Attorney Spotlight

Meet Our New Associate

Nicole Seckman Jilek has joined the firm as an associate and will focus her practice on litigation.


Nicole Seckman Jilek

Ms. Jilek received her Bachelor of Science degree with distinction in Business Administration from the University of Nebraska-Lincoln in 2004. She was a Regents Scholar, graduated from the Honors Program and attended the Nebraska at Oxford study abroad program. She completed minors in Mathematics, Political Science and Economics. Ms. Jilek received her Juris Doctor from the University of Nebraska College of Law in 2007.

Ms. Jilek is a member of the Nebraska Association of Trial Attorneys, the Omaha Bar Association and the Nebraska State Bar Association. She is also active in the Robert M. Spire American Inns of Court, a group of judges and trial lawyers who meet monthly to promote professionalism, civility and ethics.

Abrahams Kaslow & Cassman LLP Receives Recognition from Chambers USA

Our firm received high rankings in Nebraska for Corporate/Commercial and Real Estate practice areas in Chambers USA 2008. AK&C attorneys Howard J. Kaslow and John W. Herdzina received individual recognition in the areas of Corporate/Commercial and Harvey B. Cooper was recognized for Labor & Employment.

To arrive at the rankings, London-based Chambers & Partners, Legal Publishers conducted more than 10,000 interviews with clients and attorneys across the nation. Chambers ranks firms by state. The qualities on which rankings are assessed include technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other qualities most valued by the client.

We are honored to have received recognition from Chambers. To view the comments about our attorneys visit http://www.chambersandpartners.com.

This newsletter is published by the law firm of Abrahams Kaslow & Cassman LLP to inform our clients and friends about various legal developments and to provide news about our firm. This newsletter is not intended to provide legal advice on specific matters but rather to provide insight into legal topics and issues of current interest. Please consult with legal counsel before taking action on matters covered in this newsletter. If you would like further information or would like to be added to our mailing list, please contact Debbie Watson at 402-392-1250 or email dwatson@akclaw.com.

The Nebraska Rules of Professional Conduct for attorneys require the following statement on newsletters of law firms:

This is an advertisement.

ABRAHAMS
KASLOW &
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ATTORNEYS AT LAW

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AK &C

Legal Perspectives

from Abrahams Kaslow & Cassman LLP

What Happens When You Cannot Handle Your Affairs?

by James A. Tews

People often think of estate planning as merely planning for death taxes and distribution of their assets after death. Those issues of course are very important, but so is planning for the possibility that you someday may not be able to handle your affairs while you are still alive.

When a person cannot handle his or her affairs it may be necessary for the local county court to appoint a Guardian to handle those affairs on behalf of that person. A court-appointed Guardian typically makes health care decisions for the "ward", decides where the ward will live, and handles the ward's other day-to-day affairs. It may also be necessary for the court to appoint a Conservator to handle a ward's assets. In either case, the court has the ability to give the appointed Guardian/Conservator complete authority to handle the ward's affairs. The Guardian/Conservator has a "fiduciary duty" to handle the ward's affairs solely in the ward's best interests and must answer to the court if that duty is violated.

There is a wide range of issues involved when a court appoints a Guardian/Conservator. One of the issues which should be considered is the cost. The cost for legal fees and court costs is usually paid from the ward's assets, and is generally not a major cause for concern unless the appointment is contested. In the event that the appointment is contested, the legal fees and court cost can be quite high. For example, in a recent case an individual sought to have herself appointed as the Guardian and Conservator for her 80-year-old widowed aunt. The aunt had developed diabetes, dementia, depression, and a host of other heath problems that prevented her from handling her affairs. The situation became sticky when another family member felt that she instead should serve in these roles. In the end, before the court decided who should serve in these roles, thousands of dollars had been spent in legal proceedings. Eventually, the parties agreed that a neutral third party should be appointed.

