2019 CRITICAL LEGAL DEVELOPMENTS

VisTaTech Center, Livonia, Michigan

October 2, 2019

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Agenda

8:30 - 8:40	Opening Remarks	
8:40 - 9:20	Estate Planning - Best Practices	Mark G. Landau
9:20 - 9:50	Estate Planning for Millennials	Jennifer K. Johnson
9:50 - 10:20	The Tax Cuts and Jobs Act Impact on Divorce and Prenuptial Agreements	Phillip L. Sternberg
10:20 - 10:50	Break	
10:50 - 11:30	Sophisticated Tax Considerations in Connection with Equity and Asset Sale Transactions	Jeffrey A. Levine
11:30 - 12:00	Important Office Lease Provisions	Phillip J. Neuman
12:00 - 12:30	Types of Real Estate Ownership	Stacey L. DiDomenico

This material does not attempt to give specific legal or tax advice. For advice in particular situations, the services of competent legal, tax or financial planning advisors should be obtained.

RICK SNYDER
GOVERNOR

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DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES
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A student that arrives 10 or more minutes late or departs early will not receive CE credit.

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Estate Planning - Best Practices

Mark G. Landau

ESTATE PLANNING - BEST PRACTICES

I. SINGLE JOINT TRUST VS. 2 SEPARATE TRUSTS

A. Estate Tax Exemption Increase.

1. $11,400,000 per person in 2019. Estate Tax Exemption increases annually as adjusted by inflation.

2. Estate Tax Exemption scheduled to decrease to $5,000,000 (adjusted for inflation from 2011) per person on January 1, 2026. IRC Section 2010(c).

B. Portability Election. IRC Section 2010(c)(4).

1. Preserves the unused Estate Tax Exemption of the first spouse to die so that it may be used upon the death of the surviving spouse.

2. An Estate Tax Return must be filed on behalf of the Estate of the first spouse to die in order to make the election. IRC Section 2010(c)(5)(A).

3. For an estate that is not otherwise required to file an Estate Tax Return, the return must be filed within 2 years of the death of the first spouse. This is a permanent automatic extension of the Estate Tax Return filing deadline when portability is elected and a return is not otherwise required. Rev. Proc. 2017-34.

4. The unused Generation Skipping Transfer Tax Exemption of the first spouse to die is not portable.

C. Step up in Basis - Joint Trusts.

1. Keeping it simple - like joint ownership.

2. Full control of both spouses during lifetime, full control of surviving spouse.

   a. Full control by surviving spouse means plan and beneficiaries can change.

   b. No creditor protection.

3. Basis step up. IRC Sections 1014(a), (b)(9), (e).

   a. 50% basis step up upon death of first spouse, subject to proof that the decedent spouse contributed more than 50%.

   b. 100% basis step up upon death of second spouse.

4. Usually not the best choice for second marriages.

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D. Tools of the Estate Plan.

1. Revocable Trust - Joint Trust and Separate Trusts.
2. Pour-over Will.
3. Patient Advocate Designation and Living Will.
4. HIPAA Authorization.
5. Financial Durable Power of Attorney.
6. Funeral Representative Designation.
7. Asset Ownership / Funding.
8. Beneficiary Designations.

II. STEP UP IN BASIS - NEW DRAFTING STRUCTURE

A. Old - funding the Trusts based upon the remaining Estate Tax Exemption of the first spouse to die.

Marital Trust and Credit Shelter Trust.

1. Credit Shelter Trust.

    a. Funded with property equal to the Estate Tax Exemption of the first spouse to die.

    b. The Credit Shelter Trust property is not included in the Taxable Estate of the second spouse to die.

    c. There is no basis step up for the assets in the Credit Shelter Trust upon the death of the second spouse.

2. Martial Trust.

    a. Remaining property of the first spouse to die in excess of the Estate Tax Exemption.

    b. The Marital Trust property is included in the Taxable Estate of the second spouse to die, along with any property that the second spouse to die owns.

    c. There is a basis step for the assets in the Marital Trust upon the death of the second spouse.

B. New - 100% to the Marital Trust for the surviving spouse.

1. 100% of the property of the first spouse to die is held in a Martial Trust for the benefit of the surviving spouse. The Marital Trust can provide for outright

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distribution to the surviving spouse or for Qualified Terminable Interest Property (QTIP) treatment.

a. Outright - The assets are under the control of the surviving spouse.

(1) Right of Withdrawal - the surviving spouse may withdraw all of the Martial Trust property at any time.

(2) General Power of Appointment - the surviving spouse has a power to appoint the Martial Trust property to one or more among the spouse, the spouse's creditors, the spouse's estate and the creditors of the spouse's estate.

b. QTIP - The assets are controlled pursuant to the wishes of the first spouse to die.

(1) An election must be made on a timely filed Estate Tax Return on the death of the first spouse even if there is no Estate Tax due.

(2) Surviving spouse can be limited to an income interest only, but may have other rights to principal.

c. There will be a second basis step up on death of the second spouse for all Trust property in the Marital Trust. IRC Section 1014.

2. The surviving spouse can disclaim property of the Marital Trust to the Credit Shelter Trust.

a. Old - Marital/Credit Shelter Trust.

Husband - Credit Shelter Trust	Wife
$2,000,000 Growth: $1,000,000	$2,000,000

If retain assets in Credit Shelter Trust - No basis step up upon Wife's second death.

Capital Gain	Estate Tax on Wife's Death
$1,000,000 X 20% (above $488,851 MJ)	
$200,000 Capital Gains Tax	**$0 Estate Tax (below Exemption Amount - $11,400,000)**

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b. New - Retain in Marital Trust with power to disclaim to Credit Shelter Trust. Do not disclaim.

Capital Gain	Estate Tax on Wife's Death
$1,000,000 growth -$1,000,000 step up in basis	$2,000,000 (Wife's assets) + $2,000,000 (Husband's assets in Marital Trust) + $1,000,000 (growth in Marital Trust) = $5,000,000
$0 Capital Gains Tax	**$0 Estate Tax (below Exemption Amount - $11,400,000)**

Since step up in basis benefit ($200,000) is more advantageous than Estate Tax cost ($0), better to retain in Marital Trust.

c. New. Disclaim to Credit Shelter Trust.

Husband - Credit Shelter Trust	Wife
$6,000,000 Growth: $1,000,000	$11,400,000

By disclaiming to Credit Shelter Trust - avoid Estate Tax cost of $2,800,000 ($7,000,000 x 40% = $2,800,000) compared to retaining in Marital Trust = income tax benefit of $200,000 ($1,000,000 x 20% = $200,000).

Since Estate Tax benefit of $2,800,000 (disclaim) is greater than $200,000 income tax benefit (step up in basis) - better to disclaim to Credit Shelter Trust.

d. Requirements of a Qualified Disclaimer. IRC Section 2518(b).

(1) Disclaimer must be in writing;

(2) The disclaimer must be received by the transferor (the Trustee, for example, if disclaiming an interest in a Trust upon the death of the Settlor of the Trust) within 9 months of creation of the interest (the date the Trust becomes irrevocable);

(3) The disclaimant has not accepted any benefits of the disclaimed interest; and

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(4) As a result of the disclaimer, the disclaimed interest passes without any direction on the part of the disclaimant to either:

(a) the spouse of the decedent, or

(b) a person other than the disclaimant.

e. Only the spouse of a decedent can disclaim an interest and still benefit from the disclaimed interest if the interest passes without the direction of the spouse. For example, the spouse as beneficiary of a Marital Trust can disclaim property which will fall to a Credit Shelter Trust and the spouse can remain a beneficiary of the Credit Shelter Trust. However, if the spouse is also the Trustee of the Credit Shelter Trust and the children are also beneficiaries, the power of the Trustee to distribute to or for the benefit of the children must be limited by an ascertainable standard or else the spouse has retained a power to direct the disclaimed property and the disclaimer will not be a qualified disclaimer.

f. Property subject to the Qualified Disclaimer is not included in the disclaiming spouse's Taxable Estate.

III. PROTECTION AGAINST CREDITORS OF BENEFICIARY (DIVORCE)

A. Hold assets for the beneficiary in trust vs. distribution of assets outright to the beneficiary.

B. Spendthrift Provision vs. Support Provision vs. Discretionary Provision.

1. Spendthrift Provision. MCL 700.7502.

a. Use of a spendthrift provision restrains both the voluntary and involuntary transfers of the Trust beneficiary's interest.

b. Does not protect against claims by "super creditors".

2. Support Provision. MCL 700.7503.

a. An interest subject to a support provision is not subject to the enforcement of a judgment until income or principal is distributed to the beneficiary, and then only to the extent that the distributions are not necessary for the health, education, support, or maintenance of the beneficiary.

b. Does not protect against claims by "super creditors".

3. Discretionary Provision. MCL 700.7505.

a. The beneficiary does not have any inherent right to distributions; distributions are at the discretion of the Trustee.

b. The discretion whether to make a distribution, the amount to distribute, who among a class may receive a distribution, whether the distribution is income or principal or both, or when to pay (the power to determine when to

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distribute within a year is not a discretionary provision if the distribution must be made).

c. Not subject to claims by "super creditors".

4. Super Creditors. MCL 700.7504.

   a. Includes:

      (1) A judgment or court order for support or maintenance of a child or former spouse.

      (2) A judgment creditor who has provided services that enhance, preserve, or protect a Trust beneficiary's interest in the Trust.

      (3) The state of Michigan or the United States.

   b. The Court may order the Trustee to satisfy such claims from all or part of the Trust income and principal distributions as they come due if a Support Trust or a Spendthrift Trust.

5. In re Antonia Gualtieri Living Trust (Michigan Court of Appeals, Unpublished, March 19, 2019). The ex-spouse of a Trust beneficiary was seeking payment from the Trust for the beneficiary's unpaid child support and alimony. The Trust provided that the "Trustee, in its sole and absolute discretion, shall apply to, or for the benefit of" the Beneficiary so much of the income and principal "as the Trustee deems advisable for his education, health, maintenance, and support". The Court determined that the use of "shall" did not cause the Trust to be a Support Trust, which would have subjected the Trust to the claims for the unpaid child support and alimony, but instead the authority of the Trustee to distribute in its "sole and absolute discretion" caused the Trust to be a Discretionary Trust, and thus not subject to such claims.

C. Careful attention must be made to beneficiary designations and the funding of the Trust.

1. Simply executing a Trust agreement does not automatically mean that assets are governed by the provisions of the Trust.

2. Assets must be re-titled into the name of the Trust.

3. Beneficiary designations must be prepared and filed which designate the Trust as beneficiary.

4. Organizational documents for entities must be reviewed to confirm that a transfer to the Trust will be effective.

5. Trust funding through Probate (pour over will) is not ideal.

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D. Selection of the Trustee.

1. A beneficiary of the Trust.

2. An individual other than the beneficiary (trusted friend or family member).

3. Corporate Trustee.

E. Consider options for the beneficiary to change or remove the Trustee.

1. Remove a bad-actor Trustee - good.

2. Appoint a more sympathetic Trustee - may not be good if the intent is for the beneficiary to have more restricted distribution rights or the Trust property is to be retained for contingent beneficiaries.

IV. DURABLE POWER OF ATTORNEY - MAKE IT EASIER

A. A Durable Power of Attorney grants authority for the named individual(s) (attorney-in-fact under the Durable Power of Attorney) to step into the shoes of the principal to make financial decisions and otherwise act as the principal otherwise could on matters authorized in the document.

B. Avoids the need for a Conservator for the principal in the event the principal no longer has the capacity to act.

C. Can provide for immediate authority for the designated individual(s) to act (eliminating the need for Affidavits of Incapacity to be obtained). Otherwise, the designated individual(s) will be required to obtain two Affidavits from doctors, a "springing" Power of Attorney. A Springing Power of Attorney is not permitted in some states.

