



Dear Friends,

We are looking forward to an early Spring!! Now that is something to get excited about in our corner of the world. The flowers and foliage of Spring are beautiful here in West Virginia and especially Huntington, and remind us of the many new opportunities for growth that are all around us.

New clients, new matters, new friends and new attorneys have made 2008 in a word (or two) – very exciting!! Low interest rates mean loans and new construction for many of our clients. Bo Sweeney and Gary Matthews, two of our attorneys with construction litigation experience, provide a brief update on Form Construction Project Contracts. They led a statewide seminar on this topic several months ago and are happy to share their insights with you.

Tom Scarr, who heads our litigation group, and Catherine Johnston, one of our legal assistants, have joined to give us the latest on electronic discovery. Litigation nearly always is expensive, and data storage for our clients is a key part of their business. Who doesn't have data stored on a computer in some form or fashion? When litigation and data storage mix, the courts have a lot to say about it. Tom and Catherine's article is a must read.

Finally, we all have said at one time or another, "That will never happen to me!" Nick Mayo, one of our estate lawyers, encourages us to do some planning and give our families a very special and valuable gift -- our wishes.

What else would you like to see in our newsletter? Give me a call or send me a note. We would enjoy hearing from you - and wish you an early, and exciting, Spring.



Warmly,

A handwritten signature in black ink that reads "Barry Taylor".

Barry Taylor
Chief Executive Officer



E-Discovery Requirements and Your Business

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According to several business surveys across the country, many companies are not in a position to comply with the Federal Court's electronic discovery requirements of the Federal Rules of Civil Procedure (FRCP) that went into effect December 1, 2006. The financial exposure to your business and your attorneys as a result of being unprepared could be devastating. A New York federal judge levied a 1.25 million dollar sanction against an insurance company and two law firms relating to electronic information that was deleted and hard copy material that was not produced in compliance with the FRCP in the In Re September 11th Liability Insurance Coverage cases.

Recently, the FRCP regarding electronic discovery were amended significantly to address the ever-evolving technology in today's business world. The FRCP dictate the way that information must be managed during litigation; this makes the cooperation of information technology departments, corporate executives and managers, and legal counsel necessary to both minimize risk and prepare for litigation.

The task of evaluating and preparing for production of all of this information to ensure compliance with the FRCP and the time constraints imposed by the Court demands a proactive approach. Imagine, if you will, that each of your employees exchanged an average of 75 e-mails per day with customers and co-workers. If your company had 75 employees, there would be approximately 2 million e-mails per year that are subject to discovery! Additionally, e-discovery would include any other electronically stored information that each of those 75 people produced every day.

What Are The FRCP Regarding E-Discovery?

The FRCP is the set of guidelines that are used by the Federal Court system to govern its procedures in civil cases. Many states, including West Virginia, Ohio and Kentucky, have modeled their own rules of civil procedure after the FRCP. Not long ago, the FRCP's definition of electronic items which may be subject to discovery was broadened and now includes items such as e-mail, voicemail, instant messages, databases, and other forms of electronically stored information. Ten or fifteen years ago, most of this type of information was in paper form – from message notes taken by your secretary to paper invoices kept in file cabinets – and was easily accessible. Therefore, it could be easily identified and/or produced to opposing counsel when necessary. That is no longer the case.

Court rules now are long and complex regarding e-discovery. In a nutshell, the FRCP state that within only a few months of the start of the lawsuit, the parties must meet and discuss a discovery plan and evaluate the protection and production of electronic data. Soon after that conference, all parties must identify all sources of electronic information that may be relevant. Any source(s) of information that a party chooses to exclude due to burden or cost must be identified for the opposing party. Then, the parties must meet again to discuss the form the electronic data will be produced and means by which information will be preserved.

Taking A Proactive Approach To E-Discovery

What can your company do to prepare for a lawsuit involving electronically stored information? A team consisting of IT operations, human resources, record managers, corporate executives and legal counsel should be assembled to create or update a document/record retention policy and schedule. Your company's litigation readiness strategies and operational business needs should be reflected in up-to-date policies and procedures for document/record retention and destruction that govern both hard copy and electronically stored documents and information.

