and, of course, Apple (which now runs both the Mac OS X and Windows).

What to Get

You will want a dual core processor (Intel Core 2 Duo or work-alike). If you get a Windows machine, look for one that is Vista compatible (Vista is the new Windows system). Windows XP has proven itself over the last several years. It continues as the more popular choice, even after the release of Vista. You can get new computers with XP or Vista. Over time, you will find it more and more difficult to buy a computer with XP. Vista brings new features and capabilities that you may want. Even if you get XP, having a computer that you can upgrade to Vista gives you that much more flexibility and value. If you plan on using the computer primarily for work, you probably will want to stay with XP for a while as Vista has some compatibility issues with pre-existing software. If programs you use have compatibility problems, you will want to wait for new versions of that software or patches to the software to make it work with Vista.

Consider CD RW and DVD as essential. You will likely be happier with a computer that can read and write DVDs. Ideally those features will come as internal drives, although with some of the super lightweight laptops, optical drives only come as externals. Get the biggest hard disk you can. Think at least 100 GB on a

laptop and 250 on a desktop; this is another case where bigger is better. Laptop computers with up to 160 GB have become common and 200GB drives are no longer unusual. You can easily find desktop computers with 500 GB. Look for at least 2 USB 2.0 ports on a laptop and 4 or 5 on a desktop. Laptops should have a PCMCIA card slot and/or an Express 34 card slot for expansion cards, air cards etc. You will also want built-in Wi-Fi (preferably working off the "N" standard, which works with the "G" standard as well). If the manufacturer makes Bluetooth an option, you will want to add it, as it will enable the use of wireless keyboards, tracking devices, and earphones. If you plan to use a laptop as a desktop replacement and leave it fairly stationary, look at a 17" screen or plan on adding an external monitor. If you favor mobility, look at the 12–13" screens. The 14–15" screens offer a good compromise. They are larger and heavier than the 12–13" screens, but still fairly portable. Although computer manufacturers still sell computers with 512MB or even less of RAM, you will want more than that. Buy more and upgrade if necessary, but get at least 1 GB of RAM on a Windows XP machine. I strongly recommend at least 2GB on a Core 2 Duo running XP. You will definitely want that much if you plan to run Vista. I would also go for at least 2 GB on Macintosh computers. If you plan to run Windows on the Mac through Parallels, you will want more memory, as the virtual machines require real RAM. If you will run XP, you want at least 3GB. Get 4GB if you plan to run Vista.

As a general rule, desktop machines will cost less than laptops for the same amount of power. The trade off may go no farther than portability as you can augment most laptops with the additional features and devices that you may have in a desktop and also connect the laptop to an external monitor and keyboard when using it at home or work. More and more people have opted to do that. In fact, when I purchased a new laptop, my wife asked me to give her my old one and the desktop computer that we both used to use now gets very little use from either of us. You should find accept-

able desktop computers in the \$800-\$2000 range and laptops in the \$800-\$1700 range. You may, of course, choose to spend more for extra features.

Mac v. Windows

The platform question has grown less significant now that both platforms use the same processors. Macs generally cost a bit more than machines built for Windows, but you have the option of running Mac OS X and/or Windows on the new Macintosh computers, something you cannot do on machines built solely for Windows. I have seen an increasing number of users choose to get the 13" MacBook as a lightweight computer, even if they are primarily planning to run Windows. Hint: If you want to run Windows primarily, use Apple's Bootcamp and boot up as a Windows computer. You will see a speed improvement over booting up as a Mac and running Windows on a virtual machine through a program such as Parallels. Reboot to run the Mac OS. That is especially true if you use a MacBook as opposed to a MacBook Pro or have an older iMac with a 2GB limit. If you have a new iMac or a MacBook Pro with a 4 GB capacity, the performance difference diminishes as you have more RAM available for each computer.

