VALLEY LAWYER

OCTOBER 2012 • $4

A Publication of the San Fernando Valley Bar Association

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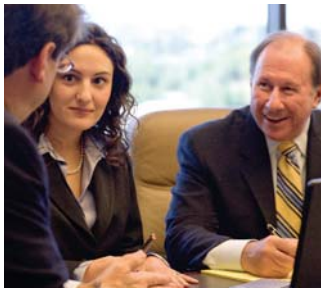

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Editorial Correction: *In the September 2012 issue of Valley Lawyer, the opening paragraphs of the MCLE article entitled, "Representing Artists in California," were edited by Valley Lawyer such that they inaccurately reflected the law. We apologize to the author, Bonnie Chermak, and our members for this error. The corrected version of the article as originally written by Ms. Chermak can be viewed on the SFVBA website. Ms. Chermak's practice profile and contact information can be found at www.LAEntertainmentLawyer.com.*

COLUMNS

DEPARTMENTS

VALLEY LAWYER

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Valley Lawyer is published 11 times a year. Articles, announcements, and advertisements are due by the first day of the month prior to the publication date. The articles in Valley Lawyer are written for general interest and are not meant to be relied upon as a substitute for independent research and independent verification of accuracy.

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The Year Ahead

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SFVBA'S YEAR STARTS OCTOBER 1. THE TERM of our officers and trustees begins on that day. The October 1 fiscal year was chosen long ago, tracking the term of the U.S. Supreme Court. Our Bar Association was founded in 1926. As a little trivia, in this fiscal year, that will be "four score and seven years ago." Here are some goals and hopes for the year ahead.

We are a trade association for our members. Let's do more for ourselves. Can we help you, your practice or lawyers in general by starting a new law section in your field? Speaking out as an association on a law practice issue? Asking our courts to adjust procedures? Honoring you or a colleague for an achievement? Something else? Please make our Bar Association benefit you! You are welcome to tell me, any officer, trustee or staff member how you want SFVBA to benefit you and our other members.

In the current economy and job market, we will seek to start an internship program. This will let students and recent grads volunteer to gain experience in law offices. You will like having enthusiastic volunteer interns in your office who are anxious to assist you and interested in learning how a law office works. This program will also provide you an answer and a way to help when clients, relatives and friends ask your help in finding a job for their children or relatives.

Our Bar Association turns lawyers into legal community leaders. We'll provide you opportunities to publish an article in *Valley Lawyer* magazine, meet judges, speak at our sections and serve in leadership capacities in our legal community.

We have already completed our move to a more central office location in Tarzana. Please look for an occasion to visit us at 5567 Reseda Blvd, south of the 101 Freeway (the Wasserman Comden building). Access is easy and parking is free for Bar members.

Valley lawyers can be proud of your devotion to clients, legal and advocacy skills, work ethic, zealousness combined with civility, collegiality, overall professionalism and so many more ways in which you deliver quality service to clients and the community. SFVBA will continue to encourage high standards in the practice of law.

We are fortunate to have a Valley bankruptcy court, Superior Courts in San Fernando, Chatsworth and Van Nuys, and in the wider San Fernando Valley in Burbank and Glendale. In these difficult times, we are proud of the service offered by the judges in these courts—their high standards of fairness, ethics and integrity. Our Bar will look for more ways to assist our courts in their functions, and will continue to praise our judges for above-and-beyond efforts to dispense justice in difficult times.

At the same time, we will ask our federal and state court judges to recognize the difficulties clients and lawyers are experiencing. A few local federal and state court judges (fortunately, it is a very few, but there are some) can find ways to take a pause and be a bit more thoughtful of the crushing burdens confronting litigants and advocates before them. Courts too are under pressure, but it still might be okay to soften that harsh criticism, defer an unnecessary sanction, or grant that first extension to a litigant or lawyer who also is bearing the weight and anxieties of difficult cases, emotional and financial challenges, time limits and other responsibilities.

There are lots of practice issues of interest to the community of lawyers. How to dispense more justice with fewer resources? How to ease the high stress of law practice faced by our members? Whether lawyers can partner with non-lawyers? Whether folks who are not permitted to work in the United States, may or may not be admitted to represent and advise others as California lawyers? Whether our society needs more, or fewer lawyers and law schools? These are examples. Our Board of Trustees will consider some of these questions and seek to reach conclusions that account for the needs and views of our broad membership.

We will seek to be active, and intellectual, to benefit ourselves, and the community. Our Bar also has plans to help ease some burdens, by arranging some socializing and fun too. And there's lots of room at the SFVBA for additional goals and hopes you'd like to add. Please let me or any of our Bar Leaders know. SFVBA will be an ever-better, wonderful organization for you, our members.

Calendar

Probate & Estate Planning Section
End-of-Life Decisions in Regard to Your Clients

OCTOBER 9
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
ENCINO

Susan DiPietro will outline the issues in regard to end-of-life decisions and discuss how this affects you and your clients.

MEMBERS	NON-MEMBERS
$35 prepaid	$45 prepaid
$45 at the door	$55 at the door
1 MCLE HOUR	

Taxation Law Section
Criminal Tax Fraud

OCTOBER 16
12:00 NOON
SFVBA CONFERENCE ROOM

Attorney Mark Pastor will discuss criminal tax fraud, a subject of interest not only to tax attorneys but criminal, business and family lawyers as well.

MEMBERS	NON-MEMBERS
$30 prepaid	$40 prepaid
$40 at the door	$50 at the door
1 MCLE HOUR	

Workers' Compensation Section
California Workers' Compensation Reform: A Summary of SB 863

OCTOBER 17
12:00 NOON
MONTEREY AT ENCINO RESTAURANT
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Former Judge Raymond Correio will discuss the bill's new Independent Medical Review dispute resolution process and the secondary review process governing billing disputes relating to medical-legal expenses.

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1 MCLE HOUR	

Family Law Section
E-Discovery

OCTOBER 22
5:30 PM
MONTEREY AT ENCINO RESTAURANT
ENCINO

Sherry Katz of Eluma Discovery will discuss how to obtain electronic data and how best to use it.

MEMBERS	NON-MEMBERS
$45 prepaid	$55 prepaid
$55 at the door	$65 at the door
1 MCLE HOUR	

Bankruptcy Law Section
Woodland Hills Judges' Opinions

OCTOBER 25
12:00 NOON
SFVBA CONFERENCE ROOM

Attorneys Lewis Landau, David Seror and Steven Fox will discuss the recent significant opinions of the Woodland Hills bankruptcy judges.

MEMBERS	NON-MEMBERS
$30 prepaid	$40 prepaid
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1 MCLE HOUR	

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider. To register for an event listed on this page, please contact Linda Temkin at (818) 227-0490, ext. 105 or events@sfvba.org.

SFVBA Partners with Atkinson-Baker

ELIZABETH POST
Executive Director
epost@sfvba.org

THE SAN FERNANDO Valley Bar Association recently kicked off an Affinity Partnership program to provide comprehensive marketing opportunities for legal support companies to reach out to SFVBA members.

The new Program is a win-win-win opportunity for members, the partners and the Bar Association: members receive discounts on much-needed legal services and will be able to attend networking events and partner-sponsored seminars for free; the Bar has a new revenue source to enable the Association to provide new services, as well as already popular member benefits like Fastcase, subsidized continuing legal education and an expanded *Valley Lawyer*; and the affinity partners have access to an all-inclusive marketing plan–that includes *Valley Lawyer*, mailings, seminars, events–to reach SFVBA's 2,000 members throughout the year.

The San Fernando Valley Bar Association is pleased to announce that Atkinson-Baker is the SFVBA's Official Court Reporter Partner and exclusive Platinum Sponsor. Founded in 1987, Glendale-based Atkinson-Baker is dedicated to providing the most efficient and comprehensive service for all court reporting needs nationwide.

Atkinson-Baker is a family- and woman-owned company that has expanded steadily over the past two decades to become one of the largest, privately owned court reporting agencies in the country. In 2012, Atkinson-Baker made Inc.'s list of 5000 fastest growing companies for the sixth time.

"We utilize our experience in the court reporting industry, our skill and the latest technology to achieve the highest quality litigation support and provide the finest court reporters nationwide," says Atkinson-Baker Client Services Director Andrea Gale.

Atkinson-Baker offers fast transcript turnaround time; free online repository of all completed deposition transcripts and exhibits; a searchable CD in the back of each transcript; and the Mobile Transcript app for transcripts formatted for smart phones and iPads. As part of the partnership, Atkinson-Baker will be offering exclusive discounts and services to SFVBA members. The rate sheet for Los Angeles County is available on the SFVBA website and at the Bar's offices.

> The San Fernando Valley Bar Association is pleased to announce that Atkinson-Baker is the SFVBA's Official Court Reporter Partner and exclusive Platinum Sponsor."

"With the Los Angeles Superior Court no longer providing court reporters for civil trials, I believed it was very important for the Bar Association to partner with a court reporting service as our first affinity sponsor," said Immediate Past President Alan J. Sedley, who was influential in bringing Atkinson-Baker aboard.

"With today's court reporting industry being as competitive as it is, there were a number of firms that were interested," continued Sedley. "Executive Director Liz Post and I felt it was important to partner with a Valley-based court reporting firm which our members already knew and trusted. Atkinson-Baker was our first choice."

The Bar is meeting with other potential partners about offering SFVBA members a variety of legal services. The Bar-wide sponsorships start at $3,000 for the entry-level Bronze Sponsorship, up to $25,000 for the exclusive Platinum Sponsorship. Interested vendors and members should contact Liz Post or Alan Sedley to obtain the details of the sponsorship packages.

By Client Communications Committee

DOs and DON'Ts of Estate Planning

The SFVBA established the Client Communications Committee to address the number one reason for client discontent—need for better communication—and reduce negative interactions with the State Bar. The Committee, a volunteer group of a dozen veteran practitioners in wide-ranging fields of law, answers written questions from attorney members regarding problems they observed or dealt with that may have been avoided by better attorney-client communication. Responses are published anonymously in *Valley Lawyer*.

