Group Legal Services Association

Solo, Small Firm, and General Practice Section

2014 Annual Conference

May 1-3, 2014, Las Vegas, Nevada

Family Law Potpourri – Dissipation of Assets Prior to Separation; Grandparents and Grandchildren, Client Triage

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Friday May 2

3:20 – 4:20 pm

Presenter:	**Robert E. Johnson, Johnson & Liebman**
Materials created by:	**Leighton Deming, Deming & Hoyt, PC and Robert E. Johnson**

Leighton Deming

Mr. Deming has ten (10) years as claims adjuster/manager (1963-1973); thirty (35) years attorney practicing in the general litigation and law with experience in most areas specializing in: Civil Litigation, Personal Injury Litigation, International Finance Law, Personal Injury (handled over 3000 cases) including auto, medical, workers compensation; specialized practice in the regulatory fields of prepaid legal and multi-level law; corporate, contracts, private placement offerings; financial areas including offshore paper transactions (ICC); some taxation in the Internal Revenue Service audit area; wills; general practice. He is a past Justice of the Peace and Magistrate Court Judge in Gwinnett County Georgia.

Robert E. Johnson

Robert E. Johnson, Partner of Johnson Liebman, LLP, is a civil litigation attorney with extensive litigation and transactional experience. He has worked on behalf of numerous insurance companies, Risk Retention Groups and self-insured businesses and clients. He has successfully defended corporations, trucking companies, supermarkets, retail businesses, large and small, as well as individuals in a variety of civil litigation matters. Robert has also handled complex assignments involving insurance coverage issues and Declaratory Judgment actions.

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Dissipation: Should Timing Be a Factor?

by Brian Blitz
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A recurring issue in many domestic relations cases is when dissipation occurs. Dissipation is defined as the use of marital money for a non-marital purpose during or after the time a marriage is irretrievably broken down. Although many states recognize dissipation, or a similar concept, some place a time limit of when dissipation can occur. For example, the Illinois Supreme Court found that dissipation may only occur while the marriage is undergoing an *irretrievable breakdown*[1]. The fact that dissipation may only occur within this window of time raises several questions.

First, what constitutes an irretrievable breakdown of a marriage? Do both parties need to accept that their marriage is over? Can one party's behavior be indicative that a marriage has broken down? What if that behavior is something that the other spouse has accepted and condoned over the years?

As with many issues in family law, trial courts have substantial discretion in determining answers to these questions. Although picking an actual point in time that the dissipation meter starts running can be difficult, courts have established some loose guidelines to determine when a marriage is irretrievably broken. Thus, where there is evidence that one party no longer desires to be married to the other, a court will find that irreconcilable differences have arisen which has caused an irretrievable breakdown of their marriage.[2] Although this guideline is helpful, it does not offer assistance to an innocent party in a case where their spouse has spent marital money inappropriately for an extended period of time, unbeknownst to that innocent spouse. Common expenditures include gambling, drinking and having an extended affair. These actions are hidden from one spouse who, presumably, if made aware of the conduct, would want a divorce.

The law in Illinois puts this innocent party at a disadvantage, while rewarding the guilty spouse for successfully manipulating the innocent spouse while hiding the dissipation. Although courts in Illinois have stated that since adultery is grounds for dissolution of marriage itself, the legitimate objects of matrimony have been destroyed if one spouse is guilty of committing adultery.[3] There has not been an opinion in Illinois that specifically provides that all money spent on a boyfriend/girlfriend during a secret affair would be considered dissipation.

Other states provide greater protection to an innocent party, by affording a spouse the opportunity to fully recover money spent by their spouse for a non-marital purpose throughout a marriage, not just after the marriage is broken.

In California and Texas, courts treat dissipation differently than Illinois, and their cases are instructive. As opposed to a timing requirement, California and Texas courts permit a monetary award from a party's share of community property if there has been a deliberate misappropriation or constructive fraud, regardless of timing. In the California case of *In re Marriage of Czapar*, the Court found substantial evidence supported a finding that the husband abused his management right by using a community corporation for personal expenditures and ordered a reimbursement to the community for the inappropriate use of money, including the payment of a salary to his girlfriend for a job that she was clearly not qualified to perform. [4]

In Texas, a presumption of constructive fraud arises where one spouse disposes of the other spouse's one-half interest in community property without the other's knowledge or consent. In the Texas case *Zieba v. Martin*, the Court found the community estate was entitled to reimbursement for money the husband spent on girlfriends and money withdrawn from bank accounts without his wife's consent.[5] Texas courts have gone further and held that a spouse must be innocent and unknowing for the constructive fraud to have occurred. In *Spruill v. Spruill*, the Court affirmed a lower court ruling that Husband had committed constructive fraud by spending a substantial portion of community property money on his girlfriend

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Dissipation
continued from page 1

without showing that it was done with his wife's consent.[6]

Court's in states that have timely requirement when determining dissipation should do more to protect an innocent party who truly does not know of their spouse's illicit expenditures, especially if those expenditures were ongoing for years. As opposed to arbitrarily choosing a point in time that a marriage is irretrievably broken, courts should establish a rebuttable presumption test which would operate as follows: If a spouse shows that a behavior was unknown from a specific point in time and that behavior resulted in the use of marital money for a non-marital purpose, there should be a presumption that the marriage was irretrievably broken at that point in time. The meter quantifying dissipation should start running at the time the behavior commenced.