To avoid the need (and cost) for appointing a Guardian and Conservator, an individual should execute a Durable Power of Attorney. In this document, a person, referred to as the "Principal", authorizes an "Agent" to handle some or all of the Principal's affairs. People typically wish that their Agent have a wide range of authority, such as the authority to handle all of their financial affairs (i.e. paying bills, preparing tax returns, selling a house, etc.). It is also common for a person to appoint an Agent to make health care decisions on his or her behalf. For example, if a person is temporarily unconscious as a result of an accident, the physician would need to consult with an individual authorized to decide which medical

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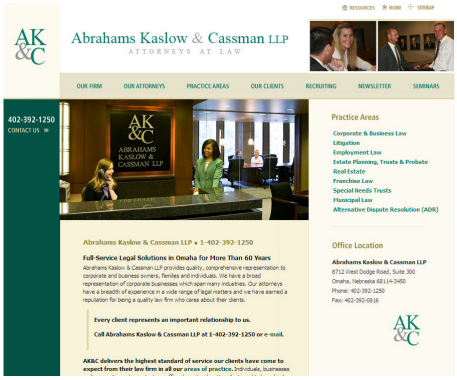

New Website Coming Soon!

Our website is getting a fresh new look. Keep checking our site daily at www.akclaw.com.

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Contact Us!

Let us know what you would like to see in our newsletter. Email your questions or comments to dwatson@akclaw.com.

What Happens When You Cannot Handle Your Affairs (continued from page 1)

treatments should be used for the patient. If the patient had not previously appointed an Agent to make such decisions, it may be necessary for the court to formally appoint a Guardian to do so. In an emergency, medical personnel could make the treatment decision, but there may be disagreements among family members as to what the decision should be if no health care Agent has been appointed.

Durable Powers of Attorney are relatively inexpensive compared to the appointment of a Guardian/Conservator. Additionally, a person can chose his or her Agent, whereas the court will select the individual who serves as the Guardian/Conservator. The authority conferred under a Durable Power of Attorney can be effective immediately when the Principal executes it, while, unless there is an emergency, proceedings to appoint a Guardian/Conservator typically take two to four weeks. As is the case with a Guardian/Conservator, an Agent appointed under a Durable Power of Attorney has a fiduciary duty to handle the Principal's affairs solely in the best interests of the Principal. The Agent may have to answer to a court if that duty is violated.

A Living Will is another document many people execute to communicate their wishes in the event they are unable to do so. The familiarity and use of this document has grown as a result of the Terri Schiavo case from Florida. In that case, a severely brain-damaged Mrs. Schiavo was determined by her doctors to be in a "persistent vegetative state", with no hope of recovery. At issue between her husband and her parents was whether she would have wanted to be kept alive by artificial means in those circumstances. After years of legal battles, the courts ultimately ruled in favor of her husband (her court-appointed Guardian) and ordered her feeding tube be removed, which led to her death shortly afterwards. The notoriety of the Terri Schiavo case has led many people to execute a Living Will, which directs a person's attending physician to withhold or withdraw life-sustaining treatment that is not necessary for comfort or to alleviate pain if he or she lapses into a persistent vegetative state or develops an incurable and irreversible condition and is unable to give his or her own directions.

Please call one of our estate planning attorneys to discuss which option is best for you.

ADA Amendment Act of 2008

On September 25, 2008, President Bush signed into law the ADA Amendments Act of 2008, which becomes effective January 1, 2009. The law amends the ADA in many respects and the changes will likely make it easier for employees to qualify for ADA protections, including reasonable accommodations for disabilities. Although the Act makes it easier for employees to establish that they are disabled, it is the intent of the law to make it easier for employers to determine which employees are entitled to protection under the ADA, rather than having to engage in "extensive analysis" to determine what constitutes a disability.

One significant change will make it more difficult for employers to take the position that an employee does not have a covered disability. A “disability” under the ADA is a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment; or being regarded as having such an impairment. Although the Act does not alter this definition, a lengthy list of major life activities was specifically included in the new law, that includes caring for oneself, performing manual tasks, eating, sleeping, reading, concentrating, thinking, communicating and working.

It is also likely that under the new law conditions that courts had not always found to be disabilities, such as cancer, diabetes, serious heart conditions, and epilepsy will be covered as disabilities. The Act implicitly relaxes the “substantially limits” standard requiring that the term be interpreted consistently with the purpose of the Act.

Overriding a United States Supreme Court decision, the Act prevents courts and employers from considering mitigating measures an employee may be using when determining whether the employee is disabled. The Act, however, permits consideration of the effect of ordinary eyeglasses or contact lenses.

