Network Newsletter

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FEATURED ARTICLES:

$8,300,000 JUDGMENT FOLLOWING JURY TRIAL AGAINST CON ED ON "NO PAY" REFERRAL

Partner **Bryce Moses** obtained a $5,500,000 verdict for our client who was exiting the Staten Island Expressway when her motor vehicle was struck by a Con Edison van. As a result of the impact, the left side of her face hit the steering wheel, her neck twisted, and she felt immediate pain in her neck which caused a herniated disk requiring fusion surgery with plate and screws. Through the efforts of WRSH partner **Ken Halperin**, prior to trial we obtained Summary Judgment on the issue of liability which resulted in added interest in excess of $2,000,000.

Despite being found responsible for the accident, Con Edison refused to settle the case and took a "no pay" position at trial. Con Edison had two lawyers and three Con Edison investigators assisting their lawyers throughout the damages trial.

Con Edison argued at trial that despite her neck pain, our client neither went to the hospital nor saw any doctors on the day of her accident. Con Edison emphasized that rather than see a doctor, our client left for Jamaica the next day on a family vacation for two weeks. Although she testified that her neck was in pain the entire time she was away, she saw a nurse at her hotel, and had an x-ray at a local medical facility, none of these records could be located. Con Edison also argued our client was not injured as a result of this accident but due to a prior car accident.

In 2008, our client was involved in a car accident in which her car spun around and was totaled. As a result of that 2008 crash, our client lost consciousness and complained of neck pain at the hospital where she had a CT scan of her cervical spine. She came under the care of a doctor in 2008 who noted that our client had neck pain and diagnosed her with acute traumatic cervical radiculitis. Con Edison argued that the 2008 accident was the cause of her fusion surgery.

Bryce was able to demonstrate through his use of our client's 2008 medical records, MRI films, and her medical treatment from the 2010 accident, that Con Edison was responsible for our client's C5-6 disc herniation and the fusion surgery necessary to repair it. Bryce showed the jury that our client's neck complaints in 2008 involved only her neck with no radiating pain down into her arms. However, a complaint of radiating pain in 2010 indicated that the C5-6 disc was now herniated and compressing the spinal nerve root. Without any complaint of radiating pain in 2008, our client's spinal surgeon explained that our client did not suffer a herniated disc that compressed her spinal nerves at that time. Bryce argued that our client's medical records from 2010 where she complained of neck pain radiating into both arms indicated a herniation. This was one of the most compelling pieces of medical evidence that convinced the jury it was the Con Ed accident that was responsible for our client's injuries.

The jury deliberated for only 20 minutes. The jury unanimously awarded our client $1,500,000 for her past pain and suffering and $4,000,000 for her future pain and suffering.

ADVOCACY TIPS FOR "WINNING" IN MEDIATION

By Elizabeth J. Shampnoi

Counsel who master the nuances of mediation advocacy are far more effective than those who apply trial skills. Wise mediation advocates recognize that just as they would adjust their advocacy style when presenting to a judge versus a jury, mediation requires a different approach.

As with most things, preparation is key. In mediation, it is important to begin preparing well in advance of the mediation and even before you select a mediator. Mediators have different styles, areas of expertise and levels of experience. There are very few "one-size-fits-all" mediators. Implementing the following tips at key stages of the mediation will put you on the path to "winning".

The Initial Mediation Plan

Once you agree to mediate, you should begin developing your mediation plan. A good plan requires: (i) identification of the strengths and weaknesses of your case; (ii) motivations and impediments to settlement; (iii) the mediator's role in resolving the dispute; and (iv) an analysis of your client's best alternative to a negotiated agreement (BATNA), worst alternative to a negotiated agreement (WATNA) and likely alternative to a negotiated agreement (LATNA). Developing this plan from each party's perspective is a worthwhile undertaking to ensure your plan is well thought out.

The Preliminary Conference Call

Consider whether you need to gather any information prior to the mediation and if so, how to do so in a cost-effective manner. Identify who should attend the mediation beyond counsel, the parties and those with full settlement authority. There may be additional people who do not fit in any of these categories but can assist in reaching settlement given the relationship they have to a party or the dispute. Identify those whose presence you believe will hinder or impede settlement. Determine how you will productively present the case so that it conveys a problem-solving approach that meets your client's interests and overcomes impediments.

The Joint Mediation Session

Your opening remarks should set a conciliatory tone for the mediation and tell a story that sets forth what your client expects from the mediation. Use this opportunity to suggest how the mediator might assist the parties in resolving the dispute. If your client wishes to speak, prepare your client adequately to ensure that any remarks align with

your mediation plan. Throughout the day, view the dispute as a shared problem you are all there to resolve. Think creatively and outside of the box. Be open to the other side's views and interests. Search for solutions with an open mind. Strive to work collaboratively and leave gamesmanship at the door. Remember, this is not a duel or a contest. Your goal is not to outsmart anyone.

