Funeral Arrangements
By: Lin Hanson

Many clients have strong views on funeral arrangements, and want to know “the best way” to see to it their instructions and wishes are carried out. Some people have asked us to include funeral directions in their will. Since wills commonly are not read until after funeral arrangements have all been settled and completed, we believe a will is not the best place for our clients to express their wishes in regard to funerals.

While in a conventional family structure, the spouse, or if none, the children of the deceased will be presumed to have the authority to make funeral arrangements, more and more people today are in less conventional arrangements. The right to make anatomical gifts and funeral arrangements is sometimes called the “Right of Sepulcher” and is of great importance to couples living in less conventional arrangements. Often there is no legal relationship between couples although they may have had close and lengthy living arrangements and, without a legally binding grant of the Right of Sepulcher tragic consequences can occur.

We suggest that these matters be the subject of discussion with family members, just as health care and end of life decisions are. Since people’s attitudes and wishes on these subjects change as life goes on, we suggest this is a topic that needs to be reviewed every few years.

In Illinois, there are two ways to legally authorize someone to make funeral arrangements for you. One of these is the Illinois Statutory Short Form Power of Attorney for Health Care. We are

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Business Owners Beware:
Advertising Via Prerecorded Phone Messages, Mass Unsolicited Faxes or Mass Text Messages May Cost More Than Its Worth
By: Ryan R. VanOsdol

A common problem for business owners experiencing a loss of customers based on the current economy is how to market your services and products to potential new customers. Advertising on billboards, television and radio is expensive and may not reach your intended market. Therefore, you may consider hiring a company that sends out phone calls with prerecorded messages, mass faxes and/or mass text messages. These companies have the ability to send out thousands of advertisements to thousands of customers in a matter of minutes using automatic dialing system equipment. Even more enticing is the fact that these companies perform this service for a relatively low fee in comparison to the other available forms of advertising. While this method may appear to be attractive because it is extremely economical on the front end, the fact that it is now prohibited by federal law makes it incredibly expensive on the back end.

The Telephone Consumer Protection Act
In response to consumer complaints regarding the receipt of unsolicited phone calls, which requires the use of the consumer’s cell phone minutes, and unsolicited faxes, which uses the consumer’s paper, toner and ink, the federal government enacted the Telephone Consumer Protection Act, 47 U.S.C. ‘227 (“TCPA”). The TCPA prohibits: 1.) using automatic dialing machines to make calls to emergency telephone lines, health service providers’ lines and cellular phones; 2.) calling residential telephone lines using a prerecorded voice to deliver a message without the prior consent of the recipient; and 3.) using fax machines or computers to send unsolicited advertisements to fax machines. Furthermore, courts interpreting the TCPA have found that sending unsolicited text messages is also prohibited by this statute.

Civil Liability for Violations of the TCPA
Not only does the TCPA prohibit the use of prerecorded messages, unsolicited faxes and unsolicited text messages for commercial advertisement purposes, but it also creates a civil cause of action for individuals harmed by the receipt of these advertisements. One would think the damages for receiving an unsolicited fax would be relatively low. A few minutes on the phone or the cost of a piece of paper, a small amount of ink and toner cannot amount to much, right? Wrong. The TCPA creates a statutory fine in the amount of $500 per violation. Further, the court can triple the amount to $1,500 per violation in the event there is a finding that the party violated the TCPA willfully or knowingly. Therefore, if a company sends out 1,000 faxes, then it could be liable for $500,000 (1,000 faxes x $500 per violation) in liability, or up to $1,500,000 in liability if the court finds that the violation was committed willfully or knowingly.

Perhaps the most damaging aspect of this statute is that courts have been imposing personal liability on the agent of the corporation who directed the advertisements to be sent out, rather than simply imposing liability on the corporation. Imagine this scenario- a business owner goes to a store that performs these mass faxing services. His business is decreasing, it does not have fixed assets and he needs to do something to generate more customers. He sends out 1,000 faxes and hopes the business will come pouring in. A few months later he receives a summons and complaint, which states that he is being sued for violating the TCPA. To his surprise, the plaintiff is not only seeking to recover from his company, but also from him personally. Therefore, business owners need to be careful to comply with this statute because not only are your business assets at stake, but so are your personal assets.

These types of cases have become a hot commodity for plaintiff’s class action attorneys. Once they find a potential plaintiff who has received a single fax, they will file suit and use discovery procedures to attempt to find out how many faxes have been sent and to whom they were sent. They will use this information to create a class of plaintiffs who all have the same TCPA violation claim against the party who sent the prerecorded messages, unsolicited faxes or text messages. In the scenario discussed above, the business owner who sent out 1,000 faxes could now be facing between $500,000 and $1,500,000 of personal liability. The potential for liability and litigation are simply not worth the use of advertising via prerecorded messages, mass faxes or mass text messages.

