

# Senior Lawyers

The newsletter of the Illinois State Bar Association's Senior Lawyers Section

## Chair's column

BY HON. EDWARD J. SCHOENBAUM

First, I want to thank Barbara Slanker, our Chair, for her leadership last year and the other members of the Senior Lawyer Section Council who did so much last year.

Next, I want to let you know some of the things we will be providing this year. One of the most important is to review member benefits,

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take our  
survey!**

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(Notice to librarians: The following issues were published in Volume 6 of this newsletter during the fiscal year ending June 30, 2015: November, No. 1; February, No. 2; June, No. 3).

## **Save the Date!** Computer Basics 2015: Is This Thing On?

*Presented by Senior Lawyers, Co-sponsored by Young Lawyers Division*

OCTOBER 9, 2015  
8:30 a.m. – 12:15 p.m.

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learn from our members what they like, what they want from us in the future and what they want to do.

Strategic planning is so important that, as we were getting ready for our annual meeting, I asked everyone to share their ideas and needs so we could start planning. Our annual meeting got us off to a good start and I appointed Frank Ariano, our Vice-chair, to chair our Long Range/Strategic Planning Committee. We recruited past chairs and those going up and got started on our Strategic Plan.

We are repeating our very successful CLE program "Computer Basics: Is This Thing On?" This year it will be in Springfield at Lincoln Land Community College. We have our four presenters along with other Senior Lawyers and Young Lawyers who will assist with "Hands On" tutoring so that each attorney registered will

have someone to help with each computer of the 24 in the computer lab.

Our CLE Committee is planning a number of Webinars on a variety of subjects. Watch for their announcements. If any of you want to suggest a course, make sure you tell us.

On the front page of this newsletter is a link to our survey. Please go there and fill it out as soon as you can and submit it, because our council intends to spend a great deal of time discussing the results at our October 9th meeting, after our morning CLE program. We want your input as we continue planning for this year and the next.

You will hear more from us and we hope you will share your needs, wants and your expertise. Please send your ideas to JudgeEdS@gmail.com and I will share them with the committee and council. ■

## Book review

BY GARY T. RAFOOL

**The book I have chosen for this review was selected not only for its content, but also for the fact that this was a first book completed and published when the author was 93 years old.** Obviously, as a senior lawyer, I became very interested in this accomplishment.

"The Invisible Wall" by Harry Bernstein was published in 2007, and it is available in paperback (some 297 pages) and electronically.

The author wrote it as a form of therapy for him after his wife of some 60 years died in 2003.

It is an autobiography of the author's early childhood from age 4 in 1914 to 1922 while living in Lancashire England, which was approximately 8 miles from Manchester. The author and his family lived on a short narrow cobblestone street which divided his and all of the other Jewish families on his side of the street from all of the Christian families on the other side of

the street.

Most, if not all, of the families on the Jewish side were refugees from Russia and Poland, who came to England before the Russian Revolution.

Many of the adult Christians on the other side of the street, while not causing physical harm to these Jews, were condescending to them and felt like they/England did them a favor by taking them in from the persecutions taking place in Eastern Europe at the time. The term "our Jews" was spoken many times among these Christians and directly to the Jews.

When there was physical abuse, it was from gangs of Christian school children against the Jewish children, who attended predominately Christian schools.

The men on the street were also divided in their jobs, with the Christians working in the city's mills and the Jews working in its tailor shops.

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## Senior Lawyers

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# Illinois Power of Attorney for Health Care

BY JOHN J. HORELED

**The new Health Care Power of Attorney became effective on January 1, 2015.** Its use may have been slow at first, but eventually it will pick up. There was a lead article on it in the April 2015 issue of the Illinois Bar Journal. I find that I do not like the form because I believe it is a dumbed-down version and more at a junior high level than the previous form.

It is my understanding that it originated because the medical societies were pushing for a different form of power of attorney that they thought would be easier to use. The new Power of Attorney, in my opinion, brings the doctors more into the picture than the former power of attorney forms did. In effect, the doctors have more input and the agents have a little less power.

The Act states under Section 4-10 that this is not considered an exclusive form and it also states that “no specific format is required for the statutory health care power of attorney other than the notice must precede the form.”

The form is available on the ISBA website. In analyzing the new power of attorney form, I separated it into two sections. The first section is the notice requirements, which run about 6 pages. At the end of the notice requirements, I have a place for initials. This initialing is my addition to the form.

The second part is the power of attorney itself. This part runs about 5 pages and starts on a new page and, yes, the notice is longer than the form.

The form itself does not provide an area for organ donation as the prior form did. It could obviously be added. This could be addressed in the portion regarding SPECIFIC LIMITATIONS. At that part of the form, you could also deal with the disposition of remains, such as cremation. Perhaps clients will need to provide agents with a file of any signed agreements.