THE CLIENT COMMUNICATIONS COMMITTEE, made up of long-term specialized stalwarts, has been responsible for the anonymous responses to "Dear Counsel" inquiries dealing with client communications. The stalwarts are ready to pass the mantle to motivated, ambitious attorneys who have not been out of law school all that long. Qualified applicants, upon acceptance, will receive bylines and full credit for their replies and articles. The stalwarts will continue to be available for their consultations, questions, inquiries or just plain mentoring in this prestigious undertaking. If interested, please contact Client Communications Committee Chair Phil Feldman at (818) 986-9890. Submitting a candid of interest, a brief biography of professional background and current career expectations are the preferred submissions materials.

Now onto this month's topic of DOs and DON'Ts of estate planning. Below is a detailed outline of what to avoid and things to accomplish when dealing with a client on wills or trust.

DON'Ts for Clients Seeking a Will, Trust or Estate Plan

- **DON'T** confuse "the client" with anyone else in the universe. If a competent client brings friends or relatives to first meeting as translators, unless you have your own, refer them to those who do. If a client brings friends or relatives as aids, amateur counsel etc., waiver or lawyer-client privilege can come back to haunt them and you. A client "assistant" reduces the rapport and confidence needed for representation. It is generally best to exclude them unless they are accountants, brokers or agents of client. [Evidence Code §952, 953, 954] If competent clients are married to each other, marital privilege is not as good as lawyer-client's. [EC§ 980, but see §970] There are two issues whenever there are two clients: (1) inadequate attention to confidentiality [B&P §6068 (1)] and (2) inadequate attention to loyalty [*Flatt v. Superior Court* (1994) 9 Cal. 4th 275, 282]

- **DON'T** assume any two persons do not create potential conflicts of interest. Spouses may be common interest partners today, but what about tomorrow? Dissolution? Dispute? Death? Poorly expressed candor can scare them away, but inadequate candor can keep your E&O carrier busy later. The era of the male chauvinist breadwinner is over. They are two distinct clients with divergent goals, interests, beneficiaries.

- **DON'T** assume that all potential conflicts of interest are waivable, or that an appropriate waiver can foresee all potential conflicts downstream, or that a foolproof or formbook waiver is ever "fool proof."

- **DON'T** forget that actual conflicts are seldom ever waivable, and that an independent counsel is sometimes mandatory.

- **DON'T** lose sight of empirical truisms: siblings as well as half siblings with a different parent are the customary and usual disputants downstream.

- **DON'T** make unrealistic promises about tax avoidance and tax savings; or about your own knowledge, skill and experience; or about when you'll complete your assignment; or about anything, ever!

- **DON'T** fail to return client communications promptly and candidly.

- **DON'T** assume the law as it is has no minority or reasonably foreseeable divergent view, even if the formbook is respected or even if the published decision, based on a lawyer who previously did it right or wrong, was affirmed or reversed. [see *Smith v Lewis* on uncertainty in law]

- **DON'T** be a jack of all trades, even if you're a CPA, real estate broker, investment counselor, divorce lawyer, psychiatrist, professor, ordained religious professional. The client seeks your specialty in wills, trusts and estate planning.

DOs for Clients Seeking a Will, Trust or Estate Plan

- **DO** document your scope of engagement in an express, fully executed retainer [B&P §6148] and as narrowly as you can! [ABA Rule of Professional Conduct 1.2, comments 6,7]

- **DO** keep client informed about all reasonable alternatives, sufficiently for client to make informed decisions, timely enough to enable client to do so, and advising them of their right to get a second opinion, of pertinent timetables, and of your fees and costs.

- **DO** be wary of caretakers, potential caretaker wannabes, aids, maids, live-ins, fiancés, neighbors, any relative, but particularly potential heirs and beneficiaries. Do not assume anyone is legally competent! Do not assume anyone is legally incompetent! Do not assume anyone is inherently evil! Do not assume anyone is inherently benevolent! Do not generally assume, anything ever. Instead investigate and explore.

- **DO** be a counselor, advisor and candidly tell the client in an appropriate manner that there may be alternatives, less disadvantages and more benefits to some of them in spite of the client's initial desires and wish lists. Do remind clients of all the other professional specialties whose skills may be relevant to their will, trust or estate plan—accountant, real estate broker, investment counselor, divorce lawyer, psychiatrist, professor or ordained religious professional.

- **DO** be very cautious of any legal business marketing plan which involves other professionals on a "one hand washes the other basis," whether joint presentations, seminars or dinners, and particularly if they pick up the tab! The above caveat regarding malpractice and State Bar discipline avoidance tends to be more relevant to this specialty of estate planning that any other legal specialty.

SFVBA Client Communications Committee accepts written questions, which may be submitted to epost@sfvba.org or SFVBA Client Communications Committee, 5567 Reseda Boulevard, Suite 200, Tarzana, CA 91356. The opinions of the Committee are those of its members and not those of the Association.

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Overview of International Estate Planning

Robert F. Klueger

ESTATE PLANNING IS OFTEN difficult enough when the client was born, resides and owns property in Tarzana. It can be infinitely more difficult if the client was born and/or resides and/or owns property in Tanzania. If the client contemplates relocating, either permanently or temporarily, from Tanzania to Tarzana, there are opportunities to be had, and pitfalls to be avoided—before the client's tax status changes. This article explores the differences in the ways in which U.S. citizens, U.S. resident aliens (RAs) and non-resident aliens (NRAs) are subject to U.S. income tax and estate tax, and the estate tax planning opportunities for NRAs.

Taxation of U.S. Citizens, RAs and NRAs

A U.S. citizen and a RA are subject to exactly the same rules of income taxation. Both are taxed on their worldwide income at graduated rates, regardless of where the income is earned. For this purpose, a U.S. citizen is either an individual or a corporation chartered by one of the 50 states.

Example 1
XYZ Corporation is a California corporation. All of its shareholders are foreign nationals. It owns no property in the United States and conducts no business within the U.S. It is subject to U.S. federal income taxes on all of its worldwide net income.

This result may be modified or nullified by a treaty between the United States and the country in which XYZ Corp conducts business.[1] But in the absence of a treaty override, citizens and RAs have the same tax code: any deduction, credit or exemption for which a citizen qualifies will be the same for a RA.

NRAs, however, are subject to a completely different income tax regime, one that often appears byzantine in its complexity. There is a reason for the complexity: the Internal Revenue Code seeks to achieve two often contradictory goals. On the one hand, the Code seeks to prevent U.S. taxpayers from transferring their business operations to offshore tax havens, thus avoiding all U.S. taxation. On the other hand, the Code seeks to prevent legitimate international business from being taxed twice, once in the United States and again in a foreign country. The attempt to assure that legitimate income is taxed only once is the source of the complexity.

An NRA is subject to U.S. income taxation only on the income that is effectively connected with a U.S. trade or business. To the extent that a NRA individual or foreign entity has effectively connected income (ECI), the ECI qualifies for the same deductions and credits and is taxed at the same graduated rates as RAs and U.S. citizens.[2]

Example 2
ABC Corp. is a German corporation that manufactures and sells auto parts worldwide. ABC is subject to U.S. income taxation on the net income from its U.S. operations, at U.S. corporate rates.

If an NRA receives any income from a U.S. source that is "fixed or determinable, annual or periodic" (FDAP), the FDAP is subject to tax at a flat 30% rate. Moreover, the FDAP is taxed on the gross amount; the taxpayer is permitted no deductions associated with earning the income. FDAP is a misnomer, in that it includes almost any income that an NRA may earn from U.S. sources, such as rents, royalties, dividends and wages that is not ECI from a U.S. trade or business.[3] What is worse, the payor of the FDAP is required to withhold the tax, requiring the NRA to file a U.S. income tax return if the NRA believes the payor overwithheld.[4]

Example 3
Mr. Brown, a citizen of the United Kingdom, is a shareholder in ABC Corp., a California corporation. ABC Corp. pays a dividend to Brown. He must pay U.S. income tax at a 30% rate on the dividend. ABC Corp. must withhold the 30% before making the distribution of the dividend.

A corporation engaged in a U.S. trade or business is subject to income taxation on the ECI from its U.S.

operations. When it distributes its profits to NRAs as FDAP, the income is effectively subject to a second round of taxation. The result is that corporations with NRA shareholders are in the same position as any other C Corporation. A corporation with an NRA shareholder cannot qualify as an S corporation.[5]

Exclusions from Income Taxation

There are, however, a number of substantial exclusions from income taxation that are available only to NRAs. NRA individuals are exempt from tax on most capital gains. The only exception is if, during the year of sale, the NRA is present in the United States for 183 days or more.[6]

Example 4
Mr. Wong, a Hong Kong citizen, invests in Homeco, a California corporation. When Wong sells his Homeco shares at a gain, he is exempt from capital gains tax.

The notable exception to this rule involves the sale of U.S.-situs real estate. Pursuant to the Foreign Investors in Real Property Tax Act (FIRPTA), when an NRA or a foreign entity holds U.S. real estate, it is deemed to be engaged in a U.S. trade or business, even if the real estate is a residence, and taxed upon sale.[7] Moreover, if more than 50% of a domestic corporation's assets consist of domestic real estate, the domestic corporation is deemed to be a "U.S. Real Property Holding Corporation," and the sale of its stock by an NRA is subject to tax.[8] A portion of the sales proceeds must be withheld by the purchaser and paid over to the IRS.[9]

Example 5
Houseco is a California corporation. Its only assets are two residences located in Los Angeles. Houseco's sole shareholder is Abel, a citizen and resident of France. The sale by Abel of his shares in Houseco is taxable and the proceeds subject to withholding.

NRAs are exempt from tax on most forms of interest income. An NRA who earns interest income from a U.S. bank is not subject to tax on the interest earned. Similarly, all income earned on "portfolio" debt is not subject to tax. Generally, portfolio debt is debt that is in registered (as opposed to bearer) form, and which on the face of the debt instrument cannot be paid to a U.S. person.[10]

Estate and Gift Tax

Just as the Code makes no income tax distinction between citizens and RAs, there is almost no distinction between citizens and RAs with respect to the taxation of estates and gifts. The principal distinction involves the eligibility for the unlimited marital deduction if the surviving spouse is not a U.S. citizen.[11]

The estate and gift tax differences between RAs and NRAs, however, are huge. U.S. citizen and RA decedents are subject to estate tax on all of their assets, wherever situated.[12] NRAs are subject to estate tax only on the date-of-death value of their U.S.-situs assets.[13]

Example 6
Mr. Schmidt is a citizen and resident of Austria. He has never set foot in the United States. He did, however, take title to a residence in Los Angeles when his children attended UCLA. Upon his death, Schmidt is subject to U.S. estate taxes on the date of death value of the residence.