By the time you read this, Apple will have the newest iteration of its software out: OS X version 10.5, code named Leopard. Apple OS upgrades tend to create far fewer problems than Windows OS upgrades. Since none of the new Macintosh machines will run OS 9 anyway, if you choose to get a new Mac, you do not need to anticipate major problems associated with getting one on Leopard. Likely a few programs will have compatibility issues; but probably not any that you need for your practice. Your grandchildren, who run games on their computers, may have a bigger issue.

How About a New Television?

The big-screen phenomenon has taken over TV rooms all over the country. Additionally, television has evolved to high definition (HD) programming. If you have cable, you can probably get a fairly significant amount of HD programming. If you have not seen HDTV yet, go to a TV store

and see it. It represents a significant step up from "normal" TV. I use the term "normal" advisedly, as HD will soon take over as the norm. The new generation of big screen TV comes in the thin and light variety, generally with a widescreen perspective. Liquid crystal display (LCD) and plasma represent the two most commonly seen screens. While plasma screens used to cost much more than LCD, that has changed recently. You can find LCD and plasma screens comparably priced. You can find 40"-50" widescreen, LCD or plasma, HD televisions starting under \$2000 for name brands such as Sony, Panasonic, JVC, Samsung, LG, Mitsubishi, and Vizio. Smaller screen LCD TV's for an office or bedroom cost somewhat less and you can find 15"-20" LCD screens, perfect for a dorm room, for less than \$400.

You will need to choose between plasma and LCD. You may also need to choose between two versions of HD, one operating at 720p and the other at 1080p. The 1080p versions will cost more than the 720p sets. If you choose to buy a set 32" or smaller, the 720p should work fine. For larger sets, opt for the 1080p.

LCDs use a florescent backlight to send light through liquid crystal molecules. LCD TVs work passively, with red, green, and blue pixels. Applying voltage to the pixels allows darkening of the pixels to prevent the backlight from showing through.

Plasma screens represent the newer technology. Plasma screens have two thin panels of mounted glass. The panels have networks of pixels (tiny pockets of compressed gas). Each pixel has three-sub pixels made up of red, green, and blue phosphors. Electronics control each sub pixel individually to produce 16 million+ colors. Applying an electrical current to a pixel causes the gas to react, forming plasma that, in turn, produces UV light. The light reacts with the colored phosphors to produce high-contrast ratios and a better, more realistic, picture. Since all the pixels emit light concurrently, the image appears clean and flicker-free.

LCD displays take less power and are more environmentally friendly than plasma. Plasma screens provide better color rendition. Plasma screens have a larger viewing angle. Plasma screens are more fragile and susceptible to screen



Exilim EX-Z77
Courtesy of Casio



Exilim EX-S880
Courtesy of Casio



PowerShot A650 IS
Courtesy of Cannon



Coolpix P5000
Courtesy of Nikon

burn-in than LCD screens. Plasma screens come in larger sizes than LCD, although that size differential has recently become less significant as LCD technology has advanced. Conversely, the smaller screens generally come only as LCDs and not as plasma. Plasma screens historically have cost more than LCD screens of the same size, but the price differential has also significantly diminished.

If you plan to get a new television set, go to a television store and look at the screens you are considering. Ideally compare them by looking at the same images (a DVD works well for that). Among the places to go for good selection: Costco, Circuit City, Best Buy, and Comp USA (which has taken over the Good Guys operation). Costco generally offers the best pricing. By way of example, the 32" Sony Bravia XBR set that I got for my bedroom cost \$1299 at Circuit City, \$1399 on sale for \$1249 at Best Buy, and \$999 at Costco).

Although the sets will generally come with acceptable speakers, you may want to consider upgrading the sound quality with a surround-sound system to give you a real home theatre. You can find the systems at most television stores at costs ranging between \$200 and \$1000. Those sets usually come with four or five speakers and a subwoofer. Some will also include DVD players with changers. You can find such systems from most major names ranging from Bose to Sony.