However, in several cases, spouses know of their partner's actions and resulting spending, but choose to ignore or condone it. In many cases, it is obvious that the party has knowledge that their spouse has a gambling problem, drinking problem or is having an affair. Then, the question becomes: "What has that spouse done with that knowledge?" If the answer is that they accepted that behavior and chose to stay married irrespective of their spouse's misappropriation of money, the "breakdown" presumption is rebutted. A guilty spouse should not be punished for behavior that was historically accepted and condoned by a "not so innocent" spouse.

In the practice area of family law, we learn a great deal about people. After spending years with the same person, sometimes a spouse will simply accept their partner's various flaws, including spending money for something unrelated to the marriage. Some spouses accept gambling, drinking and extra-marital affairs casually, similar to accepting snoring, sloppiness or other character traits that may be annoying, but are simply part of a marriage. It becomes part of that specific relationship. In other relationships, one spouse may be completely unaware of their spouse's illicit behavior and not only do they become heartbroken, but they also suffer financial consequences when they realize the amount of money used by their spouse for a non-marital purpose.

Laws should be written so innocent parties are protected. As long as certain states define dissipation as the "expenditure of marital money for a non-marital purpose after the irretrievable breakdown of the marriage," it should be made clear that, often times, a marriage is over long before one spouse may actually know it. The law should protect that spouse. ***FLR***

(Endnotes)

1 In re Marriage of O'Neill, 138 Ill.2d. 487, 563 N.E.2d 494 (1990).
2 In re Marriage of Smoller, 578 N.E.2d 256 (1st Dist. 1991).
3 In re Marriage of Bates, 490 N.E.2d 1014, 1016(2nd Dist. 1986).
4 In re Marriage of Czapar, 285 Cal.Rptr. 479, 232 Cal.App.3d 1308 (App. 4 Dist. 1991).
5 Zieba v. Martin, 928 S.W.2d 782 (Tex.App.-Houston [14 Dist.], 1996).
6 Spruill v. Spruill, 624 S.W.2d 694 (Tex. App.1981).

Brian J. Blitz represents clients in family and matrimonial law, dispute resolution and litigation. He is also the author of several articles on the financial aspects of divorce. Blitz is a member of the American Bar Association, the Illinois State Bar Association and the Chicago Bar Association.

Blitz is an associate at Berger Schatz and can be reached at bblitz@bergerschatz.com

GEORGIA POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD

NOTICE:

(1) THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE GRANDPARENT THAT YOU DESIGNATE (THE AGENT GRANDPARENT) POWERS TO CARE FOR YOUR MINOR CHILD, INCLUDING THE POWER TO: ENROLL THE CHILD IN SCHOOL AND IN EXTRACURRICULAR SCHOOL ACTIVITIES; HAVE ACCESS TO SCHOOL RECORDS AND DISCLOSE THE CONTENTS TO OTHERS; ARRANGE FOR AND CONSENT TO MEDICAL, DENTAL, AND MENTAL HEALTH TREATMENT FOR THE CHILD; HAVE ACCESS TO SUCH RECORDS RELATED TO TREATMENT OF THE CHILD AND DISCLOSE THE CONTENTS OF THOSE RECORDS TO OTHERS; PROVIDE FOR THE CHILD'S FOOD, LODGING, RECREATION, AND TRAVEL; AND HAVE ANY ADDITIONAL POWERS AS SPECIFIED BY THE PARENT.

(2) THE AGENT GRANDPARENT IS REQUIRED TO EXERCISE DUE CARE TO ACT IN THE CHILD'S BEST INTEREST AND IN ACCORDANCE WITH THE GRANT OF AUTHORITY SPECIFIED IN THIS FORM.

(3) A COURT OF COMPETENT JURISDICTION MAY REVOKE THE POWERS OF THE AGENT GRANDPARENT IF IT FINDS THAT THE AGENT GRANDPARENT IS NOT ACTING PROPERLY.

(4) THE AGENT GRANDPARENT MAY EXERCISE THE POWERS GIVEN IN THIS POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD THROUGHOUT THE CHILD'S MINORITY UNLESS THE PARENT REVOKES THIS POWER OF ATTORNEY AND PROVIDES NOTICE OF THE REVOCATION TO THE AGENT GRANDPARENT OR UNTIL A COURT OF COMPETENT JURISDICTION TERMINATES THIS POWER.

(5) THE AGENT GRANDPARENT MAY RESIGN AS AGENT AND MUST IMMEDIATELY COMMUNICATE SUCH RESIGNATION TO THE PARENT, AND IF COMMUNICATION WITH SUCH PARENT IS NOT POSSIBLE, THE AGENT GRANDPARENT SHALL NOTIFY CHILD PROTECTIVE SERVICES OR SUCH GOVERNMENT AUTHORITY THAT IS CHARGES WITH ASSURING PROPER CARE OF SUCH MINOR CHILD.

