



2022
CRITICAL LEGAL
DEVELOPMENTS

VisTaTech Center, Livonia, Michigan

November 7, 2022

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MISSION STATEMENT

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As a firm, we strive to maintain an environment for our team members which is positive and productive. We demand the highest degree of ethical conduct from every employee of the firm.

2022 CRITICAL LEGAL DEVELOPMENTS

November 7, 2022

Agenda

8:30 - 8:40	Opening Remarks	
8:40 - 9:30	Estate Planning - Best Practices	Mark G. Landau Jennifer K. Johnson Jeffrey D. Ryan Edwin Sadik Chiara F. Mattieson
9:30 - 10:20	Anatomy of a Real Estate Transaction	Gregg A. Nathanson
10:20 - 10:50	Break	
10:50 - 11:40	The Anatomy of a Business Sale Transaction	Christopher M. Williams
11:40 - 12:30	Independent Contractor Status Under the Fair Labor Standards Act (FLSA)	David A. Lawrence

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

STATE OF MICHIGAN
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES
LANSING

PATRICK M. McPHARLIN
DIRECTOR

Continuing Education Class Announcements/Protocol

At every classroom or speech/seminar each instructor or Provider Designated Person or Provider on-site representative shall be required, prior to the commencement of instruction, to read the following statements:

One credit is 50 minutes of instruction with no more than 10 minutes for a break. Fractional credits will not be awarded. Registration, coffee and lunch breaks, or social hours do not qualify for CE credit.

A student that arrives 10 or more minutes late or departs early will not receive CE credit.

All classroom courses must have attendance verified through a sign-in/sign-out sheet with a door monitor. Only students meeting minimum attendance requirements may receive Certificates of Completion.

Students must provide their name, address, license number (not SSN), time-in and time out. Reminders are given by the instructor to sign the attendance forms.

Providers must give Certificates of Completion to all individuals who complete the requirements of a CE course.

Providers should make students aware that licensees cannot receive CE credit for both a self-study (examination) course and a classroom course based on the same published materials.

Providers should make students aware that licensees are not allowed to receive or carry over credit for the same course in the same review period.

No conduct of insurance or other business by any means whatsoever or the reading of newspapers or publications unrelated to the courses may occur during the instructional period. Use of electronic devices is determined by the education provider. All electronic device ringers or sound effects should be turned off at the start of class. Emails, voice messages, etc. may be checked during breaks or lunch.

To facilitate learning, all students taking the course must be attentive and respectful to instructors and fellow students. ACTIVE participation is required.

Representatives of PSI and members of DIFS and/or its designees, may audit classroom courses, course materials, instructors' presentations and course records. Audits will be conducted in a manner that will minimize disruptions.



Estate Planning - Best Practices

Mark G. Landau
Jennifer K. Johnson
Jeffrey D. Ryan
Edwin Sadik
Chiara F. Mattieson

ESTATE PLANNING - BEST PRACTICES

EASIER AND BETTER

New Drafting Structure - Easier and Better

Trust vs. Outright - Protection against Beneficiary's Creditors and Control

Patient Advocate Designation and Durable Power of Attorney - Easier and Better

No Probate (Lady Bird Deed)

IRA Distribution - Outright or in Trust? (Control, Asset Protection, and Estate Tax Savings)

Family Business - Is Equal Fair?

Keep the Insurance - Eliminate the Irrevocable Trust

Trust Administration - Second Step-up in Basis

How to Change an Irrevocable Trust

Estate Planning Before Exemptions are Reduced

Secure Act Proposed Regulations

When the Trustee/Beneficiary Needs to Hire an Attorney

I. ESTATE PLANNING - EASIER AND BETTER

The "old way" of drafting estate planning documents can be replaced by the "new way" of drafting estate planning documents that is easier and better for most clients. Numerous changes in the law support this opportunity.

A. Estate Tax Exemption (Applicable Exclusion Amount) Increase.

1. \$12,060,000 per person in 2022. Estate Tax Exemption increases annually as adjusted by inflation [\$12,920,000 per person in 2023].
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 5 years of the death of the first spouse. Rev. Proc. 2022-32.

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

II. SINGLE JOINT TRUST

- A. Keeping it simple - like joint ownership.
 1. Easier - surviving spouse controls.
 2. Better - IRC Sections 1014(a), (b)(9), (e).
 - a. 50% basis step-up upon death of first spouse.
 - b. 100% basis step-up upon death of second spouse.
- B. Full control by both spouses during lifetime and surviving spouse at death.
 1. Full control by surviving spouse means plan of distribution and beneficiaries can change.
 2. No creditor protection.
- C. Usually not the best choice for second marriages.

III. SEPARATE TRUSTS - NEW DRAFTING STRUCTURE

Easier - surviving spouse controls.

- A. Better.
 1. 100% basis step-up of decedent's property at the first death.
 2. 100% basis step-up second death.
- B. Why separate trusts vs. 1 joint trust?
 1. Liability Protection.
 2. Business Owner.
- C. Old - Marital Trust and Credit Shelter Trust Design.
 1. First - Fund Credit Shelter Trust up to Estate Tax Exemption of the first spouse to die.
 2. Second - Remaining amount to Marital.
 3. 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.
4. Marital Trust.
- a. Funded with remaining property of the first spouse to die in excess of the Estate Tax Exemption. Can provide for outright distribution to the surviving spouse, general power of appointment for surviving spouse, or for Qualified Terminable Interest Property (QTIP) treatment (control is retained over the property).
 - 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-up for the assets in the Marital Trust upon the death of the second spouse.
- D. New - 100% to the Marital Trust for the surviving spouse. Disclaim to Credit Shelter Trust.
- 1. 100% of the property of the first spouse to die is held in a Marital Trust for the benefit of the surviving spouse. The Marital Trust can provide for outright distribution to the surviving spouse, general power of appointment for surviving spouse, or for Qualified Terminable Interest Property (QTIP) treatment (control is retained over the property).
 - a. Outright - The assets are under the control of the surviving spouse.

Right of Withdrawal - the surviving spouse may withdraw all of the Marital Trust property at any time.
 - b. General Power of Appointment.
 - (1) Can be designed for exercise during lifetime or only upon death.
 - (2) Power of appointment may be limited to one or more among i) the spouse, ii) the spouse's estate, iii) creditors of the spouse, and iv) creditors of the spouse's estate.
 - c. 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. **IMPORTANT.**
 - (2) Surviving spouse can be limited to an income interest only, but may have other rights to principal.
 - d. 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 then disclaim property from Marital Trust to Credit Shelter Trust.
- a. Why disclaim?
- (1) Liability Protection.
- (2) Projected growth of Marital Trust assets (taking into account portability) would exceed exemption amount.
- b. Old - Marital/Credit Shelter Trust.

<u>Husband - Credit Shelter Trust</u>	<u>Wife</u>
\$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.

<u>Capital Gain</u>	<u>Estate Tax on Wife's Death</u>
\$1,000,000 X <u>20%</u>	
\$200,000 Capital Gains Tax	\$0 Estate Tax (below Exemption Amount - \$12,060,000)

- c. New - Retain in Marital Trust with power to disclaim to Credit Shelter Trust. Do not disclaim if income tax benefit (\$200,000) exceeds estate tax cost (\$0).

<u>Capital Gain</u>	<u>Estate Tax on Wife's Death</u>
\$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 - \$12,060,000)

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

- d. New. If estate tax savings (\$1,976,000) exceed income tax savings (\$200,000), disclaim to Credit Shelter Trust.

<u>Husband - Credit Shelter Trust</u>	<u>Wife</u>
\$6,000,000 Growth: \$1,000,000	\$10,000,000

By disclaiming to Credit Shelter Trust - avoid Estate Tax cost of \$1,976,000 compared to retaining in Marital Trust = income tax benefit of \$200,000 (\$1,000,000 x 20% = \$200,000).

Example

Wife Estate	\$10,000,000
Husband Estate	+7,000,000
Total	\$17,000,000
Exemption	-12,060,000
Excess	\$ 4,940,000
X 40% = Tax	\$ 1,976,000

Since Estate Tax benefit of \$1,976,000 (disclaim to Credit Shelter Trust) is greater than \$200,000 income tax benefit (step-up in basis) - better to disclaim to Credit Shelter Trust.