The Caucus

There is a tendency by many traditional litigators to caucus from the outset or after the mediator's opening comments. Unless there are unusual circumstances such as a history of violence or harassment that would render a joint session impractical, staying in joint session for as long as it is productive should be the norm. In many instances, caucusing will be necessary but it should be done with a specific goal in mind. What do you wish to accomplish by speaking privately with the mediator? Is it because you wish to share certain information, in confidence, that you are unwilling to share jointly? Is it because you want to raise your demand or counter-offer with the mediator first? Do you wish to obtain the mediator's input and guidance with respect to a specific topic? Once you have set goals and a plan, it is important to be open and honest with the mediator. Nothing is gained by hiding the ball from the mediator or worse, lying to the mediator.

After the Mediation

Rapid movement towards settlement in mediation often starts at the end of the day when people are tired. Nonetheless, it is imperative to draft the settlement terms on site to avoid later memory failure or buyer's remorse. At a minimum, the agreement should be in the form of a term sheet or memorandum of understanding. All parties, including counsel, should sign it. Be sure to consider all aspects of the agreement both economic and non-economic. If you do not settle that day, do not consider it a total loss. Many cases settle after the first in-person mediation session whether at a future in-person session or through the perseverance of the mediator and counsel.

"Winning" in mediation means reaching a settlement that satisfies your client's interests efficiently and effectively. At the end of the day preparation coupled with improvisation and flexibility are the keys to "winning" in mediation.

...view the dispute as a shared problem you are all there to resolve.

Elizabeth J. Shampnoi, Esq. is a lawyer, arbitrator, mediator, consulting expert and trainer with vast experience in all aspects of conflict resolution. A former litigator, in-house counsel and business executive, Ms. Shampnoi regularly advises clients in navigating alternative dispute resolution processes to achieve the best possible outcome. She can be reached at Elizabeth@shampnoiadr.com.

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The potential impact of these revisions will have far-reaching effects...

THE COMPENSATION REFORMATION OF 2017

By Joseph F. Sensale

Ten years has elapsed since legislation was enacted with respect to the New York State Workers' Compensation statute that effected major revision to same. The "reforms" implemented April this year, alleged to help alleviate costs to employers, bring the decade-old changes to a different level. All practitioners should become duly familiar with the impact of these "reforms," not only to properly advise a potential client, but also, avoid the replete pitfalls such have created.

Upon review of the New York State Workers' Compensation Board's "Subject No. 046-936," the significant aspects of the "reform" can be properly distilled down to four items, though others persist:

(1) For cases established with an injury or disablement date on or after April 10, 2017, cumulative periods of temporary disability that ensue after an accident are now limited to 130 weeks. In essence, upon a finding of maximum medical improvement at such time, any temporary disability benefits that exceed 130 weeks would be credited against the durational benefit "cap" imposed by the 2007 legislation with respect to permanent partial disability, usually, two to ten years; the "cap" then has the potential to become a legal fiction;

(2) Effective immediately, any claimant that is classified permanently partially disabled and in receipt of monetary benefits at time such legal finding is proffered, no longer has an obligation to seek employment commensurate with remaining earning capacity; this aspect of the new legislation abrogates, in part, the issue germane to the Court of Appeals holding in Zamora v. New York Neurologic Associates, 19 N.Y.3d 186, 947 N.Y.S.2d 788 (2012);

(3) Effective immediately, the loss of wage earning capacity threshold for redetermination of a permanent partial disability predicated upon extreme financial hardship, was lowered from >80% to >75%;

(4) Most significantly, the New York State Guidelines for Determining Permanent Impairment, et al., are now subject to revision. The potential impact of these revisions will have far-reaching effects on the determination of "schedule loss of use" awards; that assessment will have to be reserved for a future column.

While it may take another ten years before any new "reforms" of the statute are considered, certainly, the impact of the current changes will be manifest long before then.

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Mr. Sensale is a partner of The Chase Sensale Law Group, L.L.P. Chase Sensale serves the needs of the injured and disabled in the practice areas of workers' compensation, social security disability, long term disability, short term disability, disability retirement, accidental death and dismemberment, and unemployment insurance benefits, with offices located in Nassau, Suffolk and the greater NYC metro area, and available on the web at www.chasesensale.com.

THE 212(D)(3) WAIVER

By Pablo G. Velez

If a foreign national has ever been arrested and/or convicted of a crime in any jurisdiction in the world, there can be negative consequences regarding travel to the United States. A criminal record could actually become a permanent hindrance on being able to visit the US for business or pleasure. However, there is a broad legal remedy available to individuals applying for a nonimmigrant visa to come into the country.

