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The ~~Thursday~~ *Friday* Report

January 5, 2018 | Issue #235

Re: In Case You Missed It (Because We Didn't Send It...Yet)

Demystifying the New Section 199A Deduction for Pass-Through Entities (part 1 of 2) **by Alan Gassman & Brandon Ketron**

A Trio of Interesting Florida Ethics Rulings **by Joseph Corsmeier**

Richard Connolly's World

A Closer Look at the Gumby Trust **by Martin Shenkman**

Humor! (Or Lack Thereof!)

Welcome back to the Thursday Report.
We thank the dozens of people whose efforts make the Thursday Report possible every week, and the handful of people who read it.

We welcome questions, comments, suggestions and compliments, whether true or not.

Happy New Year!

Quote of the Week

"Be at war with your vices, at peace with your neighbors, and let every new year find you a better man"

– Benjamin Franklin

Click HERE to celebrate changes the Bowie Way.

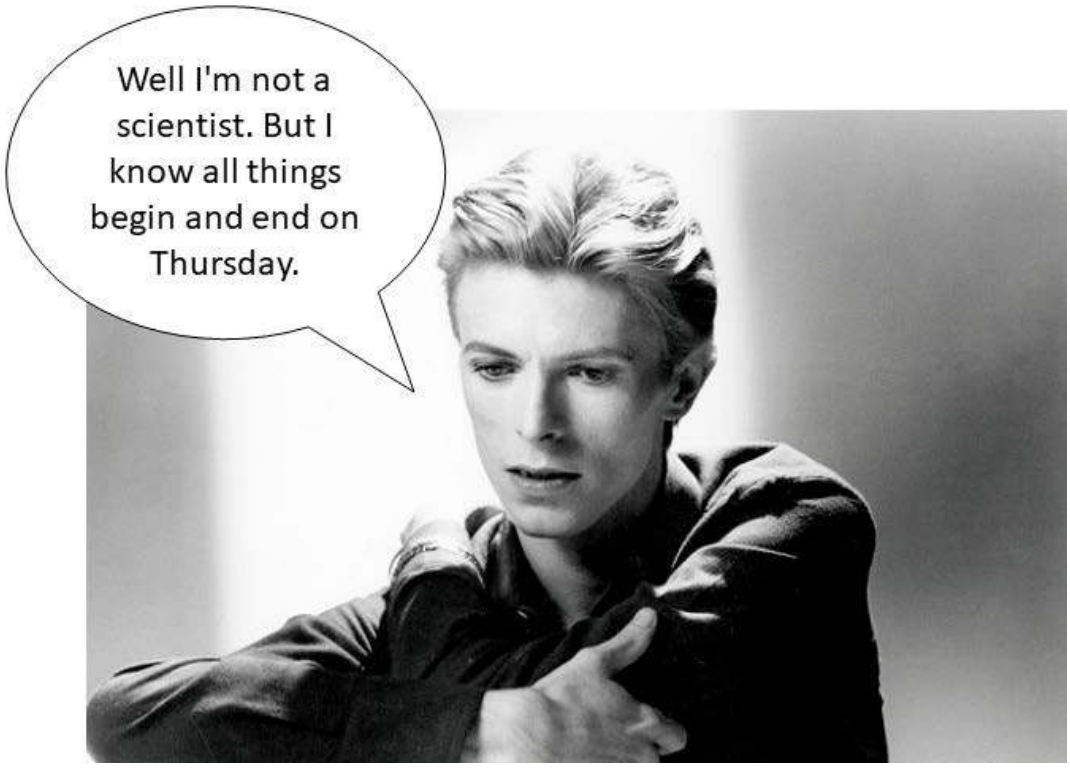
New Year is the time at which a new calendar year begins and the calendar's year count increments by one.

Many cultures celebrate the event in some manner and the 1st day of January is often marked as a national holiday.

In the Gregorian calendar, the most widely used calendar system today, New Year occurs on January 1 (New Year's Day). This was also the case both in the Roman calendar (at least after about 713 BCE) and in the Julian calendar that succeeded it.

Other calendars have been used historically in different parts of the world; some calendars count years numerically, while others do not.

During the Middle Ages in western Europe, while the Julian calendar was still in use, authorities moved New Year's Day, depending upon locale, to one of several other days, including March 1, March 25, Easter, September 1, and December 25. Beginning in 1582, the adoptions of the Gregorian calendar and changes to the Old Style and New Style dates meant the various local dates for New Year's Day changed to using one fixed date, January 1.



David Bowie quote from “The Man Who Fell to Earth”

Demystifying the New Section 199A Deduction for Pass-Through Entities (part 1 of 2)


by Alan Gassman & Brandon Ketron

reprinted from Steve Leimberg's Income Tax Planning Email Newsletter – Archive Message #125

EXECUTIVE SUMMARY:

New Internal Revenue Code Section 199A will allow individual taxpayers and trusts to receive up to a 20% deduction on what is referred to as "qualified business income". This will result in a great many businesses and professionals being taxed at a rate which is 80% of the otherwise applicable rate if several requirements are met. For example, taxpayers in the highest bracket (37%) that qualify for the full deduction will be taxed at a 29.6% rate on qualified business income (80% of the highest bracket rate of 37% is 29.6%--an additional 3.8% Medicare tax may apply depending upon the level of participation that the taxpayer has in the flow through entity).

Many taxpayers will not be able to take this deduction in 2018 due to improper positioning, or failure to restructure in ways that can make the deduction available. This newsletter will take the reader through the definitions and hurdles that need to be navigated and discuss obstacles and strategies that must be identified and applied, as well as uncertainties in the law that may cause problems for many.

FACTS:

On December 22nd, President Trump signed into law the Tax Cuts and Jobs Act (TCJA) adding a new Code Section 199A, which dramatically impacts the taxation of flow through entities.

This is a complicated code provision that has gray areas that will be worked out over the upcoming months, if not years. Practitioners will need to take extra time in order to familiarize themselves with Code Section 199A and be able to advise clients on how to properly structure their business and wages paid from such businesses to maximize tax savings.

COMMENT:

OVERVIEW

The following definitions and terminology are used in this article, and may be appropriately memorized for long term use in this letter and subsequent use in this new arena.

1. A Flow Through Trade or Business is a "trade or business" activity which occurs under an entity taxed as a partnership, an S corporation, or as disregarded or owned individually by a single person or married couple.[i] The statute does not define "trade or business" or give guidance as to which definition of that term will apply to determine whether a passive activity, such as triple net leasing, may qualify. Many investment arrangements will be restructured to become more active in nature in order to help assure qualification for the deduction. The deduction will also apply to income from Real Estate Investment Trusts ("REIT's") and publically traded limited partnerships.[ii]

2. Flow Through Income consists of K-1/reported income, or Schedule C or E income, and is thus measured by the income of the flow through entity or individual from the flow through activity, and not by the amount of cash distributions received. In order to qualify for the deduction, the income must be effectively connected to the conduct of a trade or business within the United States.[iii]

3. Individual Taxpayer means an individual married or single person who has an ownership interest in a flow through entity or has direct flow through income under a Schedule C business or a Schedule E rental activity which may qualify for the 20% deduction. When the Individual Taxpayer is married we are referring to all income of both spouses and assuming that they are filing joint returns for the purposes of this letter.

4. Specified Service Trades or Businesses consists of those eleven (11) categories of businesses or activities which will not qualify for the flow through deduction if the individual taxpayer reporting such income has taxable income exceeding the levels described below. For the most part these primarily consist of service provider professions that are normally paid by W-2 wages for services provided.[iv]

5. W-2 Wages means compensation paid to employees as salary, bonuses, and elective profit sharing plan deferrals paid by a flow through entity, and does not include wages earned by an individual taxpayer from sources other than a flow through entity, compensation paid to independent contractors, or income that is subject to self-employment taxes, if not paid and treated as wages paid to an employee.[v] Wages will also not include amounts not timely reported to the Social Security Administration. Since wages cannot be paid by a partnership to a partner because of the guaranteed payment rules, or from a Schedule C proprietor or Schedule E rental activity to the individual taxpayer there will be many businesses and activities moving to S corporations early in 2018.