D. The Durable Power of Attorney may provide broad authority to the designated attorney.

1. File tax returns.

2. Make gifts on behalf of the principal.

3. Handle real estate matters.

4. Invest and handle the payment of expenses.

5. Apply for government benefits.

E. Selection of Agent.

1. Single vs. co-attorneys.

2. Coordination with other fiduciaries such as Trustees of a Revocable Trust.

3. Trustworthiness.

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V. LIVING WILL / MEDICAL POWER OF ATTORNEY

A. Living Will - Authority to remove life support in the event certain conditions exist.

1. Incurable injury, disease or illness, regarded as a terminal condition, with life being artificially prolonged in that state.

2. Persistent vegetative state or an irreversible coma.

B. Medical Power of Attorney - Medical decision making when the principal is unable to make medical decisions (unconscious / dementia).

C. Selection of agent - All children vs. one child.

D. HIPAA Authorization - Gives the designated individuals the authority to obtain medical information about the principal.

VI. IRA DISTRIBUTIONS - BENEFICIARY DESIGNATION

A. Outright.

1. Individual beneficiary.

a. The surviving spouse has option (1) to roll-over to the surviving spouse's IRA and become the owner of the deceased spouse's IRA, (2) to take the deceased spouse's IRA as an inherited IRA using the surviving spouse's life expectancy, or (3) to take the deceased spouse's IRA as an inherited IRA using the deceased spouse's life expectancy if the deceased spouse was taking required minimum distributions and the deceased spouse's life expectancy is longer (younger) than the surviving spouse's life expectancy (older). The surviving spouse should elect to take the deceased spouse's IRA as an inherited IRA if the surviving spouse is under age 59 ½ and wants to take distributions without early withdrawal penalties.

b. A non-spouse beneficiary has the option to take the IRA as an inherited IRA and stretch the distributions over the life expectancy of the beneficiary, or, if the deceased participant was taking required minimum distributions and the deceased participant's life expectancy is longer (younger) than the beneficiary's life expectancy (older), the non-spouse beneficiary can use the deceased participant's life expectancy.

2. Charitable beneficiary.

a. Consider designating a charity as the beneficiary of an IRA when the intent is to provide for one or more charities upon death.

b. The charity will receive the IRA and will not pay income tax and non-charity beneficiaries can receive other assets that are not subject to income tax.

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c. Distribution from a Trust to a charitable beneficiary:

(1) The beneficiary designation could name a Trust wherein a charity is designated as the recipient of some or all of the IRA benefit.

(2) The Trust provision can provide for a reduction of the gift to the charity based upon other amounts received by the charity from assets outside of the Trust.

(3) Question as to the income tax deduction for the charitable gift by the Trust.

B. In Trust.

1. Trust must qualify as a "see-through trust" in order for the Trust beneficiaries to be counted as the beneficiaries of the IRA and obtain a stretch out of the IRA benefits. IRS Treas. Regs. Section 1.401(a)(9)-4, Q&A-5.

   a. The Trust must be valid under state law.

   b. The Trust must be irrevocable (or become irrevocable upon the death of the participant).

   c. The Trust beneficiaries must be identifiable within the Trust agreement.

   d. The plan administrator must be provided a copy of the Trust agreement by October 31 of the year after the death of the participant.

   e. All "counted" beneficiaries of the Trust must be individuals.

2. Conduit Trust.

   a. All distributions from the IRA to the Trust must be distributed outright to the Trust beneficiary.

   b. Succeeding Trust beneficiaries after the primary beneficiary are ignored.

3. Accumulation Trust.

   a. Distributions from the IRA to the Trust may be held in the Trust for the benefit of the beneficiary.

   b. Look through the Trust for all potential beneficiaries, may not include any non-individual and should only pay to individuals younger than the intended beneficiary in order to obtain the longest stretch.

4. Designate the separate sub-trusts for beneficiaries directly on the IRA beneficiary designation in order to use the life expectancy of each primary beneficiary of a separate sub-trust.

C. Qualified Disclaimer - May be used to shift benefits among beneficiaries or from an individual beneficiary to a Trust beneficiary. For example, spouse as primary

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beneficiary, Trust for the benefit of spouse or other beneficiaries as contingent beneficiary. Spouse can disclaim as primary beneficiary and receive benefits through the Trust.

D. The future of the IRA? The Secure Act passed the US House of Representatives on May 23, 2019 on a 417 to 3 vote. There is also bipartisan support in the Senate, however procedural hurdles have delayed debate and voting on the legislation. If passed, the law would limit to 10 years the period that most non-spouse IRA beneficiaries can keep IRA assets in the inherited IRA.

VII. FAMILY BUSINESS - IS EQUAL FAIR?

A. Will specific family members receive the interest in the family business? Options include:

1. A specific bequest to such beneficiary off the top.

2. Allocation of the business interest as portion of the beneficiary's share.

   a. Special considerations for valuation of the business upon the death of the Settlor (business owner) for purposes of allocation.

   b. Who agrees to the value?

   c. Consideration of the sweat equity of the beneficiary in the business to lower the value for allocation purposes.

3. Other assets to other beneficiaries to equalize?

   a. Life insurance could be used to fund the shares for the beneficiaries who will not receive the business.

   b. Consider having the beneficiary that receives the business pay the difference between the value of the business and share the beneficiary would otherwise receive to the other beneficiaries pursuant to a promissory note. Should the note be secured?

B. Worst Case Scenario - No Planning.

1. Business distributed equally to all children. Often children having no interest or experience in the operations of the business become co-owners.

2. Child receives business but must pay siblings pursuant to unreasonable terms that cannot be supported with the income from the business.

VIII. ELIMINATE THE IRREVOCABLE TRUST? KEEP THE INSURANCE

A. Example: Estate is well under the Estate Tax Exemption amount.

B. Distribute the policy to the beneficiaries of the Irrevocable Trust.

1. The beneficiaries can transfer the policy to the insured - No transfer for value.

2. The transfer is a gift by the beneficiaries to the insured.

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C. Sale of the policy by the Irrevocable Trust to the insured.

1. Proceeds of the sale which are paid to the Irrevocable Trust can be distributed to the beneficiaries of the Irrevocable Trust.

2. Make sure the Irrevocable Trust contains no restrictions for such a transaction.

D. The Trustee has fiduciary liability - obtain the consent of the beneficiaries for proposed transactions.

1. Non-judicial settlement agreement.

2. Court proceeding.

IX. BE FLEXIBLE - CIRCUMSTANCES CHANGE

A. The beneficiary of the Trust can be provided with the power to change the Trustee.

1. Removal authority, with or without cause.

2. Appointment authority.

a. Limit to non-beneficiaries?

b. Require a corporate Trustee?

B. The beneficiary of the Trust can be provided with a Limited Power of Appointment to a class of beneficiaries (i.e., children).

1. Exercise during lifetime vs. upon death.

2. Exercise could provide for outright distribution to children or in Trust (with new provisions).

C. Trust Director (previously Trust Protector). MCL §700.7703a. (May 2, 2019).

1. Power of Direction - A power over a Trust granted to a person exercisable while not serving as a Trustee of the Trust.

2. Trust Director - A person holding the power of direction regardless of whether or not the person is the Settlor of the Trust or a Trust beneficiary.

3. Directed Trustee - A Trustee that is subject to a power of direction in a Trust.

4. Common powers of direction include:

a. The power to authorize the sale or retention of a family business.

b. The power to determine the investment strategy of a Trust.

c. The power to approve or veto a distribution to a Trust beneficiary.

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d. The power to alter beneficial interest of someone other than the powerholder.

e. The power to change the governing law of a Trust or to change the situs of a Trust.

f. The power to grant a power of appointment.

D. Disclaimers allow flexibility for the beneficiary to disclaim interests which will then be distributed to the next specified beneficiaries. Example: A wealthy child disclaims an interest in a Trust so that assets will be distributed in Trust for the benefit of the child's children.

E. Contingent General Power of Appointment.

1. This power provides a testamentary general power of appointment for the beneficiary to appoint Trust property to the extent there is a capital gain on the Trust property and inclusion of the Trust property in the Taxable Estate of the beneficiary upon death does not result in additional Estate Tax or Generation Skipping Transfer Tax.

2. Results in a step up in basis for the included assets and inclusion of the assets in the estate of the power holder for Estate Tax purposes.

3. Potentially subject to creditors of the beneficiary. MCL 556.123(3).

X. TRUST ADMINISTRATION - SECOND STEP UP IN BASIS

A. Transfer appreciated assets from the Trust of the deceased spouse to the surviving spouse so that the assets will be included in the Taxable Estate of the surviving spouse.

B. Advantage - Second step up in basis upon the death of the surviving spouse.

C. Disadvantages:

1. Subject to the creditors of the surviving spouse.

2. There will be a loss of control from the terms of the Trust created by the first spouse to die.

3. Inclusion in the Taxable Estate of the surviving spouse; potentially subject to Estate Tax upon the death of the surviving spouse.

D. Consent of the contingent beneficiaries or a Court order should be obtained.

XI. CHANGE AN "IRREVOCABLE" TRUST

A. The Trust can be irrevocable:

1. During the lifetime of the Settlor.

2. After the death of the Settlor.

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B. Why change an "Irrevocable" Trust?

1. Change or removal of the Trustee.

2. Change the Trust from an outright distribution to the beneficiary to instead hold the Trust property in Trust for the beneficiary's lifetime.

3. Add or remove a beneficiary.

4. Achieve a basis step up on a beneficiary's death.

5. Alleviate Estate Tax or Generation Skipping Transfer Tax concerns.

6. Change Trust situs.

7. Change the perpetuities period of the Trust.

C. How can changes be made?

1. The beneficiaries can enter into a Non-Judicial Settlement Agreement. MCL 700.7111.

   a. May not violate a material purpose of the Trust.

   b. Cannot change the dispositive provisions of the Trust.

   c. Often used to change/remove unwanted Trustees.

   d. Must receive consent of the interested persons.

2. Decant the assets of the Trust into another Trust with preferred terms.

   a. An exercise of the power of the Trustee to distribute to or for the benefit of the beneficiary.

   b. The scope of the power to decant is based on the discretion that the Trustee has to distribute to or for the beneficiaries.

      (1) Full discretion of the Trustee - can make change, including changing beneficial interests. Not required to provide notice before decanting transfer. MCL 556.115a.

      (2) Discretion subject to an ascertainable standard - can make administrative changes but may not change beneficial interests. Notice must be provided to the Settlors and Qualified Trust Beneficiaries prior to the decanting transfer. MCL 700.7820a.

3. Exercise of a Power of Appointment in the Trust.

   a. Power of Appointment by a beneficiary.

   b. Power of Appointment by a non-beneficiary (Trust Director?).

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c. May be exercised during lifetime vs. upon death.

d. May limit the scope of the power of appointment to only allow appointment to certain individuals, classes of individuals, charities, etc.

e. General vs. limited power.

4. Seek court assistance in the reformation or modification of the Trust. MCL 700.7414.

   a. Reformation - seeks to correct a mistake or error. MCL 700.7415.

   b. Modification - seeks to change unwanted terms. MCL 700.7410, MCL 700.7411, MCL 700.7412, MCL 700.7414, MCL 700.7416.

5. Distribute the assets of the Trust to the beneficiary.

XII. ESTATE TAX PLANNING BEFORE IT IS TOO LATE

A. Use it or lose it.

1. Estate Tax Exemption scheduled to decrease on January 1, 2026.

2. Make gifts to Trust in order to use Estate Tax Exemption during lifetime.

3. If there is a wait-and-see who controls Congress, there will likely be a rush to plan in 2025. May be better positioned to do planning now.

4. Use the "free" lifetime annual exclusion gifts.

B. Spousal Lifetime Access Trust (SLAT).

1. Lifetime gift of assets to an Irrevocable Trust for the benefit of the beneficiary spouse.

2. The SLAT can provide for distributions to the beneficiary spouse which may be used to supplement the household needs.

3. The beneficiary spouse can be given broad limited power of appointment, limited power of appointment to issue, or no power of appointment.