(6) THIS POWER OF ATTORNEY MAY BE REVOKED IN WRITING BY ANY AUTHORIZING PARENT. IF THE POWER OF ATTORNEY IS REVOKED, THE REVOKING PARENT SHALL NOTIFY THE AGENT GRANDPARENT, SCHOOL, HEALTH CARE PROVIDERS, AND OTHERS KNOWN TO THE PARENT TO HAVE RELIED UPON SUCH POWER OF ATTORNEY.

(7) IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND,

YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.
POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD
made this _____ day of _____, ___.

(1)(A) I, _____ (insert name and address of parent or parents), hereby appoint _____ (insert name and address of grandparent to be named as agent) as attorney in fact (the agent grandparent) for my child _____(insert name of child) to act for me and in my name in any way that I could act in person.

(B) I hereby certify that the agent grandparent named herein is the (place a check mark beside the appropriate description):
_____ Biological grandparent;
_____ Stepgrandparent;
_____ Biological great-grandparent; or
_____ Stepgreat-grandparent.

(2) The agent grandparent may:

(A) Enroll the child in school and in extracurricular activities, have access to school records, and may disclose the contents to others;
(B) Arrange for and consent to medical, dental, and mental health treatment of the child, have access to such records related to treatment of the child, and disclose the contents of such records to others;
(C) Provide for the child's food, lodging, recreation, and travel; and
(D) Carry out any additional powers specified by the parent as follows:

_____

_____

_____

(3) The powers granted above shall not include the following powers or shall be subject to the following rules or limitations (here you may include any specific limitations that you deem appropriate):
_____
_____
_____

(4) This power of attorney for the care of a minor child is being executed because of the following hardship (initial all that apply):
_____ (A) The death, serious illness, or terminal illness of a parent;

_____ (B) The physical or mental condition of the parent or the child such that proper and supervision of the child cannot be provided by the parent;
_____ (C) The loss or uninhabitability of the child's home as the result of a natural disaster;
_____ (D) The incarceration of a parent; or
_____ (E) A period of active military duty of a parent.

(5) (Optional) If a guardian of my minor child is to be appointed, I nominate the following person to serve as such guardian: _____ (insert name and address of person nominated to be guardian of the minor child).

(6) I am fully informed as to all of the contents of this form and I understand the full import of this grant of powers to the agent grandparent.

(7) I certify that the minor child is not emancipated, and, if the minor child becomes emancipated, this power of attorney shall no longer be valid.

(8) Except as may be permitted by the federal No Child Left Behind Act, 20 U.S.C.A. Section 6301, et seq. And Section 7801, et seq., I hereby certify that this power of is not executed for the primary purpose of unlawfully enrolling the child in a school so that the child may participate in the academic or interscholastic athletic programs provided by that school.

(9) I certify that, to my knowledge, the minor child's welfare is not the subject of an investigation by the Department of Human Resources.

(10) I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.

Parent Signature: _____
Printed Name: _____

Parent Signature: _____
Printed Name: _____

Signed and sealed in the presence of: _____
Notary public
My commission expires _____

ADDITIONAL INFORMATION:

To the grandparent designated as attorney in fact:

(1) If a change in circumstances results in the child not living with you for more than six weeks during a school term and such change is not due to hospitalization, vacation, study abroad, or some reason otherwise acceptable to the school, you should notify in writing the school in which you have enrolled the child and to which you have given this power of attorney form.

(2) You have the authority to act on behalf of the minor child until each parent who executed the power of attorney for the care of the minor child revokes the power of attorney in writing and provides notice of revocation to you as provided in O.C.G.A. Section 19-9-128.

(3) If you are made aware of the death of the parent who executed the power of attorney, you must notify the surviving parent as soon as practicable. With the consent of the surviving parent, or if the whereabouts of the surviving parent are unknown, the power of attorney may continue for up to six months so that the child may receive consistent care until more permanent custody arrangements are made.

(4) You may resign as agent by notifying each parent in writing by certified mail or statutory overnight delivery, return receipt requested, and if you become unable to care for the child, you shall cause such resignation to be communicated to the parent. If communication with such parent is not possible, you must notify child protective services or such government authority that is charged with assuring proper care of such minor child.

To school officials:

(1) Except as provided in the policies and regulations of the county school board and the federal No Child Left Behind Act, 20 U.S.C.A. Section 6301, et seq. and Section 7801, et seq., this power of attorney, properly completed and notarized, authorizes the agent grandparent named herein to enroll the child named herein in school in the district in which the agent grandparent resides. That agent grandparent is authorized to provide consent in all school related matters and to obtain from the school district educational and behavioral information about the child. Furthermore, this power of attorney shall not prohibit the parent of the child from having access to all school records pertinent to the child.

(2) The school district may require such residency documentation as is customary in that school district.

(3) No school official who acts in good faith reliance on a power of attorney for the care of a minor child shall be subject to criminal or civil liability or professional disciplinary action for such reliance.

To health care providers:

(1) No health care provider who acts in good faith reliance on a power of attorney for the care of a minor child shall be subject to criminal or civil liability or professional disciplinary action for such reliance.

(2) The parent continues to have the right to all medical, dental, and mental health records pertaining to the minor child.