The Section 212(d)(3) waiver is a supplementary petition that is submitted along with a nonimmigrant visa application. The waiver makes an argument to the reviewing consular officer that the applicant's past criminal record should be disregarded in order to allow entry into the United States. This kind of petition is only permitted for nonimmigrant visas, meaning that it applies to individuals who want to enter the US on a temporary basis, not those seeking permanent residency. The waiver can be used for individuals desiring to enter the United States in order to visit as tourists, to work for a US-based company, to begin and manage their own US-based company, or to simply enter the US to conduct business and make investments.

The true benefit of the 212(d)(3) waiver lies in the broad range of eligible applicants. It does not specify any crimes that would not be covered under the regulations except for participation in Nazi persecutions, membership in organized crime organizations, or terrorist activities.

The true benefit of the 212(d)(3) waiver lies in the broad range of eligible applicants.

The court case which governs the standard applied by the officers examining the visa petition and the waiver is in Matter of Hranka, 16 I&N Dec. 491(BIA 1978). In this case, the Board of Immigration Appeals (BIA) lists the three criteria examined in order to determine whether to approve or deny a Section 212(d)(3) waiver:

1) The risk of harm to society if the applicant is admitted;

2) The seriousness of the applicant's prior immigration law, or criminal law, violations, if any; and

3) The reasons for wishing to enter the US

In evaluating the risk of harm to society, it is important to demonstrate a minimal number of offenses and that significant time has passed since the incident in question. The seriousness of the offense focuses on the gravity of the particular crimes, making violent offenses (especially if drugs or firearms are involved) and fraud the more difficult to mitigate. The applicant's reasons for entering the United States do not have to be incredibly compelling, however, if an individual is interested in investing in a business and creating US jobs, this will be viewed with more favor than an individual interested in bringing the family on a vacation. Nonetheless, it is by striking a balance among these three factors that a successful case is made.

The main objective of the Section 212(d)(3) petition is to create a form of relief from inadmissibility for those who would not otherwise qualify to enter or re-enter the US. Whether the offense was tax or insurance fraud, assault, or a substance related crime, if an individual can show that although they have committed an offense in the past, they have since reformed and kept a clean record, there is strong chance of being successful with this petition.

Pablo G. Velez's practice encompasses all areas of immigration law, with emphasis on business and family immigration. He also has significant experience with refugee matters, especially with asylum cases, and has represented clients in removal proceedings before the United States Immigration Court. He also has extensive experience in representing and defending in-state and out-of-state insurance carriers in both litigation and arbitration forums in numerous civil litigation matters, with particular emphasis on no-fault/PIP and insurance fraud. He speaks both English and Spanish.

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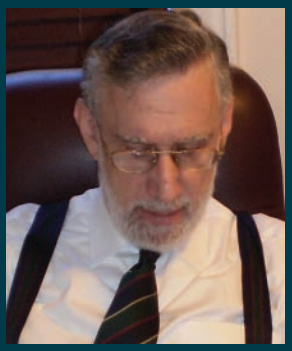

TESTIFYING BEFORE THE GRAND JURY

By Stephan Jacob Siegel

Almost immediately after starting training for my first legal position at the Queens Criminal Defense Division of the Legal Aid Society, I was adjured and quickly learned the sacred doctrine of serving a notice of intent to testify before the grand jury, pursuant to Section 190.50-5(b) of the Criminal Procedure Law on every felony arraignment. The idea was to preserve the defendant's right to testify before the grand jury. The reality was, and still is, that about none of my former colleagues ever presented clients to testify at the grand jury. Such a failure to exercise the right to testify at the grand jury under the correct circumstances ignores one of the most powerful proactive tools of the defense in an arena that is heavily weighted on the prosecution side. To make matters worse, you help hurt your credibility with the local prosecutor's office if you always serve a grand jury notice and never have your client testify.

Clearly, having a defendant testify at the grand jury is not right in every case. However, recognizing when to either present your client to the grand jury or not will make you a much stronger defense lawyer by geometrically increasing your range of options. This article will discuss various illustrative circumstances where you should either have your client testify or not at the grand jury. In the right case, your decision will short circuit the prosecution when the grand jury returns a no true bill dismissing the charges against your client. In the wrong case it will make a bad case worse. Careful consideration is key.

Know your adversary

My first consideration is always to research the assistant district attorney or assistant United States Attorney who will be presenting the case to the grand jury. Is she a prosecutor who is honest, open-minded and willing to listen to your client with an open mind or is she a true believer, certain that every criminal defendant is guilty and deserves a maximum sentence. Extreme caution is appropriate with true-believing prosecutors or if you are dealing with a dishonest, sleazy or slimy prosecutor. Such a prosecutor will inevitably either confuse your client or make her look like a liar with a resultant indictment and a really bad transcript to work with.

Conversely, an honest prosecutor makes the decision that much easier. Many times, I have had honest prosecutors actually help me in the grand jury. Then all you have to worry about is properly preparing your client.