There is a section of the form which allows you to direct the time decision making begins. In the first choice, the physician will determine when the principal

lacks the ability to make a decision. In the second choice, the principal authorizes the agent to begin making decisions at the execution of the form. The form states that, if no box is checked, the first provision will apply and, in that case, the doctor has additional authority. This is akin to placing a springing power in the doctor’s hands. The second provision, in my opinion, is written in an awkward fashion and, on the surface, you would wonder why you would want to pick it. However, in reviewing the form, I think most clients will want to make the second choice. The appropriate box is checked, not initialed.

The life support selections are optional. The first option talks about quality of life and requires the attending physician to make a finding before the agent can remove life support. Once again, the doctor has some power and the agent has some limitations.

The second option states that staying alive is more important to the principal and “I want my life to be prolonged to the greatest extent possible in accordance with reasonable medical standards.”

The witness statement is most concerned with who the witness is not (because there are limitations as to who a witness can be). The witness does not acknowledge that the principal had the opportunity to review the above form or acknowledge his or her signature or mark on the form in the presence of the witness. This is a watered down version of witnessing.

Also, there are no specimen signatures on the form.

So, what if you have been using the old form to date and have not started to use the new form. You will have to make some corrections on the form that was signed under the prior act. The new act requires that the notice provisions be attached to the form. You can actually use the old form as long as you have the notice provisions attached to it.

If a power of attorney was signed using the prior form but after January 1, 2015,

then I believe you need to prepare the notice and have it mailed to the clients for initialing. The best practice would be to have them come in and sign a whole new form, but we all know how difficult it is to get clients to come back in. I would suggest as a short term solution sending the clients the appropriate number of notices and have them forward one back to you to attach to your copy. The clients should be instructed to put the notice provision in front of the health care power of attorney and attach it. When the clients come in at a later date, they can sign a whole new form.

One final criticism of the form is that it takes more time to explain this form to clients than the remainder of the estate plan.

I welcome any comments at [jhoreled@att.net](mailto:jhoreled@att.net). ■



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BAR ASSOCIATION**

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## 1. APPLICABLE STATE LAW:

- What state was the POA executed in? \_\_\_\_\_
- Does the POA indicate that it is subject to the laws of a state other than the one it was executed in?  
 Yes  No
- If so, what state: \_\_\_\_\_

## 2. EXECUTION

- Is the POA signed by the Principal?  
 Yes  No
- Is the POA witnessed by two witnesses?  
 Yes  No
- Is the POA notarized?  
 Yes  No
- Is the POA presented the original or a certified copy of the original?  
 Yes  No

## 3. DURABILITY

- Does the POA contain language that indicates it is durable?  
 Yes  No
- If yes, what section of the POA contains this language? \_\_\_\_\_

## 4. EFFECTIVE DATE

- Does the POA contain language that a certain event must occur before the POA is effective?  
 Yes  No
- If yes, does the POA require documentation to show the event has occurred?  
 Yes  No
- If yes, is that documentation attached?  
 Yes  No

If the POA contains language that a certain event must occur before the POA is effective and it was executed after October 1, 2011, the POA is not valid under Florida law.

## 5. AUTHORITY

- Does the POA contain a statement that the Attorney-In-Fact has the "authority to conduct banking transactions as provided in section 709.2208(1) Florida Statutes?  Yes  No
- Does the POA contain specific language authorizing the requested transactions?  
 Yes  No
- If yes, what paragraph number or what words in the power of attorney authorize the requested specific transaction(s)? \_\_\_\_\_

## 6. CO-AGENTS

- Is more than one person being appointed Attorney-In-Fact?  
 Yes  No
- Is so, do the terms of the POA require that the Attorneys-In-Fact act together?  
 Yes  No

## 7. EXPIRATION DATE OR OTHER MEANS OF TERMINATION

- Does the power of attorney state an expiration date?  
 Yes  No
- If yes, what is that date? \_\_\_\_\_  
Does the power of attorney provide a specific way it can be terminated?  
 Yes  No
- If so, what is that specific way? \_\_\_\_\_

been a gap in coverage. Lawyer malpractice policies provide coverage year-to-year and, therefore, in order for an attorney to have coverage in force at all times, a policy must be purchased (or renewed) every year – without a gap in coverage. Also, an attorney can only purchase or renew a malpractice insurance policy while actively engaged in the practice of law. Of course, this presents a problem for an attorney who is planning on going into retirement as the attorney can no longer purchase coverage because he or she will no longer actively practice law. This is where tail coverage comes into play, a/k/a Extended Reporting Period (“ERP”).

