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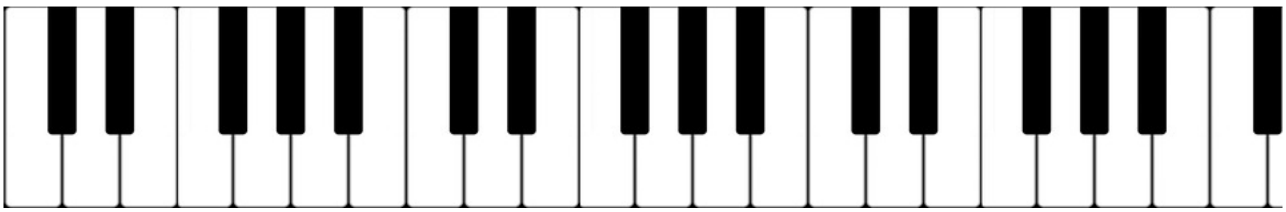
The Thursday Report

March 1, 2018 | Issue #239

Re: The Victor Borge Report



Preview Chapter: From the Soon to be Released book, *Grow Your Medical Practice* by Alan Gassman, Pariksith Singh, MD, & David Finkel

Throwback Thursday-*A Very Common Portability Misconception* by Alan Gassman

A Summary of Selected Condiderations After the 2017 Tax Act – part 1 by Martin Shenkman & Jonathan Blattmachr

Richard Connolly's World

Florida Lawyer is Disbarred for "Egregious Misconduct" and a Pattern of Disruptive and "Obnoxious" Behavior by Joseph Corsmeier

Humor! (Or Lack Thereof!)

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

Quote of the Week

"The difference between a violin and a viola is that a viola burns longer."

– Victor Borge

Victor Borge was a well-known musical and comedy genius who was born in 1909 in Denmark, and became one of the most well-known concert pianists and entertainers of all time.

An excellent Youtube video of his 80th birthday in 1989 can be viewed by clicking HERE.

One of his funniest and most famous comedy routines can be viewed by clicking HERE.

Mr. Borge escaped the Nazis in 1940 by escaping to Finland, and re-characterized his income by running it through a "Personal Company" in 1958 when he set up the "Danica" Corporation.

Mr. Borge was one of the first entertainers to use a "loan out company" where by he was an employee of the company and the company was paid by concert halls and otherwise for his "loan out services."

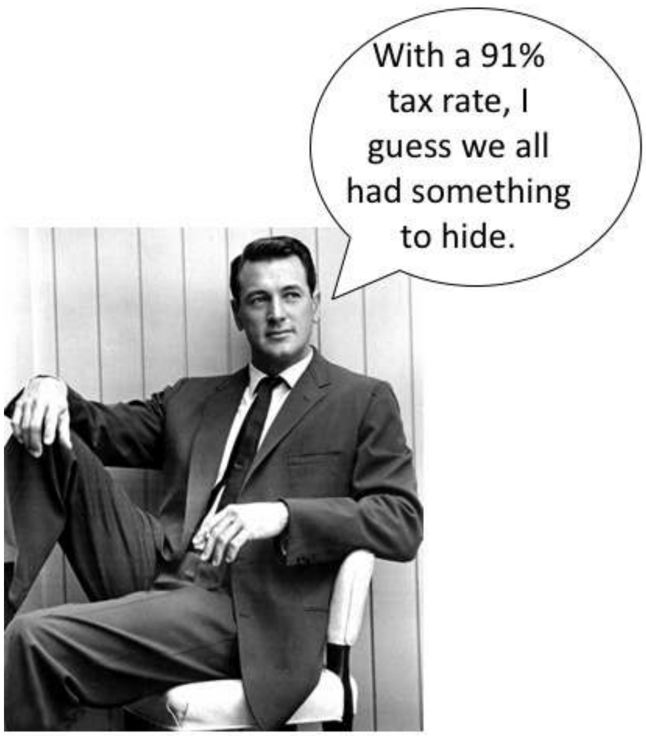
The Internal Revenue Service assessed significant additional taxes by re-allocating the income between Mr. Borge and his closely held company.

In 1958 the highest individual tax rate was 91!% and the highest corporate tax rate was 52%.

The bad news was that the tax court upheld the IRS's assertion of re-allocating income under Internal Revenue Code 482 which still exists. The court noted that such an arrangement should only hold water when the tax-payer would have entered into a similar arrangement with un-related third parties.

The good news is that the allocation proposed by the IRS and accepted by the tax court was still very advantageous to Mr. Borge.

Music, comedy, and tax aficionados can thank Mr. Borge for his contributions in all three areas.