Digital Cameras

Digital image quality has improved to the point that it rivals film images. The quality of digital cameras has also improved as prices have dropped significantly. It costs less to use a digital camera, as you don't have to process film or print the image. You can view images on most digital cameras as well as computer screens, televisions, or iPods at no cost other than the cost of having the display device. Denser media allows the user to record more pictures and the media is reusable. The cost of the digital media has also dropped dramatically. As if all that did not make a big enough collection of reasons to use digital cameras, the user can easily improve the image using one of many available computer programs allowing for the correction of problems or defects in the pictures.

Image quality reflects a combination of resolution (megapixels), lens quality, and the photographer's ability to make use of the camera, lighting, etc. Most of the new digital cameras have multiple automatic settings designed to give the photographer some control over the image exposure, but superimpose enough control to ensure a minimum level of quality for the picture. Most people will find it hard to take a badly exposed picture using the automatic settings. Advanced photographers will prefer less automatic cameras or, at least, cameras that allow manual override of automatic settings. In looking for a digital camera, you will want to get at least 4 megapixels. If you plan to print or project large images, you will need more megapixels to get a good quality image. Most cameras have optical or digital zoom capabilities. Many cameras include both. Prefer optical to digital for better image quality.

Canon, Sony, and Nikon dominate the top of the list with digital cameras. Canon and Nikon built reputations for creating excellent lenses for their cameras. Sony uses Zeiss lenses in many of its cameras. Zeiss lenses also have a well-established reputation for excellence. Advanced users will generally favor Canon and Nikon cameras, although Canon and Nikon also make some excellent mid-range and basic cameras. Sony appeals most to the mid-range of experience, but also makes some excellent basic cameras. It also has its fans among more advanced users.

If you already have a top of the line digital camera and want a second for backup or if you are looking for a good basic (essentially point and shoot) digital camera that works well and packs easily, consider the Casio Exilim line. Casio makes three series of cameras in this line, the Exilim card, the Exilim Zoom, and the Exilim Hi-Zoom. The cameras range from 7.2 to 12.1MP in resolution, with most having 7.2MP. Each series has a distinguishing characteristic. The Hi-Zoom cameras have 7x optical and 4x digital zoom. The Card series cameras all have an ultra-thin design in addition to 3x optical and 4x digital zoom. The Zoom cameras have a 3x optical and 4x digital zoom. I have tried several of them and found them completely satisfactory for general point-and-shoot

type use. The cameras list for between \$200 and \$400.

All of the manufacturers have websites with images and specifications for their full camera lines. Cnet (www.cnet.com) provides a good source of reviews.

Let's Not Forget the iPod

Apple's iconic iPod faces more and more competition, but it still remains king of the mountain when it comes to music players. Apple revitalized the entire iPod line, releasing new models to replace all existing models in September 2007. Apple also released a new version of iTunes, fully compatible with computers on both the Mac and Windows Operating Systems. The new version enables new features for the iPod and connects to the recently updated iTunes store.

Apple makes an iPod style for just about everyone and its selection of styles and features offer something for almost everyone on your list. The new models give you good reasons to get a new one to replace an older model as they provide new features, more memory (in most cases) and more diminutive sizes. The Apple web site (www.apple.com) offers complete information on the various models. Recent price reductions make the iPod an even better buy. The current range runs from the Shuffle (\$79/1GB) to the Nano (\$149/4GB, \$199/8GB) to the full-sized iPod now renamed the iPod Classic (\$249/80 GB or \$349/160GB). Building on the instant success of the iPhone and providing us with insight as to the iPods of the future, Apple released the iPod Touch. The Touch, available in only 8GB (\$299) or 16GB (\$399) versions, incorporates the look and OS of the iPhone. The iPod has established its staying power as it continues to dominate the market and serve as the standard that other music players must match.

The iPod Touch presents the iPhone with more memory and no telephony. It has the multi-touch screen and WiFi capabilities of the iPhone. It presents pictures and videos at 480 x 320 pixels on an exceptional 3.5" screen that shifts perspective as you turn it from a vertical to a horizontal position. Apple claims the rechargeable battery will provide up to 22 hours of audio or 5 hours of video use per charge.