4. The gift to the SLAT uses the Estate Tax Exemption of the spouse making the gift.

5. The assets of the SLAT are not included in the Taxable Estate of either spouse upon death unless otherwise intended (see below).

6. There is no basis step up of the assets on the gift to the SLAT; however, a contingent or formula power of appointment for the beneficiary spouse could provide a basis step up upon the death of the beneficiary spouse.

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Estate Planning for Millennials

Jennifer K. Johnson

ESTATE PLANNING FOR MILLENNIALS

I. WHY WE SHOULD CARE ABOUT REPRESENTING MILLENNIALS

A. Millennials are currently 25% of the population with substantial income, assets and planning needs.

B. Targeting this generation extends the life of your practice.

1. Millennials stand to inherit an estimated $14-30 trillion in the next several years.

2. Millennials are expected to have the largest spending power of any generation.

3. Many millennials are helping parents or in-laws with their affairs.

a. They may be involved in their parents' or in-laws' tax, estate and/or elder law planning.

b. They may administer parents' or in-laws' finances or other affairs during incapacity or later life.

c. They may handle estate administration including probate and filing of tax returns for deceased parents or in-laws.

4. As millennials age, their needs and sophistication will increase.

C. Across industries, in any period of industry disruption, the companies who listen, adapt and transform are the companies that survive changing consumer preferences.

II. UNDERSTANDING MILLENNIALS AND THEIR APPROACH TO PLANNING

A. Who is a millennial?

1. Defined by the US Census Bureau as someone being born between the years 1982 and 2000.

2. The American Psychological Association and the Federal Reserve Board both define millennials as being born between the years 1981 and 1996.

3. Millennials are often thought of as the "twenty somethings" and "thirty somethings".

4. Currently, millennials are those who are young adults or in their mid to late 30s.

B. Formative events impacting nearly every millennial.

1. The Internet Age.

2. The War on Terror.

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3. The 2008 Recession.

4. Rising education costs.

C. Differences between "older" and "younger" millennials:

	Ages during…					Age on…		
Year of Birth	Ronald Reagan's presidency (1981-1989) (R)	George Bush's Presidency (1989-1993) (R)	Bill Clinton's Presidency (1993-2001) (D)	George W. Bush's Presidency (2001-2009) (R)	Barack Obama's Presidency (2009-2017) (D)	9/11/2001	2008	2014
1982	0-7	7-11	11-19	**19-27**	27-35	18-19	26	32
1983	0-6	6-10	10-18	**18-26**	26-34	17-18	25	31
1984	0-5	5-9	9-17	**17-25**	25-33	16-17	24	30
1985	0-4	4-8	8-16	**16-24**	24-32	15-16	23	29
1986	0-3	3-7	7-15	**15-23**	23-31	14-15	22	28
1987	0-2	2-6	6-14	14-22	**22-30**	13-14	21	27
1988	0-1	1-5	5-13	13-21	**21-29**	12-13	20	26
1989	0	0-4	4-12	12-20	**20-28**	11-21	19	25
1990		0-3	3-11	11-19	**19-27**	10-11	18	24
1991		0-2	2-10	10-18	**18-26**	9-10	17	23
1992		0-1	1-9	9-17	**17-25**	8-9	16	22
1993		0	0-8	8-16	**16-24**	7-8	15	21
1994			0-7	7-15	**15-23**	6-7	14	20
1995			0-6	6-14	14-22	5-6	13	19
1996			0-5	5-13	13-21	4-5	12	18
1997			0-4	4-12	12-20	3-4	11	17
1998			0-3	3-11	11-19	2-3	10	16
1999			0-2	2-10	10-18	1-2	9	15
2000			0-1	1-9	9-17	0-1	8	14

D. Key observations.

1. About half of millennials lived at least one adolescent year in Bill Clinton's presidency.

2. Almost all millennials lived at least one adolescent year in George W. Bush's presidency, with those born in 1982 having the 2000 election as the first they were able to vote in and those born in 1983-1986 having the 2004 election as the first they were able to vote in.

3. About half of millennials lived at least one adolescent year in Barack Obama's presidency, with those born in 1987-1990 having the 2008 election as the first they were able to vote in and those born in 1991-1994 having the 2012 election as the first they were able to vote in.

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4. About half of millennials were in adolescent years when 9/11 happened; the other half were in pre-adolescent years.

5. Older millennials were in their early teens and twenties when 9/11 happened and throughout the War on Terror.

6. Younger millennials may not remember where they were on 9/11, but grew up without knowing life as it existed before that day.

7. The same half of millennials who were in adolescent years when 9/11 happened, were ages 18-26 when the 2008 recession hit, entering the job market during the recession and its recovery.

8. About three-quarters of millennials were ages 18-32 in 2014, the year when the number of jobs recovered to pre-2008 levels; younger millennials entered the job market during the recession recovery or after recovery.

9. Older millennials began using computer technology during school years and were entering high school or college as the web became a public space or as social media gained major traction; younger millennials are the first true "digital natives", having computer technology available from birth or very young ages.

E. Typical millennial characteristics -- Millennials:

1. Are accustomed to having instant access to information.

2. Are technologically savvy.

3. Are active on social media.

4. Have some (or a lot) of student loan debt, adding to the difficulty of becoming established in a tough job market during the recession.

5. Tend to be risk averse.

6. Tend to be socially conscious and community oriented.

7. Want to “make a difference”.

8. Tend to prioritize experiences (education, travel, outings) over products when spending money.

9. Tend to have less children than prior generations.

10. Are starting businesses less frequently, even though they are entrepreneurially minded.

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11. Are delaying:

    a. Buying their first home;

    b. Getting married; and

    c. Having children.

F. Common millennial values:

1. Work-life balance.

2. Finding a "calling" or purpose over finding a career.

3. Collaboration, community, inclusivity and empowerment.

4. Education.

5. Life experiences.

6. Information accessibility.

7. Flexibility.

8. Health and fitness.

9. Convenience.

10. Personalization.

11. Sustainability.

III. COMMON NEEDS, GOALS AND SCENARIOS

A. All millennials are now legal adults and need certain documents:

1. Basic estate planning and wealth transfer documents:

    a. Will.

    b. Living or Revocable Trust.

    c. Certificate of Trust.

    d. Funding documents:

        (1) Assignments.

        (2) Ladybird deeds as appropriate.

        (3) Beneficiary, "payable on death" and "transfer on death" designations.

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2. Powers of Attorney.

    a. Durable Power of Attorney for financial matters.

    b. Durable Power of Attorney and HIPAA Release for health care decisions.

3. Funeral Representative Designation.

4. Designation of guardians for minor children.

B. Goals:

1. For millennials with children, goals related to their children take priority (guardians, asset management, distribution standards, life insurance).

2. For millennials without children, goals related to their own care/comfort, life experiences, and pets take priority. This includes disability and long-term care planning.

3. Philanthropy.

4. Probate avoidance.

5. Tax planning:

    a. Income tax planning:

        (1) Tax sheltered investing.

        (2) Qualified retirement plan investing.

        (3) Basis step-up with inherited assets.

    b. Estate and gift tax planning.

C. Adequate insurance is essential.

1. Life insurance.

2. Health insurance.

3. Disability insurance.

4. Liability insurance (including an umbrella policy).

5. Long term care insurance.

6. Other.

D. Debts / Student Loans.

1. Federal vs. private student loan programs.

2. Repayment plan and loan forgiveness options.

3. Refinancing.

4. Related tax planning.

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E. Digital Assets.

1. Encourage millennials to keep a secure list of user names and passwords.

2. Discuss who should control digital assets upon death or incapacity.

3. Cryptocurrencies.

IV. ATTRACTING AND RETAINING MILLENNIAL CLIENTS

A. Market with millennials in mind.

1. Websites and social media advertising.

2. Positive business reviews.

3. Millennials value authenticity and transparency.

4. Use charts and infographics.

B. Be up to date with technology.

1. Millennials live in a "digital world" -- a solid website and social media presence are imperative.

2. Consider online portals where they can check the status of their matters at their convenience.

3. Allow for online bill-paying.

C. Communicate in their language.

1. Show them how your services can help them enjoy life, maintain their freedom and care for others.

2. Cater to their preference for instant and ongoing communication via video conferencing, text and other forms of instant communication.

D. Involve them in decisions.

1. Explain the reasons behind the advice.

2. Tie the meaning of the planning to experiences/life events, rather than data.

3. Don't give vague or incomplete answers -- information is only a "click away".

4. The formative life experiences have made many millennials risk adverse.

5. Present options and allow millennials to lean into decisions.

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The Tax Cuts and Jobs Act Impact on Divorce and Prenuptial Agreements

Phillip L. Sternberg

THE TAX CUTS AND JOBS ACT IMPACT ON
DIVORCE AND PRENUPTIAL AGREEMENTS

I. INTRODUCTION

A. Public Law 115-97, signed into law December 2017.

B. Has tremendous impact on divorce and marital planning.

II. SPOUSAL SUPPORT

A. Prior law.

1. Alimony in gross.

   a. Sometimes referred to as alimony in lieu of property settlement.

   b. Essentially was a way to defer payment of cash in order to equitably divide marital estate.

   c. Because it constituted a property division, it's tax neutral, not taxable to either party.

2. Permanent Alimony.

   a. Typically awarded in marriages of long duration.

   b. Always modifiable based upon change of circumstances.

   c. Taxable to payee.

   d. Deductible to payor.

3. Non-modifiable support pursuant to IRC Section 71.

   a. Specific rules applied in order to make it tax deductible to payor and taxable to payee.

   b. Provided best of both worlds, non-modifiable and tax advantages.

   c. Repealed by new tax law.

B. New law.

1. Applies to all divorce judgments entered on or after January 1, 2019.

2. Makes all support taxable to the payor rather than payee.

3. In other words, payor pays out of net income rather than gross income.

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4. Relates to payments under a divorce or separation agreement, including;

   a. Divorce decrees.

   b. Separate maintenance decrees.

   c. Written separation agreements.

5. May also apply to modifications of existing support, if it:

   a. Changes the terms of the alimony or separate maintenance payments, and

   b. Specifically states not deductible by payor or includable in payee's income.

   c. As long as "a" and "b" aren't in the modifications, new law will not apply to existing support orders.

C. Impact of changes to the law.

1. Prior law - "divorce subsidy".

   a. Allowed for parties to take advantage of differing tax brackets.

   b. Payor got the benefit of the deduction at the higher rate, while payee taxed on the same dollars at a much lower rate.

2. Current law.

   a. Payor is paying with after tax dollars.

   b. Payee receives payment tax free.

   c. Makes settlement negotiations more difficult, because of less flexibility.

      (1) Past practice - alimony and child support (never deductible to payor) were considered together in order to get more money to payee with less after tax consequences to payor.

      (2) Likely to create greater divorce disputes. Although on its face appears to be beneficial to payee, payor most assuredly will resist and ultimately will result in lower combined support.

      (3) Because of the prior taxable consequences to payee, it created incentive to defer pretax dollars in IRAs or Roth IRAs. That incentive is gone.

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III. CHILD RELATED TAX ISSUES

A. Elimination of dependency exemptions.

1. Shared custody, right to claim child dependency could be used as a negotiating tool.

2. Under current law, the exemption has been eliminated through 2025.

B. Expansion of child tax credit.

1. The child tax credit is up to $2,000 per qualifying dependent child.

2. Income threshold has increased so it doesn't begin to phase out until $200,000 modified AGI for taxpayers ($400,000 for couples filing jointly).

3. Custodial parent usually is entitled to release claim to noncustodial making it a negotiating tool.

4. Sunsets like the exemption elimination after 2025.

C. Expansion of 529 benefits.

1. Tax-free distributions of up to $10,000 per year for an account beneficiary's tuition at a public, private or religious elementary or secondary school in addition to college.