Simply put, the word “tail” is a synonymous term for the concept of an extended reporting period. A retiring lawyer buying tail coverage adds an extended reporting endorsement (ERE) to an existing policy that extends the time in which a claim may be reported to the insurance carrier. In short, the purchased endorsement (tail coverage) provides an attorney the right to report claims to the insurer *after* a policy has expired or been cancelled. Under most insurance industry lawyer malpractice policies’ ERP provisions, the purchase of the endorsement is not one of additional coverage or of a separate and distinct policy. This means to the retired attorney that no coverage will be available for a wrongful act that takes place *after* the retirement, during the time the ERP tail is in effect. Therefore, if a claim arises, if the malpractice occurs any time after retirement, there would be no coverage for that claim under the ERP. Therefore, be careful in helping your nephew defend a parking ticket, or handling a small claims matter for a neighbor, and the like.

Another significant *caveat* the retired lawyer should consider carefully is the decision to semi-retire, get back into the business just a little bit, and purchase a policy with reduced limits in order to save a little money. The insurance carrier may not allow an attorney to increase the policy limits on the eve of a full retirement, and therefore the lawyer may have to live with the policy limits that were in place on the last policy of his or her career. Therefore, be aware that all claims reported under the ERP will be subject to the available

remaining limits of the final policy that was in force. Of course, this begs the question – is it enough?

Traditionally, in many cases, for a retiring solo practitioner, lawyer malpractice companies provided tail coverage at no additional cost to the insured if the attorney had been continuously insured with the same insurer for a stated number of years. Some, like the Illinois State Bar Association/Mutual Insurance Company (“ISBA/MIC”), provide ERP/tail coverage at a minimal cost, e.g. if the insured is a solo and has been with them for 10 or more than years, the insured can get an “unlimited” ERP for the same cost as their expiring premium.

The situation for an attorney retiring from a multi-member, continuing-to-practice, firm is quite different. A number of insurance companies will not provide an opportunity for this retiring attorney to purchase an ERP, arguably because the firm’s existing policy is not expiring or about to be canceled and the retired lawyer is still covered. The firm will continue to remain insured and therefore the retiring firm attorney remains insured so long as the firm continues, and continues to exist.

Be cautious because, if the firm eventually does dissolve, the retired attorney may not have the option of purchasing an ERP at that time. Because this language varies among insurers, review this issue with your firm’s insurance representative well in advance of a planned retirement and consider the options.

The ISBA/MIC is developing a new program called “Retired Lawyers Policy” which will provide the necessary coverage and protection for the retiring attorney within a law firm and *not* be dependent on the insurability of the law firm. The retiring attorney will be able to obtain his or her *own* individual ERP Policy up to \$1M/\$1M for a set price (yet to be determined). This is the company’s answer to “Peace of Mind Protection”. The last thing you want as a retired attorney is wondering if the old law firm is still (1) in business and (2) insured.

The period in which one can purchase tail coverage is not infinite. Many policies allow a 30-day window that starts to run on the effective date of the expiration or

cancellation of the existing policy. A few very restrictive policies require the insured to exercise the option to purchase an ERP on the date of cancellation or non-renewal. The traditional ISBA/MIC policy, for example, provides 30-days from their expiration date to purchase one of the following options:

- 100% of annual premium - 12-month ERP
- 175% of annual premium - 36-month ERP
- 200% of annual premium - 72-month ERP

It is imperative to review relevant policy language at the time of policy purchase as the opportunity to purchase an ERP comes just once and no attorney can afford to miss it.

The duration of the tail coverage, or more accurately the length of time under which a claim may be reported, commonly varies from a fixed one, two and three year reporting period to an unlimited reporting period. The unlimited reporting period would be the most desirable, of course, if available, particularly for practitioners who have written wills during their later years of practice.

Given the above, if the ERP provisions outlined in your firm’s present malpractice policy language were not reviewed prior to policy purchase, review those provisions *now*, especially when retirement is on the horizon. Contact your insurance representative in order to understand how to obtain an ERP, should it be available. At the ISBA/MIC, the person to speak with is Underwriting Manager, Cinda Berry, [cinda.berry@isbamutual.com](mailto:cinda.berry@isbamutual.com), 312-379-2029, or with Vice President of Claims and Underwriting, Melissa Kaplan, [melissa.kaplan@isbamutual.com](mailto:melissa.kaplan@isbamutual.com), 312-379-2027.

Finally, should the unexpected happen, such as the sudden and unexpected death of an attorney still in practice, know that tail coverage can, under some policies, be obtained on behalf of the deceased attorney if timely pursued in accordance with policy provisions.