The Act also modifies the "regarded as" standard by holding employers liable if the employee can prove discrimination because of an actual or perceived physical or mental impairment, whether or not the impairment actually limits or is perceived to limit a major life activity. Employees historically had a steeper burden of proving that the employer mistakenly regarded them as having an impairment that substantially limited a major life activity. The Act clarifies, however,

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Employment Update

FMLA Provisions in Employee Handbook may Provide Leave Rights Even if the Employees are not Eligible.

Under the Family and Medical Leave Act (FMLA) an employee is qualified if he or she has worked for at least 1250 hours during the 12-month period preceding the leave of absence, and works in an office that employs at least 50 employees within a 75 mile radius. In July 2008, the Seventh U.S. Circuit Court of Appeals held that an employee can proceed with state-law claims for breach of contract or promissory estoppel based on handbook language granting FMLA-type leave, even though the employee seeking leave was not eligible under the FMLA.

The employee sustained a work-related injury in 2001 and took what he thought was FMLA leave in connection with the injury. The day after beginning his leave, the employee received a letter from his employer that stated the terms of his leave and specifically referenced the FMLA and informed him of his right to reinstatement after leave. The letter tracked language that was set forth in the company's employee handbook regarding employees' entitlement to family and medical leaves. Although the letter and the handbook both included the 1250 hour and 12 month requisites, neither included the requirement that 50 employees must be employed within a 75-mile radius. The employer in fact did not have 50 employees within a 75 mile radius, thus the employee was not eligible for leave under the FMLA.

While on leave, the employer decided to replace the employee. When the employee attempted to return to work, he was denied reinstatement to his prior position, but was offered another position which he refused. The employee filed a lawsuit asserting state law claims as well as a claim under the FMLA. The employer defended the FMLA claim on grounds that the employee was ineligible as he did not work at a location with 50 employees within a 75-mile radius.

The Seventh Circuit did not address the issue of whether the employer could raise the defense of ineligibility under the FMLA. Rather, the court held that the employee could obtain remedies identical to those available in his FMLA claim through the enforcement of contractual rights if the facts supported a finding that the handbook created an enforceable contract. In addition, the employee's promissory estoppel action permitted enforcement of the former employer's promises for FMLA-type leave to the extent the employee reasonably relied upon them.

This case illustrates the importance of ensuring that employee handbooks and policies are properly drafted and do not give employees greater rights than they are entitled to under the FMLA when the employer does not intend such a result.

To discuss your employee handbook concerns, call one of our employment law attorneys at 392-1250.

Minimum Wage Change

Effective July 24, 2008, the minimum wage under the Fair Labor Standards Act became $6.55 per hour, up from $5.85. This increase was the second step in the law passed last year and the rate will rise again on July 24, 2009 to $7.25 per hour. Employers should ensure they are in compliance with the new rate change and its impact on employees pay. For example, tipped employees or employees earning commissions must still earn more in an overtime workweek than 1.5 times the minimum wage.

ADA Amendment (continued from page 2.)

that a "regarded as" claim cannot be based on transitory and minor impairments where the impairment is expected to last less than six months. Employers are also not required to provide a reasonable accommodation to individuals who are regarded as disabled, an issue over which federal circuit courts of appeals were split.

For many employers, the changes to the ADA will likely shift the focus away from determining whether an employee has a "disability" to whether the employer is in compliance with the law by providing, among other things, reasonable accommodations, or establishing which job activities are "essential job functions" or whether an "undue hardship" excuses the employer from providing an accommodation.

In light of the January 1, 2009 effective date, employers may want to review their ADA policies to ensure the procedures and definitions meet ADA requirements. If you have any questions about the ADA, the ADAAA, or how to address reasonable accommodation requests, please contact an AK&C attorney.

Important Notice

The Internal Revenue Service has announced that the annual exclusion for federal gift tax purposes will increase to $13,000 for 2009 (from $12,000 in 2008). Such increase will permit a donor to make qualifying gifts of up to $13,000 per person in 2009 to an unlimited number of persons without incurring any gift tax. Spouses will be able to combine their annual exclusion and make qualifying gifts of up to $26,000 per person in 2009 without incurring any gift tax. Exclusions from gift tax for qualifying gifts for tuition and medical expenses are available in addition to the annual exclusion gifts. These exclusions can be an important part of an estate plan and, when used annually, can achieve significant potential federal estate tax savings. We will be pleased to consult with you concerning the many ways, including the proper use of trusts, to utilize your gift tax exclusion opportunities most effectively.