GDB LAW

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LEGAL UPDATE

Providing current information about legal developments for our clients and friends.

Electronic Deposit of Checks — Tips to Avoid Problems

By: Jay L. Hack, Esq.

The good old fashioned paper check as a method of paying bills may be on life support, but according to the Federal Reserve, there were still 5.5 billion paper checks, worth over $8.1 TRILLION, in the United States in 2015. If you are a pre-millennial, you probably still write a few checks every month, and your business probably still pays most of its debts by paper check. With the ease of using a smart phone to deposit checks as electronic images, you may ask yourself, "What stops the recipient (known legally as the payee) from photographing my check twice and depositing it twice?"

Nothing stops the payee from depositing the check twice. But your bank shouldn't pay it twice, and if the bank does, it must return the money to you so long as you let it know what happened promptly. Under state and federal law, your bank should pay each check you write only once.

Suppose that you pay the person who cleaned your gutters with a check written on your account at Citibank. He deposits it into his accounts at both Signature and Chase, both times using an electronic deposit app on his smart phone. The "checks" will eventually make it to Citibank for payment (known as presentment). The check that is presented first will be paid, and the second presentment should bounce.

What if Citibank pays both? You need to review your account statement promptly to make sure they didn't.

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Powers of Attorney — A Useful Tool

By: David I. Faust, Esq.

People are living longer. As a result, it is increasingly common for elderly people to become unable or unwilling to manage their financial affairs.

Over time, the reluctance to delegate authority over one's affairs may give way to the realization that such delegation is necessary. But you cannot wait too long to have a person make a Power of Attorney, because a Power of Attorney will not be deemed valid if it is made at a time when the maker is already considered incompetent. Between the realization that a delegation of authority over one's financial affairs is appropriate and the deterioration of capacity to the point when such a voluntary delegation of authority is no longer possible, there is a window of opportunity, in which a properly executed Durable Power of Attorney can be a useful and appropriate tool. This article addresses the most commonly used New York statutory short form power of attorney.

A Power of Attorney is a delegation or deputation of authority by the maker ("Principal") to the holder ("Agent") to manage some or all of the Principal's affairs. It is not a surrender of that authority. The Principal can still act on his or her own, so long as he or she is competent to do so.

A Durable Power of Attorney is one which survives the incapacity or disability of the Principal — the person who granted the Power. In New York, the statutory form of Power of Attorney is presumed to be durable unless it expressly provides otherwise.

- *A Power of Attorney does not generally authorize the Agent to make health care decisions. This authority or power must be in a separate form — a Health Care Proxy — with its own rules and requirements.*

- *A Power of Attorney can be general or limited. It can cover every right or power of the Principal that is delegable, or it can cover only specific matters.*

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The Role Of An Independent Monitor In Saving Your Company From A Criminal Investigation

By: Roger L. Stavis, Esq.

Even with the best of corporate practices and the best of intentions, business owners may nevertheless find their companies under investigation by one of the many state, federal, and city agencies empowered to investigate criminal conduct. One of the immutable principles of criminal law is that a corporate entity can be held criminally responsible for the acts of its agents and employees taken within the scope of their agency or employment. Even where corporate owners and executives are unaware of criminal conduct, the corporation may become the subject of a criminal investigation or even a prosecution. While corporations cannot be jailed, they can be subjected to crippling financial penalties.

How can any company survive such a criminal investigation or prosecution? One solution may be to retain an independent integrity monitor. An independent integrity monitor is often a former prosecutor who specializes in such work.

Independent integrity monitors comprehensively examine a company's financial records, operations, policies and procedures. They assist the company with drafting a code of ethics and specific "whistleblowing" procedures, such as a dedicated "hot line" to report wrongdoing. The independent integrity monitor will remain involved with the company throughout the course of the investigation and, sometimes, for a specified period of time thereafter.