6. Qualified Property means physical assets, including real estate, furniture and equipment owned by a flow through entity which may be used to meet the wages and 2.5% of the cost of qualified property test described below.[vi]

Before diving into a more technical description of the statute, the reader can be best served by reviewing the following steps of analysis that can be used to determine if and how the deduction will be applied.

IMPORTANT NOTE: LISI has developed a tool that: 1) quickly calculates the 199A pass-through deduction, and 2) also helps advisors model the more complex choice of entity question as to whether a particular client is "better off" being a C Corporation or a pass-through entity. For more information or to purchase simply click this link: leimbergservices.com/analyzers

STEP ONE -- IDENTIFY FLOW THROUGH ENTITIES AND FLOW THROUGH INCOME.

Flow through entities, which will qualify under the statute will consist of S corporations, entities taxed as partnerships, Schedule C entities such as sole proprietorships, "disregarded" LLC's owned solely by an individual or married couple, and Schedule E income received from rental activities owned personally or under a disregarded LLC. When Limited Liability Companies (LLC's) and Limited Partnerships (LP's) are involved there will often be confusion because these may be treated as C corporations, S corporations, partnerships, or as "disregarded" and owned by individuals, depending upon circumstances. Entity documents, historical elections, and tax returns must be closely examined in many situations to determine whether flow through treatment will apply.

For example, many LLC Operating Agreements for corporations that have attempted to make S elections have provisions that would require the company to be treated as a C corporation (as opposed to an S corporation) if the language of the Operating Agreement violates what is known as the "second class of stock" rule.

Companies treated as C corporations may elect to be treated as S corporations by making an election 75 days after the date upon which the S corporation election will apply (by March 15, 2018 for a January 1st S election), but entity documents must exist on January 1st which meet the S corporation eligibility rules.[vii] Caution should be exercised due to the harsh tax results that may be imposed on S corporations that have made an S election under the unrecognized built in gain rules of Code Section 1374 and the "sting tax" rules of Section 1375. There are ways to navigate around the impact of these rules by advance planning, which may involve accruing expenses in the minutes of a meeting of a C corporation before the effective date of the S election. For example, if the S election is to effective January 1st, then sufficient legitimate expenses would need to be accrued by the preceding December 31st, and actually paid by March 15th, in order to "zero out unrecognized built in gains" under Section 1374.

Advisors should keep in mind, however, that the 21% top tax bracket for C corporations is also very attractive, and may be preferable to the 80% of 37% (29.6%) top bracket for those who wish to reinvest corporate earnings, or take advantage of 1202 companies which may be sold or liquidated in a tax advantaged manner.[viii]

STEP TWO -- APPLY INCOME LIMITS AT THE INDIVIDUAL TAXPAYER LEVEL BASED ON THE ACTIVITY INVOLVED.

First, please keep in mind that all income limits in the statute are applicable to the taxpayer who receives the flow through income, and not at the flow through entity level.[ix]

Second, keep in mind that going above the limit can cause loss of thousands of dollars of deductions.

We next discuss two very essential and possibly confusing steps in the analysis, which both involve income calculations of the individual taxpayer, but apply in separate circumstance:

As a preview, Step Three applies where the flow through entity's income is from one of the 11 categories of Specified Service Trades or Businesses and the individual taxpayer is above the income amounts.

Step Four applies where the individual taxpayer is above the income amounts and there is not a sufficient amount of wages paid by the flow through entity, and/or the value of qualified property to permit the deduction.

Please keep in mind that: (1) the deduction will be based upon up to 20% of the flow through entity income, (2) the wage test under Step Four will be based on all wages paid by the flow through entity to all of its employees, including the taxpayer, and (3) the income limits will apply to the sum of the flow through entity income that is passed to the individual taxpayer and the individual taxpayer's other income (4) Wages and Qualified Property calculations will apply at the flow

through entity level, and may not be aggregated or "mixed" where an individual taxpayer has ownership interest in multiple entities.

STEP THREE -- IDENTIFY ACTIVITIES THAT CANNOT QUALIFY IF THE INDIVIDUAL TAXPAYER'S 2018 INCOME EXCEEDS $415,000/$207,500, OR WHERE DEDUCTION IS REDUCED IF TAXPAYER'S 2018 INCOME EXCEEDS $315,000/$157,500.

A great many taxpayers and advisors were shocked to learn that only individual taxpayers receiving less than $415,000 for taxpayers married filing jointly or $207,500 for single filers will be eligible to take the deduction as to flow through activity income that consists of any one or more of the following categories of businesses or professions[xxi]:

1. Health
2. Law
3. Accounting
4. Actuarial science
5. Performing arts
6. Consulting
7. Athletics
8. Financial services
9. Brokerage services
10. Any trade or business where the principal asset is the reputation or skill of one or more employees
11. Any trade or business which involves the performance of services that consist of investing and investment management, trading, or dealing in securities, partnership interests, or commodities.

This limitation for the above categories of businesses or professions is phased in ratably beginning at $315,000 of taxable income for taxpayers married filing jointly, and at $157,500 for single filers, as is further discussed below.[xii]

STEP FOUR -- NAVIGATE THE WAGES AND QUALIFIED PROPERTY TEST THAT APPLIES WHERE THE INDIVIDUAL TAXPAYER HAS TOTAL TAXABLE INCOME ABOVE $315,000 FOR MARRIED AND $157,501 FOR SINGLE FILERS – THE DEDUCTION CANNOT EXCEED A SPECIFIED PERCENTAGE OF THE GREATER OF (1) THE SALARIES PAID BY THE ACTIVITY OR (2) THE SUM OF A PORTION OF SALARIES PAID PLUS A PERCENTAGE OF THE VALUE OF "QUALIFIED PROPERTY" USED IN THE ACTIVITY.

The deduction for individual taxpayers will generally be based upon 20% of the flow through income for taxpayers at or below the $315,000 for married and $157,500 for single taxpayers, while taxpayers whose personal income exceeds these levels may have their deduction limited based upon the wages and qualified property test described above.[xiii]

The above distinction will cause much confusion, and should be carefully understood and remembered. This applies with reference to the income level of the individual taxpayer receiving the deduction, and not the flow through entity, and can significantly limit the deduction of those individuals who are above the $315,000 or $157,500 income amounts.

FOR INDIVIDUAL TAXPAYERS BELOW $315,000/$157,500:

If the individual taxpayer has income from a business or activity below $315,000 for married taxpayers filing jointly or $157,500 for single filers then the deduction will be calculated by taking the lesser of (1) the individual taxpayer's qualified business income multiplied by 20%, which is referred to in the statute as the Combined Qualified Business Income Amount, or (2) 20% of the individual taxpayers' taxable income less net capital gains.[xiv] This calculation may be altered slightly if the taxpayer has (1) dividends received from a cooperative housing organization, which are known as "Qualified Cooperative Dividends", or (2) certain amounts of net capital gains, as described below.[xv] [xvi]

For example, if A and B are a married couple filing jointly and have taxable income of $300,000, consisting of $200,000 of qualified business income from their 10% ownership of an LLC taxed as a partnership, then A and B would receive a deduction of $60,000 ($200,000 * 20%) regardless of the LLC's wage and qualified property situation.

By second example, if A and B have taxable income of $300,000 consisting of $150,000 of qualified business income from their LLC,$200,000 of capital gains, and $50,000 of itemized deductions, then A and B would receive a Section 199A deduction of $20,000 ($300,000- 200,000

* 20%), because 20% of taxable income less net capital gains is less than 20% of A and B's qualified business income, or the Combined Qualified Business Income Amount ($150,000 * 20% = $30,000).

For readers who want to roll their sleeves up to completely understand the formula that applies to individual taxpayers having less than $315,000 of taxable income if married or $157,000 for single filers, the deduction is technically calculated by taking the lesser of:

(1) the "Combined Qualified Business Income Amount" (the 20% deduction described above)

OR

(2) 20% of the excess of

A. the taxpayer's taxable income for the taxable year

less

B. any net capital gains, plus qualified cooperative dividends, plus the lesser of

1. 20% of qualified cooperative dividends

2. taxable income reduced by any net capital gain

Unless you or your client will receive a qualified cooperative dividend the underlined technical language of the statute above can be ignored, and the deduction will be the lesser of (1) 20% of qualified business income or (2) 20% of taxable income less any net capital gain, which is the test that will be used for the remainder of this article.