There is no doubt that a residence situated in Los Angeles is U.S-situs property. The shares of a domestic corporation are U.S.-situs property, as are U.S. municipal bonds and U.S. treasuries, even if the certificates are not physically present in the United States.[14] Although the issue is not free from doubt, it would appear that an NRA's shares of a foreign corporation are not subject to U.S. estate taxes. U.S. bank deposits are subject to estate taxes, even if the bank is a U.S. branch of a foreign bank. The proceeds of life insurance on the death of an NRA are not U.S.-situs property.[15] The Code provides no guidance as to the situs of partnership interests. This fact provides the basis for substantial estate tax planning by NRAs.

Another significant distinction between U.S. citizens/RAs and NRAs is in the exemptions allowed in computing the tax liability. Every U.S. citizen or RA who dies in 2012 is given an exemption equivalent to $5 million of assets; an NRA is given an exemption equivalent of $60,000.[16] As a result, the estates of some decedents are better off arguing that the decedent was a U.S. resident.

Example 7
Mrs. Alfieri was a citizen of Italy who died in 2011. There is some doubt as to whether she was a RA or an NRA for estate tax purposes. She owned a home in Los Angeles that had a date-of-death value of $2,000,000. If she was a U.S. resident, she was liable for no U.S. estate tax. If she was a NRA, her estate tax liability would be $679,000.

The most significant distinction in the estate taxation of citizens, RAs and NRAs is that the unlimited marital deduction is available if the surviving spouse is a citizen, but not if the surviving spouse is a RA or NRA, unless the transfer to the surviving spouse is by means of a Qualified Domestic Trust (QDOT). The rationale for this unique distinction is that Congress feared that if the estate of the first spouse to die qualified for the marital deduction and the surviving spouse was not a U.S. citizen, the widow/widower might relocate back to his or her home country, depriving the Treasury of estate taxes on both deaths. A QDOT mandates the appointment of a U.S. citizen trustee if the surviving spouse is not a U.S. citizen.[17]

The gift tax distinctions are even greater, and herein lie the planning opportunities. For one, there is no unlimited gift tax deduction with respect to gifts to a non-citizen spouse, even if the spouse is a RA.[18] In 2012, the gift tax exclusion for gifts to non-citizen spouses is $139,000.

Example 8
Mr. Jones is a U.S. citizen. His wife has a green card. They have lived in the U.S. since 1972. In 2012, Jones makes a cash gift to his wife of $339,000. He is liable for a gift tax on $200,000.

NRAs do qualify for annual gift tax exclusions. If, however, either spouse is an NRA, they do not qualify for gift splitting.[19]

In the most significant departure from the treatment of U.S. citizens and RAs, NRAs are not subject to gift taxes on gifts of intangible assets, regardless of where the intangibles are located. Moreover, NRAs are subject to gifts of tangible assets only if the tangibles are located in the United States.[20] As a result, if an NRA owns only intangible assets, and has the foresight to make lifetime gifts of those assets, the NRA may escape U.S. estate taxation entirely. An NRA

will similarly avoid estate taxation by converting tangible assets, such as domestic real estate, into intangibles and making gifts of the intangibles.

Because NRAs may make gifts of intangibles without gift tax consequence wherever the intangibles are located, it is important to determine just what is and is not an intangible. With respect to gifts of cash, i.e., currency, there is little doubt; green bills are tangible.[21] It is less clear whether the gift of a bank account is the gift of a tangible or intangible asset. Funds in a bank account constitute a debt from the bank to the depositor. If the depositor transfers the account itself, the depositor is transferring the bank's debt, arguably the gift of an intangible. There is case law supporting this proposition, but the issue is not settled.[22] In one recent private letter ruling, which is not binding on the IRS, a transfer of funds by means of a check drawn on a foreign bank payable to a U.S. bank was held not subject to U.S. gift tax.[23]

The shares of a domestic corporation are most likely intangibles, unless the corporation was formed as a sham for the transfer of tangible assets. The shares of a foreign corporation will escape U.S. gift taxation as being non-U.S.-situs property. The transfer of an interest in a partnership or a limited liability company most likely is the transfer of an intangible. Although a partnership is treated as an aggregate of its assets for most tax purposes, it is most likely that a partnership is treated as a separate entity for transfer tax purposes, with the partnership interests being intangibles.

The U.S. Supreme Court has ruled: "...the interest of the decedent in the partnership...was simply a right to share in what would remain of the partnership assets after the liabilities were satisfied. It was merely an interest in the surplus, a chose in action. It is an intangible, and carries with it the right to an accounting."[24]

As a result, it is most likely that an NRA can make a gift of a partnership interest without incurring U.S. gift tax, regardless of the nature or situs of the partnership's assets.

Example 9
Mr. Schmidt, a citizen and resident of Austria, is a 50% partner with his son, a U.S. citizen, in an Austrian partnership. The partnership owns a residence in Los Angeles. He makes a gift of his partnership interest to his son. There is no U.S. gift tax to Schmidt.

In this example, there is no gift tax liability to the son; he is the donee of the property. If, however, the fair market value of the partnership interest exceeded $100,000, the son is required to file IRS Form 3520 and disclose the gift.

What is an Non-Resident Alien?

Due to the crucial differences between a resident alien and non-resident alien for income and transfer tax purposes, it is important to determine just what is NRA. The criteria for determining residency for income tax purposes are completely different than those for estate and gift tax purposes, and it is possible to be a resident for one and a non-resident for the other.

There are two tests to determine residency status for income tax purposes, a "green card test" and a "substantial presence" test. Under the green card test, once a green card is obtained, one becomes a RA for income tax purposes, subject to world-wide taxation.[25] An individual's actual presence in the United States or the sources of income is irrelevant.

Example 10
Mr. Svenson is a citizen of Norway. In 2010, he obtained a green card. In 2011, he resided exclusively in Norway, had no U.S. income, no U.S. assets and no U.S. business interests. He is liable for U.S. income taxes, at regular rates, on all of his world-wide income for 2011.

Under the substantial presence test, a non-citizen becomes a RA—even without a green card—if he or she is physically present in the United States for a certain number of days. If an individual is present in the United States for 183 days during a calendar year, he or she is a RA. Under a complex formula, even if an individual is not present in the United States for 183 days in the current year but the number of days he or she is present in the current year and the two preceding years equals 183 days, he or she become a RA for the current year.[26]

For estate and gift tax purposes, "residence" is a subjective concept and is a misnomer. For estate and gift taxes, "residence" means *domicile*. A non-citizen is subject to U.S. estate taxation on his or her estate's worldwide assets if the non-citizen was domiciled in the United States at death.

The Treasury regulations provide: "A person acquires a new domicile

in a place by living there for even a brief period of time, without a definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile, nor will intention to change domicile effect such a change unless accompanied by actual removal."[27]

It is difficult to imagine a decedent who held a green card at death not being a domiciliary for estate tax purposes; an applicant for a green card must aver that he or she intends to remain in the United States permanently. Nevertheless, the IRS has unsuccessfully argued that a decedent green card holder was not domiciled in the United States, in order to deny the estate the larger estate tax exclusions.[28]

Two cases illustrate both the extreme subjectivity of "domicile" and the aggressiveness of the Service in seeking to tax the estates of non-citizens. In *Nienhuys Estate v. Commissioner*,[29] the decedent was a Dutch citizen who in 1940 was abroad when his country was overrun by German forces. He came to the United States as the guest of a friend, and remained in the United States until his death in 1946. Although he had obtained what was then the equivalent of a green card, there was evidence that he retained large holdings in Holland, and would have returned to Holland had he been able to do so. The Tax Court found that the decedent had not become a U.S. domiciliary.

In *Fokker Estate v. Commissioner*,[30] the famous and fabulously wealthy inventor of the airplane that bore his name died in New York in 1939, having lived there since 1927. In 1934 Fokker had acquired a residence in Switzerland, and from 1934 until his death, he divided his time between the United States and Switzerland. He owned substantial properties in both countries. The Tax Court held that Fokker had established domicile in the United States before he acquired the Swiss residence, and that there was insufficient evidence to support a finding that he had abandoned his U.S. domicile when he acquired the Swiss residence.

Planning for NRAs

Fokker could have avoided U.S. estate taxation with a little advance planning. In a perfect world, attorneys are able to counsel a client before he or she immigrates to the United States. Here are some planning opportunities:

- ***Sell capital assets prior to arrival***. Whether the NRA intends to remain in the United States only temporarily (e.g. on an extended work assignment) or permanently, the NRA should sell appreciated assets before becoming subject to U.S. capital gains taxes. Once the NRA is present for 183 days in any year, he or she will be subject to capital gains taxes. The cash realized from the sale of the capital assets should be deposited in a foreign bank, so as to avoid the cash being a U.S.-situs asset subject to U.S. estate taxes if the NRA dies while resident in the United States.
- ***Take distributions from foreign trusts prior to arrival***. If the NRA is a beneficiary of a trust, the NRA should—if possible—take distributions before it becomes subject to U.S. taxation.
- ***Consider making lifetime gifts to the younger generation.*** Effective U.S. estate planning is pointless if it serves to accelerate or increase a tax in another country. But very often, the interplay of the transfer tax regimes of two countries produces surprising results. For example, Japan, unlike the United States, imposes its gift tax on the donee, and only if the gifted property is located in Japan.

Example 11
Mr. Ikeda is a citizen of Japan. His son, who attends UCLA, is a U.S. citizen. Ikeda intends to relocate to the United States to be closer to his son. If Ikeda transfers a U.S. bank account to his son, the transfer is not subject to gift taxes in Japan and is not subject to U.S. gift taxes, which imposes its gift taxes on the donor.

- ***Transfer U.S.-situs assets to partnerships.*** An NRA is not subject to gift taxes on gifts of intangible assets, wherever the intangibles are located. Even if the NRA has already relocated to the United States, but before obtaining a green card, if the NRA owns U.S. real estate, the real estate should be transferred to a domestic or foreign partnership. The partnership interests should then be gifted to the younger generation.