> *The retention of an independent monitor is an effective way to demonstrate that, the corporation itself is committed to rooting out the criminal conduct and putting policies in place that will prevent a repetition of such conduct.*

Their work is often "front loaded" and after the initial period of intense activity, the work of the independent monitor is more in the realm of auditing the policies and procedures put into place. For those businesses bidding on public work, the agencies involved maintain lists of preferred independent integrity monitors and, when requested, will often select one.

The retention of an independent monitor is an effective way to demonstrate that, while an employee might have committed a crime, the corporation itself is committed to rooting out the criminal conduct and putting policies in place that will prevent a repetition of such conduct. This is particularly true when the company proactively seeks out an independent monitor prior to any suggestion by the prosecutorial agency involved in investigating the company. Such a proactive move can have a significant impact on prosecutorial decisions regarding whether to prosecute or to defer prosecution of the company, as well as the amount of financial penalties to be imposed.

Equally important, the proactive retention of an independent integrity monitor will serve as a sure sign to clients and customers that the company is a responsible corporate citizen. This is especially important for companies that bid on public contracts. The agencies that solicit those bids may continue to award them to companies that are under investigation, provided those companies have independent integrity monitors in place.

The agencies will hold formal meetings with companies, referred to as "responsibility hearings" prior to awarding the bid. At a "responsibility hearing," the company has the burden to establish that it is a responsible corporate citizen. The key to meeting that burden is the proactive retention of the independent integrity monitor. Clearly, there is a critical role to be played by experienced counsel in assisting any company through a criminal investigation and helping it not only to survive, but to flourish.

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Common Trademark Issues Facing New Businesses

By: David T. Azrin, Esq.

If I come up with a brand name for my business, product or service, how can I be sure that I have the legal right to use it?

Trademark rights are generally established based on who used the trademark first (not who registered it first). To be sure you can legally use the name, you must try to find a name that nobody has used before for your type of product or service (or a related product or service that people would expect would come from the same source).

This has become increasingly difficult, as many businesses find that almost every name they want to use is already being used by somebody else.

Trademark rights prevent someone else from using your name or a similar name for the same type of product or service if consumers are likely to be "confused" as to whether the other company's products or services come from you.

When you come up with a new name, the first step in determining whether you can legally use the name is to perform a "knock out" search. This is accomplished by performing internet searches for the name, and by checking the trademark office website (which is very user friendly, www.uspto.gov) to see if anybody else is already using the name or has registered the name for a product or service or related product or service, which is likely to cause customer confusion.

If the "knock out" search has not uncovered any other businesses that are already using the trademark for a similar product or service, you should ask a professional service, such as Thomson, to perform a more comprehensive search, which usually costs less than $1,000 per trademark.

> *A second part of protecting your brand is taking prompt action against anyone who starts using the name or a similar name.*

Once you have determined that there are no conflicting prior uses, you should promptly register the name with the trademark office website. You should also obtain the internet domain name as well as any similar domain names, including domain names with different endings, such as .com, .net, .org, or .us.

By filing the trademark registration application, you will be putting the world on notice that you are claiming the mark as your own, so that if anyone in the future is thinking about using the name, they will be deterred from using it because they will see that you have already registered it.

The trademark office does not check to see if other people were using it before. Rather, it only checks to see if anyone ever registered the name or a similar name. It also checks to make sure it is not merely a descriptive or generic mark, which cannot be registered. For example, you cannot register and protect the name "gas station" for a gas station, or "tables" for a store that sells tables.

When a trademark registration application is filed, the application must be filed based on either "actual use" or "intent to use." If the application is filed based on actual use, this means that you have already started using the name. If you file based on "actual use," then the application must include an example (a "specimen") showing how you are actually using it. The application process, from the filing of the application to the issuance of the registration, normally takes about 8-12 months.

Alternatively, the application can be based on "intent to use." In this case you certify that you have a good faith intent to use the name. You have to start using it and submit evidence that you are using it within two years (provided that you file extension requests every six months). The law says that if you file an "intent to use" application request that is eventually granted, then you will be considered to have started "using" the mark on the date you filed the application (rather than the later date of actual use). This is the only major exception to the general rule that trademark rights are based on the date of first actual use.