GEORGIA STATUTES AND CODES

§ 19-9-129 - Power of attorney form

O.C.G.A. 19-9-129 (2010)
19-9-129. Power of attorney form

(a) The statutory power of attorney for the care of a minor child form contained in this Code section may be used to grant an agent grandparent powers over the minor child's enrollment in school, medical, dental, and mental health care, food, lodging, recreation, travel, and any additional powers as specified by the parent. This power of attorney is not intended to be exclusive. No provision of this article shall be construed to bar use by the parent of any other or different form of power of attorney for the care of a minor child which complies with this article. A power of attorney for the care of a minor child in substantially the form set forth in this Code section shall have the same meaning and effect as prescribed in this article. Substantially similar forms may include forms from other states.

(b) The power of attorney for the care of a minor child shall be in substantially the following form:

"GEORGIA POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD

NOTICE:

(1) THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE GRANDPARENT THAT YOU DESIGNATE (THE AGENT GRANDPARENT) POWERS TO CARE FOR YOUR MINOR CHILD, INCLUDING THE POWER TO: ENROLL THE CHILD IN SCHOOL AND IN EXTRACURRICULAR SCHOOL ACTIVITIES; HAVE ACCESS TO SCHOOL RECORDS AND DISCLOSE THE CONTENTS TO OTHERS; ARRANGE FOR AND CONSENT TO MEDICAL, DENTAL, AND MENTAL HEALTH TREATMENT FOR THE CHILD; HAVE ACCESS TO SUCH RECORDS RELATED TO TREATMENT OF THE CHILD AND DISCLOSE THE CONTENTS OF THOSE RECORDS TO OTHERS; PROVIDE FOR THE CHILD'S FOOD, LODGING, RECREATION, AND TRAVEL; AND HAVE ANY ADDITIONAL POWERS AS SPECIFIED BY THE PARENT.
(2) THE AGENT GRANDPARENT IS REQUIRED TO EXERCISE DUE CARE TO ACT IN THE CHILD'S BEST INTEREST AND IN ACCORDANCE WITH THE GRANT OF AUTHORITY SPECIFIED IN THIS FORM.
(3) A COURT OF COMPETENT JURISDICTION MAY REVOKE THE POWERS OF THE AGENT GRANDPARENT IF IT FINDS THAT THE AGENT GRANDPARENT IS NOT ACTING PROPERLY.
(4) THE AGENT GRANDPARENT MAY EXERCISE THE POWERS GIVEN IN THIS POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD THROUGHOUT THE CHILD'S MINORITY UNLESS THE PARENT REVOKES THIS POWER OF ATTORNEY AND PROVIDES NOTICE OF THE REVOCATION TO THE AGENT GRANDPARENT OR UNTIL A COURT OF COMPETENT JURISDICTION TERMINATES THIS POWER.
(5) THE AGENT GRANDPARENT MAY RESIGN AS AGENT AND MUST IMMEDIATELY COMMUNICATE SUCH RESIGNATION TO THE PARENT, AND IF COMMUNICATION WITH SUCH

PARENT IS NOT POSSIBLE, THE AGENT GRANDPARENT SHALL NOTIFY CHILD PROTECTIVE SERVICES OR SUCH GOVERNMENT AUTHORITY THAT IS CHARGED WITH ASSURING PROPER CARE OF SUCH MINOR CHILD.
(6) THIS POWER OF ATTORNEY MAY BE REVOKED IN WRITING BY ANY AUTHORIZING PARENT. IF THE POWER OF ATTORNEY IS REVOKED, THE REVOKING PARENT SHALL NOTIFY THE AGENT GRANDPARENT, SCHOOL, HEALTH CARE PROVIDERS, AND OTHERS KNOWN TO THE PARENT TO HAVE RELIED UPON SUCH POWER OF ATTORNEY.
(7) IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.
POWER OF ATTORNEY FOR THE CARE OF A MINOR CHILD
made this day of , .

(1) (A) I, (insert name and address of parent or parents), hereby appoint (insert name and address of grandparent to be named as agent) as attorney in fact (the agent grandparent) for my child (insert name of child) to act for me and in my name in any way that I could act in person.

(B) I hereby certify that the agent grandparent named herein is the (place a check mark beside the appropriate description):

Biological grandparent;

Stepgrandparent;

Biological great-grandparent; or

Stepgreat-grandparent.

(2) The agent grandparent may:

(A) Enroll the child in school and in extracurricular activities, have access to school records, and may disclose the contents to others;

(B) Arrange for and consent to medical, dental, and mental health treatment of the child, have access to such records related to treatment of the child, and disclose the contents of such records to others;

(C) Provide for the child's food, lodging, recreation, and travel; and

(D) Carry out any additional powers specified by the parent as follows:

(3) The powers granted above shall not include the following powers or shall be subject to the following rules or limitations (here you may include any specific limitations that you deem appropriate):

(4) This power of attorney for the care of a minor child is being executed because of the following hardship (initial all that apply):

(A) The death, serious illness, or terminal illness of a parent;

(B) The physical or mental condition of the parent or the child such that proper care and supervision of the child cannot be provided by the parent;

(C) The loss or uninhabitability of the child's home as the result of a natural disaster;

(D) The incarceration of a parent; or

(E) A period of active military duty of a parent.