- e. 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
 - (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.
- f. 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.

- g. Property subject to the Qualified Disclaimer and passing to a Credit Shelter Trust is not included in the disclaiming spouse's Taxable Estate.

IV. TRUST VS. OUTRIGHT - PROTECTION AGAINST BENEFICIARY'S CREDITORS AND CONTROL

- A. Easier - Beneficiary (child) can be a Trustee (case-by-case basis).
- B. Better.
 - 1. Protects against creditors of beneficiary.
 - 2. Client can direct distribution of remaining assets at beneficiary's death.
- C. 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 directly 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 since distributions are based on the Trustee's discretion.
 - b. Trustee's discretion may include whether and when to make a distribution, the amount to distribute, who among a class may receive a distribution, and whether the distribution is income, principal or both.
 - c. Assets in discretionary trusts are not subject to claims by "super creditors."
 - 4. Super Creditors. MCL 700.7504.
 - a. Includes:
 - (1) A Trust beneficiary's child or former spouse who has a judgment or court order against the beneficiary for support or maintenance.
 - (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 of a Support Trust or Spendthrift Trust to satisfy Super Creditor claims from all or part of the Trust income and principal distributions as they come due.
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.

V. LIVING WILL/MEDICAL POWER OF ATTORNEY (PATIENT ADVOCATE DESIGNATION)

- A. Easier - Consider including adult children as a co-patient advocate.
- B. Better - Adult children are authorized to make medical decisions.
- C. Adult children (18) need a Medical Power of Attorney and a HIPAA authorization.
- D. 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.
- E. Medical Power of Attorney - Medical decision making when the principal is unable to make medical decisions (unconscious/dementia).
- F. Selection of agent - All children vs. one child?
- G. HIPAA Authorization - Gives the designated individuals the authority to obtain medical information about the principal.
- H. Give direction for organ donation and cremation.
- I. Funeral Representative Designation - select who makes funeral arrangements.

VI. DURABLE POWER OF ATTORNEY (POA)

- A. Easier - Consider immediate effectiveness vs. requiring two doctors' affidavits of incapacity.
- B. Better - Consider including adult children as a co-power of attorney.

- C. A Durable POA grants authority for the named individual(s) (attorney-in-fact under the Durable POA) to step into the shoes of the principal to make financial decisions and otherwise act as the principal could on matters authorized in the document.
- D. A POA avoids the need for a Conservator for the principal in the event the principal no longer has the capacity to act.
- E. A POA can give immediate authority for the designated individual(s) to act (eliminating the need to obtain Affidavits of Incapacity). A Springing POA is not permitted in some states.
- F. The Durable POA may provide broad authority to the designated attorney.
 - 1. Invest and handle the payment of expenses.
 - 2. Handle real estate matters.
 - 3. File tax returns.
 - 4. Make gifts on behalf of the principal.
 - 5. Apply for government benefits.
- G. Selection of Agent is important.
 - 1. Single vs. co-attorneys.
 - 2. Coordination with other fiduciaries such as Trustees of a Revocable Trust.

VII. ESTATE PLAN - FUNDING

- A. Simply executing a Trust agreement does not automatically mean that assets are governed by the provisions of the Trust.
 - 1. Careful attention must be made to ownership and beneficiary designations.
 - 2. Some 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 of some assets.
 - 4. Organizational documents for entities must be reviewed to confirm that a transfer to the Trust will be effective.
- B. Corporate stock and LLC membership interests - assign to Trust.

C. Real estate alternatives.

1. Deed real estate to the trust.
 - a. Simple.
 - b. Loss of entireties protection for married persons?
2. Ladybird deed - in effect a "beneficiary designation" for the real estate to fund the Trust (or give to another beneficiary) after death.

D. Trust funding through Probate (pour over will) is not ideal but is an important backup.

E. Coordinate with the entire team (financial advisors/insurance representative/CPA).

VIII. IRA DISTRIBUTION - OUTRIGHT OR IN TRUST

A. Designating a Trust as beneficiary of an IRA can:

1. Protect the IRA from the creditors of the Trust beneficiary.
2. Control distribution at death of beneficiary.
3. Qualify for Generation skipping.
4. Allow use of Trust or beneficiary income tax rate, where distributions from the Trust are taxed at the beneficiary's tax rate.

B. SECURE Act.

1. Under the SECURE Act, retirement account distributions to a beneficiary must occur within 10 years.
2. Other rules apply with no Designated Beneficiary.
 - a. Death before RBD. No Designated Beneficiary - 5-year rule.
 - b. Death after RDB. No Designated Beneficiary - Owner's life expectancy (non-recalculated).
3. An Eligible Designated Beneficiary can stretch the distributions over the beneficiary's life expectancy.
4. These changes are effective for retirement account owners and beneficiaries who die after January 1, 2020.
5. Proposed regulations indicate that required minimum distributions continue during the 10 year period, while a plain reading of the IRS Code provides for no required annual distribution and only for complete distribution by December 31 of the 10th year after the death of the Owner.

6. Eligible Designated Beneficiaries - See XIV of outline.

- a. Surviving spouse.
- b. Minor child of original owner.
- c. Disabled individual.
- d. Chronically ill individual.
- e. Person not more than 10 years younger (example - brother, sister).

C. 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 (1) take the IRA as an inherited IRA and stretch the distributions over a 10-year period (unless a Eligible Designated Beneficiary, who can take over such beneficiary's life expectancy based on the IRS tables), or (2) 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, subject to 10-year rule.

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.
- 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. Gift should specifically allocate IRA assets or Income in Respective of a Decedent (IRD).
 - (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) Concern as to the income tax deduction for the charitable gift by the Trust.

D. IRA Payable to 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 10-year payout of the IRA benefits (life expectancy if an Eligible Designated Beneficiary). IRS Treas. Regs. Section 1.401(a)(9)-4, Q&A-5. If a Trust is not a "see through trust" it will not qualify as a Designated Beneficiary.
 - 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. Beneficiaries who are paid or disclaim by the Designation Date (September 30 of the year after death of the IRA owner) are not counted.
2. Conduit Trust.
 - a. Under SECURE Act, for a non-Eligible Designated Beneficiary, all of the IRA assets will be distributed to the beneficiary by December 31 of the 10th year after the death of the original owner.
 - b. All distributions from the IRA to the Trust must be distributed outright to the Trust beneficiary.
 - c. 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. SECURE Act will still require all of the IRA assets be distributed from the IRA to the Trust, realizing the income, by December 31 of the 10th year after the death of the original owner.
 - c. 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. Consider designating separate sub-trusts for beneficiaries directly on the IRA beneficiary designation vs. the full Trust.

- E. Qualified Disclaimer - May be used to shift benefits among beneficiaries or from an individual beneficiary to a Trust beneficiary.

For example, spouse as primary 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.

IX. FAMILY BUSINESS - IS EQUAL FAIR?

- A. Worst Case Scenario - No Planning.

1. Business distributed equally to all children.
2. Children having no interest or experience in the operations of the business become co-owners.
3. Children in business may want to buy out children not in business.
 - a. Price.
 - b. Terms.

- B. 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. Create nonvoting stock/LLC membership interest for children not in business.
4. 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?

X. KEEP THE INSURANCE - ELIMINATE THE IRREVOCABLE TRUST

- A. Example: Estate under the Estate Tax Exemption (\$12,060,000 - 2022) including portability.
- B. The Trustee has fiduciary obligations. Need to obtain the consent of the beneficiaries for proposed transactions.
 - 1. Nonjudicial settlement agreement.
 - 2. Court proceeding.
- C. 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.
- D. 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 according to its terms.
 - 2. Make sure the Irrevocable Trust contains no restrictions for such a transaction.