Proper preparation is paramount

As long as the preparation is properly focused, there is no such thing as too much preparation. Having made many mistakes in my efforts to properly prepare clients, I have come to the conclusion that a slow incremental approach works best for virtually all clients.

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Enthusiastically providing the best criminal defense possible for the limited number of clients he can represent without compromising the quality of his work is the focus of Stephan Jacob Siegel's professional life. He loves being a criminal defense lawyer and has handled just about every crime prosecutable in the state and federal systems. On August 9, 2017, after extensive conferences with the assistant district attorneys prosecuting his client, Mr. Siegel obtained a dismissal in the interests of justice upon the recommendation of the District Attorney of New York County. His client and he were both thrilled at what is widely considered by criminal lawyers as the rarest of dispositions.

Preparation starts with a thorough review of all available information regarding the case followed by a rather long initial session with the client to gain a collaborative understanding of everything there is to know about the case. You must be on the same page as your client. After we both know all about the charges, evidence and chronological order of events, we discuss in detail exactly what we want to prove in the grand jury. No notes are taken at these discussions. After we are certain and in agreement about the case, the client leaves and I prepare a memorandum for myself and a letter to the client carefully detailing the testimony that we need to bring out. That becomes our script. This initial meeting usually takes about an hour or longer if the case involves particularly complicated fact patterns or other unusual circumstances.

We then meet as many times as possible until the grand jury appearance. Each session lasts as long as it takes for the client to recite his direct testimony and for me to assume a prosecutorial role to make the client confused, feel badly and look like a liar. I do not like to present clients to grand juries on less than a dozen preparation sessions and the more times we meet, the better we will do. I do not have a session within thirty-six hours of the scheduled grand jury appearance, unless the client really feels that it is necessary. While these meetings may be inconvenient for the client, they guarantee that we will obtain the maximum result possible.

When to avoid defendant grand jury testimony

The only rule absolute in life and litigation is that there is an exception to every rule. Even the rule that every mortal dies has at least two exceptions recorded in the bible. Any rules that I set forth are illustrative suggestions and there will no doubt be exceptions to the rules as a function of the particular facts and circumstances of your client's case.

If you are at least reasonably certain that your client is lying or even if you have a strong gut feeling that your client may be lying, that client should not testify at the grand jury. The result of such an ill-advised decision is not pretty. In addition to your potentially suborning perjury, you will almost certainly see you client indicted with a very poor script to work with. It is more or less a universal truth that unless you are pretty much certain beyond a reasonable doubt that your client is telling you the truth, you probably do not want the client testifying in the grand jury. Liars are almost always revealed by either self-contradiction, body language, effective cross examination or a combination of these three factors. The only successful liars are either members of an organized crime enterprise or those afflicted by some sort of psychotic personality disorder. My experience is that most psychopaths actually believe whatever it is that they want or need to believe, regardless of the truth content of their beliefs. If you know your client has an extra "Y" chromosome, watch out.

The only rule absolute in life and litigation is that there is an exception to every rule.

Since being admitted to the federal and state bars of New York and New Jersey, Stephan Jacob Siegel has tried more than 1,000 matters as an advocate, including more than 250 jury trials and at least 25 murder cases. In various quasi-judicial pro-bono capacities, he has handled more than 2,500 arbitrations, hearings and mediations.

Stephan Jacob Siegel recognizes his responsibility to the public by serving as a certified mediator for the United States District Court for the Eastern District of New York, as a guardian, referee and receiver for the Queens Supreme Court and as an arbitrator for the Small Claims Court Part of the Queens Civil Court.

Conversely, it is also a very good idea not to have your client testify if you are not reasonably certain that she is telling the truth.

Generally, unless you have a bullet-proof alibi or verified really weird circumstances, you should avoid having your client testify at the grand jury with allegations of a sex crime committed by a stranger or committed against a minor. Just about everybody hates sexual predators and it is not uncommon for jurors to lose their ability to judge objectively in sex cases, especially when the case is presented by an irate true-believer prosecutor. Conversely, defendants who testify in the grand jury about date rapes charges are frequently rewarded with a no true bill.

Extra caution is appropriate in murder cases due to the large amount of evidence that you are unaware has been gathered, unless your alibi is absolutely accurate and verified. In fact, anytime that you know or reasonably suspect that you are missing crucial facts about the case, you are skating on thin ice and generally do not want to have your client testify at the grand jury.

If you do not want to let the prosecutor know what your defense is or you are reasonably certain that no matter what you will do, the grand jury will not return a no true bill, testifying at the grand jury may not be a good idea, unless other compelling factors indicate otherwise.

Extra care is needed if your client is either dumb or dumber. If the client is really dumb, it might be a good idea to skip a grand jury appearance, even in a case where testifying might be otherwise appropriate

Again, let me repeat that these suggestions are illustrative and not encyclopedic.