2. If noncustodial parent is making regular contributions with intentions of funding college, might be in for big surprise if custodial parent has been depleting the fund on earlier educational needs.

3. Need to have divorce decrees spell out specific uses allowable for 529s.

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Sophisticated Tax Considerations in Connection with Equity and Asset Sale Transactions

Jeffrey A. Levine

SOPHISTICATED TAX CONSIDERATIONS IN CONNECTION WITH
EQUITY AND ASSET SALE TRANSACTIONS

I. PERSONAL GOODWILL, NON-COMPETES AND COMPENSATION FLAVORED AGREEMENT CONSIDERATIONS

A. Personal Goodwill.

1. If the target is a C corporation, consider whether some portion of the transaction consideration may justifiably be allocated to "personal goodwill" of one or more target shareholders. The advantage is having this consideration taxed to those shareholders as capital gains.

2. Personal goodwill has been aptly described as "the sum total of those imponderable qualities which attract the customers of a business-what brings patronage to the business."

3. A first and primary question is whether one or more owners of the target corporation have personal goodwill to transfer to the acquirer.

4. Among other personal goodwill allocation considerations, the following flow out of cases analyzing personal goodwill, including:

a. Can allocations to personal goodwill be justified?

b. What is the nature of the business in question?

c. Will there be an appraisal of the personal goodwill to justify an allocation to it? This is among the most important factors to consider.

d. What personality and personal qualities attract patients, customers, clients, or otherwise generate business success?

e. What is the reputation for judgment, knowledge, and skill?

f. What is the expertise, specialized knowledge, and know-how?

g. What is the comparative professional success?

h. What is the demonstrated earning power?

i. What are the personal business, industry, and customer contacts/relationships?

j. What are the close relationships with key decision-makers at referral sources, suppliers, or customers?

k. How dependent is the target on an individual for its financial success?

l. How would that individual's loss negatively impact the revenue and/or profitability of the seller/target?

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5. In one sale of a dental practice case (*Howard*, 106 AFTR 2d 2010,5533 2010-2 USTC ¶50542 (DC Wash., 2010), aff'd 108 AFTR 2d 2011,5993 448 Fed Appx 752 (CA-9, 2011)), the Ninth Circuit noted that, although the relationships that Dr. Howard formed with his patients were indeed personal, the economic value of those relationships did not belong to him because he had conveyed his rights to his professional C corporation by entering into employment and non-compete agreements with his P.C.

   a. Thus, it is key to find out factually, whether a target owner/employee has entered into any agreements with their C corporation which prevent their unencumbered ability to practice without being sued by their P.C.

   b. In single owner P.C.'s, there is certainly little if any reason to ever have the owners limit their personal ability to leave and take their patients with them.

6. After establishing that personal goodwill in fact belongs to target shareholder(s), the next question is whether those shareholders transfer that personal goodwill to the acquirer.

   a. Courts have noted that shareholder/key employees may transfer goodwill through employment contracts or non-compete agreements.

   b. An acquirer however, does not receive personal goodwill where that individual does not have a right, by contract or otherwise, to the future services of the employee. In effect, the transfer is completed by the employee's agreement not to use that goodwill to compete against the employer.

7. Personal goodwill allocations are on the IRS radar.

   a. The IRS Form 8594 (Asset Acquisition Statement Under IRC Section 1060), which must be filed by the parties in an asset sale transaction, can determine the amount being classified as personal goodwill.

   b. This makes contemporaneous determinations of allocations to personal goodwill invaluable.

B. Non-Competition Considerations.

1. What non-compete, non-solicitation, and confidentiality provisions will apply?

2. Will different owners have differing provisions (e.g. a minority owner may need to be able to continue to work after no longer being employed by the buyer/target company)?

3. Will there be liquidated damages for violations?

4. Allocations to non-competes are ordinary income to the recipient, but are amortized by the acquirer like goodwill (over a 15-year period).

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5. Thus, special consideration should be given to the amount to be allocated to non-compete payments versus goodwill.

C. Compensation Flavored Payments and other Ordinary Income/Currently Deductible Payments.

1. With acquirers looking to write off as much of the acquisition consideration as quickly as possible, allocating a substantial portion of those payments to goodwill will stretch out the amortization period to 15 years.

2. If selling target equity holders will continue to work for the acquirer post-closing, should some portion of the overall transaction payments be allocated to compensation-flavored amounts?

3. These might include signing bonuses, post-closing performance payments (similar to "earnouts"), commissions and, other currently deductible payments by the acquirer to former target equityholders.

4. In some cases, if the target equityholders will continue to own real estate being leased to the acquirer, an increased rent (from pre-closing amounts) could be considered, assuming that those increased payments can be justified.

5. In each of these cases, the payments to the recipient will be ordinary income and currently deductible to the acquirer.

II. IRC SECTION 338(g) AND SECTION 338(h)(10) ELECTION CONSIDERATIONS

Deemed Asset Sales Using Section 338 Elections.

A. If the acquirer is buying the stock of the target and not the target's assets, absent a deemed-asset sale form of transaction, the basis of the assets of the target will remain the same after the acquisition.

B. Therefore, if the purchase price for the target's stock exceeds the basis of the assets of the target (which it almost always does), the acquirer would prefer an asset acquisition to step up the basis of the assets to the purchase price of the stock.

C. One method to accomplish a step-up is an IRC Section 338 election.

D. The general rules of IRC Section 338 are as follows:

The buyer (which must be a corporation) must acquire at least 80% of the total combined voting power of all classes of stock of the seller and at least 80% of the total number of shares of all other classes of stock of the seller within a 12-month period (a "qualified stock purchase").

1. If a qualified stock purchase occurs, then the buyer may elect to treat the stock purchase as a purchase of the seller's assets. This is accomplished without the necessity of actually liquidating the seller. Rather, the seller is deemed to have sold all of its assets in a single transaction in a fully taxable transaction. The seller is then treated as a new corporation which purchases all of the assets of

the seller as of the beginning of the succeeding day. The deemed purchase price is the fair market value of the seller's assets on the acquisition date. Careful valuation and allocation among assets is very important. The rules of IRC Sections 1060 and 197 apply to this deemed sale.

2. The election under IRC Section 338 must be made on IRS Form 8023 by the 15th day of the 9th month beginning after the month in which the buyer acquires the requisite 80% stock ownership in the seller (the "acquisition date"). The election once made is irrevocable.

3. If the selling corporation was an S corporation, any recapture tax will not be paid by the S corporation shareholders; rather the seller is required to file a one day return as a C corporation in which it will report any income or loss resulting from the election under IRC Section 338.

E. IRC Section 338(h)(10) Elections.

1. IRC Section 338(h)(10) elections are used where the seller is an S corporation which is not subject to tax on built-in gains under IRC Section 1374 (the "5-year built-in-gain rule").

2. Each of the buyer and the seller must agree to make the IRC Section 338 election and file the IRS Form 8023 by the 15th day of the 9th month after the sale.

3. The transaction is treated as a taxable acquisition of the target's assets for tax purposes.

4. As in all deemed asset sales, the allocations agreed to in the definitive transaction agreement are critical.

III. IRC SECTION 336(e) ELECTION CONSIDERATIONS

A. IRC Section 336(e) Provisions.

1. IRC Section 336(e) is similar to the IRC Section 338(h)(10) election, with the key difference being the loosening of the acquirer.

2. In an IRC Section 338(h)(10) election, the purchaser must be a corporation.

3. In an IRC Section 336(e) election, the purchaser is not restricted to corporations, but may include individuals, partnerships (including LLCs taxed as partnerships), or other non-corporate entities.

4. As with an IRC Section 338(h)(10) election, for sales of S corporation stock to meet the IRC Section 336(e) criteria, at least 80% of the vote and value of S corporation stock must be disposed of in a transaction or series of transactions which occur within a 12-month period.

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5. Assuming that the requirements are satisfied, all of the S corporation shareholders and the S corporation itself must agree in writing to make the election.

B. Timing.

1. Due to the deemed liquidation of "old target", the IRC Section 336(e) election has to be made by the 15th day of the third month following the month in which the disposition date occurs.

2. The deemed liquidation prevents the general S termination rules of IRC Section 1362(e)(6)(B) from applying.

3. In an IRC Section 336(e) election transaction, the acquirer will maintain the employer identification number of the target, which is very helpful.

IV. ASSET SALE CONSIDERATIONS

A. Asset Purchase.

1. General. If the purchase price exceeds the basis of the seller's assets and to avoid assuming unwanted liabilities of the seller, the buyer usually will opt for a direct purchase of assets, rather than the indirect method under IRC Section 338.

2. From the seller's standpoint, such a transaction is more complex and, if the seller decides not to continue the sales proceeds in corporate form, the selling corporation must be liquidated.

3. As a general rule, this results in double taxation if the seller is a C corporation, first to the corporation, and again to the shareholders when the net proceeds are distributed to the shareholders. Even with the new lower corporate 21% tax rate, double tax is more expensive than one level of capital gain on an asset sale.

4. Alternative forms of payment should be considered, such as payments to stockholders for personal goodwill, covenants not to compete, rent on retained real estate leased to the acquirer, and employment agreements.

B. Liquidating Sales and Distributions.

1. General Rule - IRC Section 336 requires gain or loss generally to be recognized to the liquidating corporation on distributions in liquidation, as if the property were sold to the recipient shareholder at fair market value, and also on sales of assets after adoption of a plan of liquidation. Gain, but not loss, will also be recognized to the corporation on non-liquidating distributions (as if the property were sold to the distributee at its fair market value). In addition, a purchaser's election to step-up the basis of an acquired corporation's assets under IRC 338 will, as discussed above, also trigger recognition of gain or loss.

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2. Gain at Corporate Level.

   a. Gain or loss is recognized to a corporation on a distribution of its property in complete liquidation. The distributing corporation is treated as if it had sold the property at fair market value to the distributee-shareholders.

   b. IRC Section 1239 may apply, triggering ordinary income to the corporation if the distribution is to a related person. The corporation may be able to avoid ordinary income by making distributions of ordinary income producing property to non-related shareholders.

   c. Since the corporation is treated as having sold its property at fair market value, valuation becomes very important. IRC Section 1060 requires use of the residual method, in which all asset value, including goodwill, is taken into consideration.

   d. Liabilities.

      (1) If the distributed property is subject to a liability, the fair market value of the property for this purpose is deemed to be no less than the amount of the liability. IRC Section 336(b).

      (2) If the amount of the liability exceeds the value of the property that secures it, the distributing corporation will recognize gain in an amount equal to the excess of the liability over the adjusted basis of the property. Similarly, if the shareholders of the liquidating corporation assume liabilities of the corporation and the amount of liabilities assumed exceeds the fair market value of the distributed property, the corporation will recognize gain to the extent the assumed liabilities exceeds the adjusted basis of the property. This rule may apply on a property-by-property basis which can result in gain on some property even if the overall corporate assets do not have liabilities in excess of fair market value.

      (3) The rule is not intended to require that liabilities incurred by reason of the acquisition of the property that were not taken into account in determining the corporation's basis for that property be taken into account in determining the amount of gain or loss under IRC Section 336.

C. IRC 336 does not necessarily affect the amount realized by, or basis of property received by, the shareholders of the liquidating corporation. IRC Section 331 continues to apply to the shareholders, triggering a net fair market value amount realized to those shareholders.

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V. INSTALLMENT SALE ISSUES

A. Deferred payments.

1. General Installment Reporting Rules.

   a. IRC Section 453 generally provides that if any part of the sales price is deferred, installment reporting of the gain will apply automatically unless otherwise elected.

   b. For a transaction to qualify under IRC Section 453, at least one payment of the purchase price must be received after the year of sale. It is however permissible for 100% of the purchase price to be paid in a single installment so long as that installment is received after the year of sale. Each year the seller includes in income the percentage of principal payments received during the year which equals the seller's gross profit divided by the total contract price (Gross Profit Percentage).

   c. Installment reporting is not available for or to sales of inventory (unless the sale is of all of the seller's inventory in bulk to one purchaser).