The iPod Classic, about the same size

but a bit more svelte than its predecessor, provides up to 40 hours of audio play back in a metal jacket. It includes a bright 2.5" color display.

The new Nano looks different than its predecessor, a bit wider. It comes with a 2" color screen and its built-in battery provides up to 24 hours of audio or 5 hours of video use per charge.

The shuffle has not changed in size or memory, but gets a whole new color pallet. Apple says to expect up to 12 hours of audio from its built-in battery. The shuffle has no screen and only replays music.

With the exception of the audio-only Shuffle, all the iPods show your photos and movies as well as play your music and audio books. They also show recorded TV shows (now available at the iTunes Store), and they can offer games and function as a PDA as well as a backup drive for Macintosh computers.

Throughout the iPod lineup, each gigabyte of storage space holds approximately 240 songs. All of the iPods play MP3 and AAC compressions and you can use any of the iPod family members to store data other than your music for backup or easy transfer to another computer. Apple will personalize the Nano and full-sized iPods with two lines of engraving at no additional charge. All of the iPods create very full, rich, and impressive sound allowing the user to enjoy a substantial music library on the go. All the new iPods have Apple's "dock" connector that enables them to share a large collection of accessories.

By the way, if you get an iPod for the purpose of listening to recorded CLE programs it should be as deductible as a tape recorder bought for the same purpose. You can transfer CLE on CD to the iPod along with audio books and your music using the iTunes software that comes with the iPod. Alternatively, you can get the iPod and an external speaker system for your office and enjoy your music collection at work.

If your intended recipient already has an iPod, consider one of the other models. Many people have more than one and use them for different purposes. The small and lightweight Shuffle, for example makes an excellent exercise companion. The Nano will likely accompany many owners to work or shopping. I often take the full-



iPod touch
Courtesy of Apple



iPod classic
Courtesy of Apple



iPod nano
Courtesy of Apple



iPod shuffle
Courtesy of Apple



SE210

Courtesy of Shure



ER4

Courtesy of Etymotic



QuietComfort 2

Courtesy of Bose



QuietComfort 3

Courtesy of Bose

sized iPod with me on long plane flights and also use it as a backup disk, as I do not have 60 GB of music and photos on it—yet—and using it as a data backup disk gives me extra security.

If your intended recipients already have all the iPods they need, consider helping them accessorize their iPods. The quantity and variety of accessories for the iPod seems to grow each year. Available accessories run the range from external speakers, to upgraded headphones/earphones, to a myriad of cases and any number of connectors to make the iPod the heart of a music system for your house, office, or car—or even turn it into a boom box. More and more new cars come equipped with iPod docks and you have many choices of third-party portable and hard-wired docking solutions.

For those who use the iPod primarily for travel or mobile uses, upgrading the earphones should rate high on the list. The earphones that come with the iPod qualify as adequate only. You can find many better choices. On the relatively inexpensive side, Apple's \$39 in-ear headphones provide much better sound than those that come with the iPod.

In the expensive to premium category are Shure's E series sound isolating devices (www.shure.com). Each step up costs more and performs noticeably better than the one below. The E2c sells for \$109, the E3c for \$199, the E4c for \$299, and the E5c for \$549. The E2c will work fine for most people, providing very high quality sound. The E3c and E5c each improve on the sound from the lesser units in the series. Shure designed its E4c specifically for digital technology and it does a superb job with it.

Etymotic Research (www.etymotic.com) also offers exceptional earphones in its ER series. The ER4 costs \$299 a pair and compares favorably with the Shure E4c. The ER6 costs \$139 and provides an excellent set of earphones, but with a slightly lower range and responsiveness than the ER4. Etymotic has modified its ER6 to create the 6i, which it designed specifically for the iPod and sells for \$149.

Both Shure and Etymotic rely on sound isolating technology to prevent outside noises from impairing the quality of the sound. They rely on the seal between the ear and the earphone. You might also want

to consider a noise-canceling system. Noise-canceling systems actively generate “anti-noise” to blank out the noise that you would otherwise hear from such things as airplane engines, a significantly different approach than that of Etymotic or Shure, both of which use the passive effect of a tight seal with the ear to keep outside noise out.