If the client has already relocated to the United States, and does not intend to remain here permanently, every effort must be taken to avoid the client being deemed to have been domiciled here if the client dies during his U.S. sojourn. Property and business interests in the home country should be maintained. Little things can mean a lot. In *Estate of Khan*, supra, the IRS attempted to prove that the decedent was not a U.S. domiciliary because he didn't own a library card.

Conclusion

As for final thoughts: plan ahead! It wasn't raining when Noah built the ark.

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[1] The United States maintains an income tax treaty with almost every country that maintains some form of income tax. But the United States is a signatory to only 17 estate tax treaties, mostly with the major European countries and Japan. The United States has no estate tax treaty with China, India or Mexico.
[2] I.R.C. §§871(b) and 882(a).
[3] I.R.C. §§871(a)(1) and 881(a). The 30% rate is often lowered by income tax treaties.
[4] I.R.C. §§1441(a) and 1442(a).
[5] I.R.C. §1361(b)(1)(C).
[6] I.R.C. §871(a)(2).
[7] I.R.C. §897(a)(1).
[8] I.R.C. §897(c)(2).
[9] I.R.C. §1445.
[10] I.R.C. §871(h) and (i); I.R.C. §881(c).
[11] I.R.C. §2056(d)(1)(A).
[12] I.R.C. §2031(a).
[13] I.R.C. §2103.
[14] I.R.C. §2104(a) and (b).
[15] I.R.C. §2105(a).
[16] I.R.C. §2102(b).
[17] I.R.C. §2056(d)(2)(A).
[18] I.R.C. §2523(i).
[19] I.R.C. §2513(a)(1).
[20] I.R.C. §§2501(a)(2) and 2511(b).
[21] *Blodgett v. Silberman*, 77 US 1, 48 S. Ct. 410 (1928).
[22] See, for example, *IT&S of Iowa v. Commissioner*, 97 T.C. 496 (1991) and *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463 (1988).
[23] PLR 8210055.
[24] *Blodgett, supra, at 11.*
[25] I.R.C. §7701(b)(2).
[26] I.R.C. §7701(b)(3).
[27] Treas. Reg. §20.0-1(b)(1).
[28] *Estate of Khan v. Commissioner*, 75 TCM 1597 (1998).
[29] 17 TC 1149 (1952).
[30] 10 TC 1225 (1948).

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Leaving a Legal Legacy

By Susan B. Share

WHAT IS AN ETHICAL WILL? IT IS A NON-binding, non-legal legacy that conveys an individual's accumulated wisdom, love, affection, hopes, dreams, thoughts, desires and gratitude, in other words, one's intangible estate to a beloved relative, friend or even to the world at large.

Webster's defines the word "will" to mean "the mental faculty by which one deliberately chooses or decides upon a course of action. A secondary definition includes, "diligent purposefulness, determination" and a third focuses on "a desire, purpose" or fourth, "a deliberate intention or wish." Each of these definitions delivers the idea of intention and choice. When a person makes a will, he or she demonstrates an intention to dispose of his or her worldly property in a way consistent with personal choice and desire. In fact, a valid will should specifically state that it is the testator's intention to make such a document.

The word "ethical" is an adjective that means, "involving or expressing moral approval or disapproval." Also, "conforming to accepted standards of conduct." When "ethical" modifies "will" the resulting term, "ethical will" suggests an intention or desire to express moral approval or disapproval based on the writer's life experience and opinions. Over the decades, many have availed themselves of the ethical will, perhaps without ascribing that particular name to it.

The first recorded instance of an ethical will occurs in Genesis, Chapter 49, when Jacob, on his death bed, gathers his twelve sons and gives them each a specific charge for the future. Jacob correctly identifies the strengths and weaknesses of each son and predicts their life paths based on each son's specific attributes. Jacob delivers an honest appraisal of each son's merits and challenges and of course, his predictions for each, invariably come true.

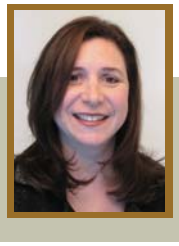
History reveals many instances of ethical wills. Why are ethical wills remembered? Often, a will is remembered as one that devises property. Perhaps the answer resides in that which is truly most important to people—what has been learned from life that can be passed on to future generations that will both smooth the way for our descendants and inform their decisions as they travel their own path in life. The competent estate planner not only makes sure that the appropriate legal documents are drafted, but first and foremost, develops an understanding of the client's goals. These goals surely revolve around the client's assets and amassed wealth, but the disposition of these assets should blend with that client's hopes and dreams for future generations.

Not only wealthy clients make ethical wills. One of the most moving ethical wills ever, and so highly regarded as to be read before the Chicago Bar Association, was written by a penniless, former attorney who had gone mad and lived out his days in a Chicago poorhouse. Found written on scraps of paper in his jacket pockets was his poetic ethical will which begins, "I give to good fathers and mothers, in trust to their children, all good little words of praise and encouragement, and all quaint pet names and endearments; and I charge said parents to use them justly, but generously, as the deeds of their children shall require."

Not every client wants to make an ethical will per se. In fact, the idea of delving into the emotional and spiritual motivation that frames an individual's life and legacy, can indeed be daunting. So the ethical will appeals to those individuals who wish to embellish their tangible legacy with their collected wisdom, suggestions and hopes for the objects of their bounty.

An ethical will can take many forms. The essential component consists of the author's intent to transfer his/her love, advice, wisdom, hopes and dreams to future generations. One contemporary, famous, ethical will is the last lecture by then terminally ill Professor Randy Pausch of Carnegie Mellon University. Professor Pausch addresses a rapt audience for an hour and a half, recapping his life, his dreams, his values and his loves. Only at the end of the lecture is it learned that the lasting importance of the taped session to the real beneficiaries, Randy's children. Of course the millions of viewings of that video translate into a legacy of wisdom that has touched all who view it.

A memoir, an autobiography or even a transcription of an interview, can all qualify as ethical wills. There is an account of a father who wrote a letter to each of his children,



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on that child's birthday, every year until the child reached 21. And on the 21st birthday, all of the unopened letters with their thoughts, hopes, fears and wishes were presented as the birthday gift. An ethical will need not be a testamentary document; it can be given during life if one so chooses.

One powerful aspect of the ethical will derives from its healing potential. During the process of preparing the ethical will, the author takes stock of his/her life, therefore it presents a significant opportunity to learn about himself—his motivations, his accomplishments, his failures and his relationships. The stories of one's life provide the basis for the ethical will. Through that analysis and documentation, one often grows in a deeply spiritual way. Additional healing occurs when a person asks forgiveness or shares his gratitude with another through this medium.

Often an ethical will takes the form of what has been called a "legacy letter." A legacy letter is simply a love letter to a dear family member or friend. The legacy letter conveys the writer's love, advice, gratitude, hopes and dreams to the recipient. These letters can be written to many loved ones and can be presented during life or posthumously. Usually shorter in length than an ethical will, the legacy letter may share one or more stories and the lessons revealed through them to a loved one.

One of the most famous letters remaining from the Civil War period is the tender and touching letter from Sullivan Ballou to his young wife Sarah: "God willing, we might still have lived and loved together, and seen our sons grown up to honorable manhood, around us…never forget how much I love you, and when my last breath escapes me on the battle field, it will whisper your name. Forgive my many faults and the many pains I have caused you. How thoughtless and foolish I have often times been! How gladly would I wash out with my tears every little spot upon your happiness…"

Educated at Phillips Academy in Andover, Brown University and the National Law School in Ballston, New York, Ballou was admitted to the Rhode Island Bar in 1853. He served as the judge advocate of the Rhode Island militia and penned the famed letter just one week prior to the Battle of Bull Run, on July 21, 1861, during which he lost his life. Alas the letter was never mailed, but it was found among Ballou's effects.

People write ethical wills at pivotal times in their lives: before marriage, on the birth of a child, a bar/bat mitzvah, a divorce, when a child leaves for college, or upon reaching adulthood. Of course, when one faces an impending major operation, an illness, or the end of their life, the motivation to draft an ethical will may also arise.

The concept of the ethical will is extremely flexible in nature. At times, a younger person may draft an ethical will for an older recipient, such as a young adult on the brink of setting out in the world; but more likely, the parents may take such an opportunity to write an ethical will to their child as he/she crosses into adulthood.

There are many additional reasons to write an ethical will. Certainly, an ethical will or legacy letter provides a deeply personal, emotional component to the legal documents that comprise an estate plan. For the very wealthy, a letter of this nature may give the next generation a charge to move in a philanthropic direction, an entrepreneurial direction or perhaps an academic direction.

For those without a tangible estate, it establishes a legacy of love and wisdom for future generations that may have otherwise been completely lost. It identifies a person's values and provides an opportunity to share those values with the next generation, with the goal of preserving them. An ethical will can confer a blessing, a prayer of gratitude, or simply an expression of love and affection. There is no better estate planning device.

Officially Tarzana: SFVBA Celebrates its Move

By Angela M. Hutchinson

It is said that when one door closes another one of new beginnings opens. The San Fernando Valley Bar Association is truly on the move and thriving in its services and membership. On August 31, 2012, the organization moved to its new home at 5567 Reseda Boulevard, Tarzana.

MOVING INTO A NEW OFFICE BUILDING IS a bitter sweet moment not only for the San Fernando Valley Bar Association staff, but also the local community and Bar members who have become accustomed to attending events, picking up MCLE tapes or arbitrating fee dispute cases at the SFVBA's former Woodland Hills location.

Valley Lawyer further reacquaints you with the SFVBA's staff, their departments and programs they run, along with their thoughts on their new workspace.

Membership Benefits

"The move will make our office and programs much more accessible to Valley residents. It will be easier for residents throughout the Valley to travel to a more central location to file their arbitration requests and to attend hearings in our office," *says Member Services Coordinator Irma Mejia.*

The San Fernando Valley Bar Association has been serving the Valley's legal community since 1926. SFVBA places an emphasis on quality and affordable MCLE seminars, added-benefits such as Fastcase and *Valley Lawyer*, mandatory fee arbitration, as well as networking opportunities for attorneys, judges and diverse professions within the legal field. The SFVBA helps its attorney members develop and improve their practice of law by providing referral opportunities, continuing legal education and discounted services for members' personal and professional use.