(5) (Optional) If a guardian of my minor child is to be appointed, I nominate the following person to serve as such guardian:
(insert name and address of person nominated to be guardian of the minor child).

(6) I am fully informed as to all of the contents of this form and I understand the full import of this grant of powers to the agent grandparent.

(7) I certify that the minor child is not emancipated, and, if the minor child becomes emancipated, this power of attorney shall no longer be valid.

(8) Except as may be permitted by the federal No Child Left Behind Act, 20 U.S.C.A. Section 6301, et seq., and Section 7801, et seq., I hereby certify that this power of attorney is not executed for the primary purpose of unlawfully enrolling the child in a school so that the child may participate in the academic or interscholastic athletic programs provided by that school.

(9) I certify that, to my knowledge, the minor child's welfare is not the subject of an investigation by the Department of Human Services.

(10) I declare under penalty of perjury under the laws of the State of Georgia that the foregoing is true and correct.

Parent Signature:

Printed name:

Parent Signature:

Printed name:

Signed and sealed in the presence of:
Notary public

My commission expires
"

(c) The following notice shall be attached to the power of attorney:

"ADDITIONAL INFORMATION:

To the grandparent designated as attorney in fact:

(1) If a change in circumstances results in the child not living with you for more than six weeks during a school term and such change is not due to hospitalization, vacation, study abroad, or some reason otherwise acceptable to the school, you should notify in writing the school in which you have enrolled the child and to which you have given this power of attorney form.

(2) You have the authority to act on behalf of the minor child until each parent who executed the power of attorney for the care of the minor child revokes the power of attorney in writing and provides notice of revocation to you as provided in O.C.G.A. Section 19-9-128.

(3) If you are made aware of the death of the parent who executed the power of attorney, you must notify the surviving parent as soon as practicable. With the consent of the surviving parent, or if the whereabouts of the surviving parent are unknown, the power of attorney may continue for up to six months so that the child may receive consistent care until more permanent custody arrangements are made.

(4) You may resign as agent by notifying each parent in writing by certified mail or statutory overnight delivery, return receipt requested, and if you become unable to care for the child, you shall cause such resignation to be communicated to the parent. If communication with such parent is not possible, you must notify child protective services or such government authority that is charged with assuring proper care of such minor child.

To school officials:

(1) Except as provided in the policies and regulations of the county school board and the federal No Child Left Behind Act, 20 U.S.C.A. Section 6301, et seq., and Section 7801, et seq., this power of attorney, properly completed and notarized, authorizes the agent grandparent named herein to enroll the child named herein in school in the district in which the agent grandparent resides. That agent grandparent is authorized to provide consent in all school related matters and to obtain from the school district educational and behavioral information about the child. Furthermore, this power of attorney shall not prohibit the parent of the child from having access to all school records pertinent to the child.

(2) The school district may require such residency documentation as is customary in that school district.

(3) No school official who acts in good faith reliance on a power of attorney for the care of a minor child shall be subject to criminal or civil liability or professional disciplinary action for such reliance.

To health care providers:

(1) No health care provider who acts in good faith reliance on a power of attorney for the care of a minor child shall be subject to criminal or civil liability or professional disciplinary action for such reliance.

(2) The parent continues to have the right to all medical, dental, and mental health records pertaining to the minor child."

GEORGIA STATUTES AND CODES

§ 19-9-124 - Liability; education; compliance with court orders

O.C.G.A. 19-9-124 (2010)
19-9-124. Liability; education; compliance with court orders

(a) An agent grandparent under a power of attorney for the care of a minor child shall act in the best interests of the minor child. Such agent grandparent shall not be liable for consenting or refusing to consent to medical, dental, or mental health care for a minor child when such decision is made in good faith and is exercised in the best interests of the minor child.

(b) (1) The agent grandparent shall have the right to enroll the minor child in a public school serving the area where the agent grandparent resides and may enroll the minor child in a private school, pre-kindergarten program, or home study program.

(2) The public school shall allow such agent grandparent with a properly executed power of attorney for the care of a minor child to enroll the minor child.

(3) At the time of enrollment the grandparent shall provide to the school such residency documentation as is customary in that school district.

(4) The school may request reasonable evidence of the stated hardship.

(5) If a public school denies enrollment of a minor child under this Code section, such denial may be appealed and shall be treated as any other denial of enrollment of a child in that school district, including all of the remedies otherwise available when enrollment is denied to a child.

(6) Except where limited by federal law, the agent grandparent shall have the same rights, duties, and responsibilities that would otherwise be exercised by the parent pursuant to the laws of this state.

(7) An agent grandparent shall be obligated to comply with any existing court order relative to the child, including, but not limited to, any visitation order.

GEORGIA STATUTES AND CODES

§ 19-9-128 - Revocation of power of attorney; termination of power of attorney; resignation of agent grandparent

O.C.G.A. 19-9-128 (2010)
19-9-128. Revocation of power of attorney; termination of power of attorney; resignation of agent grandparent

(a) (1) The agent grandparent shall have the authority to act on behalf of the minor child until each parent who executed the power of attorney for the care of a minor child revokes the power of attorney in writing and provides notice of the revocation to the agent grandparent as provided in this Code section.