When you want your client in the grand jury

If your client has a reasonable explanation of what happened with respect to the charges, by all means consider having him testify.

Assault cases and date rape cases are frequently fertile fields for having clients testify before the grand jury. In fact, any case that lends itself to “she said-he said” (or any permutation or combination thereof) has a high likelihood of being the type of case where you will want to have your client testify in the grand jury.

Defendant testimony in the grand jury is also appropriate if you are reasonably certain that your client will not hurt himself and you either want to educate or subliminally prejudice either an ambivalent or positively inclined prosecutor.

You should certainly have your client testify if you are at least reasonably certain that your client will testify at trial and you want him to gain real life experience in testifying at a real proceeding. If the prosecutor already knows your defense, then you do not lose any element of surprise, an additional positive factor to consider.

If you are going to ask the grand jury to hear other relevant witnesses, it is more or less essential to have your client testify at the grand jury. Section 190.50-6 is the controlling statute that states the grand jury may [Emphasis Provided] exercise its discretion to hear other witnesses. Keep in mind that unfortunately, the statute does not mention that if you did not have your client testify that it is virtually always the assistant district attorney presenting the case who uses its discretion to not call your witness. It is more difficult for the assistant district attorney presenting the case to manipulate the members of the grand jury when they have heard a defendant ask them to listen to his defense witnesses. Assistant district attorneys are generally not in the business of presenting witnesses to the grand jury who are going to exculpate the defendant. Indeed, one of the more important self-perceived jobs of prosecutors presenting cases in the grand jury is to manipulate the grand jury to do what the prosecutor wants it to do.

Conclusion

Defense grand jury practice is a valuable but often overlooked tool of the trade that can have outstanding results far out of proportion to the efforts required. It is more or less a universal truth that most grand juries will not hear any defendants testify at all during their terms. My experience is that they love to hear defendants testify and anecdotally, if I have a client testify who asks a grand jury to call his other witnesses, I do not recall a grand jury ever refusing to hear my other witnesses. My experience also is that those clients who testify at the grand jury frequently receive no true bills and tend to get better results even when they do have to go to trial. Good luck!

The best legal advice is first, that a person should never admit anything to anybody, especially to a law enforcement official, an attorney who is not representing them or a spouse. Second, when choosing a lawyer, the person must pick an attorney who makes them feel as comfortable as they can be under their particular facts and circumstances and is the lawyer who will put his full heart into representing them with competence, dedication, experience, expertise, integrity and intelligence.

There is a better way to divorce and still get your fair share – mediation.

THE PSYCHOLOGY OF DIVORCE

By Lois M. Brenner

One in every two marriages ends in divorce. We know this as attorneys. Considering the prevalence of divorce, it's time to question the traditional legal method that couples have been using. Each spouse hires a lawyer and pays a substantial retainer. The opposing teams then duel out in court, burn through the retainer and move to a high number for their work on the case. Ultimately, judges will make decisions about who gets what, but not until many months or even years go by, with delays, adjournments, and the slowness of the bureaucratic system. Justice delayed is justice denied, with enormous financial and emotional cost to the entire family, especially the children, who are sometimes used as pawns. Control is no longer with the couple, but in the hands of a stranger–the judge.

This traditional method is popular, as scorned spouses want revenge. Their spouse has caused them emotional distress and they believe the courts will serve them the justice they deserve. Wrong. All they get is the law and the legal bills. The system ignores any emotional issues that may have led to the divorce. The court will not proceed with any psychologically sensitivity.

What do people think first when you mention "divorce?" "Fight, fight, fight!"
There is a better way to divorce and still get your fair share – mediation. The divorcing couple hires one individual, instead of two opposing lawyers, to help them resolve their differences. The mediator is an independent, unbiased individual, trained in mediation, whose job is to facilitate an agreement on all issues between the spouses. This might sound unrealistic to couples who have reached their wit's end with each other, but mediators are capable of managing couples and achieving settlements with less cost, less time, and less aggravation.

When I work with a couple as a medically-trained professional, I identify their personality and character issues. Statutes are fairly standard about property, spousal support, and child support. What causes disruption and makes divorces difficult is the psychological issues people are not aware of – the feelings, thoughts, and behaviors that are second nature when people are hurt and angry. By identifying these characteristics, I can help my clients avoid behavior that will lead to a painful, negative outcome. If you have a client considering divorce, give serious thought to mediation.