Sole practitioners as well as large law firms find equal value in membership. Whether a fee dispute arises with a client or an attorney is seeking new clients, the SFVBA is here to serve its members and the public with distinction. As one of California's leading bar associations, the SFVBA has a plethora of reasons to celebrate their move into a new office and momentum in the legal community.

Education & Events

"The new space is also more conducive to seminars and it's nice to have more bathroom facilities for our guests," *says Linda Temkin, Director of Education & Events.*

For SFVBA trustees and other members, the central location of Tarzana is more convenient for those who attend lunch or evening events at the Bar's office. The Education & Events department makes a conscience effort to assist members in broadening their potential client base and contact list. Thanks to various sponsors, the SFVBA has hosted numerous business networking mixers and social events.

Also, the Bar is diligent with adding new audio recordings to the tape library to help members complete their self-study MCLE requirements, at no extra costs. The SFVBA strives to offer members the information and education they need to keep themselves and their practice on track and aligned with their personal and professional goals.

The SFVBA is honored to have the support of many bench officers for the Bar and its charitable arm, the Valley Community Legal Foundation. As the SFVBA continuously welcomes new event ideas, members who are looking to get more involved in a leadership capacity are encouraged

join a section or committee and help plan an educational event and/or social activity.

Public Service and ARS

"Being located on a major street with signage visible from the Ventura Freeway allows the organization to be more prominent to both the public and SFVBA members," *says Rosie Soto, Director of Public Service.*

Serving the public since 1948, the Attorney Referral Service of the SFVBA was designed to assist the people and businesses in the San Fernando Valley in locating lawyers for specific types of legal matters.

ARS Consultants Lucia Senda and Aileen Jimenez agree that having an ARS that serves the Valley community is an extremely valuable resource.

Senda says, "For many people, it is not an option to go across the Valley to Los Angeles to seek legal representation. Many of our clients prefer to have an attorney close to their home and/or job."

Jimenez agrees, "Not only is important for consumers to have access to legal counsel when needed, but also we serve as a buffer to the community."

Valley Lawyer

"As the official publication of the SFVBA, Valley Lawyer is one of the more remote member benefits in that its operations are not affected by the association's relocation," *says Angela M. Hutchinson, Managing Editor of Valley Lawyer.*

The production process of *Valley Lawyer* starts with members submitting articles via email to the managing editor. After the articles are edited in-house, they enter the design phase, and then on to the review process for final proofing. Next, the magazines are printed and mailed to SFVBA members. The monthly publication consistently arrives in members' mailboxes along with the PDF emailed to their inboxes during the first week of every month (except for an August issue).

Valley Lawyer is always seeking attorney writers with a fresh perspective and passion on various topics within their area of expertise. Please email editor@sfvba.org to submit an article or even just an idea that may need to be developed.

Also, the publication's Editorial Committee is always seeking additional members who would like to get more involved with enhancing and promoting the publication. The committee looks forward to meeting at the Bar's Tarzana office this fall.

What Staff Will Miss

A shared perspective among the SFVBA staff of what will be missed about the old office—is of course, the nearby shopping.

Temkin says, "What I will miss most is the proximity to Macy's, or should I say, Macy's will really miss seeing me."

Soto differs (on the store), "I will miss my office being so close to the Topanga Plaza, where I would go window shopping at Neiman Marcus and Nordstrom during my lunch break."

The staff has shared many celebrations and personal announcements in the old conference room, but certainly life's good news will continue in Tarzana.

Mejia will most miss the nature surrounding the old office, including the trees and squirrels, but she is excited about being across the street from Bea's Bakery at the news office. She also says, "What I like most is our larger work areas. The conference room is larger and modern. And I love how friendly everyone is in the new building."

According to Temkin, "Another aspect that makes the new office nice is that the Wasserman Comden Casselman & Esensten law firm is in the same building. It's great to see so many familiar faces and interact with attorneys that we have been close to for years."

Soto adds, "All of our new neighbors, both in our building and along the street, have been extremely welcoming."

Soto also enjoys having a window with a view in her office because it inspires creativity, while the ARS consultants have a nice window view and a larger workspace with soothing blue tones to help them combat the stresses of the job.

Officially Tarzana

A staple at the Bar's Woodland Hills' offices will definitely be missing—its 20-foot conference room table. Executive Director Liz Post says, "It didn't make it into the new offices; it was too big to move it up the elevator and stairwell. I'm shopping for new modular tables that will turn our conference room from a boardroom to a classroom in ten minutes.

"A lot of meetings and important Board decisions were made around that table over our 16 years in Woodland Hills. The table and its replacement are symbolic of the Bar's evolution and transition."

The central location, accessibility and spacious work environment at the SFVBA's Tarzana office is bound to attract new members and encourage current members to become more active. No matter where the SFVBA's office is located, its staff is dedicated to providing members and the public with professional and timely service.

Members are welcome to stop by to visit the SFVBA's new hot spot. Hours of operation are Monday through Thursday, 9:00 a.m. to 6:00 p.m. and from 9:00 a.m. to 5:00 p.m. on Friday.

Angela M. Hutchinson serves as the Managing Editor of *Valley Lawyer* magazine, and she was recently accepted to law school. Hutchinson is also a published author and entrepreneur within the entertainment field. Hutchinson can be reached at editor@sfvba.org.

By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 27.

Change of Ownership: What Triggers a Property Tax Reassessment?

By Michael Hackman, Kira S. Masteller and Robert A. Hull

Most attorneys transferring property for estate planning purposes are transferring their client's home into a revocable living trust for the benefit of the trustors who created it. There are pitfalls to watch for when completing such transfers.

THERE ARE A FEW ASPECTS OF CHANGING property ownership that attorneys should be aware of during the process. First, be careful not to transmute separate property inadvertently. Joint tenancy property may need to be re-titled as community property for income tax purposes. A Preliminary Change of Ownership Report must be filed with the transfer deed to advise the county assessor's office that such a transfer is not a change of ownership pursuant to California Revenue and Taxation (R&T) §62(d), and therefore excluded from reassessment.

Death of a Trustor, Joint Tenant, Spouse, Registered Domestic Partner or Trustee

Upon the death of a trustor of a married couple's revocable trust, there are often transfers between exemption trusts, marital trusts and survivor's trusts, all of which are excluded from reassessment as they continue in trust for the benefit of the surviving spouse trustor (R&T) §63(a). Again, a Preliminary Change of Ownership Report must be filed when recording Affidavits Death of Joint Tenant, Spouse, Registered Domestic Partner (RDP) or Trustee, advising the assessor as to why the transfer is excluded from reassessment. A transfer because of the death of a spouse or RDP, or a continuing interest in a trust for the benefit of the trustor's spouse or RDP, are excluded from reassessment as they are not deemed a change in ownership under R&T §62.

Upon the death of the second spouse or RDP, or upon the death of a single trustor, if real property is to pass to children, there are additional reporting requirements to be made to the assessor's office (generally within three years of the date of death and before any sale) so that the children will keep their parents' property tax base and the property will not be reassessed. The same rules apply for a transfer from a parent to a child (or from a child to a parent) during the transferor's life, whether the transfer is made by gift or by sale.

Parent-Child Transfer Exclusion Rules

It is important to understand the parent-child transfer exclusion rules, as there are limits to how much property can be transferred and what type of property can be transferred.

First, under R&T §63.1(a)(1), the purchase or transfer of real property which is the principal residence of an eligible transferor, in the case of a purchase of transfer between parents and their children, is excluded from reassessment. A principal residence means a dwelling that is eligible for a homeowners' exemption or a disabled veterans' exemption as a result of the transferor's ownership and occupation of the dwelling.

Second, under R&T §63(a)(2), the purchase or transfer of the first $1,000,000 of full cash value (the assessed value) of all other real property of an eligible transferor, in the case of a purchase or transfer between parents and their children, is excluded from reassessment.

Often, children will inherit their parents' home upon the surviving parent's death whether the home is worth $100,000 or $10,000,000, so long as it was the principal residence of the transferor. The property will not be reassessed upon the timely filing of a Claim for Reassessment Exclusion for Transfer Between Parent and Child.

If the children are inheriting real property other than a principal residence, and the values of the other properties exceed $1,000,000 in full cash value, it is important to evaluate whether or not there are two parents' exclusions that can be utilized (if parents were married and properties were being held for the surviving spouse, this will apply), and which properties should be used for purposes of the exemption.

Generally, properties owned by the parents the longest with the lowest assessed value for property tax purposes, should provide the most annual cost savings to the children. Property purchased more recently or property that has been improved significantly may not be the most effective use of the parent-child exclusion. Using a graph to list all of the real property, the assessed values as of the date of death, the fair market value as of the date of death, any decrease in the base value, and whether or not both parents have exemptions, will be helpful in determining which properties have the lowest property tax base, and how much of it can be used with each parent's $1,000,000 other property exclusion.

From a practical standpoint, depending on whether or not more than one child is receiving a share in each property, or if each child is receiving an interest in different properties with an intent to equalize the value of the exclusions, percentages of properties can be used for reassessment exclusion purposes (i.e., 20 percent of a property can be chosen to be excluded from reassessment instead of the entire property).

In very narrow circumstances a transfer between grandparents and their grandchild or grandchildren can be excluded from reassessment. If the parent of that grandchild or grandchildren, who qualifies as the child of the grandparent, is deceased as of the date of purchase or transfer, a transfer to the grandchild or grandchildren will be excluded from reassessment under R&T §63(a)(3)(A).

Sunsetting Tax Laws

Many individuals are currently transferring assets out of their estate to lower the value of their taxable estate upon their deaths, taking advantage of the unique 2011 and 2012 circumstances which combined, make real estate a logical asset to gift to children. First, the Federal Lifetime Gift Tax Exemption in 2011 is $5,000,000 (indexed for inflation in 2012 is $5,120,000). Second, the value of real estate these past four years is significantly lower than real estate values during the past decade.

Using entities such as Family Limited Partnerships and Limited Liability Companies allow parents to continue to control the assets, earn management or general partner income, and give minority interests in the entities to their children at considerable value discounts.

Legal Entities

There are separate exemption rules for transfers involving legal entities, such as corporations, LLCs and partnerships. Transfers of interests in legal entities between parents and children do not qualify for the parent-child exclusions because R&T §63(c)(8) limits the exclusion to transfers of real property. For this purpose, trusts are not considered legal entities.