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David T. Azrin, *a partner at Gallet Dreyer & Berkey, LLP, represents a range of business clients and individuals on employment, trademark, and franchise law matters. Mr. Azrin is the organizer of the International Franchise Association's franchise business network program in the New York City area, and has been named by* Super Lawyers *magazine as one of the top attorneys in franchise and distribution law in the New York metropolitan area, and by the editorial board of* Franchise Times *magazine as one of the top franchise attorneys ("Legal Eagle") in the United States. Mr. Azrin can be reached at dta@gdblaw.com.*

Electronic Deposit of Checks

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If you see that a check was paid twice, then you must notify Citibank. You are entitled to get the money recredited to your account quickly. If the double deduction causes other checks to bounce, your bank may be liable for all damages directly caused by the wrongful bouncing of the check.

Does the first check to be presented always win the race? Not necessarily. It depends on a number of things, principally whether there are two electronic deposits or one paper deposit and one electronic deposit. You don't care so long as the check is only paid once.

To avoid problems with checks you write, we recommend that you follow these procedures:

- *Review your bank account statements every month to make sure that no checks were paid twice. If you find any problems, notify your bank immediately.*
- *If you do not buy your printed checks directly from your bank, make sure that the checks are printed by a reputable company, and that they include all the information that your bank requires, especially including your account number and the check number on the bottom line. You want to make sure that your check can be processed automatically and your bank has the data that it needs to reject any duplicate presentment.*

> *Smart phone deposits do not have the benefit of the federal law that requires banks to make deposited funds available to you quickly.*

What if you are the one who deposits a check using your smart phone? Make sure that you keep the original in a secure place. We recommend against destroying it because, although unlikely, you may need the original. You should also check your bank account to confirm that your electronic deposit was credited to your account. If your bank did not do so, notify it immediately and be happy that you kept the paper check.

There is one major disadvantage when you deposit a check using your phone instead of in person at a bank. Smart phone deposits do not have the benefit of the federal law that requires banks to make deposited funds available to you quickly. Although some authors disagree with this conclusion, we have confirmed our analysis in direct communications with the Federal Reserve. Your bank can hold the electronic deposit for as long as it wants, within reason. The Fed has been working on proposed changes to these rules on electronic deposits for more than five years, but the law continues to play catch up as technology marches forward.

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FIRM NEWS AND HONORS

Morrell I. Berkowitz

In December and February, senior partner Morrell I. Berkowitz served as a judge in the Yale University Mock Trial regional competitions. In March, Mr. Berkowitz served as a judge in the New York University School of Law Orison S. Marden Moot Court Competition Spring Semi-Final Round.

Jay L. Hack

In January, senior partner Jay L. Hack was elected a Business Law Section representative to the New York State Bar Association's House of Delegates.

Peter R. Massa

In January, partner Peter R. Massa was a speaker at a seminar on construction defects sponsored by the New York State Bar Association's Committee on Cooperatives and Condominiums.

David T. Azrin

In January, senior partner David T. Azrin was once again selected as one of the top franchise attorneys in the country. For the seventh year in a row, Mr. Azrin's clients, peers and the editors of *Franchise Times* magazine have voted that he has earned the title as a "Legal Eagle," a distinction given only to a small percentage of franchise attorneys.

Michelle P. Quinn

In February, senior associate Michelle P. Quinn served as a judge in the Yale University Mock Trial regional competitions.

Randy J. Heller

In February, senior partner Randy J. Heller was a guest lecturer at Brooklyn Law School, teaching about construction delay claims and damages.

Trademark

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How do I protect my brand?

When the trademark office issues the registration, you should immediately start using the ® symbol on your website and all of your marketing materials. This puts the world on notice that you have registered the mark and you are claiming it as yours. You are not allowed to use the ® symbol before you obtain the registration.