Lois M. Brenner

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Lois M. Brenner is a New York Divorce Attorney and an accredited Divorce Mediator with over 35 years experience. She is also a licensed medical professional who works with patients having mood and personality disorders. After joining the prestigious firm of Sullivan & Cromwell, she was head of the matrimonial department at the Wall Street firm of Herzfeld & Rubin before opening her own practice. Ms. Brenner is a renowned advocate, negotiator, arbitrator, and trial lawyer. In recognition of her expertise, she was selected by the New York State Supreme Court to mediate difficult cases. For years clients have relied on her discretion to keep them out of the press. Attorney Lois Brenner is the author of "Getting Your Share," a divorce book published by Crown and featured on Oprah. *She has written for and been quoted by* The New York Times *and* New York Magazine, *among many other publications. She has appeared as a family law expert on* Oprah, Good Morning America *and* CNN *among many others. She is currently working on "The Psychology of Divorce," a book examining the complexity of divorce beyond the traditional legal understanding.*

SUCCESSOR LIABILITY FOR A BUYER IN M&A TRANSACTIONS: ONE LITTLE KNOWN EXCEPTION TO THE GENERAL RULE

By Peter Papagianakis

...every business that has non-owner employees is required to maintain unemployment insurance.

Most middle-market and smaller business acquisitions are structured as an asset purchase rather than a merger or a stock purchase. The primary reason for business acquisitions to be structured as asset purchase deals is to limit the post-acquisition (successor) liability of the Buyer.

Most NY attorneys representing a Buyer of a business know that an asset purchase deal triggers the Buyer's obligation to file a Form AU.196.10 captioned "Notification of Sale, Transfer or Assignment in Bulk" pursuant to NYS Sales and Use Tax Law, Article 28, Section 1141(c). One purpose of the AU-196.10 is to notify the Bulk Sales Tax Unit of the Department of Taxation and Finance (DTF) that the Seller is selling substantially all its assets and gives the DTF the opportunity to determine whether there is any sales taxes due or whether there is a deficiency in sales taxes previously remitted by the Seller. The AU-196.10 must be delivered to the DTF at least 10 days before the Buyer either takes possession of (or pays for) the assets. The AU-196.10 filing is critical because if the Buyer does not comply with that requirement, the Buyer's principal (owner) may be held personally liable for the Seller's sales tax deficiency.

In contrast to successor liability arising from the Seller's sales tax deficiency, many attorneys are not aware that a Buyer of a business succeeds to the Seller's unemployment insurance experience rating. Generally, every business that has non-owner employees is required to maintain unemployment insurance. Employers must pay unemployment insurance contributions generally on the first $8,500 that an individual employee earns during the calendar year.

According to the NYS Department of Labor, even if a business acquisition is structured as a typical asset purchase deal, the Buyer also acquires all or a portion of the Seller's unemployment insurance experience rating account balance and other aspects of the Seller's unemployment experience. Under NYS Department of Labor regulations, a business acquisition occurs when another employer (Seller) transfers or sells all or part of its business to the Buyer and any one of the following occurs: the Buyer acquires any of the Seller's goodwill; the Buyer continues or resumes the business of the Seller, either in the same location or elsewhere; the Buyer employs (post-acquisition) substantially the same employees who worked in acquired (Seller's) business.

The Buyer (in conjunction with its tax advisor) advisor must notify the NYS Department of Labor regarding the business transfer no later than the end of the year after the calendar year in which the business transfer occurred.

Eventually, the Seller's account is closed and its experience history is transferred to the Buyer's account. The Buyer's contribution rate is then determined or re-determined as of the date of the transfer. The Buyer typically receives a Notice of Experience Rating Charges reflecting benefits paid to former employees of the transferring employer that are being charged to the account.

Attorneys representing Buyers should be aware of the Buyer's successor liability that arises from the Seller's unemployment insurance experience because the Seller's unemployment experience rating may adversely affect the Buyer's post-closing unemployment insurance contribution expenses.

Since commencing his legal career in 1997, the firm's founding partner, Peter Papagianakis, has practiced law exclusively in the area of business contracts and transactions. His experience has been as an attorney for a national law firm and a Manhattan-based law firm and as senior counsel for a NYSE-listed company where he was responsible for SEC reporting and corporate and capital market transactions. In addition to being licensed to practice law in New York, Peter is licensed in Florida – where he practiced law for three years. In addition to practicing law, Peter (1) serves on the Board of Directors of NYS-based multi-state property and casualty insurance company and (2) has taught the following courses for various graduate and undergraduate university programs in New York: (i) Business Law/Commercial Transactions, (ii) Law of Business Organizations, (iii) Negotiation Skills, (iv) Microeconomics, (v) Macroeconomics, (vi) Investing in Mutual Funds, and (vii) Investing in Stocks and Bonds.

With offices in New York City and Mineola, NY, the attorneys and lawyers at Business Law Firm LLC assist clients with buying and selling businesses, financing businesses, operating businesses and forming businesses and partnerships for clients in the greater New York area including Long Island.