Once the team has updated or created the retention policy and schedule, the next step is to create or update the litigation hold policy and procedures. The litigation hold policy ensures that your organization has the proper policies and procedures in place to quickly and reliably implement holds of electronic data ensuring that the data will not be destroyed due to a routine or automated retention/deletion process. The violation behind the 1.25 million dollar sanction referred to at the beginning of this article involved litigation hold policies and procedures.

Your company also should implement appropriate technology solutions for e-mail and file system archiving. Effective archiving can reduce the need to search for e-mail messages on backup tapes and eliminate duplicate documents. Archiving solutions also may reduce storage costs for unstructured data, such as audio files, by keeping only the files that are necessary. In addition, archiving solutions can provide automatic capture of e-mail messages and attachments which may reduce your company's dependence on human behavior to maintain a complete business record.

Finally, the team must put into action an employee training and audit program on all new policies and procedures. Because the FRCP are unclear on exactly what is considered reasonably accessible data, a company's ability to demonstrate its document/record retention policy, as well as consistent, repetitive and verifiable enforcement of it, will assist your company in preparing its case and avoiding discovery sanctions.

The Benefits Of Being Prepared

Becoming proactive in anticipation of e-discovery requests is like buying an insurance policy; you are preparing and protecting your company for any adversity. If you are prepared, answering the request is easier, cost-effective and repeatable. By taking control of the information, instead of merely reacting to each discovery request individually, you become more aware of your company's information landscape, of processes that it can streamline and of information that can be preserved and repeated from one discovery request to the next.

If yours is a company that does not have its house of electronic data storage and retention policies and procedures in order regarding e-discovery demands, now is the time to work with counsel who are skilled in this area.



Update on Form Construction Project Contracts

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Last fall, the American Institute of Architects (AIA) began publishing its new set of form contracts with revisions based upon several years of comments from design professionals and others in the construction industry. The AIA, however, no longer is the only organization publishing such forms. The Associated General Contractors of America (AGC), the Engineers Joint Contract Documents Committee (EJCDC) and the Construction Management Association of America (CMAA) are but three of the other groups that now publish form contracts. An understanding of the types of form contracts available from these organizations is necessary for determining which and what type is most appropriate for your construction project. Below you will find a sampling of the organizations that publish construction contracts.

The AIA is the most well-known organization that publishes form contracts. It published its first form contract more than 100 years ago and now publishes more than 100 different contracts and forms. The AIA separates its documents into families and series based on project type or project delivery method. The AIA documents are not state-specific and can be used nationwide. A large body of case law interprets the various provisions of the AIA documents and, as a result, the use of AIA documents often can provide a degree of security based upon the foreseeability of an outcome if a dispute arises. This element of the AIA documents is very important because construction projects generally are conducted without the benefit of state statutes.

The AIA A201 is the primary document in the AIA's set and it is sometimes referred to as the "keystone" document. The AIA solicits opinions and comments from a wide variety of parties involved in construction projects including owners, architects, engineers, contractors, subcontractors, lawyers, the surety and insurance industries and others. Despite these opinions, certain industries claim that the AIA documents are too centered on the architect's role in a construction project and provide too much authority to the architect in many circumstances.

The AGC is the oldest and largest national construction trade association in the United States. Its members are involved in commercial construction for both public and private entities. The AGC publishes more than 70 different forms and contracts that are similar to the AIA family of documents. Its set of form contracts is called "ConsensusDOCS." In an effort to differentiate its ConsensusDOCS from the AIA family of documents, participants from all aspects of the construction industry, including approximately 21 organizations representing owners, contractors, subcontractors and the surety and bond industries, were involved in their drafting. In prior years, the AGC and AIA had published some joint documents. However, last fall, a press release from the AGC stated its Board of Directors

unanimously had voted against endorsement of the AIA's A201 document because the Board believed that the A201 shifted too much risk to general contractors and others not in the design profession. As a result, the AIA and AGC probably will not publish joint documents in the future.