Under no circumstances can the amount of the deduction exceed the excess of the taxpayer's taxable income over net capital gains.[xvii]

LIMITATION FOR SPECIFIED SERVICE TRADES OR BUSINESSES

As indicated above**,** Code Section 199A limits the ability of specified service trades or businesses to make use of the deduction for qualified business income.[xviii]

A specified service trade or business is defined by Subsection 1202(e)(3)(A) to be "any trade or business involving the performance of services in the fields of health, law, accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services, or any trade

or business where the principal asset of such trade or business is the reputation or skill of one or more of its employees."[xix]

It is noteworthy that engineering and architecture firms are named under Section 1202(e)(3)(A) but are specifically exempted under the statute and thus not considered to be Specified Service Businesses under Code Section 199A.[xx]

Specified Service Businesses also include trade or businesses which involve the performance of services that consist of investing and investment management, trading, or dealing in securities, partnership interests, or commodities.[xxi] Very little guidance is given on the above definitions, so many taxpayers may fall into a gray area, or may divide their businesses into separate companies to isolate and possibly maximize the type of income that qualifies for the deduction. Examples of gray area businesses will include payroll services, certain types of insurance agencies, IT companies and management companies.

If the flow through entity is engaged in one of the above referenced businesses and the taxpayer has taxable income that exceeds $415,000 for taxpayers married filing jointly or $207,500 for single filers then the deduction under Code Section 199A is not available.[xxii] If the taxpayer's taxable income is less than the above amounts then the taxpayer will be able to deduct the lesser of (1) 20% of the taxpayer's qualified business income or (2) 20% of taxable income less any net capital gain.[xxiii]

If the taxpayer's taxable income exceeds $315,000 for taxpayer's married filing jointly or $157,500 for single filers then the deduction will be phased out by the amount the taxpayer's taxable income exceeds the above amounts divided by $100,000 for taxpayer's married filing jointly or $50,000 for single filers.[xxiv]

For example, if a married doctor receives $200,000 of flow through income from his medical practice and has taxable income of $365,000 then the deduction will be limited to $20,000, which is calculated as follows:

$$\frac{\$365{,}000 - \$315{,}000}{\$100{,}000} = 50\%$$

$$50\% * (\$200{,}000 * 20\%) = \$20{,}000$$

In addition, since the doctor's income exceeds the income limit his deduction may be further limited by the wages and qualified property test, which is also phased in at $315,000 for taxpayer married filing jointly. This test is discussed in more detail below.

LIMITATION FOR HIGH INCOME INDIVIDUAL TAXPAYERS:

Individual taxpayers who have taxable income before the Section 199A deduction exceeding $415,000 for married taxpayers filing jointly or $207,500 for single filers face a limit on what they can deduct on their individual returns, which takes into account the wages paid and qualified property used by the flow through entity based upon the lesser of (1) or (2) below:

(1) 20% of the taxpayer's qualified business income with respect to the qualified trade or business

(2) The greater of:

A. 50% of the W-2 wages with respect to the qualified trade or business

OR

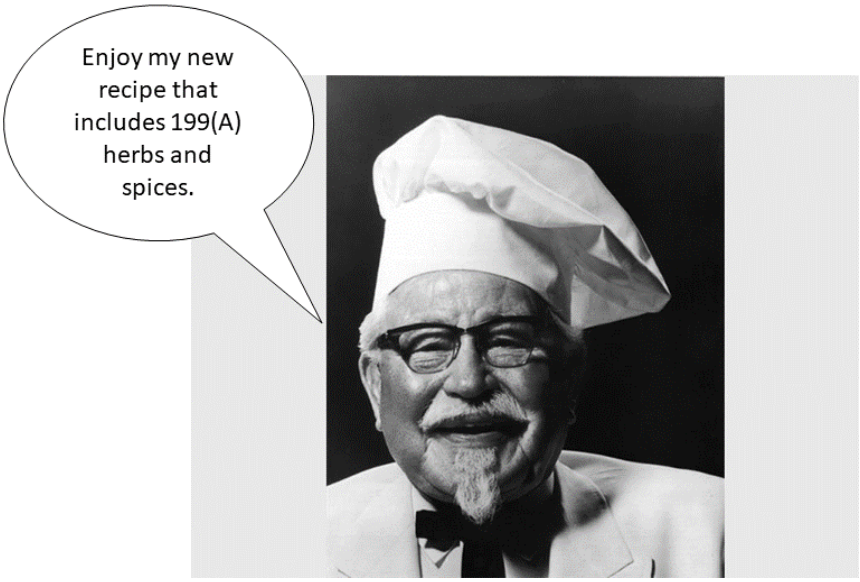
B. the sum of (i) 25% of the W-2 wages with respect to the qualified trade or business plus (ii) 2.5% of the "original cost" (technically the unadjusted basis immediately after the acquisition) of all "qualified property" used in the business or investment activity.[xxv]

W-2 wages are defined as wages paid by the flow through entity with respect to the employment of employees during the calendar year ending during such taxable year.[xxvi] Wages include those amounts that are paid to all employees of the flow through entity, including but not limited to the individual taxpayer/owner.[xxvii]

For example, if the taxpayer has $1,000,000 of qualified business income received from a flow through entity, the flow through entity does not pay any W-2 wages, and has no qualified trade or business assets then there will be no deduction.

If the same individual taxpayer, however, takes a salary from the flow through trade or business of $333,000, so that the qualified trade or business income is $667,000, then 20% of $667,000 is $133,400, and 50% of $333,000 in wages is $166,500, so the deduction will be the lesser of the two numbers, which is $133,400.

By further example, if A and B have qualified trade or business property with an unadjusted basis of $5,000,000, no W-2 wages, and qualified business income of $1,000,000, $5,000,000 multiplied by 2.5% is $125,000 and $1,000,000 multiplied by 20% is $200,000, so a deduction of $125,000 may be taken, in addition to having depreciation deductions for the qualified property.



For a recent webinar we did on pass through entities, please click HERE

A Trio of Interesting Florida Ethics Rulings

by
Joseph Corsmeier

Joseph Corsmeier has recently written 3 articles which provide very interesting information regarding recent ethics rulings by both the Florida Supreme Court and the Florida Bar. Below are those articles as well as links to additional materials. Be sure to keep an eye out for the upcoming webinar(s) featuring Mr. Corsmeier and Mr. Gassman regarding these, and other interesting legal ethics topics.

Florida Bar's Board of Governors votes to request the Florida Supreme Court to determine whether TIKD activities are unauthorized practice of law.

Hello everyone and welcome to this Ethics Alert Update which will discuss the recent media reports that the Florida Bar's Board of Governors has voted to request that the Florida Supreme Court determine whether TIKD's app and activities constitute the unlicensed practice of law (UPL). As I previously blogged, TIKD filed a federal lawsuit against The Florida Bar and The Ticket Clinic in November 2017 alleging, inter alia, a conspiracy to force it to cease its business activities and that The Florida Bar's procedures violate the antitrust laws under the U.S. Supreme Court opinion in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.

The federal case is *TIKD Services LLC, v. The Florida Bar, et al.,* Case No. 1:17-cv-24103-MGC (U.S. District Court Southern District of Florida-Miami Division) and I blogged about the TIKD federal lawsuit here: https://jcorsmeier.wordpress.com/2017/12/07/startup-app-tikd-sues-florida-bar-for-alleged-antitrust-violations-florida-bar-moves-to-disqualify-former-president-from-case/, and here: https://jcorsmeier.wordpress.com/2017/12/21/florida-bars-former-president-responds-and-opposes-bars-motion-to-disqualify-him-from-tikd-v-florida-bar-ticket-clinic-antitrust-suit/

According to media reports, at its December 2017 meeting, the Florida Bar's Board of Governors accepted a recommendation from a Bar committee which concluded that TIKD is violating Florida law by practicing law without a license or providing false or misleading information to its customer to send the matter to the Florida Supreme Court for review and an opinion.