A second part of protecting your brand is taking prompt action against anyone who starts using the name or a similar name. This may mean sending a formal letter in which you demand that the competing user "cease and desist" from using your name, and then taking legal action if the user does not comply. If you allow other people to use the name, a competing user may argue in court that you waived or lost your right to stop other people from using the name because of your inaction. In special situations, it may be appropriate to enter into a "co-existence" agreement. Under this type of agreement, you and the other user agree that you both can continue using the trademark, provided that such use is restricted to a particular geographic area or type of good or service, in a manner that is not likely to cause customer confusion.

You should also monitor whether other people have started using the name by doing periodic searches on the internet and the trademark office website. You can pay a private service to conduct such searches and to notify you if anyone starts using your name or a similar name, applies for trademark registration of your name or a similar name, or applies for a domain name that contains your name or a similar name.

OUR PRACTICE AREAS INCLUDE:

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- *Construction Law*
- *Co-op and Condo Law*
- *Corporate Finance and Securities*
- *Corporate Law*
- *Employment Law*
- *Franchising, Distribution and Licensing*
- *Intellectual Property*
- *International Business Law*
- *Litigation*
- *Mergers and Acquisitions*
- *Real Estate Law*
- *Tax Law*
- *Trusts and Estates*
- *White Collar Criminal Defense*

Document Retention: How Long is Enough?

By: David N. Milner, Esq.

Clients often ask "For how long should I retain my records?" Unfortunately, there is no finite answer to this question. Typically the need for retaining records is to support a position in the event it is challenged. The best answer is that records should only be destroyed when you are certain there will be no reason to produce them in the future.

With respect to tax and most contract matters, conventional wisdom is that records should be retained for six years. With respect to income tax matters this standard is based on the time period given to the IRS to challenge positions taken on your income tax returns. While the period during which the IRS may assess additional income tax is generally three years, if the Internal Revenue Service can establish that there was an omission of income equal to or greater than 25% of the gross income that was reported, a six-year statute of limitations will apply. It is important to remember that the statute runs from the time the return is filed. For example, for the 2016 year, if you obtain an extension for filing your return and do not file your return until October 15, 2017, then applying the "standard" six-year statute, you should retain any back-up documentation supporting positions taken on your 2016 return until at least October 15, 2023.

However, it is best to retain records for as long as possible. For example:

When you sell your residence, you will need to establish the tax basis of your residence (i.e., generally its original cost plus the cost of any permanent improvements) for purposes of determining gain or loss. This is true regardless of how long ago the residence was acquired.

> *Records should only be destroyed when you are certain you will not be required to produce them. The use of modern technology may help since records can be scanned and the images retained electronically.*

The same is true for securities you sell. You will need to establish your tax basis in the securities, no matter how long ago you acquired them. In addition to retaining records supporting what you paid for the security, you should also retain records showing any stock dividends, stock-splits or shares acquired through dividend reinvestment programs since these may affect your tax basis. While financial institutions generally maintain these records, the burden remains on you. Further, if you move your accounts from one financial institution to another, the basis information may not necessarily follow.

For assets that you acquire by gift, you will need to establish the cost basis of the assets in the hands of the donor in order to determine if you have sold the asset for a gain or a loss. For assets you inherit, you need to establish the fair market value of the asset on the date of decedent's death (or its value up to six months later if the decedent's executor elects to use the alternative valuation method for purposes of valuing the decedent's estate) in order to determine gain or loss on the sale of the asset.

Similarly, equipment and real property used in a trade or business must be depreciated using guidelines established by the IRS. Regardless of when the property was acquired, the tax basis of the asset being depreciated must be established.

With respect to contract claims, the six year measuring period does not start until there is a breach of the contract. The measuring period may restart if there is a partial payment or partial performance of the contract after the breach occurs. There can also be other situations when the beginning of the measuring period is not necessarily the day upon which you allegedly first breached the particular agreement.