2. To the extent the face amount of all applicable installment obligations exceed $5,000,000 at the end of the taxable year, interest is charged on the tax which is deferred under the installment method to the extent of the face amount of the deferred payments. Further, to the extent that any debt is secured directly by an installment obligation that arises out of applicable sales, the net proceeds of the secured debt are treated as payments with respect to the other obligations. Thus, if a seller receives a promissory note at closing, and then pledges that note as collateral for a post-closing new loan, the seller loses installment reporting on the closing note to the extent of post-closing borrowing.

B. Liquidations of S Corporations Receiving Installment Obligations.

1. IRC Section 453(h) generally treats payments under an installment obligation received in connection with an asset sale of a corporation's assets (and not the obligation itself) as payments received by the shareholders in exchange for the shareholders' stock (i.e., permits shareholders to use the installment method).

2. IRC Section 453(h) is applicable to all corporations and IRC Section 453B(h) is applicable only to S corporations. The requirements for satisfaction of IRC Section 453(h) are:

   a. There must be a plan of liquidation adopted by the liquidating corporation;

   b. The installment obligation must be received pursuant to a sale of corporate assets contemplated by the plan of liquidation; and

   c. The corporation must distribute the installment obligation and formally dissolve within 12 months after adoption of the plan of liquidation.

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3. The special rule of IRC Section 453(h) does not apply to any installment obligation or any portion thereof related to inventory unless the inventory was sold in bulk in one transaction to one buyer.

4. IRC Section 453B(h) provides that no gain or loss will be recognized by an S corporation with respect to the distribution of an installment obligation in complete liquidation if that installment obligation is not treated as payment for the shareholders' S corporation stock under IRC Section 453(h).

VI. "F" REORGANIZATION STRATEGIES

A. Why Choose an Equity Form of Acquisitive Transaction?

1. For non-tax reasons, an acquirer may want to (or may be forced to) acquire the equity of a "target" company instead of the target's assets.

2. While acquirers often want to buy assets directly from a target in order to (among other reasons) seek to avoid the target's pre-closing liabilities, sometimes an equity form of transaction makes the most business sense.

3. A sale of a target's equity to an acquirer (instead of acquiring assets directly from a target company) may avoid the necessity of:

   a. The acquirer obtaining new vendor or supplier codes with the targets' customers and suppliers; and

   b. The acquirer needing written consents to the transfer of valuable target contracts (such as supply contacts and lease agreements).

4. While it is always critical for the parties to an acquisition to determine what "change of control" provisions may apply in connection with a transfer of a target's equity to an acquirer, there are often no express requirements for "permission" to be obtained from third parties.

5. Asset sales almost always require the consent of third parties, which may be difficult or impossible to obtain, or may require substantial time, due diligence, and/or publicity which the parties want to avoid.

B. Targets and Acquirers.

1. A "target" is a company (or series of companies) which an acquirer wants to acquire. The target may also be referred to as a "seller."

2. An "acquirer" is the entity (or series of entities) which wants to acquire a target. An acquirer may also be referred to as a "buyer."

C. What is an "F" Reorganization?

1. There are a number of types of corporate reorganizations under the IRC.

2. One form is called an "F" reorganization, or simply "an F reorg."

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3. An F reorg. (so named because it falls under IRC Section 368(a)(1)**(F)**) is a "mere change in identity, form, or place of organization of **one** corporation, however effected."

D. Tax Reasons for an F Reorg.

1. If an equity form of transaction is a "must", an acquirer will still want to get a step-up in basis in the assets being acquired (indirectly) from the target.

2. At the same time, the owners of the target's equity will want to maximize capital gain treatment and minimize ordinary income.

E. Long-Term S Corporation.

1. An F reorg. works where the target is a "long-term" S corporation (one which has been an S corporation for at least 5 taxable years before the transaction occurs).

2. That way, there is no built-in gain to worry about at the S corporation level if the target was at one time a C corporation which converted to S status.

F. Transaction Steps.

1. The target, being a long-term S corporation, operates an active business which the acquirer wants to buy.

2. The shareholders of the target first form a new Delaware corporation ("Holding Company").

3. The Holding Company will need to obtain its own, new taxpayer identification number.

4. Pursuant to a contribution agreement, the shareholders of the target then contribute all of their target S corporation shares to the Holding Company, and receive in exchange for that contributed target stock newly issued Holding Company stock. Thus, the target's shareholders become the sole owners of all of Holding Company's issued and outstanding stock.

5. The Holding Company then will need to file a Qualified Subchapter S Subsidiary Election (Qsub Election), where the Holding Company elects to treat its new subsidiary (the target) as a qualified subchapter S subsidiary of the Holding Company.

6. If any of the shareholders of the target had made a Qualified Subchapter S Election ("QSST Election") at the target level, for prudence it is recommended that those new Holding Company trust shareholders make a new QSST Election for their ownership of Holding Company shares.

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7. Then, as a wholly owned subsidiary of the Holding Company, target can convert into a new Delaware limited liability company (the "Company").

    a. A Delaware certificate of conversion and a Delaware certificate of formation will each need to be filed in Delaware, pursuant to which the target is converted into a Delaware LLC.

    b. You will need to obtain a certificate of good standing as well showing that the Company is in good standing as of the date of its formation.

    c. Since the Holding Company is now the sole owner (member) of the Company, the Holding Company should execute a limited liability company (operating) agreement, evidencing its sole ownership in the Company.

8. Assuming that the target is a Michigan corporation before its conversion into a Delaware limited liability company, there needs to be a certificate of conversion filed in Michigan.

9. Simultaneously with the filing of a certificate of conversion in Michigan, the new Company (the new Delaware LLC) will need to file a certificate of authority to transact business in Michigan.

10. A plan of conversion should be prepared and signed by the Holding Company and the target, along with appropriate shareholder and board of directors' resolutions approving of the conversion.

11. Lastly, the acquirer will buy from the Holding Company all of the membership interests which the Holding Company owns in the Company (the new Delaware LLC) pursuant to a membership interest purchase agreement to be negotiated by the parties.

G. Tax Issues in Connection with the Pre-Closing Restructuring.

1. Steps F.2., 4. and 5. will constitute an F reorg. See CCA 200941019 (April 9, 2009) and Rev. Rul. 2008-18.

2. As an F reorg., the target will adopt a plan of reorganization, along with the Holding Company.

3. Each party to the F reorg. (the target and the Holding Company) must file the required statement with their respective returns under Treasury Regulation Section 1.368-3.

4. The basis of the Holding Company's shareholders in their Holding Company stock is the same as the basis those same shareholders had in their target company stock (which was contributed by them to the Holding Company).

5. The holding period of the Holding Company's shareholders in their new Holding Company stock will be the same as their holding period in their target stock.

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6. Further, when the Qsub Election was made, the separate tax existence of the target will cease, and (for tax purposes) the Holding Company is treated as owning all of the assets previously owned by the target.

7. The Holding Company gets a carryover basis in the target's assets and gets a "tacking" of the target's holding period for its assets.

8. The original employer identification number of the target will remain with the target even after the QSub Election is filed (See Rev. Rul. 2008-18).

9. Further, on conversion of the target into the new Delaware limited liability company, the EIN of the target became the EIN of the Company, and the acquirer steps into the shoes of the Company and retains that employer identification number on the sale of the Company's membership interests by the Holding Company to the acquirer.

10. As noted above, the target's business is, when the Qsub Election is filed, a disregarded entity, and the target's assets are treated as owned by the Holding Company.

11. When the Holding Company sells all of the membership interest in the Company to the acquirer in the transaction, this was treated as if the Holding Company sold the assets of the Company to the acquirer. See Rev. Rul. 99-5 for the situation where a buyer acquires the membership interests in a single member LLC.

12. The Qsub Election terminates automatically on the conversion to a single member LLC.

13. Lastly, when the acquirer purchases all of the membership interests in the Company owned by the Holding Company, this should be a "non-event" (from an equity perspective - but not from a deemed "asset sale" perspective) since the operating entity (which is disregarded already) is moved from one disregarded entity, into another disregarded entity.

H. "Gross Up" Considerations.

1. In the transaction negotiations, a "gross up" provision should be considered to compensate the Holding Company shareholders for "deemed asset sale" allocations to ordinary income items (receivables, inventory, depreciation recapture, and non-compete allocations, among others), rather than all capital gain treatment.

2. The measure of the gross up needs to be spelled out with certainty in the definitive purchase agreement.

I. Delaware Law Issues.

1. Under Delaware law (§18-214 of the Delaware Limited Liability Company Act), upon the filing of a Delaware certificate of conversion into a Delaware limited liability company and the Delaware certificate of formation, the target (called the "other entity" under Delaware law) shall be converted into a Delaware LLC and,

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importantly, the "existence of the (newly formed Delaware) limited liability company *shall be deemed to have commenced on the date the other entity commenced its existence in the jurisdiction in which the other entity was first created, formed, incorporated or otherwise came into being" (emphasis added).*

2. This means that upon the conversion of a Michigan corporation (in this case a Qsub of the Holding Company), which is disregarded for tax purposes, into the newly formed Delaware LLC, the existence of the new Delaware LLC will have a retroactive date of existence to the date on which the Michigan corporation was formed.

3. Further, when the conversion becomes effective, for all purposes of the laws of the State of Delaware "all of the rights, privileges and powers of the other entity that has converted, and all property, real, personal and mixed, and all debts due to such other entity, as well as all other things and causes of action belonging to such other entity, shall remain vested in the domestic limited liability company to which such other entity has converted and shall be the property of such domestic limited liability company, and the title to any real property vested by deed or otherwise in such other entity shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of such other entity shall be preserved unimpaired, and all debts, liabilities and duties of the other entity that has converted shall remain attached to the domestic limited liability company to which such other entity has converted, and may be enforced against it to the same extent as if said debts, liabilities and duties had originally been incurred or contracted by it in its capacity as a domestic limited liability company. The rights, privileges, powers and interests in property of the other entity, as well as the debts, liabilities and duties of the other entity, shall not be deemed, as a consequence of the conversion, to have been transferred to the domestic limited liability company to which such other entity has converted for any purpose of the laws of the State of Delaware".

4. This is a very powerful provision. In essence, there is no "transfer" of assets or liabilities under Delaware law, so the "change of control" provisions typically applicable to an asset sale, or even an equity sale should not apply.

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Important Office Lease Provisions

Phillip J. Neuman

IMPORTANT OFFICE LEASE PROVISIONS

I. INTRODUCTION

A. Office leases come in many shapes and sizes.

B. Office leases are typically heavily negotiated between landlords and tenants with brokers also being involved in the process. Knowledgeable real estate attorneys should be used by all these parties for assistance.

C. This outline covers many, but not all, important lease provisions. Omitted items that can also require careful negotiation may include: rent, lease term, repair obligations, buildout allowances, deposits, insurance requirements and default provisions.

II. LOAD FACTOR

A. Leases in multi-tenant buildings typically have a load factor built into the rental rate.

B. The load factor is based upon two concepts: usable square footage and rentable square footage.

1. Usable square footage is the actual space occupied by the tenant from wall to wall inside the tenant's demised premises.

2. Rentable square footage is the usable square footage plus a prorata portion of the building's shared spaces, such as lobbies, restrooms, hallways, elevator shafts and the like.

C. Rent is typically calculated based upon rentable square footage. The difference between usable square footage and rentable square footage is the load factor.