If an entity purchases real property, the result is a reassessment. That entity will not suffer a reassessment in the future, unless a change in control occurs, i.e., when a person or entity which did not own more than 50 percent of the ownership then engages in a transaction or transactions which results in that person or entity now owning more than 50 percent (R&T §64(c)(1)).

Transfers of real property to or from an entity are exempt from reassessment, if the ownership interests of the transferor and transferee are identical (R&T §62(a)). If the transferee is the entity, the owners are known as the original co-owners. That entity can then be subsequently reassessed

in two ways. First, reassessment occurs if a change in control takes place, resulting in a new owner who owns more than 50 percent of the entity. Second, reassessment is triggered if the original co-owners cumulatively transfer more than 50 percent in the entity, resulting in a change of ownership (R&T §64(d)).

For example, assume parents own a property they propose to include in an LLC, and want 49 percent of the LLC to be ultimately owned by their two children. The alternatives are:

1. The parents transfer the property to the LLC, in which they are the only members. The transfer is exempt from reassessment because the ownership of the transferor and transferee are identical. The parents become the original co-owners, and subsequently transfer 49 percent of the LLC to their children. There is no change in ownership because there is not yet a cumulative transfer of over 50 percent. The parent-child exemption does not apply to a transfer of an interest in an entity, and the $1,000,000 limitation on the parent-child exemption is not applicable.
2. The parents can transfer a 49 percent interest in the property to the children, which would qualify for the parent-child exemption, subject to the $1,000,000 limitation(s). The family members can subsequently transfer their interests in the property to the LLC, and such interests are exempt from reassessment because the ownership of the transferor and transferee are identical.

Section 64 of R&T provides that a single member LLC undergoes a change of ownership if a person or entity acquires more than a 50 percent interest in the LLC. It appears that the legal standing of the single member LLC is respected for property tax purposes, and the single member LLC is not treated as a disregarded entity as it is for income tax purposes.

Transfers of interests in legal entities, unlike direct transfers of properties, do not involve deeds recorded and made public. However, if either a change in ownership or change in control as previously defined occurs with respect to an entity, the entity is required to file a Form BOE-100-B with the Board of Equalization within 90 days of the transfer.

In addition, if the Board sends a Form BOE-100-B to the entity, it is required to file a response within 90 days, whether or not an event or events constituting either a change in control or change in ownership has taken place. New time limits are in effect as of January 1, 2012. There are penalties for not informing the authorities on a timely basis.

The property tax rules are sometimes similar to rules governing other taxes, but they have their own purposes and are unique:

- The rules with respect to documentary transfer taxes are similar, but not identical.
- The definition of principal residence has nothing to do with the various IRS definitions, and especially is not based on the two out of five years test for the $250,000 capital gains exemptions on the sale of property.
- If, for example, the parents are transferring a 49 percent interest to their children, the assessor, in considering the $1,000,000 limitation, is unlikely to accept the minority/lack of marketability discounts used in filing gift tax returns with the IRS.

Step Transactions

One tricky area in avoiding property reassessment involves multiple beneficiaries, not all of whom qualify as children. For example, the decedent leaves 80 percent of her estate to her only child and the remaining 20 percent to a non-child, and has property worth less than 80 percent of the estate.

The parties agree to leave all of the property to the child, in order to qualify for the exemption. The balance of the estate benefits the non-child to the extent of the 20 percent interest, and the remainder to the child. In this case, the assessor may challenge the transfer and refuse to allow the exemption to 20 percent of the property, claiming that the 20 percent was effectively transferred to the child from the non-child in a non-exempt transaction.

Some transactions can run afoul of the step transaction doctrine, which the assessor may choose to apply in certain specific cases where it appears that a series of transfers are used to circumvent the change in ownership rules. In *Shuwa Investments Corp. v. County of Los Angeles*, 1 Cal. App.4th 1635, 1648-1649 (1991), the California Court of Appeal set forth three tests: (1) end result test, where it could be determined that a series of transfers were really component parts of a single transaction, which the parties planned all along to be taken to reaching the end result; (2) interdependence test, where the steps taken were so interdependent that the relationships created by one transfer would have been fruitless without completing the entire series of steps, other than qualifying for the exclusion; and (3) binding commitment test, if it appears that there is an agreement that once the first transfer is taken, that the parties are then committed to implement the remaining steps.

The State Board of Equalization (SBE) stated that assessors could apply the step transaction test where taxpayers, in order to obtain a lower assessment where the market value had fallen below the assessed value, transferred the property to another party, who in turned transferred the property back to the taxpayer.

However, the legislature in R&T §63.1 stated its intent that the step transaction argument is not to be used to collapse parent-child transfers, including transfers involving legal entities. In an uncodified note, the Legislature stated its intent that:

> "Section 63.1 of the Revenue and Taxation Code shall be liberally construed in order to...exclude from change in ownership purchases or transfers between parents and their children described therein."

When California real property is involved, property taxes can be as important as income, estate or gift taxes. By careful planning, potentially expensive reassessments can often be avoided.

Michael Hackman is a Certified Specialist in Tax Law, as designated by the State Bar of California Board of Legal Specialization. He is the Chair of the Tax and Trusts & Estate Planning Practice Groups at Lewitt Hackman. **Kira S. Masteller** is a gift tax and trusts and estate planning attorney. **Robert A. Hull** is a trusts and estate planning and corporate attorney, also at Lewitt Hackman.

Test No. 49

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. To prevent property reassessment, a Preliminary Change of Ownership Report (PCOR) must be filed with the transfer deed to alert the county assessor's office.
   ❑ True ❑ False

2. Transfers because of the death of a spouse or Registered Domestic Partner (RDP) are not deemed a change in ownership under California Revenue and Taxation Code 62.
   ❑ True ❑ False

3. A continuing interest in a trust for the benefit of the trustor's spouse or RDP will trigger a property reassessment.
   ❑ True ❑ False

4. When the trustor of a married revocable trust dies, transfers between exemption trusts, marital trusts and survivor's trusts are generally excluded from reassessment.
   ❑ True ❑ False

5. The purchase or transfer of real property, other than a principal residence of an eligible transferor, between a parent and his or her children, is excluded from reassessment for the first $1,000,000 of fair market value.
   ❑ True ❑ False

6. If the property is the principal residence of the transferor, the property will not be reassessed even if a Claim for Reassessment Exclusion for Transfer Between Parent and Child was not filed on a timely basis.
   ❑ True ❑ False

7. Property purchased recently or property that underwent significant improvements are the properties best suited for a parent-child exclusion.
   ❑ True ❑ False

8. It is important to evaluate whether or not two parents' exclusions can be used when multiple properties with a total value of over $1,000,000 in full cash value are inherited by the children.
   ❑ True ❑ False

9. Percentages of properties cannot be used for reassessment exclusion purposes.
   ❑ True ❑ False

10. All property transferred from a grandparent or grandparents to a grandchild or grandchildren will be excluded from reassessment.
    ❑ True ❑ False

11. It's better to wait until after December 31, 2012 to help clients transfer assets such as property because the current federal tax laws and the housing market aren't beneficial for property owners right now.
    ❑ True ❑ False

12. Parents may be able to give minority interests in Limited Liability Companies and Family Limited Partnerships to children at a considerable value discount.
    ❑ True ❑ False

13. Transfers of interests in legal entities may also qualify for the parent-child exemption.
    ❑ True ❑ False

14. A purchase of real property by an entity will generally trigger a reassessment.
    ❑ True ❑ False

15. If there is a change in control of an entity, its owned property will be reassessed.
    ❑ True ❑ False

16. So long as the parents who transfer an interest in an entity holding real property to their children retain a 51 percent interest in that entity, there will be no reassessment of the property.
    ❑ True ❑ False

17. The transfer of property interests to an entity constitutes a change of ownership, even if the owners of the entity/transferees are identical to the transferors.
    ❑ True ❑ False

18. The legal standing of a single member LLC is respected for property tax purposes, not treated as a disregarded entity as it is for income tax purposes.
    ❑ True ❑ False

19. Assessors may apply a step transaction test, questioning whether a series of transactions contributed to a single end result were sufficiently interdependent, and represented a binding commitment by the parties to implement the remaining steps of the transaction in an effort to circumvent change of ownership rules.
    ❑ True ❑ False

20. An entity is required to file Form BOE-100-B with the Board of Equalization within 60 days of a change in ownership or control.
    ❑ True ❑ False

MCLE Answer Sheet No. 49

INSTRUCTIONS:
1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the $15 testing fee for SFVBA members (or $25 for non-SFVBA members) to:

   San Fernando Valley Bar Association
   5567 Reseda Boulevard, Suite 200
   Tarzana, CA 91356

METHOD OF PAYMENT:
❑ Check or money order payable to "SFVBA"
❑ Please charge my credit card for $_____.

_____
Credit Card Number Exp. Date

_____
Authorized Signature

5. Make a copy of this completed form for your records.
6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

Name_____
Law Firm/Organization_____
_____
Address_____
City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

ANSWERS:
Mark your answers by checking the appropriate box.
Each question only has one answer.

1.	❑ True	❑ False
2.	❑ True	❑ False
3.	❑ True	❑ False
4.	❑ True	❑ False
5.	❑ True	❑ False
6.	❑ True	❑ False
7.	❑ True	❑ False
8.	❑ True	❑ False
9.	❑ True	❑ False
10.	❑ True	❑ False
11.	❑ True	❑ False
12.	❑ True	❑ False
13.	❑ True	❑ False
14.	❑ True	❑ False
15.	❑ True	❑ False
16.	❑ True	❑ False
17.	❑ True	❑ False
18.	❑ True	❑ False
19.	❑ True	❑ False
20.	❑ True	❑ False

Arbitration Provisions in Contracts

The High Hurdle in Obtaining a Right to Attach Order and Writ of Attachment

By Jonathan B. Cole and Vincent S. Green

THE REMEDY OF A PRE-judgment attachment of defendant's assets was created by the California Legislature to ensure that there would be assets to execute upon once a judgment was obtained. *Halsted v. Halsted* (1946) 72 Cal.App.2d 832, 836. However, merely adding an arbitration provision to a contract or an attorney-client fee retainer agreement exponentially increases the difficulty of obtaining a right to attach order and writ of attachment against a defendant.