(2) The agent grandparent shall have the authority to act on behalf of the child until a copy of the revocation of the power of attorney is received by certified mail or statutory overnight delivery, return receipt requested, and upon receipt of the revocation the agent grandparent shall cease to act as agent.

(3) The parent shall send a copy of the revocation of the power of attorney to the agent grandparent within five days of the execution of the revocation by certified mail or statutory overnight delivery, return receipt requested.

(4) The revoking parent shall notify the school, health care providers, and others known to the parent to have relied upon such power of attorney.

(b) The power of attorney for the care of a minor child may also be terminated by any order of a court of competent jurisdiction.

(c) (1) The agent grandparent shall notify the school in which the agent grandparent had enrolled the child whenever a change in circumstances results in a change in residence for such child that is expected to last more than six weeks during a school term and such change in residence is not due to hospitalization, vacation, study abroad, or some reason otherwise acceptable to the school.

(2) The agent grandparent may resign by notifying the parent in writing by certified mail or statutory overnight delivery, return receipt requested, and, if the agent grandparent is aware that the parent's hardship still exists, such agent grandparent shall also notify child protective services or such government authority that is charged with assuring proper care of such minor child.

(3) Upon the death of the authorizing parent, the agent grandparent shall notify the surviving parent as soon as practicable. With consent of the surviving parent or if the whereabouts of the surviving parent are unknown, the power of attorney for the care of a minor child may continue for up to six months so that the child may receive consistent care until more permanent custody arrangements are made.

(d) The authority to designate an agent to act on behalf of a minor child is in addition to any other lawful action a parent may take for the benefit of such minor child, and the parent shall continue to have the right to medical, dental, mental health, and school records pertaining to the minor child.

GEORGIA STATUTES AND CODES

§ 19-9-127 - Violations; execution of power of attorney; power of attorney to be signed and acknowledged

O.C.G.A. 19-9-127 (2010)
19-9-127. Violations; execution of power of attorney; power of attorney to be signed and acknowledged

(a) Except as may be permitted by the federal No Child Left Behind Act, 20 U.S.C.A. Section 6301, et seq., and Section 7801, et seq., a parent executing the power of attorney for the care of a minor child shall certify that such action is not for the primary purpose of enrolling the child in a school for the sole purpose of participating in the academic or interscholastic athletic programs provided by that school or for any other unlawful purpose. Violation of this subsection shall be punishable in accordance with Georgia law and may require, in addition to any other remedies, repayment by such parent or grandparent of all costs incurred by the school as a result of the violation.

(b) (1) The instrument providing for the power of attorney for the care of a minor child shall be executed by both parents, if both parents are living and have joint legal custody of the minor child, and shall specify which hardship prevents the parent or parents from caring for the child. If the parents do not have joint legal custody, the parent having sole permanent legal custody shall have authority to grant the power of attorney.

(2) The power of attorney for the care of a minor child shall be signed and acknowledged before a notary public by the parent executing the power of attorney. Any noncustodial parent shall be notified in writing of the name and address of the grandparent who has been appointed the agent grandparent under the power of attorney. The executing parent shall send the notification by certified mail or statutory overnight delivery, return receipt requested, to the noncustodial parent at the noncustodial parent's last known address within five days of the execution of the power of attorney. A noncustodial parent who has joint legal custody shall have the same authority to execute a revocation of the power of attorney as granted to the custodial parent.

(c) If only one parent has sole permanent legal custody of the minor child, then that parent shall have authority to execute the power of attorney for the care of a minor child and to revoke the power of attorney.

ABA API Conference
May 1, 2014 to May 3, 2014
Las Vegas, Nevada

"Prepaid Legal Services Plans: Understanding, Managing, and Meeting Client Expectations"

By: Robert E. Johnson, Esq.
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INTRODUCTION

The attorney's successful management of prepaid legal plan assignments and client expectations will produce a win-win result. Legal plans provide unparalleled opportunities for firms to reach new clients and to develop and broaden their practice. However, the attorney or firm, by virtue of participating in prepaid legal plans, must have the requisite skills to resolve the legal matters presented by the client in an efficient and expeditious matter.

As most legal plans use flat fee agreements, based on national "volume discount" rates, the attorney that does not effectively and efficiently handle these cases will invariably miss out on the benefit of the bargain.[1] The attorney that spends too much time conducting legal research and learning about the subject matter after he or she has been retained by a plan member exposes that client to the risk of ineffective representation. Moreover, the client does not gain the trust and confidence in the attorney's firm and, as a result, will not consider the firm for future matters, including those that the firm is particularly well-positioned to handle. Poor representation may also result in a complaint to the plan administrator or a poor evaluation during a customer service audit by the plan.

This discussion will provide guidance regarding the attorney's duties and responsibilities, as well as some practice tips for how to efficiently provide quality legal services, manage client expectations, and maximize the experience and benefits of participating in legal plans.

