Ten Years Later

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Chair | CMBA Young Lawyers Section

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The older I get, the less certain I am about anything.

Right now, I'm not certain this article's getting finished. It's due in less than four hours and I just settled on a topic. I assure myself that I work best under pressure. No need to panic, not that I could anyhow. When you earn the right to put "Esq." after your name, you forfeit the right to panic. I'm not sure it's a fair trade, but at least I can justify the rows of antiperspirant and bull tranquilizers lining my medicine cabinet to snooping house guests. Lord knows that was tough to do *before* I was a lawyer.

Father Time's all-too-familiar *tick-tick-ticking* sermon resonates loudly in the background. I wish he'd quit preaching for just a second so I can collect my thoughts on paper. It's no wonder he exploits our attention when we're on deadline or deathbed. He seldom has an audience otherwise. The poor guy probably resents the lungs on Mother Nature.

But Father Time's droning reminds me that August marks my 10th year in the law—three as a law student, seven as a lawyer. It's difficult to describe a journey beginning with a nervous upchuck on the eve of my first day of law school, and continuing through the hunt-and-peck keystrokes putting this article to rest. No single word suits the task. There are a few that, when strewn together, might come close; however, they'd likely earn me a "talking to" from the editors or, worse yet, my mother.

In golf-speak, the 10-year mark means I've been around long enough to qualify for the tour, but not necessarily long enough to win a green jacket at Augusta. (Those of you who've endured even nine holes with me know, however, that the only green jacket in my future is a rain poncho from the maintenance department at your local Putt-Putt Golf 'n Games.) Essentially, I'm in a position to offer some thoughts that the law students and rookie lawyers may find beneficial, and that I hope the veterans take a moment to digest.

To law students and rookie lawyers, I have only three pieces of advice to offer:

First, remember that irrespective of how much you may love the law, it can never love you back. The law is a jealous bedmate with an insatiable appetite for commitment that it has no intent of reciprocating. That isn't to say the law won't take you places you've never imagined, because it will. But when it comes to love, save it for your family, your friends, your pets or just about anything else capable of loving you back. You'll be better off in the end.

Second, never over-identify with your client or your client's cause because it's hazardous on all fronts. Over-identification is hazardous to you because the already hazy line between career and self becomes hopelessly obscured. Consequently, when the day comes that your client doesn't need you anymore—and it will come—the over-identifying lawyer loses not only a client, but also a piece of him- or herself. Emotional losses like these eventually rob you of the very spirit making you a good lawyer.

Over-identification is also hazardous to your client because it's the enemy of objectivity. Some newer lawyers make the mistake of associating zealous representation with complete identity with a client or a client's cause. It's an easy mistake to make, and certainly one that you'd choose over blowing the deadline to appeal a death sentence. Nevertheless, over-identification finds no home in a profession where much of a lawyer's worth is measured in ability to see the forest through the trees.

Finally, always guard the integrity of your word. I wrote on this in the July/August 2007 edition of

the *Bar Journal*, but it merits repeating again here. If the integrity of your word is compromised early in your career, then your word will fail you when you most need it—when it's the last thing left on which to hang your hat.

To the veteran lawyers, I'm not going to pretend to be qualified to render any advice. I'll instead share with you two observations I've made during the last 10 years:

First, you have no idea how influential you are on the landscape of a young lawyer's entire career. Second, you have ***no idea*** how influential you are on the landscape of a young lawyer's ***entire*** career.

At the basest of levels, young lawyers are no different than little brothers and sisters starving for role models and mentors. *You are our role models and mentors.* Upon taking your oaths as lawyers, in addition to forfeiting the right to panic you also forfeited the right to disclaim responsibility as role models and mentors to young lawyers. If you wanted to shirk this responsibility, then you should've hung a left on "Professional Athletes and Entertainers Boulevard" when mapping your career paths.

The need for mentoring is readily apparent in the legal community, where lawyers are increasingly commoditized, talent disappears faster than jelly-filleds on Donut Day and the marvels of modern technology come at the price of substantial human detachment. When an opportunity to mentor—*truly mentor*—a young lawyer presents itself, I implore you to seize upon it with the same vigor that drives your practices. I assure you that, 10 years later, the young lawyer you took the time to help will look fondly upon your name. More importantly, that same lawyer will follow your example by sharing your wise advice and thoughtful guidance with yet another generation of lawyers.

How's that for your legacy?

Speaking of legacies, it's time for one more to pass. This month marks the end of my term as chair of the Young Lawyers Section. I spent many of my last 10 years working with this group of some of the finest, most impressive people I've ever had the privilege of leading. I've also had the privilege of writing this article, and receiving feedback—good and bad—from readers. While no words can describe succinctly the last 10 years of my life in the law, two words summarize how I feel heading into the home stretch of this particular lap:

Thank you. ■

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would've, could've

Interestingly, the court also rejected the government's primary argument, based on the decision in *Rudkin* and the proposed regulations, that the fees are deductible only if they could not have been incurred by an individual. Instead, the court adopted a more moderate position in line with the *Mellon Bank* and *Scott* cases. The court held that a statutory analysis of whether investment advisory fees are subject to the 2 percent floor should not be based on whether a particular cost could not have been incurred if the property were held by an individual. The court held that the statutory analysis should turn instead on whether such costs were uncommon or unusual for such a hypothetical individual to incur. The court also supported its interpretation on the basis that an inquiry into whether the expense in question is commonly or customarily incurred outside trusts also respects both prongs of the Section 67 (e) statutory test.

The Conclusion

In conclusion, the court has spoken and made it "clear" that the deduction of investment advisory fees incurred by trusts should, indeed, be subject to the 2 percent floor. Most practitioners, however, would contend that application of the statute is still open to question. Unfortunately, the court itself recognizes that the inquiry into what expenses are commonly deducted by individual taxpayers may not be all that easy. It even waffles on the issue of investment advisory fees, leaving the door open in the event an investment advisor imposes a special or additional charge applicable only to its fiduciary accounts. Additionally, the court recognizes that where an investment objective or balancing of competitive interests is present, investment advisory fees of certain trusts may again be distinctive and not subject to the 2 percent floor. The questions as to deductibility of other expenses and to what extent fees must be unbundled also remain unanswered.

The AICPA and others have asked that the proposed regulations be withdrawn and re-issued since the Supreme Court specifically rejected the interpretation of the statue upon which they are based. The AICPA requested guidance on which costs incurred by an estate or trust are "commonly" or "customarily" incurred by individuals. They also urged the IRS and Treasury to reconsider the proposal to require unbundling of fiduciary fees.

The IRS responded earlier this year by issuing Notice 2008-32, 2008-11 IRB 593 (02/27/2008). The notice offered some limited guidance for practitioners preparing tax returns during the 2008 filing season. It provided that for tax years beginning before 2008, taxpayers are not required to determine the portion of any bundled fees subject to the 2 percent floor under IRC Section 67(a), and may deduct the full amount of the fee without regard to the floor. The notice continued, stating that the IRS expects to issue final regulations that are consistent with the holding in the *Knight* case, and that such regulations will be applied prospectively. Additionally, the regulations are expected to contain safe harbor provisions for allocation of fees and expenses between costs that are subject to the 2 percent floor and those that are not.

So significant questions remain, and one would fully expect that financial services professionals representing trusts will be challenged to develop, offer and price products and services to take advantage of the uncertainties that remain in spite of the decision in the *Knight* case. ■

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