The advantages of arbitration versus litigation may still weigh in favor of retaining arbitration clauses in contracts. Still, practitioners should be aware of the consequences of placing arbitration provisions in contracts if they wish to seek a pre-judgment right to attach order and writ of attachment. Further, anytime a right to attach order and writ of attachment is sought an attorney should immediately review the contract to determine if it contains an arbitration provision, which triggers a heightened threshold to obtain the writ.

Obtaining the Right to Attach Order and Writ of Attachment

Code of Civil Procedure section 484.090(a) provides that a court shall issue a right to attach order, and then a writ of attachment, when it finds each of the following: (1) the claim upon which the attachment is based is one upon which an attachment may be issued; (2) the plaintiff has established the probable validity of the claim upon which the attachment is based; and (3) the attachment is not sought for a purpose other than the recovery on the claim upon which the attachment is based.

To show that the claim is one upon which an attachment may be issued, the applicant must establish that each of the following requirements have been met:

- The claim is on a contract, express or implied. (Civ. Proc. Code §483.010(a))
- The claim is for a fixed or readily ascertainable amount of at least $500. (Civ. Proc. Code §483.010(a))
- The claim must not be secured by any interest in real property arising from agreement, statute or other rule of law. (Civ. Proc. Code §483.010(b))

If the attachment sought is based on a claim against a defendant who is a natural person, the claim must arise out of the conduct by the defendant of a trade, business or profession. (Civ. Proc. Code §483.010(c)) *Nakasone v. Randall* (1982) 129 Cal.App.3d 757, 764 (business is activity carried on for the purpose of livelihood or profit on a continuing basis) The claim must not be based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where the property sold or leased or licensed for use, the services furnished, or the money loaned was used by the defendant primarily for personal, family or household purposes. (Civ. Proc. Code §483.010(c))

Standard without an Arbitration Provision

Normally, a plaintiff will need only establish the probable validity of its claim for the court to grant the right to attach order and writ of attachment. Code of Civil Procedure section 481.190 provides as follows: "A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim."

The Law Revision Commission Comment, in pertinent part, explains the minimum standard the plaintiff must meet in order to establish probable validity: "The Definition of 'probable validity' in Section 481.190 requires that, at the hearing on the application for a writ, the plaintiff must at least establish a *prima facie case*."

By way of example, a declaration authenticating a law firm's billing statements, which were sent to a client, provides sufficient evidence of the probable validity of the claim for unpaid legal fees thereby supporting the issuance of a right to attach order. *Loeb & Loeb v. Beverly Glen Music*, Inc. (1985) 166 Cal.App.3d 1110, 1118-1120.

Standard with an Arbitration Provision

Merely adding an arbitration provision to any contract completely changes the standard of proof required to obtain a right to attach order and writ of attachment. The standard changes from "probable validity" to the arbitration award may be "rendered ineffectual without provisional relief."

Code of Civil Procedure section 1281.8(4)(b) provides: "A party to an arbitration agreement may file [for a provisional remedy] in the court in the county in which an arbitration proceeding is pending…but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief."

There has been only one California appellate decision interpreting what is meant by "rendered ineffectual without provisional relief" in an attachment case. In *California Retail Portfolio Fund GMBH & Co. KG v. Hopkins Real Estate Group* (2011) 193 Cal.App.4th 849, the plaintiff entered into a partnership agreement with Hopkins Real Estate Group by which California Retail invested more than $5.5 million in five Southern California area shopping centers. California Retail was to receive an annual payment of $582,000 per year from Hopkins.

When Hopkins missed two payments, California Retail initiated contractual arbitration proceedings against Hopkins for breach of the real estate joint venture agreement. California Retail also applied to the trial court for a right to attach order and writ of attachment against Hopkins. Hopkins opposed the writ on numerous grounds including that California Retail had failed to demonstrate that the arbitration award would be "rendered ineffectual without provisional relief." California Retail filed a Reply in which it included an email from Hopkins' chief financial officer in which he stated he had concerns about Hopkins' "overall liquidity." *Id.* at 860.

The court determined that "the apparent insolvency of a party to an arbitration agreement, or other evidence showing that the party was experiencing serve financial difficulties, is sufficient to satisfy the ineffectual relief requirement." *Id.* at 857. Additionally, the court looked to the legislative history of CCP section 1281.8 and determined that the "ineffectual relief requirement" was "similar to irreparable harm" standard found in the provisional remedy of injunctive relief under Code of Civil Procedure section 526. *Id.* at 857. Insolvency or inability to otherwise pay money damages is a type of irreparable harm recognized under the injunction statute. *Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 890

Finally, the court also turned for guidance to the procedures for obtaining an ex parte writ of attachment and its requirement that "great or irreparable injury would result to plaintiff if issuance of the order were delayed until the matter could be heard on notice." Id. at 858; Code of Civil Procedure section 484.310 et. seq. In particular, the court looked to the ex parte statutes' requirements of danger that the property sought to be attached would be "concealed, substantially impaired in value, or otherwise made unavailable to levy if issuance of the order were delayed until the matter could be heard on notice." *Id.* at 858; Code of Civil Procedure section 485.010(b)(1)

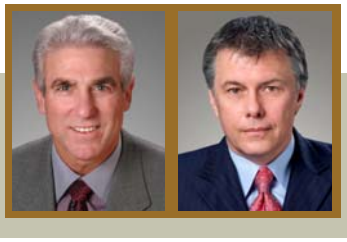
In the end, the *California Retail* court found plaintiff's arbitration award might be rendered ineffectual without the writ of attachment based on the CFO's email about liquidity problems. *Id.* at 862.

How to Demonstrate the Higher Standard

The *California Retail* court provides practioners some guidance on how to demonstrate CCP section 1281.8(4)(b)'s higher standard to obtain a writ when there is an arbitration provision in the contract:

- the defendant has liquidity problems
- the defendant is apparently insolvent
- an inability to pay money damages
- property would be concealed
- property could be substantially impaired in value
- property could be made unavailable to levy if issuance of order delayed

As more and more parties turn to arbitration as a means to litigate disputes, it is important to keep in mind that if the plaintiff seeks a pre-judgment right to attach order and writ of attachment, they will be required to meet a much higher standard to obtain the writ.



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Dinner with the Author

BARRY EDZANT
SCVBA President
BarryE@Valencialaw.com

ON THURSDAY, OCTOBER 11, 2012, the Santa Clarita Valley Bar Association will welcome author and attorney Robert K. Tanenbaum as speaker for the inaugural "Dinner with the Author" event, to be held at the Tournament Players Club in Valencia. The SCVBA hopes members will attend what may become a hallmark annual event. The event kicks off at 5:30 p.m., with a cocktail hour, followed at 6:30 p.m. by dinner and Tanenbaum's presentation.

Tanenbaum is a nationally known attorney and legal expert who has worked as both a successful prosecuting attorney and a high profile defender. He served as the Assistant District Attorney in New York County, where he ran the Homicide Bureau. As Chief of the Criminal Courts, he was in charge of the D.A.'s legal staff training program. Additionally, Tanenbaum served as the Deputy Chief Counsel for the Congressional Committee investigation into the assassinations of President John F. Kennedy and the Rev. Dr. Martin Luther King, Jr.

Other highlights of Tanenbaum's distinguished career include serving as a special prosecution consultant on the Hillside Strangler case in Los Angeles, defending Amy Grossberg in her sensationalized baby death case and representing eight black plaintiffs in a major racial profiling case. Tanenbaum is a member of the State Bars of New York, California and Pennsylvania. He also served two terms as the Mayor of Beverly Hills and has taught Advanced Criminal Procedure at Boalt Hall School of Law.

Tanenbaum is the author of 24 novels and three non-fiction books, including "The Piano Teacher" and "Badge of the Assassin." His latest book, "Echoes of My Soul," (due out in April 2013), is the true story of one of the most intense manhunts in police history and of the young District Attorney who exonerated the unjustly accused, brought the killer to justice and reformed law enforcement practices. Many of Tanenbaum's novels feature the Butch Karp character. His recently released novel, "Bad Faith," is a murder mystery focusing on faith healing, child abuse and First Amendment defense.

Born in Brooklyn, New York, Tanenbaum attended the University of California at Berkeley on a basketball scholarship, where he earned a B.A., and received his law degree from Boalt Hall School of Law at the University of California, Berkeley. He will be discussing his career in the law and what he has found to be a need for a moral component in people's public lives, his experiences in the District Attorney's office and in Washington and why he began writing books.

Tickets for the event are $50 if purchased before September 27 and $65 after September 27 and at the door. The event includes a dinner with choice of prime filet, salmon or pasta dish. A limited number of table sponsorships are available for $500 (includes eight dinner tickets and two autographed books) and $250 (four tickets and one autographed book). All table sponsorships include a table sign and acknowledgement in the printed program.

To reserve a table, purchase tickets or sponsorships, or for general questions and information, please contact Sarah at (855) 506-9161 or info@scvbar.org. Also, visit the SCVBA website at www.scvbar.org or Facebook page. The upcoming "Dinner with the Author" event is open to the general public. The SCVBA especially looks forward to seeing the local legal community there!

Long-Term Care Planning in California

By Serria Rego and Tim Ripp

AS THE SAYING GOES, "WE have come a long way baby." Over the last 40 years, long-term care has evolved from a mainly institutional vision to a very broad community-based solution, from nursing homes to new technologies and services which allow people to stay in their homes, to residential care and alternate care facilities.

Just as services and care has evolved and expanded, so has the long-term care insurance industry to meet this growing and changing environment. But as with most industries, as the care become more expansive in its coverage, and the demand for care increases, costs will continue to rise to provide that care.

Having a plan for long-term care is an essential part of today's estate planning and a critical part of future estate planning. With medium annual cost for long-term care in California in 2012 of $48,000 for homemaker services[1], $42,000 for a one bedroom assisted living unit[2] and $82,000 for a semi-private room in a nursing home[3], it is becoming a significant financial burden for families, especially for the surviving spouse or partner.

These numbers only reflect the net cost to the family, without consideration for the taxes potentially owed on liquidated assets, coupled with the lost opportunity of those invested assets. Depending on the situation, the gross cost to the family could be considerably more to the estate over the length of the claim.

It is beneficial to help increase awareness of the potential financial exposure faced for unfunded long-term care. In the finance industry, many now view the future of long-term care as a perfect storm for estate planning. The coming together of many factors could push demand very high, while at the same time previous care supply solutions shrink.