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CASH ONLY, PLEASE

By Michelle Gershfeld

When Jenny and Kenny (the "Chargers") came to speak to me the first time, there were raised voices and accusations. The Chargers recognized their spending had become out of control, but each felt the other was to blame. The Chargers lived under the false impression that the credit extended to them via unsecured credit cards was their money. Of course it was not. They played the game the credit card companies offered, moving debt from one card to another, "taking advantage" of teaser rates and promises of "points" for extra purchases and airline miles.

Instead of really looking at their finances and analyzing what they were doing with their hard earned money, Jenny and Kenny lived every day with no plan and hoped for the best. Due to Kenny's variable commission earnings and uncertainty, the Chargers convinced themselves they couldn't create or live by a budget. After all, they never really know how much money they will bring in, in any given month.

As their debt grew both suffered immeasurably, wondering and worrying about how they were going to dig out of the ever growing hole. Yet, both were afraid to voice their concerns, so they continued to hide from reality and live a lie. The credit lie. The denial lie. The "if we don't talk about it, it won't bite us" lie.

That worked well, in fact, for many years. Credit continued to be extended and while the teaser rates evaporated, the credit was still offered, and the Chargers continued to feed their own and each other's egos with thoughts of grandeur upon the day their inevitable success would arrive and get them back in "the black".

More years passed and interest rates continued to rise, but the credit limit increases stopped. At once, it seemed, no matter how much money they brought in, at the end of the month, the only way they could survive was by digging into another credit card. But, by now there was no more credit. The cards were at "the max". What to do now?

What if you gave up all of your credit cards and could only spend the money you earned? They felt they could not do it. The Chargers needed their credit.

But, when your average credit card bill has a 23 percent interest charge every month, every dollar you "spend" that is not yours, is costing you $1.23. You can never catch up. The only way to get ahead is to stop spending what isn't yours. Just stop.

Look hard at the numbers. Write down all of your income, for every month. Look at the percentages and see how much you are actually spending on different categories. Learnvest suggests a feasible 50/20/30 guideline.
https://www.learnvest.com/knowledge-center/your-ultimate-budget-guideline-the-502030-rule/

This formula, which is malleable, suggests that no more than 50% of your take home income be applied to fixed living costs (housing, utilities and transportation), 20% on your financial goals (long and short term savings, debt repayment), and 30% on flexible spending (groceries, shopping and entertainment).

Comparing their net income and expenses lead the Charges to the realization that the real crises was in their fixed living expenses. The monthly mortgage (including property taxes and insurance), maintenance and utilities costs exceeded 75% of the Chargers monthly take home pay. Never having broken down the costs in that manner, allowed each to think/blame each other's spending as the cause of their financial distress.

The first step for Jenny and Kenny in reversing their downward spiral was reducing their fixed monthly expenses and increasing their take home income. The Chargers were adamant they did not want to sell their home.

To get the ratio where they needed it, Jenny and Kenny worked creatively together to find solutions. They came to these joint solutions: (i) rent out their garage, a valuable commodity as they live close to an airport, (ii) additional part time jobs, allowing for a greater "guaranteed" amount each month, while providing an impediment to more spending, (iii) cutting off cable tv and gym memberships, and (iv) committing to a limited $200/month personal allowance.

The additional $1,000 monthly "income" along with the reduced expenses allowed Jenny and Kenny to stop using credit completely. The Chargers are now jointly working on paying off their debt and they sit together to pay their bills, committed to openly discussing their goals and priorities.

Are you ready to take the Chargers challenge and live without reliance on credit? For one month? Try it, and see...

What if you gave up all of your credit cards and could only spend the money you earned?

Michelle Gershfeld is the founder of The Law Offices of Michelle Gershfeld. She is a master debt negotiator, bankruptcy and real estate attorney. Michelle's almost 30 years of bankruptcy and consumer debt experience provides her clients with strong analytical and negotiating skills. Michelle has a passion for financial literacy education and is a personal finance counselor and coach thorough her company, Get Financially Fit. Michelle advises people who are in debt, or building wealth, by identifying and overcoming obstacles that lie in their path to securing worry-free, financial wellness. Michelle can be reached by phone 914.815.3222 or via email: Mgershfeldlaw@gmail.com.

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ADVISING THE EMPLOYEE WHO HAS BEEN LAID OFF

By Paul T. Shoemaker

In today's economy, layoffs are commonplace as companies downsize and reorganize with alarming frequency, leaving terminated employees in their wake. Many of those employees will seek legal counsel concerning their rights in connection with the termination of their employment.

The key question that always comes up is the question of severance pay. There is no law in the United States which creates a right to severance pay. No law mandates that an employer must pay severance to employees who are laid off.

If, however, an employer has a severance payment policy, that policy is enforceable under federal law (ERISA). In this area, the law is similar to the law concerning pensions. That is, the law does not require a company to have a pension plan. If, however, a company does have a policy or practice of paying pensions, it must make certain filings with the U.S. Department of Labor and it must comply with ERISA in its administration of the pension plan. The same applies with respect to severance payments which also are considered an employee benefit and may be subject to the requirements of ERISA and state law.