XI. TRUST ADMINISTRATION - SECOND STEP-UP IN BASIS

- A. Example.
 - 1. First spouse dies with assets in Credit Shelter Trust.
 - No second step-up in basis upon death of surviving spouse.
 - 2. Surviving spouse's estate - under exemption amount (\$12,060,000 - 2022).
- B. If the Trust terms allow, 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.
- C. Advantage:
 - Second step-up in basis upon the death of the surviving spouse.
- D. Disadvantages:
 - 1. Subject to the creditors of the surviving spouse.
 - 2. Surviving spouse can change the ultimate distribution.
 - 3. Inclusion in the Taxable Estate of the surviving spouse. Potentially subject to Estate Tax upon the death of the surviving spouse.

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

XII. CHANGE AN IRREVOCABLE TRUST

A. Irrevocable:

1. During the lifetime of the Settlor (life insurance trust).
2. A revocable trust after the death of the Settlor.

B. Why change an Irrevocable Trust?

1. Change or remove 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 materially change beneficial interests. Notice must be provided to the Settlor 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 may be granted to a beneficiary or a non-beneficiary (Trust Director).
 - b. May be exercised during lifetime vs. upon death as provided by the governing document.
 - c. May be general or limited to allow appointment only to certain individuals, classes of individuals, charities, etc.
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 per Trust terms.
6. Consider Trustee powers to modify under the Trust agreement.
7. Consider Trust Director authority per MCL §700.7703a if provided in the Trust agreement.
 - a. Trust Director must be independent.
 - b. Who cannot serve as Trust Director?

Settlor's spouse, Trust beneficiary or someone who is related or subordinate to Settlor, Settlor's spouse, or Trust beneficiary
 - c. Trust Director can still be appointed by the Settlor, Settlor's spouse, a Trust beneficiary or the Trustee.
 - d. Common Powers of Direction include:
 - (1) The power to alter beneficial interest of someone other than the powerholder.
 - (2) The power to authorize the sale or retention of a family business.
 - (3) The power to determine the investment strategy of a Trust.
 - (4) The power to change the Trustees.

- (5) The power to approve or veto a distribution to a Trust beneficiary.
 - (6) The power to change the governing law of a Trust or to change the situs of a Trust.
 - (7) 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 is 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).

XIII. ESTATE TAX PLANNING BEFORE EXEMPTIONS ARE REDUCED

- A. Advantage/Disadvantage of lifetime gifts.
- 1. Advantage - Appreciation excluded from estate.
 - 2. Disadvantage - carryover basis.
- B. "Bonus Exemption" - Use it or lose it.
- 1. Estate Tax Exemption scheduled to decrease from \$12,060,000 to \$5,000,000 (as adjusted for inflation) on January 1, 2026.
 - 2. Bonus exemption is the amount over \$5,000,000.
 - 3. Consider making gifts to Trust in order to use Estate Tax Exemption during lifetime.
 - 4. 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.
 - 5. No claw-back.
 - 6. Use the "free" lifetime annual exclusion gifts. \$16,000 in 2022 [\$17,000 in 2023].

C. 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 a broad limited power of appointment to issue.
4. The gift to the SLAT uses the Estate Tax Exemption of the spouse making the gift because the gift does not qualify for a marital deduction.
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.

D. Irrevocable Gift Trust.

1. Non-spouse beneficiary - can be for children, grandchildren, etc.
2. Grantor Trust - Grantor paying tax on income so gifted assets will not be reduced by income tax burden. The tax payments are not additional gifts.

XIV. SECURE ACT PROPOSED REGULATIONS

A. On February 24, 2022, the IRS released proposed regulations relating to the SECURE Act.

1. <https://public-inspection.federalregister.gov/2022-02522.pdf>.
2. The proposed regulations seek to clarify the RMD requirement during the 10-year withdrawal period for designated beneficiaries.
3. The proposed regulations also provide criteria for determining Eligible Designated Beneficiaries: minor, disabled beneficiary, and chronically ill.

B. SECURE Act framework.

1. Beneficiary withdrawal options.

Spouses	Roll over, Stretch IRA
Eligible Designated Beneficiaries	Stretch IRA
Designated Beneficiary	10 Year plan
No Beneficiary	5 Year plan or decedent's life expectancy

2. 10-year rule: 401(a)(9)(H) as added by the Secure Act extends the 5-year plan of 401(a)(9)(B)(ii) to 10 years.

Most practitioners expected the 10-year rule would apply like the 5-year rule under 401(a)(9)(B)(ii): the account must be exhausted by the end of the 10th year without RMDs.

3. Stretch IRAs: 401(a)(9)(H) as added by the Secure Act limits the availability of stretch IRA's under 401(a)(9)(B)(iii) to Eligible Designated Beneficiaries.

C. 10-year rule of 401(a)(9)(H).

Entirely different application depending on account owner's age.

1. Account owner dies before the required beginning date: Account must be exhausted by the end of the 10th year.
2. Account owner dies after the required beginning date: Account must be exhausted by the end of the 10th year **and** beneficiary must take RMD's.

D. RMDs for 2021 and 2022 under the 10-Year rule.

1. Practitioners left unsure about what to do for 2021 or 2022.
2. IRS released Notice 2022-53 on October 7, 2022.
3. <https://www.irs.gov/pub/irs-drop/n-22-53.pdf>.
4. No penalty for RMD's that would have been due for 2021 and 2022 pursuant to 401(a)(9) as interpreted in the proposed regulations.
5. Penalties already paid are refundable.
6. IRS signaling intent to implement regulations as proposed.

E. Criteria to determine Eligible Designated Beneficiaries.

1. Eligible designated beneficiaries are exempt from the 10-year rule.
2. Account Owner's Minor Child.
 - a. Determined at state law level.
 - b. 401(a)(9)-6: 26 years old if pursuing a course of study.
 - c. Proposed regulations define a minor as someone under 21.
 - d. Treated as an Eligible Designated Beneficiary until the age of majority.
 - (1) RMD's until 21 years old.
 - (2) Then look to 10-year rule applicable based on account owner's age at death.

3. Disabled individual.
 - a. Deemed disabled by the Social Security Administration as of the account owner's date of death.
 - b. Minor who has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or to be of long-continued and indefinite duration.
 - c. Individual who provides "documentation" substantiating their disability to the plan administrator by October 31 of year following death.
4. Chronically ill individual.
 - a. IRC §7702B(c)(2) defines an individual as chronically ill if they are properly certified as being unable to perform two or more of the activities of daily living for at least 90 days.
 - b. The regulations remove the 90-day requirement and require that the illness should "reasonably be expected to be lengthy in nature."
5. Individual not more than 10 years younger than account owner.
 - a. How do we measure 10 years?
 - b. Based on dates of birth.
 - (1) Owner born on October 1, 1953.
 - (2) Not more than 10 years younger - must be born on or before October 1, 1963.

XV. WHEN YOUR FIDUCIARY AND BENEFICIARY CLIENTS NEED TO HIRE ESTATE AND TRUST CONFLICTS/DISPUTES ATTORNEYS

- A. Signs of likely dispute/conflict development:
 1. Estate planning changes:
 - a. Late in life.
 - b. Disinheriting someone or significantly reducing someone's share.
 - c. In response to "bad acts/undesirable acts" of a devisee or beneficiary.
 - d. Significantly favoring one devisee or beneficiary over another.
 2. Estrangement or historical acrimony between family members.
 3. Mental health, addiction, gambling issues in the family.
 4. Significant wealth disparities between heirs/beneficiaries.

5. Family members making demands for assets or information.
 6. "Blended" families.
 7. "Joint accounts" with one heir or beneficiary, but not the other logical heirs.
- B. When the client should consult with/retain an attorney:
1. For heir/beneficiary clients: as soon as the heir/beneficiary client is not comfortable/suspects wrongdoing by a fiduciary or other heirs or beneficiaries.
 2. For fiduciaries (trustees, agents under powers of attorney, personal representatives): as soon as they are preparing to accept the position or begin to act.
 3. Death of the person leaving the inheritance behind is not always soon enough.
- C. What should your clients look for in attorneys for this representation?
1. Attorneys with significant probate and trust litigation specific experience ("litigation experience" is not enough). This is non-negotiable.
 2. Attorneys with estate planning and estate and trust administration experience *in addition to* the probate and trust litigation experience. (Avoid the "I'll try anything - I'm just a good litigator" folks.)
 3. Attorneys who have been appointed to "private pay" fiduciary positions by the Courts as special personal representatives, guardians, conservators, and fiduciaries involving cases with significant assets and some complexity. (Note many court appointments paid with government funds involve routine matters.)
- D. Couzens Lansky is well staffed and significantly experienced in this growing practice area.