The EJCDC has been involved in the development and endorsement of contract documents for more than 30 years. While several organizations participate in the drafting of EJCDC documents, the committee is a joint venture comprised of the AGC and three other professional groups engaged in the practice of providing engineering and construction services for constructed projects. The EJCDC documents have been drafted reflecting "the experience and knowledge of the many engineers, owners, contractors, and other construction-related professionals who comprise the committee" and with the assistance of legal counsel. These documents can be used in a variety of situations, but they really are geared toward engineering projects, such as water or waste projects.

The CMAA is an organization that was started approximately 25 years ago. Its primary focus involves construction management-related issues. A typical situation involving a construction manager may concern a project with more than one general contractor and may involve coordination and scheduling among them to complete the project. Therefore, the CMAA's form contracts, which in theory could be used on small projects, are better suited to large, sophisticated projects or heavy construction.

In addition to these organizations, several private vendors sell form contract software via the internet and other sources. Many of these vendors direct their materials toward smaller general contractors performing residential or light commercial construction. These documents may be acceptable depending upon the size and scope of the project. However, they do not have the benefit of the legal history and jurisprudence of the AIA behind them. Therefore, in that regard, they are less secure and less desirable if a dispute should arise.

When deciding what type of contract is necessary for your construction project, several issues should be considered. Among others, these include the size and scope of the project, the number of parties involved (i.e., architects, construction managers, general contractors, subcontractors, etc.), the cost and the likelihood for disputes. Take all of these thoughts into account in your contract(s) to ensure that your project is completed on time, on budget and with a mechanism to address disputes.

For more information regarding construction contracts or assistance with other construction contract or litigation questions, feel free to contact the attorneys at Jenkins Fenstermaker, PLLC.



“That will never happen to me.”

Nicholas E. Mayo

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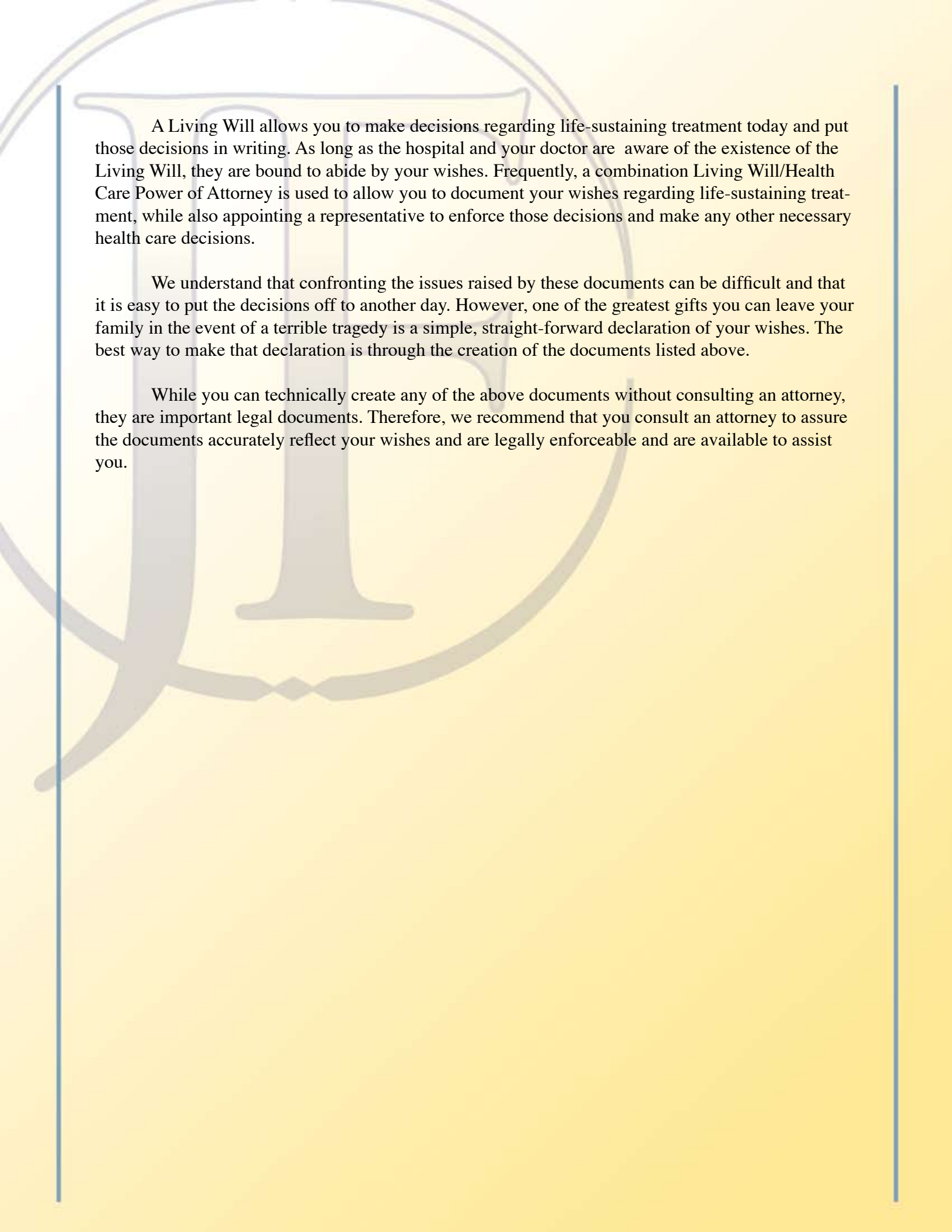
As we watch the local news or read the newspaper, we learn about families destroyed by tragedy. We sympathize with these families but think, “That will never happen to me.” This seems especially true for young people, like myself, who are just beginning their careers, starting new families and generally believe they are invincible.