The BOG decision appears to have resulted, at least in part, from the federal lawsuit which was filed in November 2017 by TIKD, an entity with an internet application that assists individuals who receive traffic tickets by retaining a lawyer and promises its users that they will not get any points on their traffic record. The company's lawsuit against The Florida Bar and The Ticket Clinic alleges that The Ticket Clinic and The Florida Bar are conspiring to reduce competition, that The Ticket Clinic has made threats to TIKD lawyers, that the Bar's procedures violate antitrust laws, and that TIKD has been deprived of revenue as a result of the conduct.

According to the federal lawsuit and media reports, The Ticket Clinic, a law firm that provides legal services and defends clients in traffic ticket matters, filed complaints with The Florida Bar claiming that TIKD is engaging in UPL, and also filed complaints against lawyers who have represented TIKD customers and has threatened to have them disbarred

Bottom line: As I previously blogged, the TIKD federal lawsuit is one of the first filed in Florida which directly alleges that The Florida Bar's UPL procedures violate the Sherman Antitrust Act based upon the U.S. Supreme Court opinion in *North Carolina State Board of Dental Examiners* and, as added drama, the Bar filed a motion to disqualify its recent former president from representing TIKD in the lawsuit. Now, The Florida Bar will ask the Florida Supreme Court to weigh in and provide an opinion on whether the TIKD app runs afoul of UPL and other Bar rules.

Florida Bar's Board of Governors finds that AVVO Advisor is a for-profit lawyer referral service and must comply with Bar Rules

According to a recent Bar Board of Governors informational release and the January 1, 2018 issue of the Florida Bar News, the BOG Review Committee on Professional Ethics responded to a lawyer inquiry regarding the status of AVVO Advisor and unanimously recommended that the lawyer be advised that Avvo Advisor, which is described as "a private for-profit company's online system for connecting potential clients to lawyers for 15-minute consultations for $39", is a lawyer referral service under Florida's rules. The Board of Governors voted unanimously at its December 8, 2018 meeting to approve the committee's recommendation and opinion. The January 1, 2018 Florida Bar News article is here: https://www.floridabar.org/news/tfb-news/?durl=%2Fdivcom%2Fjn%2Fjnnews01.nsf%2F8c9f13012b96736985256aa900624829%2F3a1cd1f9be52b1f1852581fe004ede22.

As a for-profit lawyer referral service, AVVO Advisor will now be required to comply with Florida Bar Rule 4-7.22 or Florida lawyers will not be permitted to participate in the service. Florida Bar Rule 4-7.22 requires that the services receive no payment that constitutes a division of fees, it must furnish or require lawyers to have professional liability insurance, it must affirmatively state in advertisements that the system is a lawyer referral service, and comply with the other requirements in the rule. According to the BOG release, there are twenty-eight lawyer referral services which are current in their quarterly reports to The Florida Bar.

Florida Bar President-elect Designate John Stewart is quoted as stating: "This is a difficult question for this board, it's going to set a lot of precedent for issues we are going to have to deal with that are related…The decision could affect a large number of our constituents. There are at least, anecdotally, a fair number of our constituents who participate in this program."

The Florida Bar will provide a 90-day grace period on discipline under Rule 4-7.22 for lawyers who may be currently associated with Avvo Advisor. This would allow Avvo Advisor to file its first quarterly report and comply with Rule 4-7.22 or for the Florida lawyers to exercise other options if Avvo Advisor chooses not to follow Rule 4-7.22, Rules Regulating The Florida Bar.

The January 1, 2018 Florida Bar News, which went online on December 26, provides more information for Bar members about participating in Avvo Advisor. The webpage "What you need to know about the Bar and AVVO Advisor" is here: https://www.floridabar.org/news/tfb-news/?durl=%2Fdivcom%2Fjn%2Fjnnews01.nsf%2F8c9f13012b96736985256aa900624829%2Fb5f5fefbce7ee680852581fe004f7f92.

Bottom line: This decision by the BOG addresses only the Avvo Advisor service and it triggers the requirement that AVVO Advisor comply with Florida Bar Rule 4-7.22. Those requirements include, *inter alia*, that there is no division of fees that AVVO either have, or ensure that lawyers have, professional liability insurance, and that AVVO affirmatively state in any advertisements that it is a lawyer referral service. If a lawyer is currently participating in this service, or is considering participating, he or she should act accordingly.

The Florida Supreme Court rejects Bar proposed advertising Rule amendment on lawyers' use of "expert" and "specialist"

Hello and welcome to this Ethics Alert update on the Bar's proposed amendment to Florida Bar Rule 4-7.14 on lawyers' of "specialization" and "expertise" in advertisements which was filed in response to the federal court opinion which found the rule unconstitutional. The Bar filed an Omnibus Rules Petition with, *inter alia*, the proposed rule amendment with the Florida Supreme Court and the court issued an opinion on November 9, 2017 rejecting the proposed rule revisions. The SC opinion is here: http://www.floridasupremecourt.org/decisions/2017/sc16-1961.pdf#search=Bar petition 2017 wells

The proposed amendment would have prohibited a lawyer from stating that he or she is "a specialist, an expert, or other variations of those terms" unless "the lawyer's experience and training demonstrate specialized competence in the advertised area of practice that is reasonably comparable to that demonstrated by the standards of the Florida Certification Plan." If the lawyer's area of expertise is an area in which the Bar approves certifications, the lawyer would be required to include "a reasonably prominent disclaimer that the lawyer is not board certified in that area of practice by The Florida Bar or another certification program." The court's opinion states:

> We decline to adopt the Bar's proposal to amend Bar Rule 4-7.14 (Potentially Misleading Advertisements). The Bar proposes amendments to this rule in response to a decision from the United States District Court for the Northern District of Florida, which held, in relevant part, that provisions in Bar Rule 4-7.14(a) broadly prohibiting lawyers who were not board certified from making truthful statements that they "specialize in" or "have expertise in" a particular field of practice were unconstitutional.
>
> In response to this decision, the Bar recommended amending the rule in subdivision (a) (Potentially Misleading Advertisements) to add a new subdivision (a)(5), which would prohibit lawyers from using in their advertisements the terms "specialist,"

> "expert," or other variations of those terms unless the lawyer meets one of the four criteria established in subdivisions (a)(5)(A)-(a)(5)(D). The criteria in subdivisions (a)(5)(A), (a)(5)(B), and (a)(5)(C) are similar to those in other parts of rule 4-7.14. However, subdivision (a)(5)(D) would provide that a lawyer may identify as a "specialist" or "expert" if the lawyer's "experience and training demonstrate specialized competence in an area of practice that is reasonably comparable to that demonstrated by the standards of the Florida Certification Plan set forth in chapter 6 of these rules"; if the area of claimed specialization or expertise is or falls within an area of practice under the Florida Certification Plan, the advertisement must include a reasonably prominent disclaimer that the lawyer is not board certified in that area of practice by the Bar or another certification program.
>
> We are concerned that the Bar's proposal here does not sufficiently address the district court's decision, and that the language requiring that a lawyer's experience be "reasonably comparable" to the Florida Certification Plan will prove to be problematic because it could lead to differing and inconsistent applications. Because we believe that this important issue requires further study, we decline to adopt the Bar's proposed amendments to rule 4-7.14, and we refer this matter to The Florida Bar for additional consideration.

Bottom line: I previously stated that the proposed Bar rule amendment was problematic and may not comply with the federal district judge's opinion finding that the rule violates the U.S. Constitution. The Florida Supreme Court has declined to implement the revised rule and the Bar will now go back to the drawing board.

Stay tuned…and be careful out there.