We have successfully defended multiple companies and individuals who have been sued for alleged TCPA violations. If you are faced with litigation regarding violation of the TCPA or are considering advertising for your company using prerecorded messages, faxes or text messages, please contact us to discuss your legal rights before proceeding.
Lost in the recent publicity regarding the Illinois income tax relief law enacted to entice Sears and CME to remain in Illinois was a significant change to the Illinois Estate Tax that was tacked on to the law. The statute was signed into law by Governor Quinn on December 16, 2011. The Illinois Estate Tax law prior to this new law recognized an “exclusion amount” of $2 million. Thus, for Illinois citizens dying before January 1, 2012, the Illinois Estate Tax was levied on the taxable estate of the decedent in excess of $2 million, at a graduated tax rate of eight (8%) to sixteen (16%) percent.

The recently-signed law increases the exclusion amount to $3.5 million for persons dying in 2012 and $4.0 million for persons dying on or after January 1, 2013. While this relief is welcome, it does not synch up with the federal estate tax, which now taxes decedents’ taxable estates which exceed $5 million for persons dying in 2011 and 2012, but is scheduled to revert to only a $1 million exempt amount beginning in 2013. While the conventional wisdom among tax practitioners assumes that the current $5 million exempt amount (or a similar amount) will be extended by future federal legislation, the experience of the recent past has taught us to be careful about such assumptions.

The change in Illinois’ Estate tax law should not require any change to estate plans drafted with the prior $2 million exemption in mind. Our tax practitioners are watching this developing scenario closely to evaluate what modification, if any, will be required to our clients’ estate plans if and when Congress acts.

As many of you know, our partner, Lin Hanson, recently celebrated his 50th year of law practice. It seems fitting to reflect on what Lin has meant, and continues to mean, to this law firm, to the practice of law and to younger lawyers, and to think about what mentorship means in the law.

Lin began his law career in 1961, the third in a line of family practice stretching back to 1894 when his maternal grandfather, Roscoe Linscott Roberts (“RL”), graduated from a law school now known as IIT Chicago-Kent College of Law. Lin’s dad, Fred B. Hanson, joined RL in practice when Fred returned from the Navy at the end of World War II. RL then was well past his 50th year in practice. Lin immediately took responsibility for some of RL’s and Fred’s files upon joining the practice in 1961. Fred practiced law until age 84. He continued giving counsel to his clients, and to Lin, until he was almost 94.

Whereas RL was an office lawyer focused on corporations, trust and estates (like Lin is), Fred came from a trial law background, defending cases for a number of insurance companies, and functioning as head of the claims department for Standard Oil of Indiana. In reflecting on his practice, Lin said, “From RL I learned to carefully select a good trustee and then give the trustee flexible guidelines to run the trust by. From Dad I learned the importance of getting out of the office and calling on clients ‘visit the scene’ was his standard advice. When I undertake the representation of a new company, I try to visit them. You see things you could never hear about over the telephone. Dad insisted on doing the paperwork. He had all kinds of tips, in the books he wrote, and in person, on how to negotiate — tips that work as well in contracting to buy or sell a company as they do in settling an injury claim.

Lin’s dedication to his profession has included actively serving since 1981 on the Illinois Secretary of State’s Corporations Act Advisory Committee, now the Institute of Illinois Business Law. Shortly after Jim Edgar became Secretary of State in 1981, he decided to review the Illinois business statutes administered by the Secretary’s office. A number of prominent Illinois attorneys were contacted for their assistance and advice and ultimately Secretary Edgar created a Business Corporations Act Revision Committee. Members included Lin, and the committee went on to draft, revise, or modernize over 500 items of legislation, including the Illinois Business Corporation Act, the Limited Liability Company Act, and the Partnership Act. Lin has been the only member serving continuously since 1981.

Lin also has been a frequent speaker and prolific writer for the Illinois Institute of Continuing Legal Education, the Illinois Bar Association, and numerous other organizations. ICLE is honoring Lin this summer for his contributions. Lin’s door at the firm is always open, literally and figuratively. He is amazingly generous with his time, providing direction, sharing his skills, asking probing questions, and challenging our assumptions and analyses.

Lin’s 50 years in practice sparked an outpouring of congratulatory missives thanking him for his contributions to the legal profession as a whole, and for positively affecting the lives of young lawyers. Representative is the following from Chicago attorney Markus May: “Lin, you have always been a great help and inspiration! Throughout the years when I have run across a thorny problem or just a simple question, you have always been there to help out. It is greatly appreciated.

However, it is not only myself and other individual lawyers you have helped. You have taken time out of your schedule to help draft the Illinois business laws and make our statutes some of the best around.

Your service to the legal community is often unrecognized and I am sure that no one knows all the different ways you have contributed. It is with great joy that we get the opportunity to recognize you for 50 years of service!

Way to go and thank you so much for your tireless contributions. You are a class act that many try to emulate and your legacy is found not only in the legal work you did, but greatly in your impact in making all of us a little better. Best wishes Lin!!!