Anatomy of a Real Estate Transaction

Gregg A. Nathanson

ANATOMY OF A REAL ESTATE TRANSACTION

I. INITIAL CONSIDERATIONS AND BROKERS

- A. Is the property residential or commercial?
- B. Is the property listed with a Broker vs. For Sale By Owner (FSBO)?
- C. Listing Agreement - Key Terms.
 - 1. Term. When does listing agreement expire? Does it renew automatically?
 - 2. Purchase price. Can it be a cash sale, land contract sale, exchange or lease?
 - 3. Can Owner approve all terms of sale?
 - 4. When is commission earned and payable? When Broker produces ready, willing and able Buyer vs. only if and at closing?
 - 5. Can Owner terminate listing agreement early? If so, then must termination be for cause?
 - 6. Protection Period. How long does it last? Must potential Buyers be on a list of protected persons the listing agent delivers to Seller when listing period ends?
- D. Buyer's Broker.
 - 1. Does contract create an exclusive or non-exclusive agency relationship?
 - 2. Greater fiduciary duties in practice (loyalty, due care, obedience, confidentiality, disclosure and accounting) than listing agent.
 - 3. Not a sub-agent of listing agent who represents Seller.

II. LETTERS OF INTENT (LOI)

- A. What is it?
 - 1. Expression of intent.
 - 2. Sets forth material deal terms.
 - 3. Contract to make a future contract (agree to agree).
 - 4. Is it enforceable?

B. Binding vs Non-binding?

1. Usually non-binding.
2. Some terms may be binding, such as confidentiality (refer to the letter of intent).
3. Language matters.

C. What does it address?

1. Property, price, parties.
2. Due diligence – scope and timing, extensions.
3. Contingencies – physical and environmental inspections, financing, zoning, site plan approval, appraisal, liquor license, marijuana licenses and permits.
4. Title and Survey.
5. Earnest Money.
6. Closing - Timing.
7. Who pays what costs?
8. Amount of time to execute Purchase Agreement before LOI terminates.
9. Broker commissions.
10. What sections are (not) binding?

D. What else might it address, and why (or why not)?

1. Confidentiality.
2. Seller deliverables.
3. Representations and warranties, and indemnities.
4. Title company.
5. Buying real estate vs. LLC membership interests.
6. Assignability.
7. Personal property, fixtures, exclusions.
8. Purchase price allocation.
9. Business assets.
10. Termination.

11. Exclusivity.
12. Higher authority approval needed.

E. Statute of Frauds.

1. Requires signed writing in order for sale of real estate to be enforceable.
2. Who signs? Who doesn't sign? Apparent authority?
3. Is electronic transmission a signed writing? Emails vs. texts?

III. PURCHASE AGREEMENTS AND DUE DILIGENCE

A. Environmental Considerations.

1. Is the property contaminated?
 - a. Phase I Environmental Site Assessment - all appropriate inquiry.
 - (1) Talk to owners and occupants.
 - (2) Walk the land.
 - (3) Inspect public records.
 - b. Non-scope additional considerations: include black mold, lead paint, asbestos, radon.
 - c. Any Recognized Environmental Conditions (RECs)? "REC" means the presence or likely presence of hazardous substances or petroleum products in, on or at the property.
 - d. Consider historic and controlled recognized environmental conditions (HRECs and CRECs).
2. If the Phase I identifies one or more RECs, then Buyer should have their environmental consultant determine if the property is contaminated by conducting a Phase II subsurface investigation.
 - a. Phase II subsurface investigation tests:
 - (1) Soil.
 - (2) Groundwater.
 - (3) Air (if appropriate).
 - b. Is the property a "Facility?" "Facility" means the property contains one or more hazardous substances in excess of concentrations that satisfy the clean-up criteria for unrestricted residential use (even though the property is

used for commercial or industrial purposes). In other words, the property is contaminated.

3. If the property is a "Facility", then:
 - a. The owner and/or operator of the Facility can file a Baseline Environmental Assessment (BEA) with the Michigan Department of Environment, Great Lakes, and Energy (EGLE) to avoid liability to remediate existing contamination. BEA is a written document that describes the results of "all appropriate inquiry" and the Phase II sampling and analysis that confirms the property is a Facility.
 - b. The owner and/or operator of a Facility should prepare a documentation of due care compliance, known as a Due Care Plan, to satisfy their statutory due care obligations. While the owner or operator of a Facility may not have clean-up liability if they file a BEA with EGLE, they do have certain statutory "due care" obligations. They must undertake all actions necessary to protect human health and the environment from exposure to contamination in soil, groundwater and subsurface vapors whenever that person has knowledge that the property is contaminated.
4. Environmental Contamination and Purchase Agreement Considerations.
 - a. Must Seller deliver all existing reports? All (pertinent) information?
 - b. Is Buyer authorized to rely on Seller's reports? Are the reports "stale"?
 - c. Are the reports given on "as is" basis?
 - d. There is no Seller Disclosure Statement in commercial transactions, unless otherwise required by the terms of the Purchase Agreement, *but* Seller does have statutory disclosure requirements if property is a Facility. Seller must disclose the known general nature of hazardous substances affecting the property.
 - e. Does Purchase Agreement permit Buyer to conduct unlimited invasive Phase II testing?
 - f. Can Seller pre-approve or prevent Phase II testing?
 - g. Can Buyer obtain BEA? File the BEA with EGLE before vs. after closing?
 - h. Does Purchase Agreement have a "kill" provision? At what cost to Seller?
 - i. Does Purchase Agreement address other "what if" environmental issues, such as:
 - (1) Who performs remediation?
 - (2) Who pays for remediation?
 - (3) What standard – how clean is clean?

(4) Timing – before vs. after closing?

(5) Representations and Warranties (how broad?) vs. “as is”.

(6) Indemnity – how broad?

j. Are funds placed in escrow to pay for post-closing remediation? Under what circumstances is money released from escrow?

k. What about pollution insurance?

B. Title Issues and Encumbrances.

1. Will Seller provide a warranty deed, covenant deed or quit claim deed?
2. Does "Seller" own the property?
3. Is Seller an individual? LLC? Corporation? Trust? Estate? Authority to act needs to be documented.
4. What legal description should be used in deed: record, survey or tax legal description?
5. How to resolve discrepancies in conflicting legal descriptions.
6. Will Seller retain land divisions? This is important if Seller owns or retains adjacent land.
7. Will Seller retain access and/or utility easements across the sold parcel to benefit Seller's adjacent retained parcel?
8. Will Seller impose building or use restrictions on the property being sold?
9. Will Buyer receive title to the property free and clear of unwanted liens, claims and encumbrances?
 - a. Read all recorded documents.
 - b. Buyer's Broker has greater duty to discover and disclose potential problems.
 - c. Sleeper issues?
10. Title Insurance Policy Endorsements provide additional, specific, title insurance protection against select concerns. Sample endorsements include:
 - a. Same as survey.
 - b. Access – direct vs. indirect.
 - c. Utility access.
 - d. Contiguity.

- e. Separate tax parcel.
- f. Location.
- g. Covenants, conditions & restrictions.
- h. Condominium.
- i. Subdivision.
- j. Zoning.
- k. Mineral rights.
- l. Leasehold.
- m. Option.

C. Survey Matters.

1. Types of surveys.
 - a. Mortgage report (location).
 - b. Boundary (stake).
 - c. ALTA with Table A items.
2. Who pays for the survey? Who gets copies?
3. Does title company require ALTA survey to remove (survey related) standard exceptions?
4. Does title (record) legal description = survey (measured) legal description = assessed (tax) legal description?
5. Location of all buildings and improvements.
6. Location of “existing” vs. “recorded” utilities and easements.
7. Location of curb cuts and legal access (public vs. private roads, easements).
8. Existing encroachments, set-back violations, potential boundary disputes.
9. Future construction issues (e.g. need to avoid setback violations or encroachments).