Bose (www.bose.com) makes excellent noise canceling headsets. Their Quiet Comfort II (QC2) (\$299) has been out for several years. The Quiet Comfort 3 (QC3) (\$349) came out a year or so ago. The QC2 earpieces fit over the ear. The QC3 has smaller earpieces that fit on top of the ear but do engulf it as do the earpieces on the QC2. The QC3 weighs less than the QC2 (5.6 to 6.9 ounces), making it more comfortable; the QC3's noise cancellation can become somewhat disconcerting after a while. The QC2 requires a standard AAA battery to power its noise cancellation technology. The QC3 comes with a specially configured rechargeable battery that lasts up to 20 hours per charge cycle. Both headphones provide excellent audio quality. Both work very well to reduce ambient noise levels such as airplane noise. Neither reduces outside noise as well as the sound isolating earphones, however.

Those wanting to share music with others, or just listen to it without earphones, will enjoy receiving a set of external speakers designed for the iPod. You have several excellent choices in this category. The most expensive of the lot, the Bose SoundDock, costs \$300 and provides a deep, rich, full sound. Altec-Lansing offers several speaker sets for the iPod. Its inMotion series, including the InMotion3c (\$179) and new inMotion iM7 portable boom box, both make exceptional choices. JBL's \$159 On Stage makes another excellent choice. You can find more information about all of these systems online at the Apple Store site or at the manufacturer's site.

One system stands out as unique and superior in most respects as a home or office iPod dock. Chestnut Hill Sound's (www.chillsound.com) “George” combines an iPod speaker system with an AM/FM radio and an alarm. It comes with a removable faceplate and a full-function remote control unit. Most importantly, it does a great job, producing a full, rich, room-fill-

ing sound making it clearly one of the best, if not the best that I have heard from the stand-alone iPod speaker set ups. The George lists for \$499.

Making the Case

One of my favorite bag companies, Road-wired (www.roadwired.com), recently changed its name to “Skooba Design” to capitalize on its highly successful Scooba bag’s name. Scooba Design also upgraded its well-known Scooba Satchel to the Scooba Satchel 2 (\$99). San Francisco Bag Co. (www.sfbags.com) produces many interesting and well-designed bags, including its newly released iPhone cases that sell for \$35–\$39.

For computer laptop bags, you might also consider looking at the offerings of Targus (www.targus.com) and Wenger Swiss Gear. Both make a variety of well thought out, well designed, and reasonably priced computer bags. I am particularly impressed by the Targus Corporate Traveler series, as I have a strong preference for cases with wheels. Targus also makes a number of messenger style and backpack style computer cases. They even have a special line designed for women.

Stocking Stuffers

Flash memory drives (often called “thumb drives,” “jump drives,” “pocket drives,” and a variety of other things), come in sizes ranging from 8 MB to 16 GB. You can put these small, often colorfully and

fancifully designed drives in your pocket or a brief case; you can even wear them around your neck with (often included) straps. Depending on the size, it will hold the same amount of information as one to several boxes of floppy disks and/or zip disks. Prices have dropped tremendously within the last few months and I have seen 8 GB drives available for under \$80. Flash memory cards for cameras, video cameras, and other devices have also dropped dramatically in price. Well-known and reliable manufacturers include Lexar, Sandisk, and Kingston. You can find flash media in most stores that carry electronics, such as Fry’s, Best Products, Circuit City, etc., but it will generally cost less online. I have found www.ecost.com an excellent place to go for discounted media and electronics.

Apple iTunes Store gift cards also make great stocking stuffers. So do cases and other accessories for telephones, iPods, computers, digital cameras, and other electronic devices. You can find many sources for such items. The Apple Store (www.Apple.com) has a very large selection of iPod/iPhone accessories and cases available. ■

**HAPPY SHOPPING!!
HAPPY HOLIDAYS!!**



Skooba Satchel 2.0
Courtesy of Scooba Design



iPhone cases
Courtesy of Waterfield

Leading Remarks

(continued from page 2)

of time for family and friends; long neglected hobbies and leisure travel become a part of everyday life.