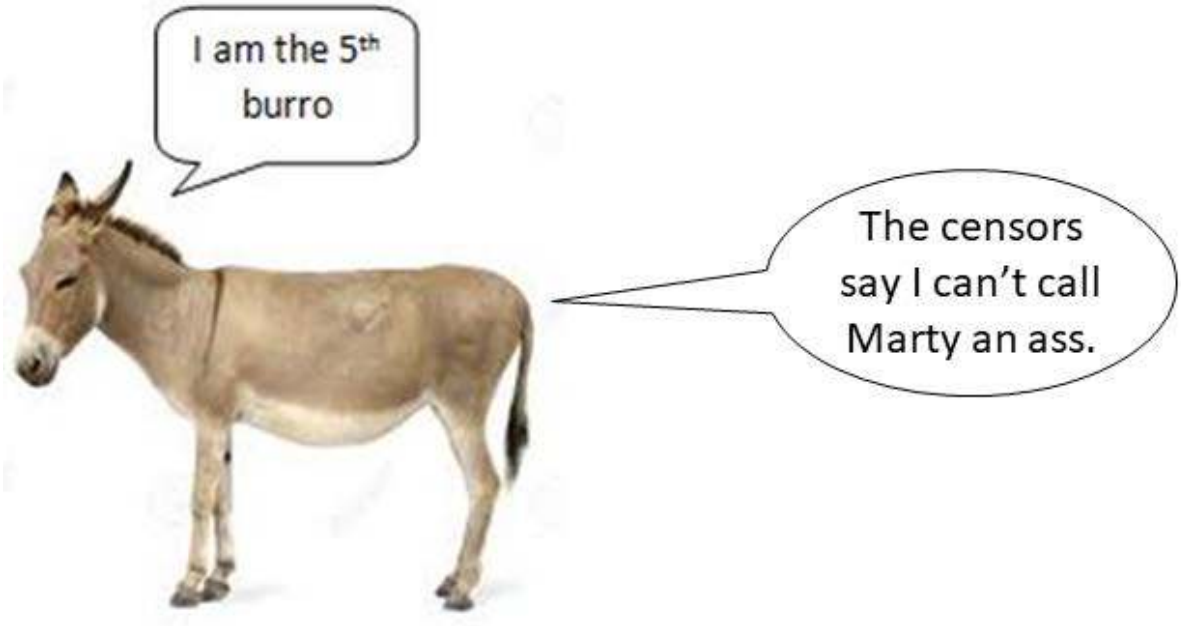
Richard Connolly's World

Insurance advisor Richard Connolly of Ward & Connolly in Columbus, Ohio often shares pertinent articles found in well-known publications such as *The Wall Street Journal*, *Barron's*, and *The New York Times*. Each issue, we feature some of Richard's recommendations with links to the articles.

The attached article from *Private Wealth Magazine* reports:

Wealthy families fight over estates for zillions of reasons.

Fortunately, private wealth advisors can anticipate these hostilities and the litigation they spawn by considering six common scenarios that lead to estate challenges and letting clients know about solutions well before the (mink) fur flies. To View the Full Article Click Here



A Closer Look at the Gumby Trust

by Martin Shenkman

Summary:

Now you see it, now you don't! One never knows what the tax magicians in Washington might do. And whatever the current magicians pull out of their legislative hats, the next act of magicians might swap hats and pull out different rabbits. The only certainty in the tax laws has been and is likely to remain, uncertainty. So, plan now. Like the Nike estate planner says, "Just Do It!" But do it with flexibility so your irrevocable trusts can have a better shot at adjusting to future circumstances.

√ Asset Protection. Continue to use limited liability companies ("LLCs") to hold assets, e.g. any real estate property or business venture generally should be held in a separate LLC. Set up irrevocable trusts (or use existing trusts) and transfer assets to them to use up your current estate tax exemption. For larger estates, sales and other techniques can be used to shift value into protective trust structures. If there are existing/potential future claims you may not be able to transfer assets without it being viewed as hindering, delaying or defrauding the claimant (a fraudulent conveyance). The time to plan is when you don't need to plan. So regardless of the status of the gift, estate or GST taxes, planning now is better than waiting.

√ Flexibility. Gumby-like irrevocable trusts are the way to go. Uncertainty should not be used as an excuse not to plan, but rather as a reason to plan with more flexibility. Pokey says use modern trust drafting bells and whistles to create more options for future changes in the tax and other laws. Shifting assets now into robust irrevocable trusts may provide asset protection benefits and may provide more tax planning opportunities as tax laws change and change again (and again….).

√ Trust protectors. This position has become more common in irrevocable trusts. Giving a fiduciary power to change trustees, governing law, situs, and more, infuses flexibility to respond to future changes.

√ Charitable Designator. Before swap powers became de-rigueur trusts sometimes included a right for a person, acting in a non-fiduciary capacity, to add a charitable beneficiary. This right, during the gran-tor's lifetime, characterizes the trust as a grantor trust. With all the un-certainty over income and estate tax law changes, consider adding a broader charitable designator provision. If the estate tax is repealed there may be no downside to making charitable gifts of trust assets. If the income tax rules for charitable contribution deductions become more restrictive perhaps it will be advantageous from an income tax perspective to make the gifts out of a trust instead of by the individual. Don't have the power end on the grantor's death, permit it to continue in perpetuity since the purpose is not merely to trigger grantor trust status, but to add flexibility to planning. If the estate plan is successful, significant wealth will be shifted out of your estate to long term irrevocable trusts. What resources will future generations direct to charity if their inherited wealth is in trust with no charitable beneficiaries?

√ Swap Power. This power can be used to create grantor trust status (income of the trust is taxed to you). But it also is an incredible tool to build in flexibility. You can transfer family business

interests to an irrevocable trust, locking in valuation dis-counts available under current law. But if you later want to return those assets to your name, you can swap in an equivalent amount of cash and get the business back. This could be useful to obtain a basis step up on death. It could enable you to change your dispositive scheme and transfer the business to another heir. If a capital gains tax on death is enacted, you could reverse swap. Shift appreciated assets into the trust (the opposite of what most folks do under current law) to avoid a cap gains on death. Trust Claymation is flexible!

√ Loan Director. Just like the charitable designator, it had been com-mon to include a power to a person acting in a non-fiduciary capacity to make loans to the settlor of the trust. Adequate interest should be charged but adequate security is not necessary. This too would have characterized the trust as a grantor trust. While grantor trust status can be assured with a swap power, perhaps a loan provision should still be included, but now more for providing a means for the settlor to access trust principal than for grantor trust characterization. If the estate tax is re-pealed you might be happier with the planning knowing that there is a means to provide you access to trust funds, even if that is as a loan.

√ Powers of Appointment. Include powers of appointment (someone who can re-direct how trust property will be distributed and to whom). This can provide flexibility. Granting someone else the power to transmute limited powers of appointment into general ones can be used to cause some or all the trust assets to be included in a beneficiary's estate for a basis step-up on death should that prove advantageous.

√ 2038 Power. The trust could give the trustee, or perhaps a third party acting in a non-fiduciary capacity, a power to grant the settlor the right to control the beneficial enjoyment of trust assets. This would cause estate tax inclusion in the settlor's estate under IRC Sec. 2038. A corporate trustee may be unwilling to exercise such a power so it may be advisable to grant the power to an individual. Consider giving the power to a non-fiduciary. This can provide a mechanism to cause estate inclusion and obtain a basis step up on the settlor's death if that proves advantageous. It might be advantageous to divide the trust so the power can be exercised over some assets. If an asset has declined in value, it may be preferable to avoid changing the basis at death. Caution, if the estate tax is repealed, there will presumably be no Section 2038, so how the step up in basis would be effected under a repeal regime is uncertain.

√ Perpetual Trusts. Have the trust last a long time or forever. If you leverage wealth out of your estate, why not keep it out of whatever transfer tax system the future might bring. Long term trusts protect your heirs from law suits, divorce, and more.

√ Decanting Powers. Give the trustee the power to merge the trust into a new and improved trust so administrative provisions can be modified to address future circumstances. Decanting can be used to add or remove a swap power, add an insurance trustee provision so life insurance can be

add-ed to a trust that did not provide for it, and so much more. Even if you are able to accomplish the desired modifications with a trust protector action, or non-judicial modification by beneficiaries, including broad decanting powers is like chicken soup, "It can't hurt."