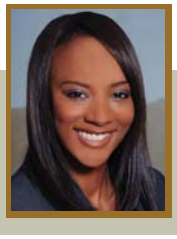
Factors include the government, which has historically been the main provider of institutional care, and will continue to be, but most likely with much stricter financial qualifications for a person to receive care. The Federal Deficit Act of 2005 was a first step by the federal government to reclaim Medicaid and Medi-Cal for its intended purpose, to protect and help the poor. Unless Washington provides social engineering, similar to that under President Johnson with the creation of Medicare and Medicaid, the funding of long-term care will be left to the individual.

The pressure from an ever expanding and aging population could push demand and costs higher in the future. According to the 2010 US Census Bureau, 1 in 5 Americans are expected to be 65 or older by 2035.[4] This aging population, coupled with a medical care system designed to sustain life, having solved many of the afflictions and diseases which took previous generations swiftly and prematurely, just adds to the storm.

In addition, where care in the past was provided by the children, many people have fewer children. And in many instances, those children live at great distances with much more complicated lives. Therefore it is essential that clients understand the importance of having a plan for long-term care. Not only having a plan, but also creating that plan while healthy enough to have insurance planning choices.

Too often, families come to realize the value of planning when it is too late. There are two choices when it comes to having a plan for long-term care: self-fund a possible future claim, dollar-for-dollar, or transfer part or a majority of the risk to an insurance company.

In terms of self-funding, it is a great idea in theory, usually considered while in good health, but difficult to execute, in practice. Too often, the healthy spouse cannot come to spend the money needed to bring in the care, rationalizing away the paid care and taking on the care responsibility to save money. The outcome is poor care for the ill spouse and deteriorating health for the caregiver. What is ironic is that if a third party provided the dollars for



Serria Rego is a Financial Advisor with Waddell & Reed in Sherman Oaks. She is securities and insurance licensed in California. Rego can be reached at srego@wradvisors.com. **Tim Ripp** of Associates of Clifton Park is a long-term care specialist.

monthly care, it would gladly be taken. The average person spends unearned funds in a different fashion than earned.

California offers a unique opportunity for residents to purchase long-term care insurance and, as an incentive, receive asset protection. The California Department of Health Services (DHS) in 1992 received a grant from the Robert Wood Johnson Foundation to pilot a program to create an innovative partnership between the consumer, California and private insurance companies.[5] The success of this pilot program in California and the other three pilot states, Connecticut, Indiana, and New York, opened the door to all states now being eligible to participate though the Deficit Reduction Act of 2005 in the creation of partnership plans.

The California Partnership for Long-Term Care provides dollar-for-dollar protection for residents who have purchased a specific California Partnership Policy. For every dollar of benefit received while on claim, an extra dollar above the Medi-Cal allowance for asset protection is also received. Those assets are excludable from a Medi-Cal spend down, and are free from a Medi-Cal estate recovery action after death.

Two unique features of the California Partnership are the requirement of care management to help the family find and manage the plan of care and premium rate stability for partnership policies. For the average person or couple looking at long-term care planning with what are called traditional long-term care plans, partnership or non-partnership policies, the annual cost for premiums is usually under one percent of the interest off the person's assets.

Earlier it was mentioned that not only has care evolved, but the insurance industry is evolving with expanded coverage and new policy designs. A new subset of long-term care policies are asset-based long-term care plans. These policies were created to help alleviate that constant client thought of "what if I never become incapacitated and use my policy."

An asset-based policy is an asset transfer, usually as a single premium into a life insurance policy. Money is fully refundable at any time, no charges or loads. If the client keeps the policy and dies without accessing the LTC benefits, there is a tax free death benefit paid out, typically around 150% of the initial deposit.[6] If the insured needs long-term care, the death benefit is accelerated by a 2, 3 or 4% per month distribution to pay for care. If it were elected at time of application, an additional period of care could be continued for two, three or four additional years, all tax free.

An asset-based policy can be a great alternative for older self-insurers or wealthy clients for leverage efficiency, but keep in mind that benefits provided by insurance policies are subject to the claims-paying-ability of the issuing insurance company. What is important to remember is that growing older is mandatory, doing it well is optional; having a plan for long-term care is part of doing it well.

The article is meant to be used for informational purposes only and should not be construed as financial advice related to your personal situation. Please consult with your tax, legal and financial advisor prior to making financial decisions.

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[1] Assumes 44 hours per week by 52 weeks; Genworth 2012 Cost of Care Survey

[2] Monthly rate multiplied by 12 months; Genworth 2012 Cost of Care Survey

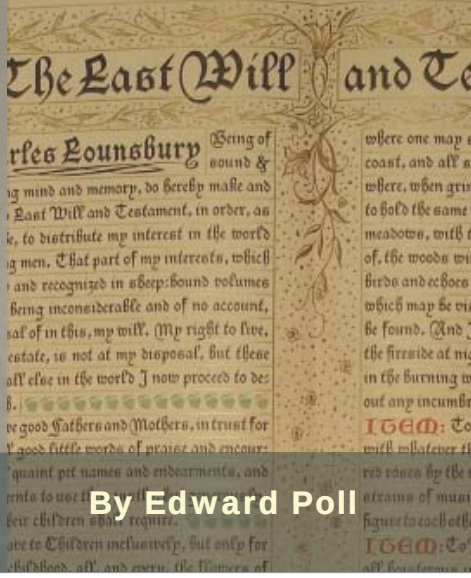
[3] Daily Rate multiplied by 12 months; Genworth 2012 Cost of Care Survey

[4] 2010 US Census Bureau; The Next Four Decades; The Older Population in the US: 2010 to 2050

[5] California Department of Health Services; California Department of Aging: Taking Care of Tomorrow

[6] Standard Rates, female age 65; Lincoln Financial

Ethical Dimensions of a Practice Estate Plan



By Edward Poll

ESTATE PLANNING IS A fundamental legal discipline. But how many lawyers ever make an estate plan for their own practice? With an estimated 400,000 baby boomer lawyers at or nearing traditional retirement age in the upcoming decade, every sole or small firm practice with partners over the age of 50 should begin thinking of how to meet client needs in the event of partner death or disability. Lawyers are not immortal, and the lawyer without a plan for a physical inability to practice is playing with fire.

Ethical Risks

Failure to plan for taking care of clients in the event of death or disability constitutes reckless disregard for client welfare. The ABA's Commentary 5 on Rule of Professional Conduct 1.3 ("Diligence") states: "To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action."

In 2010, the State Bar of California's Commission for the Revision of the Rules of Professional Conduct considered requiring such a plan for all firms in the state, but ultimately dismissed the idea as impractical. However, other ethical risks make a practice estate plan essential.

All state codes of professional responsibility require, for a practice suddenly closed through death or disability, formal notification to clients, opposing counsel, courts where the firm had pending matters, errors and omissions insurers and the State Bar Association. In California, and other states, a practice closed due to an attorney's death or incapacity must be wound up by a personal representative, guardian or conservator. For cases or matters not completely closed, the State Bar can intervene, assume responsibility for action and seek reimbursement and compensation from the lawyer's estate or assets.

Family Considerations

Lawyers who do not plan for what happens to their practices if they suddenly die deprive their families of an opportunity to grieve for them when immediately faced with what to do about the practice. They dilute the value of their estates, cheating their heirs when the State Bar reaches out to the grave and imposes financial penalties. And they make a gift of their clients to strangers—the other lawyers from whom the firm's clients seek representation.

Family considerations have further impact. Suppose the spouse of an older lawyer suddenly has a serious illness, and the lawyer wants to devote more time to care for the spouse than the practice allows. Without a plan to do so, what are the alternatives?

- Ignore the illness, hope for the best and live in fear of family and financial loss.
- Hire a contract lawyer to temporarily take over the process and, upon returning to practice, face the potential loss of clients to the new lawyer.
- Merge with or hire another partner-level lawyer who has an option to buy the practice and risk having the other lawyer leave or otherwise reject the deal before a return is possible.
- Buy another practice to add help and incur the expense and risk of unplanned expansion.

Colleague, Successor and Purchaser

To avoid such problems, solo and small firm lawyers must plan to enlist a practice colleague, successor or purchaser. First, prepare a client list containing all current contact information and status of matters/cases being handled. This listing should be maintained on a current basis. Second, create a memo for each file so that any lawyer who assumes the file will know the strategy developed, the outcome planned and the tactics anticipated. Third, create a buddy

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system by arranging with a colleague to review all this information and either take on the cases or provide for other representation without using a state bar conservator paid by the estate.

A better alternative is grooming a successor brought on board as an associate or a lateral partner. Ideally, matters can be transitioned to the new lawyer over several years, through ongoing conversations with key clients about the upcoming transition as the successor forges new ties and gets up to speed on what the client needs and expects. Such preparation assures continuation of the firm's reputation, embodied in the client list and the ongoing nature of the practice (with staff and systems in place). Transitioning a successor from inside the firm eliminates ethical concerns and succession worries.

The third alternative is identifying a purchaser for the practice. A strong client base and professional reputation are assets that can set the selling price for a firm. Usually, even the smallest and most personal practices are saleable for the right price and under the right terms. Buyers are law firms that are well run and free of debt, and that may themselves be run by successful lawyers positioned to take advantage of many opportunities to be offered by purchasing other practices. It's a win-win situation for both parties, made possible by Rule 1.17 allowing for sale of all or part of a practice.

No matter whether colleague, successor or purchaser ultimately takes responsibility, proper planning will give any lawyer peace of mind that ethical snares will not diminish the value of a practice built during decades of hard work.

New Members

The following applied as SFVBA members in August 2012:

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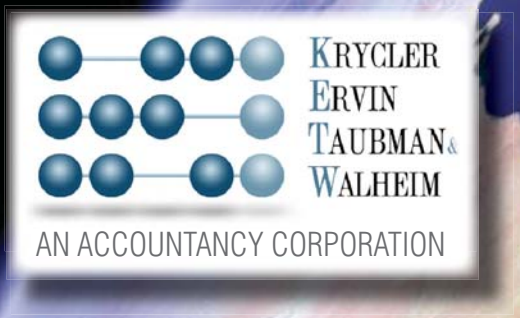

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