On the advice of others, we usually acknowledge our mortality to some extent by purchasing life and disability insurance and engaging financial planners to assist in providing for our families in the event of the “worst-case scenario.” However, insurance and financial planning are only two pieces of the puzzle. The completion of a Will, a Durable Power of Attorney, a Medical Power of Attorney and a Living Will provide you with the other pieces necessary to plan for the future and the possibility of the “worst-case scenario.”

When people die without a Will, referred to as dying “intestate,” the disposition of their assets is left entirely up to the laws of the state in which they reside. These state laws provide for the passage of property but probably will not align with your wishes and may not provide the level of security that you want to give your family. A Will may also be used to make general gifts of property, appoint a legal guardian for your children, make specific gifts to individuals or charities, create trusts to help your children manage the funds they receive or even to create special needs trusts that allow disabled children to continue receiving aid from other sources like Medicare. Most importantly, a Will can minimize disputes over contested property and provide you with the peace of mind that comes from knowing your wishes will be followed after your death.

While a Will documents the decisions you have made for events after your death, a Power of Attorney allows you to appoint another person to make decisions on your behalf while you are still alive. Two general types of Power of Attorney are the Durable Power of Attorney and the Medical Power of Attorney. A Durable Power of Attorney allows you to appoint another person to make financial decisions on your behalf. The term “durable” derives from the fact that the power of attorney declaration is still valid even if you are judged incompetent or become incapacitated. On the other hand, you can also create a “springing” Durable Power of Attorney that only becomes valid when you are judged incompetent or become incapacitated.

A Medical Power of Attorney is a little different as it allows you to appoint another individual to make health care decisions on your behalf. The most common use of the Medical Power of Attorney is appointing a representative to make decisions about life-sustaining treatment if you become unable to do so. The Medical Power of Attorney also gives your representative the authority to make other decisions, like giving or withholding consent to treatment, if you become incapacitated.



A Living Will allows you to make decisions regarding life-sustaining treatment today and put those decisions in writing. As long as the hospital and your doctor are aware of the existence of the Living Will, they are bound to abide by your wishes. Frequently, a combination Living Will/Health Care Power of Attorney is used to allow you to document your wishes regarding life-sustaining treatment, while also appointing a representative to enforce those decisions and make any other necessary health care decisions.

We understand that confronting the issues raised by these documents can be difficult and that it is easy to put the decisions off to another day. However, one of the greatest gifts you can leave your family in the event of a terrible tragedy is a simple, straight-forward declaration of your wishes. The best way to make that declaration is through the creation of the documents listed above.

While you can technically create any of the above documents without consulting an attorney, they are important legal documents. Therefore, we recommend that you consult an attorney to assure the documents accurately reflect your wishes and are legally enforceable and are available to assist you.