√ Hybrid DAPT. If your trust is formed in one of the 16 states that permit self-settled trusts (DAPTs), you can be a beneficiary of your own trust. However, if you reside in a state that does not permit these trusts, some advisers view it as risky to create a DAPT in a state that does. But there is a hybrid solution that might reduce the risk some experts perceive, yet leave open the possibility of you benefiting from that trust. Don't be named initially as a beneficiary. Instead give someone the right to add as beneficiaries of the trust the descendants of your grandparents (hint…that includes you). So, if you are not a beneficiary now, the trust should not face that risk. But you'll have the possibility of becoming a beneficiary if you need access to trust property in the future.

Humor! (Or lack thereof!)

In The News with Ron Ross

MAJOR BOWL GAME RESULTS:

SUGAR BOWL: Alabama beats Clemson

ROSE BOWL: Georgia beats Oklahoma

COAL BOWL: Dark grey cloud covers what appears to be a football game

SKOAL BOAL: Tobacco company regrets decision to sponsor game when required to clean up after chewers and spitters.

OLE' BOWL: Players in leather helmets collide, can't remember who they're playing for.

GROHL BOWL: Fu Fighters perform for first hour and a half, take a break, then finish with another hour and a half set. "Halftime" is ten minutes of a football game.

TROLL VS. MOLE BOWL: Home field advantage goes to Moles as game is played underground.

TOLL BOWL: 80,000 fans turn around just before getting to stadium, refuse to pay the additional $1.25

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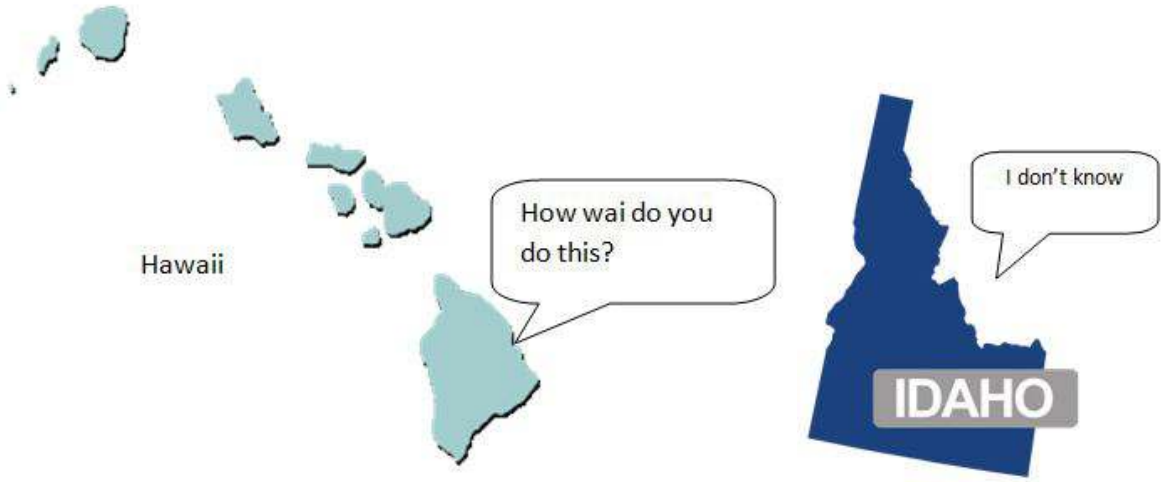
IMPORTANT NOTICE:

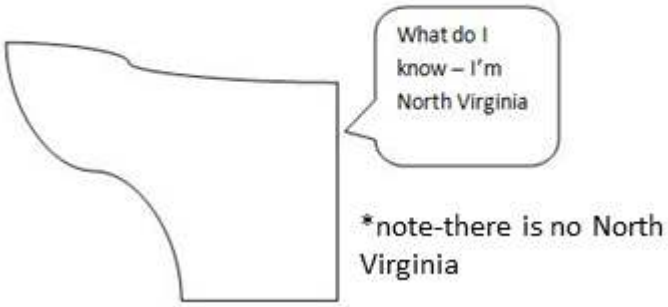
Have you ever wondered what makes a person tick?

Maybe it’s the wristwatch the surgeon accidentally dropped inside him.

That’s why you need to have an attorney on speed dial!

How about some stately humor?





*note-there is no North Virginia


Ok "lahoma"


Pay more Taxas


The rain in
Maine falls
mostly on...

Upcoming Seminars and Webinars

Calendar of Events

Newly announced events are shown in RED

Not nearly ready for prime time presentations..

Alan Gassman Presenting at The Interactive Legal Booth at Heckerling

ILLUSTRATING ESTATE TAX SAVINGS USING ESTATEVIEW SOFTWARE (WITH FREE SAMPLES!)

Please join Alan Gassman at the Interactive Legal booth at Heckerling as he discusses, displays, and explains the ease of use of EstateView estate planning software. (With Free Gifts!)

Questions in advance of the presentation will be welcome
Send questions to Agassman@gassmanpa.com

GASSMAN, CROTTY, & DENICOLO, PA
ATTORNEYS AT LAW

Alan Gassman

InterActive Legal

January 23, 2018

10:40 A.M.—11:10 A.M.

Alan Gassman Presenting at The Premier Trust Booth at Heckerling

PROMINENT DIFFERENCES BETWEEN FLORIDA AND NEVADA TRUST LAW—MORE THAN THE OBVIOUS

Please join Alan Gassman at the Premier Trust booth at Heckerling as he discusses the not-so-obvious differences between trust law in Florida and Nevada.

Questions in advance of the presentation will be welcome
Send questions to Agassman@gassmanpa.com

GASSMAN, CROTTY, & DENICOLO, PA
ATTORNEYS AT LAW

FLORIDA LAW FOR TAX, BUSINESS AND FINANCIAL PLANNING ADVISORS

ALAN S. GASSMAN, J.D., LL.M.
Gassman, Crotty & Denicolo, P.A.