D. Scope of Buyer’s Due Diligence.

1. Does Purchase Agreement grant Buyer broad permission to conduct any and all due diligence?

2. "Physical" due diligence – Can Buyer conduct unlimited invasive testing (i.e. Phase II environmental site assessment testing soil, groundwater and air)?
 3. Does Buyer have a duty to repair damage caused by inspections?
 4. Does Buyer have a duty to defend and indemnify Seller against liabilities arising from Buyer's due diligence activities?
 5. Does Buyer have a duty to provide Seller with evidence of liability insurance? Name Seller as additional insured? Provide Seller with a policy endorsement?
 6. Does Buyer have a duty to provide Seller copies of (some or all) due diligence/reports? When? Does Seller want copies?
 7. Must Seller reimburse Buyer for due diligence reports?
 8. "Legal" due diligence – consider Buyer's contracts and assignment of contracts and intangible property rights. Are permits and licenses assignable? What third party consents are required?
 9. "Business" due diligence – review existing financial records and leases. Speak with tenants and obtain tenant estoppel certificates to verify leasing information.
 10. "Franchise" due diligence – examine franchise records and contracts, speak with franchisor, receive assignment of franchise rights.
 11. Obtain and review all pertinent public (government) information – File a Freedom of Information Act (FOIA) request.
 12. Speak with government officials regarding zoning, code violations, property issues and obtain confirming letter.
- E. Vacant Land Due Diligence: Is the property physically and legally suitable for the Buyer's proposed development? Buyer needs to investigate:
1. Soil conditions.
 2. Site specific considerations.
 3. Recorded building and use restrictions.
 4. Direct access to public road vs. indirect access to public road by way of an easement.
 5. Access to utilities.
 6. Zoning.
 7. Governmental requirements, permits and approvals.

F. Are Government Approvals Required?

1. Buyer needs to confirm zoning and the need for one or more variances, especially for new construction or repurposing.
2. Buyer needs to confirm conditions for site plan approval.
3. Buyer needs to confirm requirements for and availability of desired permits, licenses and/or consents.
4. New construction considerations.
5. Is Seller cooperation required?
6. Does Buyer have the automatic right under Purchase Agreement to extend due diligence period to receive desired government approvals?
7. Does Buyer have to make additional deposits to extend due diligence?
8. Are deposits paid to Seller or Broker or the title company holding initial good faith deposit under the Purchase Agreement?
9. Is additional deposit(s) refundable vs. non-refundable?
10. Is additional deposit(s) applicable vs. not applicable to purchase price?
11. Will Buyer's project qualify for any local, state or federal tax credits, inducements, abatements, deductions or incentives (i.e. "Brownfield" tax credits to recapture property tax increase to help finance investment).

IV. PSYCHOLOGICAL DEFECTS

- A. Unrelated to property condition.
- B. Affects purchase decision.
- C. Stigma (prior homicide, suicide, drug house or divorce).
- D. Could increase value (George Washington or Madonna slept here).
- E. Mostly for residential transactions.

V. WHAT ABOUT FINANCING? BASIC CONSIDERATIONS INCLUDE:

- A. Timing.
- B. Rate, terms and conditions.
- C. Lender and appraisal requirements.
- D. Types of loans.

- E. Types of lenders.
- F. Mortgage Brokers.
- G. SBA financing.
- H. Seller (second?) financing and land contracts.

VI. CLOSING ISSUES

- A. Two closings:
 - 1. Financing.
 - 2. Real Estate.
- B. Remote vs. In Person.
 - 1. Remote online notarization.
 - 2. Electronic signatures.
 - 3. Email executed PDF.
 - 4. Closer comes to house or office.
 - 5. Zoom closings.
- C. Wire Transfer vs. Bank or Certified Check to minimize the risk of passing bad funds or wire fraud.
- D. Problem Solving.
 - 1. Plan in advance.
 - 2. Produce another document.
 - 3. Escrow funds and/or documents.

VII. SECTION 1031 LIKE-KIND EXCHANGES

- A. Basic Requirements for Internal Revenue Code Section 1031 Tax Deferred Like-Kind Exchange of Real Property.
 - 1. Taxpayer **exchanges** “relinquished” property for “replacement” property without income tax on the gain.
 - 2. Cannot sell, receive the proceeds, then purchase (Taxpayer cannot touch the money).
 - 3. Defer paying tax on gain until sale of replacement property. Think of it as an interest free loan from IRS.

4. Both properties must be like-kind (i.e. real estate).
5. Taxpayer must “hold” both properties for productive use in a trade or business or for investment.
6. Taxpayer has 45 days to identify (a) up to 3 potential replacement properties or (b) any number of potential replacement properties as long as their aggregate fair market value does not exceed 200% of the fair market value of the relinquished property.
7. Taxpayer has 180 days to close on purchase of replacement property. May need to extend filing date for tax return beyond April 15 to avoid shortening 180 day period to complete exchange, if closing on sale of relinquished property occurs after October 17.
8. Need unrelated third party “Qualified Intermediary” and/or possibly “Exchange Accommodation Titleholder,” to facilitate exchange.
9. With “reverse” exchange, Taxpayer acquires replacement property *before* disposing of relinquished property.
10. With “new construction” exchange, improvements must be made to replacement property before Taxpayer acquires title.

B. What About Second Homes and Vacation Property?

1. Historically a personal residence (second or vacation home) could not qualify for 1031 exchange treatment.
2. In 2008, IRS provided safe harbor for second homes and vacation property to qualify, even if Taxpayer enjoys occasional personal use (Rev. Proc. 2008-16).
3. Taxpayer must own relinquished property at least 24 months before and must own replacement property at least 24 months after exchange.
4. Taxpayer must rent property to others at “fair rental” at least 14 days in each of 2 years before and after exchange.
5. “Fair rental” is based on all existing facts and circumstances when rental agreement is executed.
6. Think Airbnb or vacation rental by owner (VRBO).
7. Personal use is permitted, but annually cannot exceed greater of 14 days or 10% of number of days the property is rented.
8. Must satisfy all other 1031 exchange requirements.

C. Combine §1031 Exchange with §121 Exclusion?

1. Strategy: After completing 1031 exchange for rental property, Taxpayer could convert replacement (rental) property to primary residence and exclude (vs. defer) taxable gain upon sale.
2. Section 121: Taxpayer receives \$250,000 (single) or \$500,000 (married) capital gain *exclusion* upon sale of primary residence.
3. Must own and use (new) replacement property as primary residence for at least 2 of final 5 years before its sale, and must own (new) replacement property for at least 5 years before sale.
4. Great for retirees selling Michigan rental property and moving to Florida or Arizona.



The Anatomy of a Business Sale Transaction

Christopher M. Williams

THE ANATOMY OF A BUSINESS SALE TRANSACTION

I. SCOPE OF PRESENTATION

- A. Asset Sale vs Equity Sale.
- B. Asset Sale Transaction: A transaction in which some or all of the assets of a business are sold.
- C. Asset transactions involving substantially all of the assets of the business are effectively, a sale of the "business," but not a sale of the business entity.
- D. Assets: All tangible and intangible interests owned by a Seller business (e.g. equipment, inventory, intellectual property, goodwill, cash, accounts, deposits, records, etc.).
- E. Equity Sale Transaction: A transaction in which the ownership interest in a business is sold (e.g. stock or membership interests). Effectively, a sale of the business entity itself, not just its assets.

II. SESSION GOALS

- A. To understand the process of completing a business sale transaction from beginning to end.
- B. To identify "value added" opportunities for professionals assisting in a business sale transaction.

III. PRE-PLANNING

- A. It is extremely important for Sellers to engage in pre-planning before entering into negotiations to sell a business or its assets.
- B. Pre-planning should happen years in advance; not immediately prior to a sales negotiation.
- C. Key Pre-Planning Activities.
 - 1. Evaluating goals and objectives.
 - a. Financial considerations.
 - b. Timing considerations.
 - c. Buyer considerations.
 - (1) Family.
 - (2) Management.
 - (3) Third-party.