It is generally in the mid- to later retirement years that the storm clouds approach. The discretionary income now is used for rising medical costs. The quality of life begins to erode and instead of having choices, people are forced into difficult decisions such as selling their homes or placing a loved one into an institution.

These are the challenges and changes to which SLD members and SLD Comm-

itees can offer professional and personal insight and expertise.

The challenges that this country and the families of seniors face are the challenges that the SLD has and will continue to embrace. We have the opportunity to help and counsel our colleagues and clients, to expand our own practices, to help ourselves and our families gain knowledge and experience, and to help our country as it faces this great challenge which is now here. ■

Fall Prologue

(continued from page 1)

possible that the history of our country would have taken a different cast.

To be sure, from the beginning of our history, the rights guaranteed in explicit terms by the Bill of Rights have not been static. All were to be defined and redefined over time. As I have written earlier, the reality of our constitutional rights depend not on their precise articulation or identity at any particular period but, rather, on their principled continuity over time. Progress in the development of the law, to borrow from Justice Cardozo is neither “a straight line nor a curve, it is a

series of dots and dashes,” not impervious to time, place or circumstance.

But whatever, the time, the context or the controversy, if we are to survive as a republic and a democracy, the structures and guarantees of the Bill of Rights always must be central to our vision. In good times and bad, we must turn to its central message. And the centrality of that message is loud and clear. Quite simply, it is a message which rejects the notion of arbitrary government wherever and whenever it appears.

In a word, Professor Labunski’s article is as timely as it is timeless. ■

Senior Lawyers Division CALENDAR

MEETINGS

February 8 - 9, 2008

Midyear Meeting

Hyatt Regency Century Plaza
Los Angeles, California

Spring Meeting

To be decided

June 8 - 9, 2008

Annual Trip to U.S. Supreme Court

Ritz-Carlton Hotel
Washington, D.C.

August 8 - 9, 2008

Annual Meeting

Hilton New York
New York, New York

FUGAZI TRAVEL



[Trips subject to Board of Governors approval]

July 24 - August 4, 2008

Northern Treasures Baltic Sea & Russia Cruise

September 28 - October 7, 2008

Splendors of the Fall Canada/New England Cruise

October 8 - 14, 2008

Rockies, Sierras, and Napa Valley

October 21 - 31, 2008

Mexican Riviera Cruise

CONTINUING LEGAL EDUCATION

Audio Conferences

January 31, 2008

Succession Planning (tentative)

February 28, 2008

International Teaching Opportunities for Senior Lawyers

Seminars

January 17 - 18, 2008

Elder Law: Issues, Answers and Opportunities

Miami, Florida

February 7, 2008

Elder Law for Judges

Los Angeles,
California

State Ethics Rules: Don't Rely on the "Smell Test"

BY THOMAS SPAHN

Lawyers' ethics rules do not represent a collection of basic moral precepts. Instead, the ethics rules reflect our profession's attempts to balance a lawyer's duties to her clients with her duties to adversaries, third parties, the justice system, society as a whole, etc. Lawyers usually cannot rely on the "smell test" when making ethics decisions.

To make matters even more complicated, in some of the most critical areas states take widely varying approaches when balancing these interests. While many lawyers justifiably look to the ABA Model Rules of Professional Conduct for general guidance, those rules actually do not govern any lawyer's conduct anywhere. The ABA Model Rules simply reflect a suggested approach by a voluntary organization. Lawyers in every state must know their state's rules.

Ironically, lawyers face perhaps the greatest variation in states' ethics rules precisely in the context in which they need the clearest guidance—when determining whether to "blow the whistle" on their own clients.