III. COMMON AREA MAINTENANCE CHARGES/OPERATING EXPENSES/UTILITIES AND AUDIT RIGHTS

A. Common area maintenance charges are typically the charges incurred by the landlord in maintaining the common areas of the building that get passed through to the tenants.

B. Common area maintenance charges are less inclusive than operating expenses.

1. Common areas typically include parking areas, driveways, sidewalks and ramps, service areas, hallways, lighting facilities and landscaped areas. Common area maintenance charges relate specifically to the cost of maintaining those areas.

2. Operating expenses are a broader category of expenses incurred by the landlord, including personal property taxes and assessments, wages, salaries and compensation of employees, cost of consulting, accounting, legal, janitorial, maintenance, guard and other services, utility costs not reimbursed by tenants and any other costs, charges and expenses that under generally accepted accounting principles would be regarded as management, maintenance and/or operating expenses.

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C. Some leases provide for the tenants to pay merely the increase in common area maintenance charges or operating expenses over a base year, while other leases provide for the tenants to pay all of the common area maintenance charges or operating expenses incurred by the landlord.

D. Some leases provide for a maximum increase in any one year notwithstanding the actual increase in common area maintenance charges or operating expenses.

E. The lease should carefully spell out the difference between charges that constitute mere maintenance versus costs that are deemed to be capital improvements.

1. For example, patching and striping a parking lot would usually be considered a maintenance charge, while removing the existing asphalt and placing new asphalt would typically be deemed a capital improvement.

2. Similarly, repairing or yearly maintenance of the HVAC system would be considered a maintenance charge, while replacing the HVAC system would be deemed a capital improvement.

F. There are a number of approaches to handling utility costs.

1. In some office buildings, each suite is individually metered for electricity, gas and/or water, and the tenant typically will pay those charges either to the landlord or directly to the utility company.

2. In other office buildings, the landlord may pass through the actual utility costs to each of the tenants on a pro-rata basis as part of the operating expense.

    - This can be unfair to tenants that are not heavy users of utilities.

G. Leases should allow the tenant to have a limited right to audit the landlord's records to verify the charges that are passed through.

1. Sample provision (pro-landlord): Provided no Event of Default exists under this Lease, Tenant shall have ninety (90) days after receipt of the certified statement of amounts payable to have an independent certified public accountant reasonably acceptable to Landlord in all respects which is not working for Tenant on a contingency fee basis complete an audit of Landlord's books and records on Operating Expenses during normal business hours upon reasonable advance written notice at Landlord's local office. Tenant shall deliver to Landlord a copy of the results of such audit within ten (10) days of receipt by Tenant. In the event the audit indicates an overpayment by Tenant of five (5%) percent or more of the full amount owed for the calendar year, Landlord shall reimburse Tenant for the reasonable out of pocket costs (not to exceed $2,500.00) incurred by Tenant for such audit.

2. Sample provision (pro-tenant): Landlord shall maintain, at its main office, a complete record of such costs and expenses, including such records as might be reasonably audited by a certified public accountant in determining Tenant's Proportionate Share of the CAM Expenses, insurance premium costs and the real estate taxes and Tenant, or its authorized representative, shall be entitled to

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make or cause to be made an audit of such records upon ten (10) days prior written notice to Landlord. If such audit shall disclose that Tenant has paid more than required under the terms of this Lease with respect to the payment of its Proportionate Share of CAM Expenses, property insurance premiums and/or real estate taxes, Landlord shall promptly refund any overpayment to Tenant, provided Landlord shall also promptly reimburse Tenant the reasonable cost of such audit if such audit discloses that the CAM Expenses and/or other charges hereunder have been either understated or overstated by more than three percent (3%). If Tenant's audit shall disclose that Tenant has paid Landlord less than required under the terms of this Lease under this Article, then Tenant shall promptly pay Landlord the amount of the underpayment. Any such audit to be performed by Tenant pursuant to this paragraph shall be commenced within twelve (12) months following the date on which Tenant receives Landlord's annual statement of CAM expenses.

3. Accountants who are asked to perform an audit of expenses may have to look at detailed back-up documentation to confirm that charges are properly deemed to be maintenance or operating expenses rather than capital improvements.

IV. PROPERTY TAXES

A. Most office leases provide that the tenant pays a pro-rata share of any increase in real estate taxes for the office complex over the base year.

1. The tenant should try to get a provision that excludes increases in taxes as a result of an uncapping event.

2. Some leases will provide for a maximum increase in the pro-rata share of taxes in any one year regardless of the actual increase.

B. A few leases will give the tenant the right to appeal a tax increase on the office complex, but unless the tenant has a significant presence in the complex, it is usually not worth the effort.

V. EXPANSION/CONTRACTION RIGHTS

A. Tenants often need flexibility in terms of the amount of office space they utilize. The tenant should negotiate for a provision that permits expansion of the space as well as contraction when appropriate.

B. Landlords (and their lenders) typically resist the ability to contract the lease space. If you are able to obtain expansion/contraction rights, here are some things to consider:

1. Is it a one-time right or can expansion/contraction occur periodically throughout the lease term?

2. Is it a fixed amount of space subject to expansion/contraction or variable?

3. How much prior notice must be given?

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4. Is the expansion space specified when the lease is signed?

5. Will there be a fee for exercising the contraction right and if so, how is it calculated?

C. In addition to expansion/contraction, some leases allow the landlord to relocate the tenant to "comparable" space in the building at the landlord's expense. This is extremely disruptive, so the tenant will want to limit this ability as much as possible.

VI. RENEWAL RIGHTS

A. Tenants will usually want the right to renew the lease within a certain period of time prior to the expiration of the existing term. This is particularly true where the initial term of the lease is 5 years or less and the tenant wants to make sure it does not lose the value of the improvements installed in the space or the costs associated with the initial move into the space.

B. Renewal rights typically only benefit the tenant rather than the landlord.

1. Most renewal options will contain a fixed amount for the rental rate during the renewal term.

2. If the rental rate is too high, the tenant will decline to exercise the renewal option unless the landlord agrees to a lower rate.

C. Here are some issues to consider in connection with renewal rights:

1. How many renewal terms is the tenant given?

2. When does the tenant have to exercise the renewal right?

   a. Most leases provide for notice of anywhere from six to twelve months.

   b. The tenant should ask for a provision that obligates the landlord to provide a notice of the expiration of the renewal right before it actually expires. Sample provision: Notwithstanding anything to the contrary contained in this Article, Landlord shall not terminate this Lease by reason of Tenant's failure to exercise any option herein specified to extend the Lease Term without first giving Tenant thirty (30) days prior written notice that Tenant has failed to exercise its right to extend the Lease Term pursuant to the renewal option contained herein. Tenant's right to extend the Lease Term pursuant to this Article shall not lapse until the expiration of the aforesaid thirty (30) day period following Tenant's receipt of Landlord's written notice.

3. Will the renewal rental rate be a fixed amount, tied to consumer price index increases, or some sort of "market rate"? If "market rate" is to be used, there needs to be time to negotiate the rate before the renewal becomes official.

4. Does a tenant default cancel the renewal option? What if the default is timely cured?

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5. Will the base year for common area maintenance/operating expenses and property taxes be adjusted?

VII. SIGNAGE/PARKING

A. Larger tenants will often try to get the right to have their name or logo on the building pylon, if any, or the side of the building.

B. Smaller tenants will want to make sure that they can place "building standard" suite identification signage at the entry door to the leased premises and that there is a building directory in the lobby which has each tenant's name on it.

C. Parking areas are typically deemed to be unassigned, nonreserved and nondesignated. Office buildings typically use a ratio of a certain number of parking spaces for each 1,000 square feet of rentable area. Where there are more dense office layouts, however, this ratio may be unsatisfactory.

D. Some tenants prefer to have reserved or designated parking spots, but depending on their bargaining power, will usually end up paying additional rent for the privilege.

E. Another parking issue relates to visitor parking and whether there are enough spaces designated for visitors.

VIII. PERSONAL GUARANTY

A. One of the most heavily negotiated provisions involves the personal guaranty of the principals of a corporate tenant. The guaranty is typically a separate document executed simultaneously with the lease.

B. Issues to consider with a personal guaranty:

1. The guarantor will want a maximum dollar cap on the guarantor's liability, which should decrease over time so long as the tenant does not default.

2. An alternative to a set-dollar cap is a formula-based liability cap. Generally, the formula includes lost rent, the amount of the unamortized tenant improvement allowance and brokerage fees, costs to restore the premises to the condition required under the lease and attorney fees and costs incurred in evicting the tenant.

3. Does the guaranty apply to any renewal terms?

4. If there are multiple professionals (doctors, lawyers, accountants) in the practice that is renting the space, will each professional be fully liable for the entire amount of landlord's damages or liable only on a pro-rata basis?

5. The landlord will want to include a provision that attorney fees and costs incurred in pursuing the guarantor are not included in any cap on guarantor liability.

6. What notice must be given to the guarantor of a tenant default? Does the guarantor have an opportunity to cure tenant's default?

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Types of Real Estate Ownership

Stacey L. DiDomenico

TYPES OF REAL ESTATE OWNERSHIP

I. TENANTS BY THE ENTIRETIES

A. Who? Tenancy by the entireties is reserved exclusively for married couples.

B. What? This designation means that the spouses own the property jointly, with right of survivorship.

When one spouse dies, the property is automatically vested in the surviving spouse.

C. Why? Tenancy by the entireties is very favorable for couples. The creditor of one spouse cannot attach to real property owned by them jointly.

The protection does not apply to:

1. Federal tax liens.

2. Debt for which both spouses are liable.

3. Debt for which the property is used as collateral, such as a mortgage.

D. When? In most cases, property owned by a married couple should be owned as tenants by the entireties.

E. How? When a married couple takes title, a tenancy by the entireties is presumed, absent a different designation.

If an unmarried couple purchases property and later marry, it is recommended that a new deed be prepared, designating the couple as tenants by the entireties.

II. TENANTS IN COMMON

A. Who? Tenants in common is a designation that can be used by any number of individuals, trusts and other entities.

B. What? Each owner has a right to possession of the property. There is no right of survivorship. Unless otherwise designated, ownership of the property is presumed equal.

1. For example: If the property is owned by A, B and C as tenants in common, absent another designation, it is presumed A, B and C each own 1/3 of the property.

2. Usually an owner's interest is "undivided", which means each owner has a right to use the whole property.

C. Why? Tenancy in common is used when an individual does not want his/her share to go to the other owner(s) upon his/her death. This designation is also commonly used in cases of ownership by multiple entities, such as trusts or LLCs, or co-ownership of a trust and an individual is desired.

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D. When? Tenancy in common is the default when there are multiple owners. Therefore, if a deed states multiple owners (who are not husband and wife) but no tenancy is designated, then the owners are tenants in common.

Caution: Because there is no right of survivorship, when an individual owning real estate as tenants in common dies, his/her interest in the property will have to be probated, unless there is a ladybird designation in effect.

E. How? When multiple individuals and/or entities desire co-ownership, title should be taken as tenants in common. It is helpful to spell out their ownership interests on the deed as well (i.e. equal shares, ¼ share, etc.).

III. TRUST

A. Who? Real property can be owned by a Revocable Living Trust, or an Irrevocable Trust.

B. What? A trustee holds legal title to the property on behalf of beneficiaries of a trust.

C. Why? Titling property in the name of a trust avoids Probate upon a grantor's death. Also, the trust terms can dictate what should happen to the property upon the grantor's death.

D. When? There are a few instances in which a trust may want to own property:

1. Upon the death of a spouse, the surviving spouse should convey his/her interest to a Revocable Living Trust to avoid Probate.

2. An unmarried individual may want to own any property in his/her Living Trust to avoid Probate.

3. In a second marriage, a spouse may want to own property in his/her Living Trust instead of jointly with the new spouse, to ensure the property is distributed in accordance with the owner's wishes.