2. Evaluating and supporting the value of your business.
 - a. Value the business. Consider comparables, industry multipliers, liquidation value, etc.
 - b. Is there a gap between the owner's perceived value and what can be supported?
 - c. Review and evaluate financial statements.
 - (1) Consider from a Quality of Earnings perspective (i.e. a report that makes normalizing adjustments to reported EBITDA - Earnings before interest, taxes, depreciation, and amortization).
 - (2) Consider from a Net Working Capital perspective (i.e. current assets minus current liabilities).
 - (3) Financial statements need to show the company's financials trending in the right direction. The 6 month window before closing is critical.
 3. Keep reliable books and records.
 4. Customer and contract considerations.
 - a. Assignability of contracts and permits.
 - b. Approved vendor considerations.
 5. Key tax considerations.
 - a. What is the tax impact of a business sale transaction?
 - b. Does the Seller's entity structure maximize tax advantages?
 6. Key employee considerations.
 - a. Who would a Buyer want to retain?
 - b. How will Seller retain key employees in anticipation of a sale?
 - c. Are employees subject to confidentiality, non-solicitation, and non-competition agreements?
- D. Sellers will not maximize their value if their house isn't in order.
1. Buyers will be spooked and pay less or cancel the deal if problem areas are identified and can't be adequately explained or quickly resolved.
 2. Transaction costs will be higher as expedited professional services will be required to meet transaction deadlines.

- E. There are many opportunities for professional advisors to assist in this process.
 - 1. Ask questions: What is your plan?
 - 2. Assist in the pre-planning process.
 - 3. Connect clients with qualified professionals.
 - 4. Professional advisors help clients by identifying potential problems and any biases and blind spots.

IV. PRELIMINARY TRANSACTION MATTERS

A. Source of Offers.

- 1. Directly from third-party buyers.
 - a. Strategic buyers.
 - (1) Make us better.
 - (2) Make them better.
 - b. Financial buyers.
 - (1) Investment.
 - (2) What is their experience in the business?
 - (3) How long will they be around?
 - (4) How have their prior deals gone?
- 2. Management.
 - a. How will they pay?
 - b. Employee vs owner mentality.
- 3. Family.
- 4. Investment bankers and business brokers.

B. Non-disclosure agreements and other restrictive covenants.

- 1. Sellers should have a non-disclosure agreement in place before disclosing sensitive or proprietary information to prospective Buyers.
- 2. Depending on the circumstances, it may be necessary to have additional restrictive covenants in place.
 - a. Non-solicitation agreements with respect to employees.

- b. Non-solicitation agreements with respect to vendors, suppliers, and/or customers.
- c. Non-competition agreements.

C. Letter of Intent.

- 1. An overview of general transaction terms.
- 2. Sets the ground rules.
- 3. "No shop provision."
- 4. It is important to have a clearly defined closing timetable.
- 5. Non-binding.
- 6. Break-up fee.

V. PRE-CLOSING MATTERS

A. Due Diligence.

- 1. Due diligence is the process by which a Buyer studies a Seller's business and a Seller confirms a Buyer's ability to complete a transaction.
- 2. Areas that a Buyer should examine include:
 - a. Existence, title to, liens upon, and condition of assets.
 - b. Uniform Commercial Code (UCC) searches.
 - c. Financial statements (both audited and unaudited).
 - d. Accounts receivable and accounts payable reports.
 - e. State and federal tax returns.
 - f. Contracts (both written and verbal), warranties, permits, and licenses.
 - g. Real property, including title, encumbrances, zoning, condition, and environmental matters.
 - h. Intellectual property, including copyrights, trademarks, patents, and domain names.
 - i. Insurance policies and claim information.
 - j. Litigation and claims including litigation searches.
 - k. Labor and employment matters.

- I. Benefit plans and arrangements.
 - m. Seller organizational documents and minute books.
 - 3. Areas that a Seller should examine include:
 - a. Buyer organizational documents.
 - b. Litigation and claims including litigation searches.
 - 4. Professional advisors should assist and coordinate in the due diligence process.
- B. Pre-Closing Notices, Filings, and Forms.
 - 1. UIA 1027 - Business Transferor's Notice to Transferee of Unemployment Tax Liability and Rate.
 - 2. UIA 1395 - Clearance of Account.
 - 3. Michigan Department of Treasury Form 5156 - Request for Tax Clearance Application.
 - 4. Other Notices.
 - a. Worker Adjustment and Retraining Notification (WARN) Act notices.
 - b. Hart-Scott-Rodino Antitrust Improvements Act of 1976.
 - c. Notices to unions or employees.
 - d. COBRA notices.
 - e. Notices to lenders, customers and suppliers or otherwise required under existing contracts.

VI. KEY TERMS AND CONDITIONS OF THE TRANSACTION

- A. Purchase Price and Payment.
 - 1. Entire amount paid.
 - 2. Portion paid.
 - a. Down payment.
 - b. Promissory note with interest.
 - c. Collateral for repayment.
 - 3. Adjustments to purchase price.
 - a. Inventory adjustments.

- b. Accounts receivable adjustments.
 - c. Net working capital adjustments.
 - d. Earnouts.
 - 4. Allocation of purchase price for tax purposes (IRS Form 8594) if an Asset Sale or treated as an Asset Sale for tax purposes.
- B. Included and Excluded Assets.
- 1. All assets included less specific excluded items.
 - 2. Only specified assets are included and everything else is excluded.
 - 3. Common excluded assets can include:
 - a. Cash and cash equivalents.
 - b. Bank accounts.
 - c. Insurance policies.
 - d. Prepaid deposits.
 - e. Corporate minute books and records.
 - f. Tax returns, refunds, and credits.
 - g. Vehicles.
- C. Assumed and Excluded Liabilities.
- 1. Most common: Only certain liabilities are included and everything else is excluded.
 - 2. Less common: All liabilities included except for specific excluded liabilities.
 - 3. Identify assumed liabilities.
- D. Consents and Liens.
- 1. Approval of third-parties.
 - a. Are any contracts, licenses, or permits to be assigned?
 - b. Assignment provisions and processes should be reviewed.

2. Discharge of liens.
 - a. UCC terminations.
 - b. Payoff letters.
- E. Employment Matters.
 1. Termination of employees by Seller.
 2. Hiring of employees and/or consultants by Buyer.
 - a. Employment agreements.
 - b. Consulting agreements.
 3. Employee benefit plans.
- F. Real Estate Matters.
 1. Leases.
 - a. Termination with new lease.
 - b. Assignment and assumption of lease.
 - c. Proration of rent.
 - d. Security deposit.
 2. Purchase of real estate.
 3. Environmental matters.
- G. Representations and Warranties.
 1. Who is making them?
 - a. Owners.
 - b. Entity.
 2. Scope.
 3. Knowledge.

4. Survival periods.
 - a. Forever.
 - b. Expiration of statute of limitation.
 - c. Specific time period (e.g. 12 - 36 months).
 5. Fraud.
 6. Representation and warranty insurance.
- H. Indemnification.
1. Scope.
 - a. Representations and warranties.
 - b. Covenants.
 - c. Line item indemnities. Watch out for double dipping!
 2. Cap.
 3. Basket.
 - a. Deductible.
 - b. Tipping.
 4. Escrows and holdbacks.
 5. Right to offset.
 6. Sandbagging.
 7. Materiality scrape.
- I. Timing of Closing.
1. Sign and delay.
 2. Sign and close.
- J. Industry Specific Issues (Examples).
1. Transfer of patient records.
 2. Government contracts.

VII. KEY TRANSACTION DOCUMENTS

A. Purchase Agreement.

1. The most important document.
2. One size does not fit all.
3. Needs to be reviewed from both a Seller's perspective and a Buyer's perspective.
4. Drafter has the advantage.
5. Needs to be reviewed by professional advisors.

B. Disclosure Schedules.

1. Attached to the Purchase Agreement.
2. Provides qualifications and exceptions to representations and warranties.
3. Needs to be accurate and complete to avoid liability.
4. A key area where professional advisors can help.

C. Financing and Security Documents.

1. Promissory note.
2. Security agreement.
3. UCC financing statements.
4. Personal guaranty.
5. Collateral assignment of life insurance.