In general, if a company has a formal severance policy – or even a practice not codified as a formal policy – it must, as with pensions, administer that policy in an even-handed manner. The company cannot arbitrarily decide that certain people will get severance and others will not. (Note, however, that this does not mean that a company cannot deny severance to an employee who has been terminated for cause. It is permissible to deny severance pay to employees who are terminated with cause.)

In addition to a company-wide policy or practice, sometimes individuals have employment contracts which contain provisions for severance. Such contracts are enforceable in accordance with their terms. Often, however, they will turn out to be meaningless because the company is in financial difficulty and unable to make the required severance payments.

In the event that a company fails or refuses to honor its severance pay commitments, whether set forth in company policies or in an employment contract, the employee has remedies under ERISA and also under state law. Under New York State law, for example, a failure to make severance payments in accordance with an existing agreement or policy may render the employer liable for the employee's attorney's fees incurred in collecting the payments and also for a penalty equal to the amount of the unpaid benefits.

In addition to legal arguments, arguments of fair play and morality can be made on behalf of an employee who has been let go without severance pay. Frequently there may be an individual in the company who hired the employee in the first place who will feel some degree of responsibility for the fact that the employee is being let go without severance pay and who may be willing and able to go to bat for the employee.

In addition, arguments can be made to the employer to the effect that it will be bad for employee morale if the company is perceived as being harsh with people who are laid off and that it will make it more difficult for the company to hire and retain good employees if that is its reputation. One also can argue that the individual in question intends to continue to work in the industry and that it will be beneficial for the company if the person has a favorable disposition towards the company and is willing to do business with the company in the future.

Many other issues should be reviewed with the employee who consults you about his or her rights in connection with the termination of employment. These additional issues include whether the employee will have a continuation of benefits during any severance pay period, whether the employee

is eligible for COBRA, and whether the company will pay the COBRA premiums. The company is not required to pay those premiums but many companies agree to pay them as a benefit to a terminated employee.

In addition, the company may offer outplacement services to the terminated employee. If that is the case, you should ask the employee whether he or she feels that such services will be useful. Many people these days are accustomed to conducting job searches and do not need the assistance and coaching that is provided by an outplacement service. If the employee does not feel the need for such services, you should ask the company whether it is willing to pay to the employee the amount that the company otherwise would have expended for the outplacement services. That amount can be substantial and ordinarily is in the range of $10,000 to $20,000 per employee. If the employee agrees not to utilize the services, then the company will save that amount and may be willing to pay it over to the employee, or at least to share it with the employee.

Other significant issues are the question of whether the employee will receive favorable references and whether the company will agree to a non-disparagement clause whereby it will undertake not to disparage the employee. The law of libel and slander and potential liability for interference with employment relations provide protection to the employee regardless of whether there is such a clause. However, in cases where there is a significant amount of ill-will and the employee believes that one or more persons employed at the company may go on a vendetta against the employee, it can be advisable to request such a clause.

The employee may also wish to ask the company to pay for the employee's legal and financial advice in connection with the termination and companies sometimes are willing to do that. The employee may also wish to clarify that the company will not oppose the employee's application for unemployment insurance benefits. The following items also must be reviewed: unpaid accrued vacation time, bonuses that have been earned but not paid, and the status of any deferred compensation, stock grants, stock options and pension benefits.

Many factors should be considered in connection with determining the appropriate amount of severance to demand on behalf of the employee. Those factors include: the employee's length of service and contributions to the company, the impact of the layoff on the employee and the difficulty that the employee is likely to have in finding new employment, and any legal claims the employee may have against the employer, such as claims for discrimination, retaliation or breach of contract.

The employee also should be advised to consider whether and to what extent the employer may want to have a confidentiality or non-competition agreement with the employee. If that is significant to the employer, then the employee may have leverage which will enable him or her to get additional severance pay in exchange for agreeing to enter into a non-competition or confidentiality or non-solicitation agreement.

In connection with such matters, strategic considerations are important. The first approach to the company in some instances should be made by the employee, particularly if the employee has a powerful ally within the company who is willing to go to bat for the employee in terms of seeking additional severance and benefits.

If that option is not feasible or is not successful, then the employee's lawyer should step forward and contact the company on behalf of the employee with the employee's demands for additional severance and benefits and laying out the arguments that the employee will make in the event that it becomes necessary and appropriate to commence formal legal proceedings.

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NEWSLETTER

UPCOMING NETWORK EVENTS

THURSDAY, OCTOBER 19th
5:00 PM – 7:30 PM

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HOLIDAY PARTY

WEDNESDAY, DECEMBER 13th
5:30 PM – 10:30 PM

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