E. How? The deed should state with particularity the name of the trustee, and the name and date of the trust.

Property owned by a trust often qualifies for the Principal Residence Exemption, if the beneficiary resides in the property as their principal residence.

IV. JOINT TENANTS WITH RIGHT OF SURVIVORSHIP

A. Who? One or more individuals may own property as joint tenants with right of survivorship.

B. What? Joint tenants hold equal and undivided interests in property, with a right of survivorship.

1. Standard joint tenancy: if a designation of the owners is "joint tenants", then if an owner conveys his or her interest, the joint tenancy is severed and becomes tenancy in common.

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2. Rights of survivorship joint tenancy: if a designation of the owners is "joint tenants with right of survivorship", then an owner cannot unilaterally convey his/her interest. Upon the death of a joint tenant, his/her interest is automatically conveyed to the remaining joint tenant(s).

C. Why? Joint tenancy is desired in a few situations:

1. Among multiple individuals who desire their interest in the property gets passed to a co-owner upon his/her death.

2. In order to avoid Probate, as a deceased owner's interest automatically vests in the surviving owner(s).

3. To limit the person(s) who can inherit the property.

D. When? Historically, only individuals may own property as joint tenants, because the right of survivorship is measured by an owner's life.

1. Corporations, LLCs and other entities have not qualified to be joint tenants.

2. In a recent unpublished discussion, the Michigan Court of Appeals held that a trust may hold and convey real estate as a joint tenant with rights of survivorship. Schaaf, et al. v. Forbes, Mich. App. No. 343630 (August 6, 2019). There was a lengthy dissent. The planning opportunities this presents remain unclear.

E. How? If the parties desire to create a joint tenancy with rights of survivorship, this should be designated as such on the deed. Upon the death of a joint tenant, his/her death certificate should be recorded in the public records for the county of the property.

V. LIMITED LIABILITY COMPANY

A. Who? Property may be owned by a limited liability company ("LLC").

B. What? An LLC may own any real estate, whether commercial or residential.

C. Why? LLCs protect the individual owners from personal liability in the event of a person's injury or a lawsuit relating to the property. Property owned by an LLC cannot qualify for the Principal Residence Exemption.

D. When? LLCs are frequently used in situations where there is potential liability and/or multiple owners.

1. Residential rental real estate.

2. Real property inherited by multiple family members.

An operating agreement amongst the members of the LLC can spell out the owners' duties, costs, restrictions, transfer rights and more.

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3. Property used for commercial purposes.

4. Recreation real property (e.g. hunting camps).

E. How? Owners may initially take title in the name of an LLC, or they may transfer currently owned property to an LLC.

1. If the property is subject to a mortgage, a conveyance to an LLC may trigger the due on sale clause.

2. Be careful when transferring property to an LLC not to trigger an uncapping of the taxable value of a property.

VI. <u>LADYBIRD DEEDS</u>

A. Who? A ladybird deed is often used by both married couples and single individuals in order to avoid Probate at death.

B. What? A ladybird deed is also known as an "enhanced life estate" deed. It is essentially a transfer on death designation.

1. Life Estate. A grantor transfers to him/her/themselves a life estate in the property only. There is no power to convey or transfer the property without joinder of the remainder persons. Upon the life tenant's death, the property is automatically transferred to the named beneficiary(ies).

2. Ladybird. A grantor transfers to him/her/themselves a life estate in the property, with the power to convey, mortgage, sell or otherwise transfer the property, without the consent of the remainder persons, and the remainder to a named beneficiary upon the grantor's death. Therefore, if the life tenant does not sell the property during the life tenant's lifetime, the property is automatically transferred to the named beneficiary(ies) upon the life tenant's death.

C. Why? A ladybird deed is useful when the current owner wants to retain control and ownership of the property during the owner's lifetime, but wants to designate who should inherit the property upon the owner's death.

D. When? There are many circumstances where use of a ladybird deed is appropriate:

1. Medicaid planning.

2. Probate avoidance.

3. Ability to transfer property to individuals without the use of a trust.

4. Maintain tenancy by the entireties protection during a married couple's lifetime.

Not all states permit ladybird deeds, however they are accepted in both Michigan and Florida.

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E. How? A ladybird deed (or any life estate deed) should be drafted by an experienced attorney. The owners should first obtain title in fee simple, and then designate the remainder beneficiary(ies) in a subsequent ladybird deed.

1. A ladybird deed permits the life tenant to continue to occupy the property and maintain the Principal Residence Exemption.

2. Sometimes lenders do not understand the ladybird deed concept. If the property is subject to a mortgage and the owners refinance or take out an equity loan, sometimes lenders require the property not be held in an enhanced life estate, but instead pure fee simple.

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- Commercial contract preparation and review
- Service as an arbitrator in business contract matters

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- Sophisticated gift, estate, generation skipping transfer tax planning and documentation
- Wealth transfer planning and implementation
- Probate and trust administration
- Design and implementation of Wills, revocable trusts, irrevocable trusts, special needs trusts, charitable trusts and special trust agreements of various kinds
- Executive compensation arrangements, including deferred compensation and split dollar agreements
- Retirement distribution planning
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- Work with clients to resolve complex business issues, including shareholder disputes, loan renegotiations, executive terminations and restructuring
- Representation of creditors, debtors and creditor committees in Chapter 7 and 11 bankruptcy cases
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- General representation of business entities
- Tax planning with respect to partnerships, S corporations, limited liability companies and similar pass through entities
- Development of effective compensation and long-term benefit plans for business entities
- Tax planning involving mergers, acquisitions, divestitures and tax-free reorganizations
- Representation of buyers and sellers in the purchase or sale of businesses
- Preparation of estate planning documentation, including Wills, revocable trusts, irrevocable trusts, special needs trusts, qualified personal residence trusts, charitable trusts, intentionally defective grantor trusts, grantor retained annuity trusts and family limited partnerships
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- Construction contract litigation matters involving a variety of private, nonprofit and government entities, covering issues such as contract interpretation, construction delay, construction defects, mechanic's liens and stop notices
- Real estate litigation
- Complex commercial litigation, including corporate governance issues, contractual disputes, breach of fiduciary duty, unfair competition, covenants not to compete, fraud and deceptive trade practices, disparagement, dissolutions and other business claims
- Representation of public pension funds
- Representation of municipal government entities
- Representation of individuals and business entities in connection with tax controversies before the Internal Revenue Service, the Michigan Tax Tribunal and other courts
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- Assisting closely held businesses in formation, operation, tax planning, restructuring and termination
- Executive compensation and buy-sell agreement planning
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- Designing and drafting trusts of all types, including charitable trusts
- Business succession planning
- Assisting closely held businesses in formation, operation, tax planning, restructuring and termination
- Assisting tax-exempt organizations get established, obtain appropriate government approvals and operate in compliance with applicable rules
- Church and ecclesiastical law matters
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- Estate and gift tax counseling
- Design and preparation of standard and sophisticated estate planning documentation
- Probate Law representation
- Representation in Guardianship/Conservatorship proceedings
- Elder Law, including Medicaid and Social Security claim representation
- Business succession planning
- Drafting trusts of all types
- Estate and trust administration for individual and corporate fiduciaries
- Contested estate representation
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- General corporate representation including counsel to Boards of Directors, entity formation and capitalization, shareholder agreements, all contract matters, customer-supplier relationships, compensation planning, employee benefits and executive employment matters
- Mergers, acquisitions, investments, controlling interest sales, management buy-outs, joint ventures, restructuring, recapitalizations and equity incentive plan implementation
- Federal and state corporate tax planning and compliance
- Individual income tax planning
- Structure and implementation of family wealth transfer transactions

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PHILLIP L. STERNBERG is a shareholder of the firm with over 38 years of trial experience representing individuals, corporate and business clients. Mr. Sternberg's practice extends from routine through sophisticated and highly complex litigation. However, he knows it is best to avoid litigation when possible, and he will utilize aggressive and innovative negotiating strategies to avoid litigation when it's in the client's best interest. To that end, Mr. Sternberg is skilled in negotiating and drafting a variety of legal documents to avoid or resolve disputes before seeking resolution in the courts. Such documents include settlement and release agreements, confidentiality agreements, domestic relations agreements, prenuptial agreements, commercial, corporate and a variety of other documents customized to the issues at hand. He will always provide his client with an honest cost/benefit analysis, prior to engaging in litigation, so that the client can make an educated choice before proceeding.

Mr. Sternberg is both a tenacious courtroom advocate as well as a skilled and inventive theorist of the law. He has successfully pursued litigation in a broad range of categories and levels, including the state and federal appellate courts, U.S. District Court, Eastern and Western Districts of Michigan, Circuit Courts, and the U.S. Tax Court in diverse areas of law including, but not exclusively, the following:

- Business & Commercial Litigation
- Domestic Relations
- Employment Contract Litigation
- Insurance Disputes
- Investment Practices
- Negligence and Personal Injury Matters
- Probate and Trust Litigation

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LISA J. WALTERS is a shareholder of the firm. Ms. Walters concentrates her practice in the areas of estate planning, elder law, guardianships and conservatorships, probate, probate avoidance, tax planning strategies and trust and estate administration. Examples of her representation include:

- Estate and gift tax counseling
- Standard and complex estate, gift and charitable transfer planning
- Estate and trust administration for individual and corporate fiduciaries
- Durable powers of attorney for financial matters and medical treatment decisions
- Guardianship/conservatorship proceedings (including assisting in obtaining the appointment of the guardian and conservator as well as the ongoing administration)
- Advanced wealth transfer planning and implementation

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DONALD A. WAGNER is a shareholder of the firm. Mr. Wagner's practice focuses primarily on business financing transactions and all areas of commercial lending, including:

- Real estate and commercial/asset based transactions, such as construction loans, end mortgage loans, land acquisition and development loans, revolving credit facilities, government backed loans, involving various types of real estate, including condominiums, office buildings, shopping centers, mobile home parks, health care facilities, commercial and industrial complexes, hotels, resort and marina complexes with related environmental assessment and compliance documentation
- Letters of credit, equipment leases and other specialized transactions, including documentary and commercial (sight and stand-by) letters of credit and transactions secured by letters of credit from others. Financing to and/or involving third party lessors and lessees, machinery and equipment purchase facilities, warehouse and bridge facilities, equity kicker and equity participation arrangements, demand and piggyback rights agreements relating to a variety of areas, including for example, broadcast facilities, utility assets, multi-lender participations and pension and profit sharing plans

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GREGG A. NATHANSON is a shareholder of the firm. Mr. Nathanson has concentrated his practice in the areas of real estate, business, finance, environmental and corporate law. He is a prolific publisher and speaker concerning real estate matters, including service as an editor or advisor for the Michigan Institute of Continuing Legal Education and the Michigan Land Title Association regarding real estate matters. Examples of matters he has been involved in include:

- Representation of hundreds of owners, lenders, developers, builders, corporate users, landlords, tenants, investors, local government agencies, contractors and property managers regarding real estate matters
- Lease negotiation and documentation
- Client assistance in real property management
- Environmental, including due diligence and compliance
- Real estate tax planning and economic development, including Section 1031 like kind exchanges
- Resolution of title disputes
- Real estate acquisitions and disposition

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MARK S. FRANKEL is a shareholder of the firm. Mr. Frankel is a member of the firm's litigation section and he has concentrated his practice in the arena of probate law, complex commercial litigation, real estate, bankruptcy and creditors rights, commercial and business law. He is head of the firm's Probate Litigation Group. Examples of some of the matters he has handled include:

- Representation of estates, trusts, trustees and beneficiaries in contested estate, trust and probate administration matters
- Probate Court proceedings of all types, including Will, trust and estate administration and contests, guardianships, conservatorships, trust reformations, Trustee representation and examination of accountings
- Real estate litigation and administrative proceedings, including zoning and land use proceedings, contract litigation, environmental compliance and economic development
- Resolving title disputes
- Representation of individuals and business entities in connection with tax controversies before the Internal Revenue Service, the Michigan Tax Tribunal, zoning Boards of Appeal and other courts and administrative bodies
- Complex commercial litigation, including corporate governance issues, contractual disputes, breach of fiduciary duty, unfair competition, covenants not to compete, fraud and deceptive trade practices, disparagement, dissolutions and other business claims

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DAVID A. LAWRENCE is a shareholder of the firm. Mr. Lawrence concentrates his practice on civil litigation and employment and labor law. Mr. Lawrence's trial success includes the third largest Michigan jury verdict of 2007 (*Pamela Anton and Cheryl Freeman Snipes v. SBC Global Services, Inc.*, U.S. District Court for the Eastern District of Michigan, Case Nos. 01-40198 and 01-40213, affirmed by the Sixth Circuit Court of Appeals, Case Nos. 08-1307 and 08-1325).