D. Closing Statement.

1. Wire instructions.
2. Payoff letters.
3. Professional advisor fees and commissions.

E. Ancillary Documents (Depending on the type of transaction).

1. Bill of Sale (Asset Sale).
2. Stock or Membership Interest Certificates and Assignments separate from Certificate (Equity Sale).
3. Vehicle titles endorsed for transfer.

4. Assignment and assumption agreement.
5. Escrow agreement.
6. Employment agreements / consulting agreements.
7. Confidentiality, non-solicitation, and non-competition agreements.
8. Bring-down certificates.
9. Secretary's certificates for entity parties.
10. Corporate resolutions for entity parties.
11. Resignations.
12. Certificate of good standing for entity parties.
13. Amendment to articles to change name, if acquired.
14. Termination of assumed names / Certificate of assumed name.
15. Real estate acquisition documents.
16. Lease assignments / terminations.

VIII. CLOSING MATTERS

- A. Satisfaction of Conditions Precedent.
- B. Authorization and Approvals.
- C. Insurance Matters.
 1. Seller: What insurance should be adjusted?
 2. Buyer: Is insurance in place?
- D. Banking Matters.
 1. Ensure all bank financing and loan documents are prepared.
 2. Remove terminated employees from bank accounts being retained.
 3. New signature cards will be needed for bank accounts being transferred.
- E. Employment Matters.
 1. Notice to employees.
 2. Benefit plans and payroll in place for new employees.

F. Real Estate Matters.

1. Change of utilities.
2. Transfer keys, codes, combinations, and garage door openers.
3. Ensure all real estate documents are prepared if real estate is included.

IX. POST-CLOSING MATTERS

A. Post-Closing Adjustments to the Purchase Price.

1. Follow necessary procedures.
2. Pay attention to deadlines.

B. Post-Closing Covenants (Examples).

1. Access to records.
2. Retention of records.
3. Mail.
4. Litigation assistance.

C. Tax Filings.

1. Michigan Department of Treasury Form 5156 - Request for Tax Clearance Application.
2. Michigan Department of Treasury Form 163 - Notice of Change or Discontinuance.
3. IRS Form 8594 - Asset Acquisition Statement under IRC Section 1060.
4. UIA Schedule B - Successorship Questionnaire. To be completed by a Buyer.
5. Form UIA 1772 - Discontinuance or Transfer of Payroll or Assets in Whole or Part. To be completed by Seller.

D. Announcements.

E. Industry Specific Filings (Examples).

1. Statutorily required notice concerning sale of a medical or dental practice.
2. Statutorily required notice concerning transfer of patient records.



**Independent Contractor Status Under
the Fair Labor Standards Act (FLSA)**

David A. Lawrence

EMPLOYEE OR INDEPENDENT CONTRACTOR?
CLASSIFYING WORKERS APPROPRIATELY AND WHY IT'S IMPORTANT

I. **INDEPENDENT CONTRACTOR STATUS UNDER THE FAIR LABOR STANDARDS ACT (FLSA)**

Key Take-Away: Misclassification of employee vs. independent contractor can result in significant ramifications.

A. Potential Ramifications.

1. Underpayment/nonpayment of income taxes, FICA taxes, UI taxes and WC premiums.
2. Federal and state agency recoupment of underpaid taxes with penalties determined through coordination and collaboration of federal and state agencies (sharing of data collection and analysis).
 - a. IRS and Michigan's UIA.
 - b. Michigan's UIA and Wage & Hour Division.
 - c. Michigan's UIA and Workers' Compensation Agency.
3. Subject to future audits to ensure compliance.
4. Continued misclassification can result in employer being subject to penalties that quadruple the amount of taxes owed on any misclassified wages.

B. Tests.

1. The (Federal) Economic Reality Test.
 - a. In use before March 8, 2021.
 - b. Judicially created [US v Silk, 331 US 704 (1947); Rutherford Food Corp v McComb, 331 US 722 (1947)].
 - c. Six Factors.
 - (1) How much control does the employer have over the employee's work?
 - (2) Does the worker have an opportunity to earn more or less money based on how they manage their work (i.e., opportunity for profit and loss)?
 - (3) Does the worker own or invest in the equipment required to perform the work?
 - (4) Does the work performed require a special skill?

(5) Is this a long-term or permanent working relationship, or a short-term, temporary relationship?

(6) How integral, or central, is the task performed by the worker to the business?

d. Issues with the Test.

2. Department of Labor (DOL) Independent Contractor Rule (ICR) [86 FR 1168].

a. Intent/Purpose.

(1) Simplify, clarify and harmonize factors for determining when a worker is an independent contractor vs. employee under the FLSA.

(2) Intended to be the sole and authoritative interpretation.

b. History of the ICR.

(1) Published January 7, 2021 and scheduled to take effect March 8, 2021.

(2) February 5, 2021 - DOL publishes proposal to delay the effective date until May 7, 2021.

(3) March 4, 2021 - DOL publishes a final rule delaying effective date to May 7, 2021.

(4) March 12, 2021 - DOL publishes notice of proposed rulemaking proposing to withdraw ICR.

(5) May 5, 2021 - DOL announces final rule withdrawing ICR, effective immediately upon publication on May 6, 2021.

(6) March 14, 2022 - Federal district court (ED of Texas) holds that the DOL's 2021 delay and ultimate withdrawal of ICR was unlawful and vacates DOL's various rules, including rule withdrawing ICR. The ICR became effective March 8, 2021 and remains in effect.

(7) May 13, 2022 - DOL appeals the federal court's decision to the 5th Cir.

(8) June 3, 2022 - DOL announces development of proposed rule to determine employee or independent contractor status under the FLSA.

(9) June 7, 2022 - DOL files motion in the 5th Cir. asking the court to hold the appeal in abeyance pending the completion of the DOL's new rulemaking proceedings.

(10) June 10, 2022 - 5th Cir. grants DOL's motion and stays the appeal for 180 days.

(11) October 11, 2022 - DOL announces publication of a notice of proposed rulemaking, Employee or Independent Contractor Classification Under the Fair Labor Standards Act, which would rescind the ICR.

c. 2 Core Factors + 3 Guideposts.

(1) Core Factor: The nature and degree of control over the work.

(2) Core Factor: The worker's opportunity for profit or loss based on initiative and investment.

(3) Guidepost: The amount of skill required for the work.

(4) Guidepost: The degree of permanence of the working relationship between the worker and the potential employer.

(5) Guidepost: Whether the work is part of an integral unit of production.

II. IRS INDEPENDENT CONTRACTOR TEST

Key Take-Away: The IRS presumes that a worker is an employee unless the employer proves otherwise.

A. Intent/Purpose.

1. Determining whether a worker is an independent contractor or an employee for purposes of federal employment taxes (income tax, FICA, unemployment).
2. Focuses on the degree of control and independence.

B. History.

1. Pre-2021, analysis based on IRS 20 Factor Test.
2. In 2021, IRS refines analysis and moves away from 20 Factor Test.

C. IRS 20-Factor Test.

1. Actual instruction or direction of the worker.
2. Training.
3. Integration of services.
4. Personal nature of services.
5. Similar workers.
6. Continuing relationship.
7. Hours of work.

8. Full-time work.
9. Work on premises.
10. Order of performance.
11. Submitting reports.
12. Method of payment.
13. Payment of expenses.
14. Tools and materials.
15. Investment.
16. Profit or loss.
17. Exclusivity of work.
18. Services available to the general public.
19. Right of discharge.
20. Right to quit.

D. Current Refined Test (Post 2021).

1. Behavioral Control - Does the business control or have the right to control how the worker does their job?
 - a. Type of instructions given.
 - b. Degree of instruction.
 - c. Evaluation systems.
 - d. Training.
2. Financial Control - Does the business have the right to control the economic aspects of the worker's job?
 - a. Significant investment.
 - b. Unreimbursed expenses.
 - c. Opportunity for profit/loss.
 - d. Services available to the public/market.
 - e. Method of payment.

3. Relationship of the Parties - How do the worker and the business view their relationship with one another?
 - a. Written contracts.
 - b. Employee benefits.
 - c. Permanency of the relationship.
 - d. Services provided as a key activity of the business.