In some areas, such as conflicts of interest, lawyers can often protect themselves by taking the most cautious approach, usually by not undertaking a representation or by withdrawing from a representation if a conflict arises. However, lawyers do not have that luxury when determining what to do if a client states an intent to commit a future wrongdoing. A lawyer keeping the client's intent secret (when the ethics rules require disclosure) could be seen as passively assisting the wrongdoing. Some third party might pay with his life for such silence. On the other hand, a lawyer disclosing a client's intent to commit a future wrongdoing (when the ethics rules require confidentiality) has betrayed the client.

The client might be imprisoned based on his own lawyer's disclosure of confidential communications.

One might think that every state's ethics rule would take the same approach to this horrible dilemma. In fact, there is no area in which the state ethics rules differ so much.

My law firm of McGuireWoods has offices in nine states and Washington, D.C. As the McGuireWoods "ethics guru," I would have to provide the following advice to a partner asking about the following scenarios. Assume for each of these scenarios that my partner has learned the information in confidence from a client, and that the client objects to the disclosure.

First, suppose a client tells my partner that he intends to kill someone. My partner would be required to tell the authorities in Florida, Illinois, and Virginia. My partner would be permitted to (but not required to) tell the authorities in California, Georgia, Maryland, New York, North Carolina, Pennsylvania, and Washington, D.C. The ABA Model Rules also take this approach.

Second, suppose a client tells my partner that her husband (whom we do not represent) intends to kill someone. My partner would be required to tell the authorities in Florida. My partner would be allowed to (but not required to) tell the authorities in California, Georgia, Maryland, North Carolina, Pennsylvania, and Washington, D.C. The ABA Model Rules take this approach. My partner would be prohibited from telling the authorities in Illinois, New York, and Virginia.

Notice that in my home state of Virginia my partner would be required to tell the authorities if a client intends to kill someone but prohibited from telling the



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authorities if a non-client intends to kill someone. Virginia's approach seems doubly strange. A Virginia lawyer has a higher duty to blow the whistle on her own client's intended future misconduct than on a stranger's future misconduct. And if saving someone's life is the ultimate goal, why wouldn't the ethics rules at least permit a Virginia lawyer to alert authorities about a stranger's murderous intent?

Third, suppose a client tells my partner that he intends to commit a future crime or fraud that will cause substantial injury to the financial interests of another. My partner would be required to tell the authorities in Florida and Virginia. My partner would be allowed to (but not required to) tell the authorities in Georgia, Illinois, New York, North Carolina, and Pennsylvania. My partner would be prohibited from telling the authorities in California, Maryland, and Washington, D.C. This is the approach the ABA Model Rules take as well. Interestingly, the answer dramatically changes if the client will be using my partner's services committing the future crime or fraud; in that situation Maryland, Washington, D.C., and the ABA Model Rules switch from prohibition to permissible disclosure.

Fourth, suppose a client tells my partner that her husband (whom we do not represent) intends to commit a future crime or fraud that will cause substantial injury to the financial interests of another. None of our jurisdictions require my partner to tell the authorities. In the states where McGuireWoods has offices, only Georgia permits my partner to tell the authorities—all of the other states prohibit my partner from making that disclosure (as do the ABA Model Rules).

Fifth, suppose a client tells my partner that he intends to tap into the cable television line near his house and obtain cable television service without paying for it. My partner would be required to tell the authorities in Florida and Virginia. My partner would be allowed to (but not required to) tell the authorities in Georgia, Illinois, New York, and North Carolina. My partner would be prohibited from telling the authorities in California, Maryland, Pennsylvania, and Washington, D.C. The ABA Model Rules also take this approach.

If all of this sounds confusing, it is. Just these handfuls of states' ethics rules provide a remarkable set of permutations. Some states prohibit disclosure of certain client wrongdoing, while some states permit disclosure, and some require disclosure—of the same conduct. States have differing rules covering none, some, or all of the following types of misconduct: (1) all criminal activity; (2) crimes involving death, personal injury, or financial loss; or (3) just crimes involving death or bodily harm. Some states require disclosure just of a client's intended crime, while others require disclosure of intended crimes by clients or third parties. Some states include fraud in the type of wrongdoing that lawyers may sometimes disclose, while other states do not. The variations are essentially endless.