I. THE ATTORNEY-CLIENT RELATIONSHIP

An attorney is bound by the rules of professional responsibility of the state in which he or she practices law. Each state has its own rules, which are often modeled after the ABA Model Rules of Professional Conduct. The Preamble to the ABA Rules emphasizes the lawyer's "obligation to zealously protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." In other words, a lawyer is expected to aggressively and thoroughly advocate his or her client's position, provided such advocacy is supported by law and not frivolous.

All firms and attorneys who are on the panel for a given legal plan are obligated to comply with the rules of that plan. These rules typically determine the fee structure and plan administrator's expectations with regard to the scope of services and potential conflicts. However, despite the legal plan's role as facilitator, once the plan member is consulted, the plan member and his or her

[1] Increasingly, insurers, businesses, and clients are demanding flat fee agreements. These agreements must be carefully negotiated to provide compensation for extraordinary services, where warranted.

covered family members are considered clients and the attorney and/or firm has an obligation to zealously represent them in accordance with the applicable rules of professional responsibility.

A. FEES

Often, legal plans have different tiers of benefits offered to different members, and it is important that the attorney check the individual member's coverage at the time of initial communication. Although ABA Rule 1.5 endorses the use of written retainer agreements, such agreements are unnecessary as long as the attorney's services are covered under the member's prepaid legal plan, as the attorney is paid directly from the plan. However, retainer agreements are advisable where the client requires legal services beyond the scope of their plan's coverage and is willing to pay the attorney's fees out of pocket.

B. CONFLICTS OF INTEREST

Pursuant to ABA Rules 1.6 and 1.7, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if it could result in the violation of the lawyer's duty to protect confidential client information.

Some potential conflicts are preempted by the extent of coverage afforded under a given plan. For example, legal plans are typically offered as an optional employee benefit, and coverage is often extended to plan members' spouses and dependents. As a result, plans often exclude services relating to employee-employer conflicts. Similarly, a member's spouse will not be covered should the plan member seek coverage for a family law dispute, such as a divorce.

If it would be ethically improper to represent the plan member or the attorney/law firm has a conflict of interest, the attorney/firm must get the client's informed consent or withdraw from the representation. Legal plans have varying policies in terms of the plan member's options. For example, some plans will arrange for outside counsel to resume representation of the member and will pay up to a certain amount for outside counsel fees.

C. REPRESENTING CLIENTS COMPETENTLY

Perhaps the most important principle of professional responsibility is the requirement that a lawyer represent his or her client competently. Rule 1.1 of the ABA Rules provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This is a critical rule which is too often forgotten, as we attempt to aid family members and friends in need of legal services.

This rule is especially important in the context of legal plans. A law firm representing its skills to prospective legal plan members must be sure that the services offered in the legal plan's web page or directory, or following consultation, are services that they have experience and expertise in, or have the ability to become competent to handle in a short period of time. For the law firm to accept the matter with the intention of referring the matter out, could constitute a violation of this provision.

Failure to represent a client competently may result in disciplinary proceedings, and includes:

1. Handling a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.
2. Handling a legal matter without preparation adequate in the circumstances.
3. Neglecting a legal matter entrusted to the lawyer.

Number 3 is particularly important because even if the lawyer has experience and is competent to handle a given matter, failure to do so may subject the lawyer to discipline. Typically, law office failure is not a defense, as the mere neglect constitutes violation of the ethical rule.

II. SUCCESSFUL DELIVERY OF PREPAID SERVICES

The first area the practitioner or firm needs to master is an honest assessment of the skills and resources of the firm. In order to attract the right clients, the firm has to identify those areas of practice, which they perform competently and efficiently. Generally, given enough time and resources, every attorney can likely solve every legal problem. However, the law has become increasingly specialized. The attorney/firm needs to have special knowledge to handle certain cases and practice areas, such as Elder Law or Trusts and Estates. In the age of legal plans and flat fees, it is incumbent upon the firm to do what they do best. To that end, the firm must ask:

- What are the firm's core practice areas?
- What direction is the firm heading?
- Does the firm want a volume-based practice or specialty cases?
- Is the firm geared toward litigation or transactions?
- Are there other considerations or circumstances dictating how certain matters are handled?

By properly assessing the firm's core practice areas and goals, a firm can target its marketing so that the cases assigned are good fits for the firm. It makes little sense to handle cases that the firm does not have an interest in, unless the firm is willing to commit additional resources and is moving toward developing a practice in that area.

The expectations of the client and the demands for increasing specialization make it unprofitable and unwise to venture into areas where the firm could wind up exposing itself to malpractice or disciplinary action.

Once a firm's practice areas are identified, it is incumbent upon the firm to review their messages, communications and advertising, to confirm that it matches the type of work the firm is attempting to attract. For each legal plan, there may be a brochure or web site, which specifies the firm's practice areas and services. These web sites must be periodically updated on a quarterly or annual basis to reflect current staff and their practice areas, to ensure that the firm personnel is ready, willing, and able to take on particular assignments. It is quite frustrating for a client to call, only to find that the firm is no longer engaged in handling cases in the practice area

they need, notwithstanding the firm's representation of handling cases in that practice area. This confusion results in a demerit on the firm's standing with the plan.