For these reasons as well as many others, records should only be destroyed when you are certain you will not be required to produce them. The use of modern technology may help since records can be scanned and the images retained electronically. However, relying upon digital records can present problems of accessibility, including the difficulty for others to access your records if you become incapacitated or after you have died. These issues are discussed in an Article that appeared in the Winter 2016 issue of this Newsletter.

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David N. Milner *is a senior partner at Gallet Dreyer & Berkey, LLP. Mr. Milner's practice focuses on tax law, estate planning, corporate law, and real estate. Mr. Milner, who is also a certified public accountant, helps clients structure transactions in a manner calculated to reduce adverse tax consequences, and helps families develop estate planning strategies. He frequently speaks to community groups and trade organizations on matters relating to estate planning. Mr. Milner can be reached at dnm@gdblaw.com.*

Powers of Attorney

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- *A Power of Attorney can be issued for a limited period of time (e.g., the duration of a trip) or a specific transaction (e.g. the sale of a house) and, if properly executed and notarized, will be effective only for that period or transaction.*

- *In New York, if the Principal wants to delegate the power to make gifts over $500 in the aggregate in any one year, he or she must execute a separate Gifts Rider.*

- *A Principal can appoint more than one Agent, but must then make clear if the Agents can act individually or must act by majority OR unanimously.*

- *Powers of Attorney generally give the Agent the right but not the duty to act.*

- *The Agent is a fiduciary. The fiduciary duty is owed to the Principal, not to family members, creditors or others.*

- *A Power of Attorney is valid until the Principal dies or revokes the Power — or the Agent resigns. An Agent may use the Power, and third parties can rely on the Agent's use of the Power, until the Agent, or the third party, as the case may be, is notified of its revocation or of the death of the Principal. It is not unusual for an Agent who wants to act pursuant to a Power of Attorney to be asked to sign an affidavit confirming that the Power has not been revoked.*

- *The Statutory Forms do not explicitly revoke prior powers. This can cause a very real problem. Suppose a person gives a Power to a spouse. However, years ago, a Power was granted to someone else, perhaps a child from a prior marriage. If that prior Power is not revoked, there may be two valid Powers, held by people with inconsistent interests. A careful preparer should ask the Principal if there are any outstanding Powers of Attorney, and revoke them if appropriate — with notice to the holder of the revoked Power and to anyone else who the Principal thinks may have the Power. Generally, unless our clients are certain that they want a prior Power of Attorney to remain valid, we recommend that the new Power of Attorney should explicitly state that it revokes all prior Powers of Attorney.*

> *"Capacity" to execute a valid Power of Attorney in New York is defined by statute to be the ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a Power of Attorney.*

New York State strongly prefers the use of its statutorily prescribed form of Power of Attorney. However, it does permit the use of other forms but only if they comply with tightly prescribed rules concerning the format, language, purpose, place of execution, and even typeface.

Notarization

The failure to notarize the Principal's signature can be fatal to the effectiveness of the Power.

Capacity

A primary concern in preparing a Durable Power of Attorney for a client is the capacity of the client.

In New York, a valid Power of Attorney must be "signed and dated by a principal with capacity" and must be notarized. "Capacity" to execute a valid Power of Attorney in New York is defined by statute to be the ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a Power of Attorney. A person with mild dementia may still have the requisite capacity to execute a valid Durable Power of Attorney. If you think that a family member or a client may need a Power but there might be a question of capacity, it is best to discuss the issue, make a memo of the discussion, and have the Power executed and notarized while the window of opportunity remains clearly open.

Delayed Power

The effectiveness of a Power of Attorney can be delayed, so that it takes effect only on or after a specified date or contingency. This is also called a Springing Power of Attorney. Examples of a contingency might include an injury or illness that required prolonged hospitalization or certification by a doctor that the Principal is incapacitated. So long as such a Power was properly executed when the Principal had the requisite capacity, delaying effectiveness until he or she is incapacitated is valid.

A Springing Power of Attorney could be a solution to the problem of someone who realizes an oncoming inability to handle his or her own affairs but is reluctant to delegate such authority just yet.

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