E. Analysis Pointers.

1. Weigh all factors to determine relationship.
2. No one factor is more important than any other.
3. Not all factors may be relevant to the situation.
4. Consider the entire relationship and the degree/extent of the right to direct and control.
5. Document, document, document.
6. If unclear about status, file Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding, and the IRS will determine for you.

III. "EMPLOYEE" STATUS UNDER OTHER FEDERAL EMPLOYMENT LAWS - THE CLACKAMAS TEST

Key Takeaway: The distinction between employees, partners, and owners is critical to the applicability of a variety of federal employment laws.

A. Intent/Purpose.

1. Determining whether a partner/shareholder/director is an "employee" for purposes of federal employment statutes.
2. Not all federal statutes meaningfully define "employee" internally or by reference.

B. History.

1. Judicially-created [*Clackamas Gastroenterology Associates v Wells*, 538 U.S. 440 (2003)].
2. Facts of the Case.
 - a. Employee Wells sued her employer medical practice claiming it violated the ADA when it terminated her employment.

- b. Employer argued it was not an "employer" under ADA because it didn't have 15 or more employees.
- c. Employer argued that the 4 doctor-shareholders who owned the practice and made up its board of directors weren't "employees".

3. Issue for the Courts.

Should the 4 doctors actively engaged in the medical practice as shareholders and directors be counted as "employees" under the ADA?

4. Supreme Court Ruling.

- a. Control in the master-servant relationship is most significant factor in determining "employee" status.
- b. "[I]f the shareholder-directors operate independently and manage the business, they are proprietors and not employees; if they are subject to the firm's control, they are employees."
- c. Adopted EEOC approach and guidance from EEOC compliance manual.
- d. No single factor of the six-factor test is decisive.
- e. Determination based on "all the incidents of the relationship."
- f. "The mere fact that a person has a particular title—such as partner, director, or vice-president—should not necessarily be used to determine whether he or she is an employee or proprietor.... Nor should the mere existence of a document styled 'employment agreement' lead inexorably to the conclusion that either party is an employee."

C. The *Clackamas* Test.

- 1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- 2. Whether and, if so, to what extent the organization supervises the individual's work.
- 3. Whether the individual reports to someone higher in the organization.
- 4. Whether and, if so, to what extent the individual is able to influence the organization.
- 5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- 6. Whether the individual shares in the profits, losses, and liabilities of the organization.

D. Application.

1. Anti-discrimination statutes (Title VII, ADEA, ADA, EPA).
2. FMLA - *Nichols v All Points Transport Corp. of Michigan, Inc.*, 364 F Supp 2d 621 (EDMI 2005).
3. ERISA - *Pearl v Monarch Life Ins. Co.*, 289 F Supp 2d 324 (EDNY 2003).

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- Complex commercial litigation, involving such areas as 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
- Defense of employers in labor law disputes
- Commercial contract preparation and review
- Service as an arbitrator in business contract matters



JACK S. COUZENS, II is a shareholder of the firm. Mr. Couzens has headed the firm's estate planning group since 1978. As a Chartered Life Underwriter, he brings significant knowledge regarding insurance products to his client representation on matters of estate planning and corporate law, employee benefits law and executive compensation. His principal areas of focus have included:

- 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
- Business and personal income, gift and estate tax planning

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JERRY M. ELLIS is a senior attorney of the firm. Mr. Ellis has over 40 years' experience in insolvency, workout, restructuring and bankruptcy matters, including the related litigation. He is the former Mayor of the City of Farmington Hills, MI, providing him with a unique perspective in disputes or planning involving government entities. Examples of matters he has focused on include:

- 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
- Lender representation in the workout and bankruptcies of troubled secured real estate matters, out of court loan modifications and foreclosures
- Complex business and commercial litigation

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DONALD M. LANSKY is a shareholder of the firm. Mr. Lansky has focused his practice on individual and business tax planning, business entity planning, family wealth transfers, estate planning and mergers and acquisitions. He has extensive experience in areas such as the following:

- 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
- 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
- Development of effective wealth transfer planning strategies and techniques
- Assistance in forming and obtaining tax rulings for private charitable foundations and public charities, as well as general legal representation for such organizations

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BRUCE J. LAZAR is a shareholder of the firm. With over 40 years of experience, Mr. Lazar heads the firm's litigation practice area. Martindale-Hubbell has awarded Mr. Lazar the highest rating of AV, which identifies a lawyer with very high to preeminent legal ability. In addition, Mr. Lazar has been chosen as a Michigan Super Lawyer on multiple occasions. His practice concentrates primarily in the area of commercial litigation and he has tried a multitude of cases in both state and federal courts, as well as arbitration proceedings. Along with trial work, Mr. Lazar has extensive appellate experience with many published opinions. His career has concentrated in the following areas of practice:

- 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
- Representation of estates, trusts, trustees and beneficiaries in contested estate, trust and probate administration matters

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ALAN C. ROEDER is a shareholder of the firm. Mr. Roeder is licensed in Michigan and Colorado and concentrates his practice in the areas of estate planning and taxation, closely held business law and real estate. This has included such matters as:

- Designing, drafting, implementing and administering estate plans for a broad range of estate sizes
- Assisting closely held businesses in formation, operation, tax planning, restructuring and termination
- Executive compensation and buy-sell agreement planning
- Real estate ownership structure, tax planning, financing, sale, purchase and development
- Lease negotiation and documentation
- Client assistance in real property management
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RENARD J. KOLASA is a senior attorney of the firm. Mr. Kolasa has concentrated his practice in the areas of estate planning and taxation, closely held business law and tax-exempt organizations. This has included such matters as:

- Designing, drafting, implementing and administering estate plans for a broad range of estate sizes
- 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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KATHRYN GILSON SUSSMAN is a shareholder of the firm. Ms. Sussman has concentrated her practice in the areas of estate planning, estate administration, elder law and non-profit organizations, including:

- 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
- Preparation of Gift and Estate Tax returns, including generation skipping analysis

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JEFFREY A. LEVINE is a shareholder of the firm. Mr. Levine's practice primarily focuses on general business counseling, business tax planning and acquisition transactions. There is a strong transactional emphasis on Mr. Levine's practice, including:

- 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
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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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- 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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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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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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PRERANA R. BACON concentrates her practice in the areas of litigation and dispute resolution, business and corporate and employment and labor. Ms. Bacon regularly advises clients in the following areas:

- Negligence & Intentional Tort Litigation
- Personal Injury Litigation
- Civil RICO Prosecution and Defense
- SIU & Insurance Fraud Investigation
- Insurance Coverage & Disputes
- Commercial & Business Litigation, including Directors & Officers and Shareholder Litigation
- Regulatory Compliance and Corporate Governance
- Employment & Labor Charges/Complaints/Litigation
- Intellectual Property Litigation
- E-Discovery, Document Retention and Preservation Planning

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COREY S. ROSEN concentrates his practice in the areas of business and corporate, real estate, trusts and estates and taxation. Mr. Rosen regularly advises clients in the following areas:

- Reviewing and drafting real estate, commercial, and asset-based financing documents for institutional lenders and businesses, including leases and secured transactional documents
- Assisting closely held and medium-sized businesses in formation and organizational matters
- Handling commercial real estate transactions, including purchase agreements and title review
- Reviewing and drafting all types of business contracts
- Business owner buy-outs, purchases and sales

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OF COUNSEL



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 and dispute resolution, banking and finance, construction law, business and corporate, mergers and 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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CHIARA F. MATTIESON is Of Counsel to the firm. She focuses on probate and trust litigation and administration, civil and commercial litigation and estate planning. Examples of her representation include:

- Probate litigation in areas of capacity challenges, guardianships or conservatorships, prosecuting and defending breach of fiduciary duty claims and will and trust contests
- Assisting fiduciaries in administering estates and trusts and defending fiduciaries against claims of breach of fiduciary duty
- Litigation of civil disputes in state and federal courts that are related to or arise from estate and trust matters

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EDWIN SADIK is Of Counsel to the firm. He works primarily in the areas of estate planning, probate litigation, taxation, probate, probate avoidance, tax planning strategies and trust and estate administration. Examples of his representation include:

- 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
- Closely held business succession and transition planning
- Business and personal income, gift and estate tax planning

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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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