In reviewing your marketing and practice areas, it is important to look for "under-utilized marketing" and "over-reaching." Under-utilized marketing is where the firm has the capacity to perform services within the plan's offered services, but has not represented or sought those types of cases. Conversely, over-reaching occurs where the firm represents skills and practice areas in which they are not fully versed or are no longer interested in working. Both of these outcomes are detrimental to the firm's reputation. The best practice is to focus on what your firm can reasonably expect to do that would result in praise by the client and satisfaction by the plan.

Generally, plan administrators authorize the payment of extraordinary fees where a firm faces unexpected circumstances, which result in an excessive amount of work. There is sometimes a disconnect between the plan's fee schedule and local fees. For example, in New York, co-op and condominium sales involve extra work, which usually results in extraordinary fees. When possible, it is best to request extraordinary fees from the outset, especially in litigation cases. It is also important to note that extraordinary fees will not be paid where a law firm expends more time than usual due to a lack of competence or experience.

III. MANAGEMENT OF CLIENT EXPECTATIONS

Because of the unique nature of prepaid legal plan services, a client is not forced to make decisions regarding the cost of additional services; and quite frankly, clients may not factor the attorney's time into their list of demands or expectations. The majority of clients accept the attorney's judgment and take a reserved approach toward directing the attorney's activity in resolving a legal matter. However, typically in litigation cases, the client wishes to instruct the attorney because the client has realized that the attorney works for them and they need not pay for the attorney's time on an hourly basis. In such cases, we have identified several problems that often arise. This list is not intended to be exhaustive, and I welcome discussion afterwards to talk about some other situations that attorneys/firms frequently encounter.

1. The client with unrealistic expectations.

In several instances, clients are led to believe that the legal plan somehow vests them with supernatural rights to control the attorney-client relationship to their advantage. Some of the unreasonable requests we've received include:

- "Can you come by our home to execute our Wills?"
- "Can you be available on evenings and weekends to fit our schedule?"
- "Is it okay to call you up to 11:00 p.m.?"
- "Can I discuss a 'hypothetical problem' [typically regarding services uncovered by the plan] with you?"
- "I am no longer with the plan; can you assist me anyway as a courtesy?"
- "Can you take over a case I had before I joined the plan?"
- "Can you call my spouse and repeat everything we just discussed?"
- "Can you advise me on 'uncovered' or 'excluded' matters?"

In all of these situations, we have to be creative in providing an explanation and a solution, so as to avoid alienating the client. As far as meeting the client in his or her home, we explain that while our firm does not have a policy of making house calls, we are amenable to meeting in our office or in court, when scheduled. Regarding the client's desire that we be available 24/7, each firm's schedule is different, and it is important to maintain some flexibility to accommodate the client, while also setting temporal boundaries. Generally, attorneys in our firm respond after hours, but do not return calls after 7:00 p.m. until the following day, unless absolutely necessary.

Addressing the client with "hypothetical problems" depends on his or her plan. If the client is covered for consultation, we will gladly discuss their problem. However, we make it clear that we do not provide services for uncovered members unless they choose to engage us privately.

The ability to addressing "uncovered" and "excluded" matters also depends on the individual's plan. It is important to differentiate between "uncovered" and "excluded" matters. If a client is seeking advice on a legal matter that is outside the scope of the plan, many plans permit the attorney to provide telephone or office consultation regarding the matter, even if they are not permitted to fully represent the member. "Excluded" matters are different, and may not be addressed at all. Excluded matters may include employment-related matters, matters involving plan attorneys, matters in which there is a conflict of interest between the employee and spouse or dependents, in which case services are excluded for the spouse and dependents, appeals, class actions, or matters for which an attorney-client relationship exists prior to the participant becoming eligible for plan benefits.

2. The overwhelmed client.

In many cases, a client will have a myriad of problems, some of which have escalated into legal problems, such as eviction, repossession of a car, or a civil law suit for debt. These clients tend to be—understandably—overwhelmed. We recommend focusing on the legal problems, rather than the personal ones. While it is important to explain to the client how the personal problems factor in, it is equally important to clearly delineate between the two types of problems. Doing so allows you to limit your role as attorney in terms of what is reasonably expected of you, which is primarily to provide solutions to legal problems.

IV. PRACTICE EXAMPLES

Practice example 1: During the course of representing your client in a covered matter, you discover your client is engaged in fraudulent behavior. What is your duty to the client and to the plan?

Practice example 2: There is a conflict between your recommended course of action and your client's desired course of action.

Practice example 3: Your client does not want to pay separate costs for prosecuting a mandatory counter-claim.

Practice example 4: A plan member has a potential claim against his or her employer.

Practice example 5: A plan member has a dispute with his or her employer's provider of voluntary benefits.

CONCLUSION

I hope this presentation will enable you to more effectively and efficiently provide prepaid legal plan services. Remember, the ultimate goal is to increase your firm's client base. To that end, it is important to provide quality legal services to every plan member, so that they will both use and refer your firm in the future.

DISCLAIMER: THIS DISCUSSION IS FOR EDUCATIONAL PURPOSES ONLY AND IS NOT INTENDED AS LEGAL ADVICE.