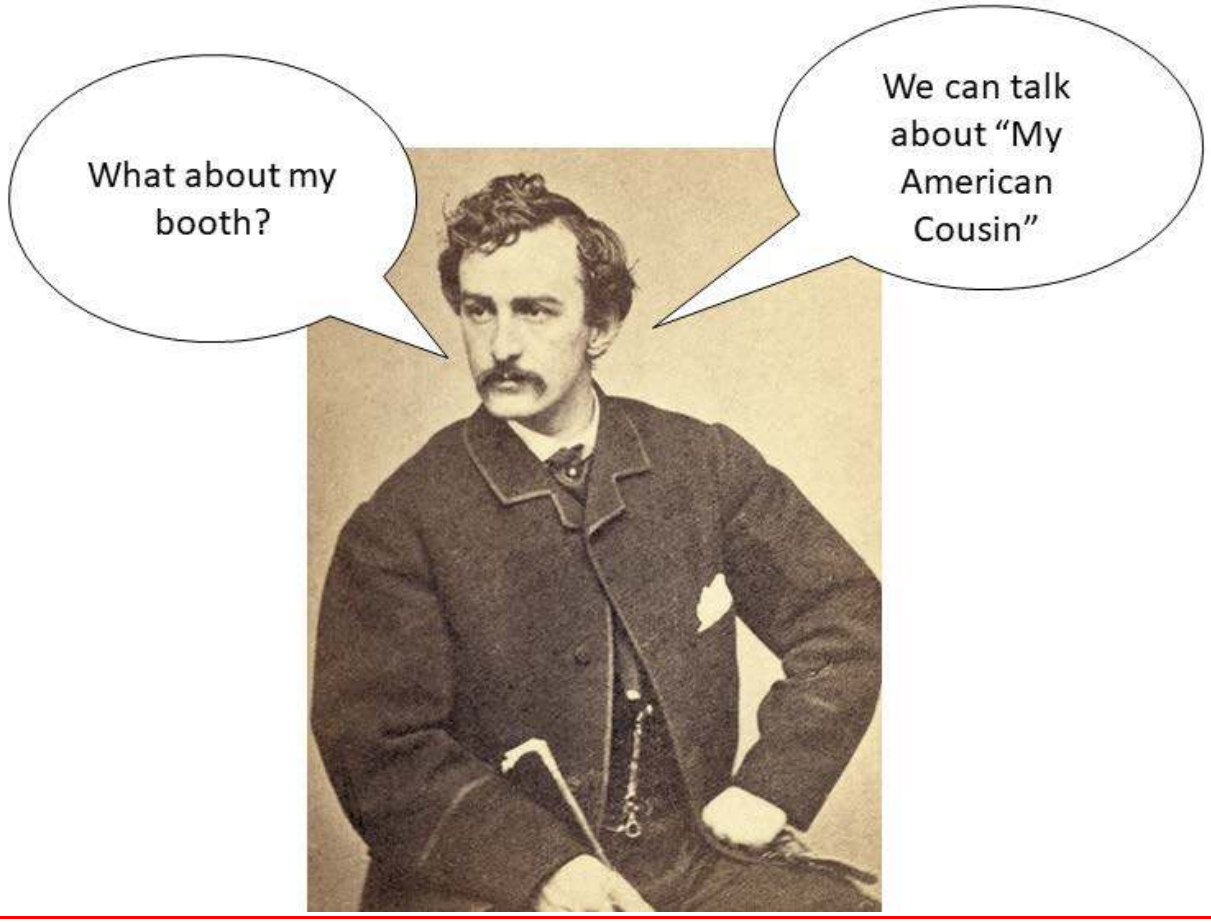
Alan Gassman

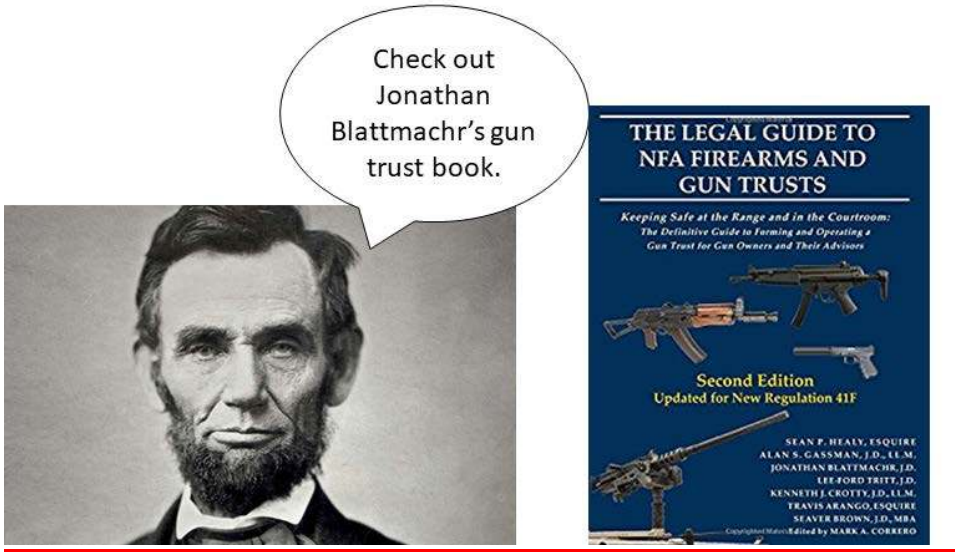
PREMIER TRUST

January 24, 2018 10:40 A.M.—10:55 A.M.

RSVP to bsimmons@premiertrust.com

receive a free copy of Alan's book, Florida Law for Tax, Business and Financial Planning Advisors (Pictured Above)





To order a copy, click *HERE*


This makes no cents.
IN GOD WE TRUST
LIBERTY
2017
P

Florida Bar-Representing the Physician:

Ever Improving Your Practice and Knowledge

Alan's last year as co-chair

Our annual Florida Bar program will be held in Ft. Lauderdale this year and will feature the following presentations:

February 16, 2018

8:30 a.m. - 8:40 a.m.

A Brief Introduction and Updates

8:40 a.m. to 9:30 a.m.

Dentists are Different - Practical, Business, Regulatory and Common Forms and Language Used in the Representation of Dentists and Dental Practices.

Alan S. Gassman, Esq., Co-Chair

Gassman, Crotty & Denicolo, P.A.

Clearwater, FL

9:30 a.m. - 10:30 a.m.

Interacting with Medicare Contractors – Advice from the Insiders

Lydia Rogers, VP of Operations

Harvey Dikter, Program Manager

First Coast Service Options, Inc.

Jacksonville, FL

10:30 a.m. - 10:40 a.m. - **Break**

10:40 a.m. - 11:30 a.m.

Private Equity Comes to Town

Dotty Bollinger, RN, Esq.

Managing Partner- Healthcare

GPB Capital Holdings

New York, New York

11:30 a.m. - 12:20 p.m.

What Health Lawyers Need to Know About Medical Practices and Compliance, With Recent Developments

Lynda Dilts-Benson, RN, CCM, LHRM

Access Management Co., LLC

Spring Hill, FL

12:20 p.m. - 1:20 p.m. - **Lunch Boxes Provided on Site**

1:20 p.m. - 2:10 p.m.

Medicare and Medicaid: What to Expect from CMS

Kimberly Brandt, Esq. (Invited)

Principal Deputy Administrator for Operations

Centers for Medicare & Medicaid Services

Baltimore, MD

2:10 p.m. to 3:00 p.m.

Lessons Learned While Beating the Feds

Howard C. Root, Esq.

Tonka Bay, MN

3:00 - 3:10 p.m. - BREAK

3:10 to 4:00 p.m.

Healthcare Insolvency: What are the options?

Frank P. Terzo, Esq.

Broad and Cassel LLP

Fort Lauderdale, FL

4:00 p.m. - 4:50 p.m.

Attorney/Client and Work Product Privilege and Ethical Issues when Retaining Consultants

Lester J. Perling, Esq., CHC

Broad and Cassel LLP

Fort Lauderdale, FL

4:50 p.m. - 5:00 p.m.

Wrap up

For additional information about this presentation, contact agassman@gassmanpa.com

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See Alan in Cabo!

We invite you to attend one or more of Alan's talks in Puerto Los Cabos, Mexico on November 8-11 which is being presented for the MER Medical Continuing Education Program.

Alan's four topics are as follows:

1. Lawsuits 101
2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning
3. Essential Creditor Protection & Retirement Planning Considerations.

4. 50 Ways to Leave Your Overhead & Increase Personal Productivity.

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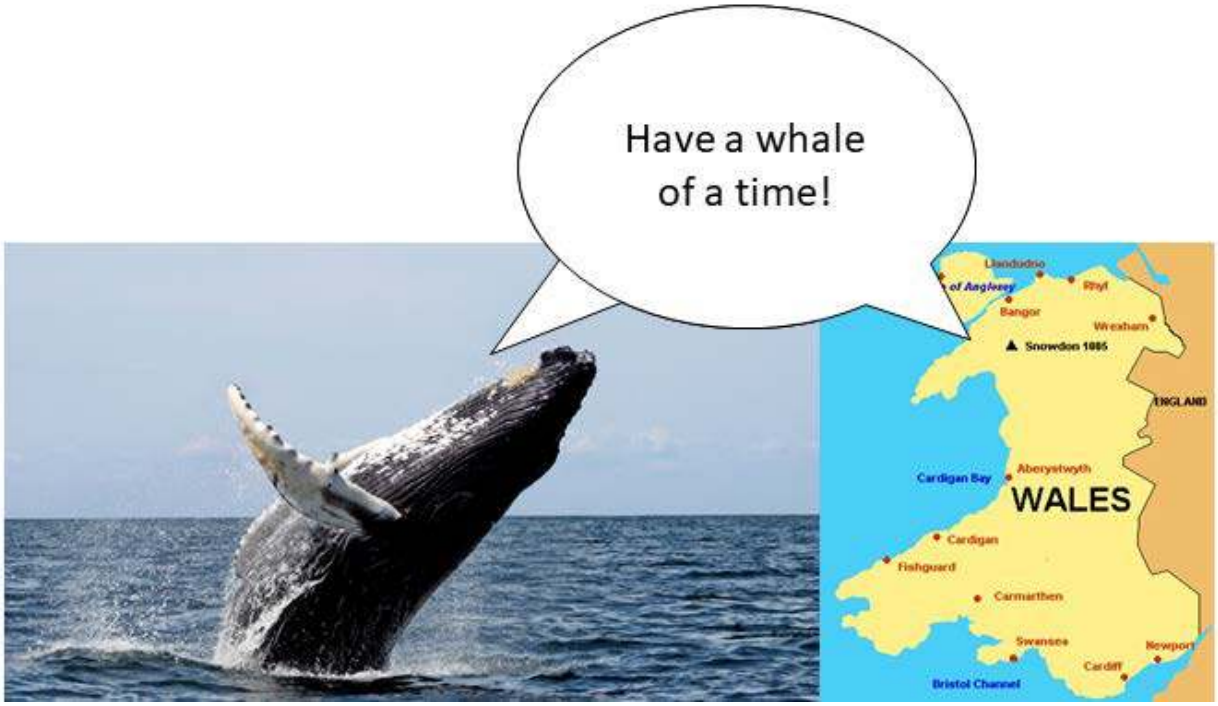
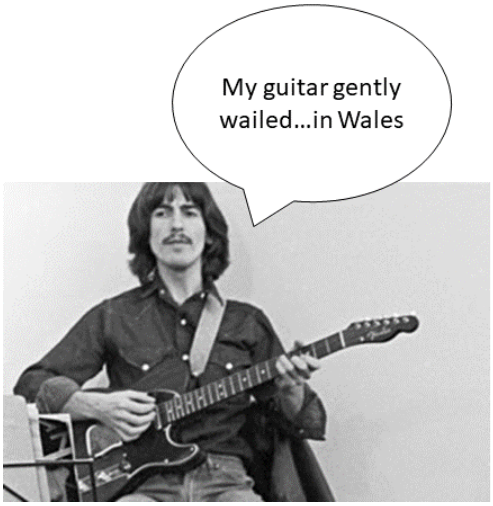
3 interesting facts about Cabo:

1. The city is known as the “End of the Earth” as it is the last piece of land in the Baja California Peninsula.

2. Called the “Striped Marlin Capital of the World,” Cabo San Lucas hosts the world’s highest paying marlin tournament with a jackpot of more than $3 million U.S. dollars.

3. In the winter, whales can be spotted in the area, because they like to raise their offspring in the warm waters of the Sea of Cortez.




My guitar gently
wailed…in Wales

EVENT	DATE/TIME	LOCATION	DESCRIPTION	REGISTRATION	FLYER
Leimberg Information Services Webinar	Friday, January 5th, 2018, 3:00 PM – 4:00 PM	Gotowebinar.com	Planning with an $11.2M Per Person Estate Tax Exemption:	Click HERE	Click HERE
New Tax Law Webinar	Tuesday, January 9, 2018, 12:00-12:30 & 5:00-5:30	Gotowebinar.com	Creative Planning with Flow Through Entities Including 199(A) New Ideas	To register for the 12 P.M. presentation, click HERE To register for the 5 P.M. presentation, click HERE	Click HERE
42nd Annual Alexander L. Paskay Memorial Bankruptcy Seminar	Thursday, January 18th – 19th, 2018	Epicurean Hotel, Tampa, FL	Gassman, Crotty & Denicolo, P.A. will be a sponsor and encourage everyone interested to attend.	Click HERE	
Heckerling Institute on Estate Planning	Tuesday, January 23, 2018, 10:40AM – 11:10AM	Interactive Legal Booth	Illustrating Tax Savings Using EstateView Software		Click HERE
Heckerling Institute on Estate Planning	Wednesday, January 24, 2018, 10:40AM – 10:55AM	Premier Trust Booth	Prominent Differences Between Florida and Nevada Trust Law		Click HERE
Maui Mastermind	Sunday, January 28, 2018	San Diego	Asset Protection- 10 Tips Every Business Owner Needs to Think About.	Contact: Agassman@gassmanpa.com	
5th Annual Estate Planning Symposium	Tuesday, February 6th, 2018	University of Miami	Sponsored by The Estate Planning Council of Greater Miami Asset Protection for Business Owners and Their Entities	Contact: Jason@gassmanpa.com	Click Here
Representing the Physician Seminar	Friday, February 16, 2018	Embassy Suites- 1100 SE 17th St, Ft. Lauderdale, FL	Dentists are Different - Practical, Business, Regulatory and	Contact: Agassman@gassmanpa.com	

			Common Forms and Language Used in the Representation of Dentists and Dental Practices		
Clearwater Bar Small Firm Section	Friday, February 23, 12Pm – 1PM	Carrabba's 2680 Gulf to Bay Blvd, Clearwater, FL 33759	"Hiring a Rockstar Employee in Your Budget"	Contact: Agassman@gassmanpa.com	
Estate Planning Council of Northeast Florida	Tuesday, March 20, 2018	Jacksonville, FL	Dynamic Planning Strategies For The Successful Client	Contact: Jason@gassmanpa.com	
Professional Acceleration Workshop	Friday, April 6, 2018. 11AM-5PM	Stetson Law School—Gulfport Campus 1401 61st Street South St. Petersburg, FL 33707	Reach Your Personal Goals, Increase Productivity and Accelerate Your Career.	Contact: Jason@gassmanpa.com	Click Here
Ave Maria Estate Planning Conference- With Jonathan Gopman	Friday, April 27, 2018	Ritz Carlton Beach Resort-Naples, FL	"Asset Protection for the Everyday Estate Planning Lawyer: a nuts to bolts review of asset protection techniques from simple to complex"- **presented by Alan and Jonathan Gopman.**	Contact: Jason@gassmanpa.com	Click Here
Florida Bar Annual Wealth Protection Conference	Friday, May 4, 2018	Tampa Airport Marriott	Creditor Protection Planning for Business and Investment Entities and Their Owners - Including 7 Strategies you Didn't Know About	Contact: Agassman@gassmanpa.com	
2018 MER Continuing Education Program Talks For Physicians	Thursday, May 17 – Sunday, May 20, 2018	Nassau, Bahamas - Atlantis Paradise Island Resort	Alan will be speaking at the Medical Education Resources (MER) event	Contact: Jason@gassmanpa.com	
MER Primary Care Conference	Thursday, July 5-8, 2018	Yellowstone, Wyoming	Alan will be speaking at the Medical Education Resources (MER) event	Contact: Jason@gassmanpa.com	
MER Primary Care Conference	November 8-11, 2018	JW Marriott Los Cabos Beach Resort & Spa	1. Lawsuits 101 2. Ten Biggest Mistakes That	Contact: Agassman@gassmanpa.com	

			Physicians Make in Their Investment and Business Planning 3. Essential Creditor Protection & Retirement Planning Considerations. 4. 50 Ways to Leave Your Overhead & Increase Personal Productivity.		

[i] *See* IRC § 199A(c)

[ii] IRC § 199A(b)(1)(B)

[iii] IRC § 199A(c)(3)(A)(i)

[iv] *See* IRC §199A(d)

[v] IRC § 199A(b)(4)

[vi] *See* IRC § 199A(b)(6)

[vii] IRC §1362

[viii] See Gassman Ketron, *1202 Things to Consider When Setting Up a Related Business Servicing Company,* Leimberg Business Entities Email Newsletter – Archive Message #152.

[ix] IRC § 199A(b)(3(B)(i)(I)

[x] For taxpayer's married filing separately the threshold amount is $157,000.

[xi] IRC §199A(d)(2) and (3)

[xii] IRC §199A(d)(3)

[xiii] IRC §199A(b)(2) and (3)

[xiv] IRC §199A(a)

[xv] *Id.*

[xvi] A qualified cooperative dividend is a dividend received from a cooperative that a taxpayer is a member of and is based upon the quantity or value of business done with the cooperative.

[xvii] IRC §199A(a) flush language

[xviii] IRC §199A(d)(2) and (3)

[xix] IRC §199A(d)(2)(A)

[xx] *Id.*

[xxi] IRC §199A(2)(A); IRC §1202(e)(3)(A)

[xxii] IRC §199A(d)(3)(A)

[xxiii] *Id.*

[xxiv] IRC §199A(d)(3)(B)

[xxv] IRC §199A(d)(2) and (3)

[xxvi] IRC §199A(d)(4)

[xxvii] *Id.*