The next time that one of your partners tells you that she follows the "smell test" when deciding ethics issues, you should remind her that the ethics rules are not based on morality. Rather, they reflect each state's efforts to strike a balance between a lawyer's primary duty to clients and lesser duties to adversaries, the system, and society. There simply is no substitute for checking your state's ethics rules. ■

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ESTATE PLANNING

Estate Planning at a Time of Uncertainty

BY JAY A. SOLED AND HERBERT L. ZUCKERMAN

In 2001 Congress passed legislation that gradually increased the amount decedents could pass tax free from \$1 million to \$2 (where it is today) to \$3.5 million beginning in 2009. In 2010, Congress suspended the estate tax for one year and then reinstated the \$1 million exemption beginning in 2011 and going forward. At the time of passage, most practitioners and taxpayers thought that over the next several years Congress would fix a “permanent” exemption number and avoid the scheduled up and down roller coaster of exemption amounts. Well, most practitioners and taxpayers were dead wrong.

To date, Congress has not settled upon a “permanent” exemption number. Moreover, looking across the horizon, no further action seems likely on the estate tax at least until after a new president takes office in 2009. Where does this uncertainty leave tax practitioners and taxpayers? Here are our thoughts.

For starters, no one in Washington is anticipating that the estate tax will be repealed. Yes, there were several years when the Republicans controlled both houses of Congress that this was a possibility. Now, however, with the Democrats in control of both houses, unless there is a dramatic shift in the political climate, estate tax repeal seems extraordinarily remote.

With the possibility of repeal now a distant thought, there are only two significant items of business Congress is seriously considering. These items are determining what the exact amount the estate tax exemption and the appropriate tax rate schedule should be. Many politi-

cal pundits suggest that the exemption amount will ultimately settle in the \$2.5 to \$4 million range and that the estate tax rate will probably be in the 35 to 50 percent range.

Consider the fact that the exemption amount is currently set at \$2 million and the estate tax rate is a flat 45 percent. In light of what these political pundits are suggesting, coupled with burgeoning deficits and escalating entitlement costs, there is not much chance that either the exemption will significantly increase or estate tax rates precipitously drop. That being the case, our advice to tax practitioners would be to steer a steady course and to continue to practice in the same fashion they been over the past half decade. We see no necessity to have clients implement two estate plans, one if there is no estate tax and one if there is an estate tax. The odds of there not being an estate tax are far too removed to be cost justified.

For taxpayers who have been using the uncertainty of the estate tax as an excuse not to do their estate planning, they should get off their duffs. Nothing radical from Washington is likely to be forthcoming in 2009. Admittedly, the estate tax exemption and estate tax rates will change, but not in a material enough fashion to color their decisions (or that of their advisors).

Use of the term “uncertainty” in the title of our piece perpetuates what is being said about the estate tax in the mass media. To the contrary, from our vantage point, when it comes to the estate tax, there is much certainty: it will continue to be imposed on economically well-to-do taxpayers at a fairly high tax rate. ■



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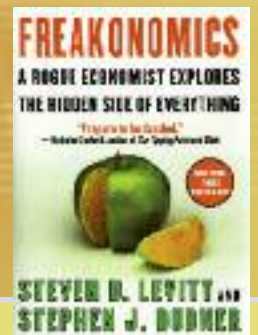
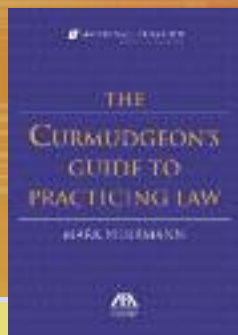
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“I will candidly acknowledge that . . . if all power is subject to abuse, then it is possible the abuse of the powers of the general government may be guarded against in a more secure manner than is now done”

— James Madison

Quoted in *James Madison and the Struggle for the Bill of Rights* by Richard Labunski (see inside, page 6).