Lin credits RL and Fred for their guidance and mentoring. Well, apples come from apple trees, and the legal community and we at Di Monte & Lizak are blessed to benefit from the teachings of RL and Fred, and to have the teacher, mentor, and scholar we have in Lin.”
Beware of Improper Classification of Workers

By: Margherita M. Albarello

Companies may find they need people with certain skills, but are concerned about expanding their workforce with regular employees and the overhead concomitant with employees (unemployment insurance taxes, worker’s compensation insurance, payroll costs, etc.) One solution is to supplement the workforce with independent contractors.

Governmental agencies like the Illinois Department of Employment Security (IDES), the Illinois Department of Labor, and the IRS increasingly are challenging companies’ classifications of workers as independent contractors. These agencies start with the presumption that the company is the legal employer of the independent contractor. Therefore, when a company pays the worker to perform services, the worker is presumed to be the employee of the company upon audit by the agency. Consequently, every company using independent contractors should seriously be preparing, long before an audit or any other legal challenge, to prove that the independent contractor is not a company employee.

How does a company do this? The crux is to prove that the independent contractor is self-employed. What are some indications that an individual is self-employed? One indicator of self-employment is an independent contractor who is incorporated and in “good standing” with the state of incorporation. If the independent contractor is not incorporated, and not willing to be incorporated, make sure that the contractor has a business name as a sole proprietor and uses that business name. Effective proof includes documents showing that the worker holds himself out under his own business name, checks from the company made out to the independent contractor’s business name with the contractor endorsing the checks with his business name, IRS Forms 1099 made out to the business name of the independent contractor, a well-drafted independent contractor agreement, and proof that if the company closed its door tomorrow, the independent contractor could continue to function as a self-employed entity. If the contractor needs a license in order to perform the work, require proof of the license and a copy. A contractor will have a hard time establishing an independent contractor relationship with a roofing subcontractor if the latter does not have the roofing license required by the Illinois Roofing Industry Licensing Act. Companies should maintain files for each independent contractor and include these materials in each file.

The IRS and the IDES have their own detailed checklist of rules and regulations to prove that the workers are independent contractors. The Illinois Employee Classification Act, which applies to construction-related companies, has a test which is particularly difficult for companies to meet. Penalties for worker misclassification are steep. Careful assessment of worker relationships and taking practical steps can significantly lower your company’s exposure.

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familiar with these documents as authorizing a person to make end of life decisions in cases where the person is no longer able to make these decisions or express these decisions on their own behalf. Often our clients refer to this form as the “pull the plug” form. It contains statement regarding the client’s wishes about prevention of suffering and prolongation of life, and authorizes a person to insure that these wishes are carried out.

The actual power of attorney form was adopted as a part of the statute adopted by the Illinois legislature – its exact language is dictated by the act. While it is possible to create a form which does not exactly follow the language of the act, we recommend, and most of our clients decide to use the statutory form.

A provision of the form which is often ignored by our clients deals with funeral arrangements. Since it is short, it’s included here in its entirety:

A. My agent shall have the same access to my medical records that I have, including the right to disclose the contents to others. **My agent shall also have full power to authorize an autopsy and direct the disposition of my remains.** [Emphasis Added]

B. Effective upon my death, my agent has the full power to make an anatomical gift of the following (initial one):

   (NOTE: Initial one. In the event none of the options are initialed, then it shall be concluded that you do not wish to grant your agent any such authority.)

   • Any organs, tissues, or eyes suitable for transplantation or used for research or education.
   • Specific organs: .................................
   • I do not grant my agent authority to make any anatomical gifts.

C. My agent shall also have full power to authorize an autopsy and direct the disposition of my remains. [Emphasis Added] I intend for this power of attorney to be in substantial compliance with Section 10 of the Disposition of Remains Act. All decisions made by my agent with respect to the disposition of my remains, including cremation, shall be binding. I hereby direct any cemetery organization, business operating a crematory or columbarium or both, funeral director or embalmer, or a funeral establishment who receives a copy of this document to act under it.

So this form, perhaps thought of for a different purpose, allows you to designate someone with an absolute right and authority to make funeral arrangements for you.

There is a second form. Perhaps you wish to use your health care power of attorney to empower someone with regard to medical decisions, but give authority over you funeral to someone else. Since you can only have one health care agent, you might then chose the second form, called “Appointment of Agent to Control Disposition of Remains” which is authorized under another Illinois statute, the Disposition of Remains Act. This form is much more focused than the Health Care Power of Attorney, and permits you to appoint an agent just for the purpose of arranging your funeral, including cremation if that is your wish. Like the Health Care Power, it provides an opportunity to name a successor agent if the original one is unable to act.

Should you wish to make or change either of the forms discussed in this article, please contact me or another attorney at DiMonte & Lizak.
Mentor, Scholar hidden in Tax Relief Law signed on, we suggest this is a topic that can occur.

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