For example, in the event of a death or total and permanent disability, ISBA Mutual now provides a “Free” 24-month

ERP for limits of liability up to \$1M/\$1M.  
Additional food for thought:

- If any of the limits of liability have been used during the policy period, note that it will reduce the limits of liability available for the ERP.  
Example: Insured Bob has an active

In preparation for Saturday Shabbos, chicken soup was usually prepared before sundown on Friday by the Jewish families, because after that they would have to hire “fire goys” from across the street for a penny or two to torch fires in grates and lift pots from the fires.

Otherwise, distance was maintained by both the Christians and the Jews on the street. From the book, it did not appear that any Jews ever entered a Christian home.

However, with the casualties and tragedies bestowed on families on both sides of the street during World War I, the residents did come together, albeit briefly, to console each other in the street between their homes.

Harry’s mother was the heroine in his story, and she constantly struggled through a loveless marriage to maintain her family of 5 children (a sixth child was born later in the book). A reviewer from “USA Today” made some comparisons between her and the mother described in the book “Angela’s Ashes”.

On the other hand, Harry’s father was described as being perhaps one notch above an unemotional, selfish beast.

When the father was quite young and living in Poland, his mother and father abandoned him because of his drinking and fighting. After an emotional outburst and hospitalization, Harry’s father worked his way across Europe to find his parents in England. When his father made such a ruckus trying to break into Harry’s grandparents’ home one very early morning, his grandmother dumped a well used bedpan on his father outside her front door.

To get rid of him and to save face among her Jewish friends, the father’s mother decided to find him a nice young Jewish

\$500,000 / \$500,000 limit of liability policy and he has a \$250,000 claim payment – the limit of liability available for the ERP is only \$250,000.

- All lawyers, at some point, especially senior, graying lawyers, have to be aware of malpractice possibilities when

refugee to marry, namely Harry’s mother, who was 16 when she arrived in England from Poland. To make sure Harry’s father stayed in England, while the rest of his family came to America, he and Harry’s mother were given a wedding present of the father’s parents’ home, which is where Harry grew up.

With all of the love and respect that Harry had for his mother, he did deceive her about his older sister’s romance and eventual secret marriage to a Christian from across the street.

While the groom’s Christian family accepted this marriage, Harry’s family did not. This resulted in Shivah (mourning the dead) in his home where all of the members of Harry’s family sat for seven days in their stocking feet and mourned the death of this daughter.

After many months of having her attempts at reconciliation snubbed by her family, Harry’s married sister was finally

contemplating the ending of the practice of law, e.g., retirement, disability, etc.

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[Authors’ note: We wish to thank our soon-to-be lawyer clerk, Colleen Redden, for her research for this article and ISBA/MIC President, Jon DeMoss, Vice President Melissa Kaplan and Kurt Bounds for their contributions].

able to bring them all together again with the birth of a child and the rebirth, so to speak, of this married daughter.

The Christian parents of the man who married this sister then organized a block party for Christians and Jews to celebrate this new baby. With lots of beer and other drinks, this party was a huge success, and it once again brought the two sides of the street together in celebration.

Shortly after this party, Harry, his mother, father and siblings, except for the married sister, finally were able to come to the United States in 1922, settling first in Chicago and then eventually in New York.

Harry died in 2011, which gave him the opportunity to enjoy the accolades and success of this book and relive his early childhood in England. It also gave him the time to write a sequel entitled “The Dream,” which begins on the ship taking all of them from England and takes the reader through their early years in Chicago. ■



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## Practice tip for Florida POAs

BY EUGENIA C. HUNTER

In the course of dealing with my mother's business affairs, for whom I am the agent under a Florida Durable Power of Attorney, I was sent a "Florida Power of Attorney Review Form" by the bank. The purpose of the form was for the branch bank to make certain determinations (e.g. who I was and what I wanted) before faxing the form, power of attorney and other documents (a copy of my driver's license) to the fraud prevention department for approval or denial of my authority. While this was for one bank, a national bank, concerning a Florida account, my guess is all big banks use similar forms for most, if not all, states, and many of you have clients who spend time in Florida, have elderly relatives in Florida, or winter in Florida.

The form that is used by the fraud department asks the reviewer the following:

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## Everything a (senior) lawyer could ever want to know about the Extended Reporting Period (ERP) a/k/a "Tail" coverage

BY LEONARD F. AMARI AND KATHERINE A. O'DELL

Insurance 101 tells us that all legal malpractice insurance policies are "claims-made" policies. That an attorney is provided lawyer malpractice coverage for claims made and reported to the insurance carrier *only* while the policy is in force. Further, the alleged act or omission of malpractice upon which a claim is based had to occur only after the policy was written – the inception date of the first claims-made policy purchased, providing there has not

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