- Mr. Lawrence provides both advisory services and litigates matters concerning discrimination, wage/hour and all other employment issues, physician and executive employment agreements, restrictive covenants, business contracts of all types, business torts, complex commercial cases, commissioned sales representatives, shareholder/member disputes, management side labor and occupational safety and health
- Mr. Lawrence regularly practices before the state and federal trial and appellate courts of Michigan, and several other states as necessary, the Equal Employment Opportunity Commission, National Labor Relations Board, Michigan Department of Civil Rights, U.S. Department of Labor, Michigan Wage & Hour Division, Michigan Unemployment Insurance Agency, Occupational Safety and Health Administration and Michigan Occupational Safety and Health Administration

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MARK G. LANDAU is a shareholder of the firm. Mr. Landau has focused his practice in the areas of estate planning, probate, estate administration, business succession planning and taxation. This has included such items as:

- Design and preparation of estate planning documentation, including Wills, revocable trusts, irrevocable trusts, special needs trusts, qualified personal residence trusts, charitable trusts, intentionally defective grantor trusts, grantor retained annuity trusts, and family limited partnerships
- Estate and gift tax counseling
- Buy-sell agreement design and implementation
- Estate and trust administration for individual and corporate fiduciaries
- Development of effective wealth transfer planning strategies and techniques

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RONN S. NADIS is a shareholder of the firm. Mr. Nadis has concentrated his practice in the area of commercial real estate. He represents institutional and private property owners in sales, acquisitions, finance, development and commercial leasing and property management issues. Representative legal matters include the following:

- Commercial real estate ownership, structure, sale, purchase and development
- Commercial real estate finance including CMBS (commercial mortgage-backed securities) and mezzanine lending and tax planning
- Office, retail and industrial lease transactions for investors, landlords, property managers and tenants
- Real estate sales and acquisitions for developers and other real estate companies, including multi-state transactions

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PHILLIP J. NEUMAN is a shareholder of the firm. Mr. Neuman focuses his practice on real estate and business litigation, including title issues, construction lien matters, contract disputes and commercial and residential landlord tenant matters. Examples of the types of matters he has handled include:

- Real estate litigation in Michigan and federal courts, including quiet title actions, title insurance coverage, mortgage priority disputes, adverse possession claims, forged deeds, construction lien foreclosure and condominium and homeowners' association lien foreclosure
- Resolution of title disputes, including reformation of recorded documents, boundary disputes
- Landlord tenant evictions and lease negotiation, drafting, interpretation, enforcement and litigation
- Commercial litigation involving business contracts of all types
- Bankruptcy matters, including nondischargeability claims (published opinion of the Sixth Circuit Court of Appeals) and automatic stay issues

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MONICA D. MOONS is a shareholder of the firm. Ms. Moons concentrates her practice in the areas of estate planning and taxation, estate and trust administration, probate and tax litigation and real estate. This has included such matters as:

- Estate and gift tax counseling
- Design and preparation of standard and sophisticated estate planning documentation
- Estate and trust administration for individual and corporate fiduciaries
- Representation of estates, trusts, trustees and beneficiaries in contested estate, trust and probate administration litigation matters
- Probate Court proceedings of all types, including Wills, trusts and estate administration and contests, guardianships, conservatorships, trust reformations, Trustee representation and examination of accountings
- Preparation of Gift and Estate Tax returns
- Commercial and residential real estate acquisition and sale

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GARY SCHWARCZ works primarily in the areas of business planning, estate planning and taxation. He has spoken on numerous occasions to professional groups, including CPAs, on tax topics, including the technical aspects of partnership and S corporation taxation. Examples of legal matters he has handled for clients include the following:

- Federal and state business tax planning and compliance
- Individual income tax planning
- Planning, formation, development, operation and tax compliance regarding closely held business entities
- General representation of business entities
- Tax planning with respect to partnerships, S corporations, limited liability companies and similar pass through entities
- Tax analysis and documentation concerning mergers, acquisitions, investments, controlling interest sales, buy-outs, joint ventures, restructuring and recapitalizations
- Planning and preparation of estate planning documentation
- Tax analysis, structure and implementation regarding family wealth transfer transactions

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JOSEPH H. WENER concentrates his legal practice in the areas of real estate law, corporate and business law, commercial transactions and contracts and issues concerning Canadian law. Examples of matters he has handled include:

- Planning, formation, development, operation and tax compliance regarding closely held business entities in both the United States and Canada
- General representation of business entities
- Tax and succession planning with respect to partnerships, corporations, limited liability companies and other business organizations
- Analysis and documentation concerning mergers, acquisitions, investments, controlling interest sales, buy-outs, joint ventures, restructuring and recapitalizations
- Real estate ownership structure, sale, purchase, leasing and development
- Real estate and asset-based financing (acting for both institutional lenders and borrowers)
- Capital markets finance

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CHRISTOPHER M. WILLIAMS specializes in mergers and acquisitions, business formation and operation, and commercial real estate transactions. He has represented clients in a wide variety of industries including: automotive, construction, dentistry, engineering, food service, graphic design, health care, information technology, machining, manufacturing, marketing, mechanical contracting, real estate, retail sales, veterinary practice and website development.

Mr. Williams regularly assists clients with:

- Business purchases and sales
- Ownership buy-outs
- Business formation and organizational documents
- Contract review and drafting
- Annual meetings and record keeping
- Commercial real estate purchases and sales
- Commercial leases

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STACEY L. DIDOMENICO concentrates her practice on business and corporate law, real estate, employment matters and non-profit organization law. She regularly advises businesses on a variety of legal issues, such as formation, day-to-day governance and business contracts, as well as real estate issues including purchases, sales and leases. She also assists individuals with acquiring real estate, whether a principal residence, vacation or investment property, including advising on issues such as ownership, contracts, leases and entity formation. As a licensed attorney in both Michigan and Florida, she is especially suited to advise residents and property owners of both states on real estate and estate planning issues. She believes in giving back and thoroughly enjoys helping non-profit organizations succeed. Some examples of her work include:

- Assisting closely held and medium-sized businesses in formation, operation, planning, restructuring and termination
- Drafting and negotiating all types of business contracts, including bylaws and operating agreements, shareholder/member agreements, buy-sell agreements and stock/membership interest purchase agreements
- Advising clients in connection with commercial and residential real estate acquisitions and sales, as well as lease drafting and negotiation
- Successfully obtaining tax exempt status for non-profit organizations, including public charities and private foundations, and providing general legal counsel on all business matters
- Counseling businesses on general employment-related contracts, including employment and independent contractor agreements, non-competition and confidentiality agreements, employment handbooks and employee benefit plans
- Drafting executive compensation arrangements, including deferred compensation (409A plans) and split dollar life insurance agreements
- Drafting Florida estate plans in conjunction with Couzens Lansky estate planning attorneys

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MICHAEL K. DOROCAK focuses his legal practice in the areas of commercial and real estate litigation and real estate and commercial transactions. Examples of his work include:

- Business and commercial litigation, including contract litigation, construction disputes, commercial and residential tax appeals, supplier disputes and appeals
- Real estate litigation, including resolution of title insurance disputes, quiet title actions, lien and mortgage priority disputes, riparian rights and water access, easement and road disputes, boundary disputes, forged or fraudulent conveyances
- Landlord tenant, including lease negotiation, preparation, interpretation, enforcement and litigation
- Documentation of commercial and real estate transactions of all types, including purchase agreements, operating agreements, leases, easement agreements, financing documents and condominium and homeowners' association documents
- Contract review and drafting
- Representation of non-profit organizations
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SARAH HEISLER GIDLEY works primarily in the areas of commercial litigation and real estate law. Representative examples of her practice include:

- Litigation involving title disputes and title insurance coverage
- Litigation involving real estate contracts, including landlord-tenant disputes
- Litigation concerning land use and restrictions
- Commercial litigation, including corporate governance issues, contractual disputes and other business claims

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JENNIFER K. JOHNSON works primarily in the areas of estate planning and trust administration, as well as business and corporate law. Representative examples of her practice include:

- Drafting complex estate planning documents: Wills, codicils, trusts, financial and health care powers of attorney, deeds and ancillary documents
- Analyzing legal and tax issues related to estate planning
- Analyzing and preparing documents related to gifting strategies
- Estate and trust administration for individual and corporate fiduciaries
- Corporate and limited liability company formation and capitalization
- General representation of business entities

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JEFFREY D. RYAN works primarily in the areas of estate planning and trust administration, as well as business and corporate law. Representative examples of his practice include:

- Designing, drafting and implementing estate plans for a broad range of estate sizes
- Probate and trust administration for individual and corporate fiduciaries
- Analyzing and preparing documents related to gifting strategies
- Advanced wealth transfer planning and implementation
- Estate and gift tax counseling, including generation skipping analysis
- Corporate and limited liability company formation and capitalization
- Business succession planning
- Preparation of Gift and Estate Tax returns

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STEPHEN L. GUTMAN is Of Counsel to the firm. Mr. Gutman concentrates his practice in the areas of taxation, business and corporate law and trusts and estates. This has included:

- Tax litigation
- Mergers and acquisitions
- All aspects of estate planning
- Trust and estate administration

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EUGENE W. PYATENKO is Of Counsel to the firm. He focuses his practice in the areas of real estate, litigation & dispute resolution, banking & finance, construction law, business & corporate, mergers & acquisitions and medical practice management. He is a prolific speaker concerning real estate matters, banking and business transactions, bankruptcy and international business. Examples of the matters he has been involved in include:

- General commercial, banking and business transactions
- Debtor/creditor rights
- Commercial litigation and construction lien law
- Bank/borrower relationships
- All aspects of bankruptcy reorganization, including debtor reorganization not undertaken in the context of formal bankruptcy proceedings
- Establishing contacts and trade between U.S. and foreign entities with an emphasis on enterprises located within the Former Soviet Union
- Bilateral trade negotiations
- Establish joint ventures and intermediary activity between public and private sectors, ministries and government officials

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LAWRENCE F. SCHILLER is Of Counsel to the firm. Mr. Schiller concentrates his practice on the topics of employee benefits, ERISA, pension and profit sharing plans, tax-qualified retirement plans and executive compensation law. Examples of the types of representation he has provided to clients include:

- Design, drafting, implementation and compliance documentation for all types of qualified and non-qualified employee benefit plans, including flexible benefit plans, medical expense reimbursement plans, medical savings accounts, group life insurance programs, split dollar insurance arrangements and similar programs
- Executive compensation arrangements, including deferred compensation and split dollar agreements
- ERISA interpretation, application and compliance
- Discrimination testing analysis
- Correction of plan compliance failures (IRS and DOL)
- Handling of government audits of plans (IRS and DOL)

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KENNETH F. POSNER is Of Counsel to the firm. Mr. Posner has focused his legal practice on the areas of real estate, commercial law and general litigation. Examples of his work include:

- Commercial litigation and alternative dispute resolution involving business contracts of all types
- Real estate litigation in Michigan and federal courts and administrative agencies
- Resolution of title disputes
- Landlord tenant litigation

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