Rock Hudson

Preview of *Grow Your Medical* Practice – Chapter 9 – Accelerator Five: Protect Your Assets

Book by Alan Gassman, Pariksith Singh, MD, & David Finkel
Excerpt By Alan Gassman

According to a 2010 AMA report, more than 61 percent of doctors older than fifty-five have been sued at least once. Let's face it: The odds are not in your favor. Here you are, working so hard, investing the time and energy to grow and mature your practice, and yet, it could all be shaken or even destroyed in a lawsuit. In this chapter, we'll lean heavily on Alan's thirty-three years of experience representing physicians and their medical practices. Dr. Singh and David like to refer to Alan as "the doctor's lawyer" because of his experience representing thousands of physicians in almost every conceivable situation. In this chapter you'll find his best input to help you protect yourself and your practice from lawsuits, creditors, and other potential threats.

Don't Let This Happen to You

Consider what happened to a physician we'll call Dr. Arneaux. He was in his late sixties and was getting ready to retire after he had put all of his children through private school. He had even worked a few more years than he'd intended in order to finally save enough for retirement. What he hadn't done, however, was take proper protective measures to plan for a worst-case event. When he called Alan's law office for help, he was facing a lawsuit from an angry patient. To make matters worse, several pages of the patient's chart had gone missing, perhaps stolen by Dr. Arneaux's former employee, who was a friend of the patient.

Worse still, the angry patient had hired a litigator who was known for aggressive tactics and had made a name for himself by suing doctors. He was known to browbeat physicians during their depositions, and he sometimes took lawsuits all the way to trial just for the publicity. After two painful years of litigation, the matter was finally settled. Dr. Arneaux ended up having to write a sizeable check on top of the payment made by his malpractice-insurance carrier. He lost a lot of sleep in those two years, and the ordeal drained a significant amount of the honor and pride of the more than thirty-five years he had spent practicing medicine.

No one should have to go through that—at any age—and if you find this story terrifying, we understand. You're also not alone, not by a long stretch. The truth is that most doctors don't seriously plan for this scenario; only about 40 percent take the right precautions to protect themselves. And yet advance planning makes an enormous, and even a life-changing, difference. In Dr. Arneaux's case, the story would have had a different ending if only he had done a few key things beforehand.

Once the patient had initiated legal action, Dr. Arneaux did everything in his power to protect himself from further harm. But certain precautions taken in advance would have made a huge difference. The good news is that, if you act proactively, you can reduce the likelihood that you'll ever be sued, and you can build legal protections around your practice and personal assets to radically diminish the risk of losing anything significant if a lawsuit does occur. So let's get to work getting you protected.

Recognize Your Risks

The first step to protecting yourself is to concretely identify your top legal threats. Once you've recognized the sources of risk, you can then adequately protect yourself. Here are the top five legal risks you face as both a practicing physician and the owner of a medical practice:

Risk #1: Medical Malpractice for Acts and Omissions as a Practicing Physician

Malpractice can take many forms; among the most common is the failure to see a test and make a diagnosis, or the failure to notify a patient about an abnormal test result.

Risk #2: Medical Malpractice for the Acts and Omissions of Those Who Work for You

Remember, much of this liability falls to the practice entity and to you as the owner.

Risk #3: Medicare, Medicaid, and Insurance Carrier Suits

and Infractions

These include suits and penalties related to billing and collections activities that are noncompliant with what are sometimes arcane and quite complex rules. Sadly, many of these suits are the result of employee

whistle-blowers who were involved in the very violations they reported.

Risk #4: Liability for Car, Motorcycle, Boat, or Other Accidents

While it may seem as though this type of liability is not unique to doctors, in fact, people are more likely to sue when they learn that the operator of the other vehicle is a doctor; that is, they see a dollar sign on your head. You're also liable for the negligence of any driver operating a vehicle that contains your name on the title.

Risk #5: Ordinary Business Exposures

These exposures include the following: if someone slips and falls, if a patient or employee is mistreated or harassed by another employee, contract damage when a business dealing goes awry, liability from business or investment activities in your name or in the name of a company in which you serve as an officer or director, and liability for actions or inactions of a partner in a partnership that is not incorporated (all partners in a general partnership are jointly liable).

Many types of liabilities cannot be expunged through bankruptcy and will stay with you forever. These include some kinds of Medicare payback obligations and penalties, certain taxes, penalties associated with

environmental waste, and malpractice in which the doctor was found reckless or willful in his or her conduct. Thankfully, just by identifying the risks that threaten you and your practice, you've taken an important first step toward safeguarding your livelihood. The next step is to build the proper legal protections around you and your practice.

Powerful Protections to Put into Place Before You Get Sued

Now that you understand the risks, let's talk about what you can do to protect yourself, your practice, and your family. Lawsuits are normally filed against both the doctor and the practice, and sometimes other affiliated entities as well. Many doctors erroneously assume that a lawsuit will settle within the limits of their malpractice insurance. This is incorrect. In fact, few plaintiff lawyers are willing to settle for policy limits unless both the doctor and the practice entity are what we call "judgment proof." What does it take to be judgment proof? You'll find that below, along with the rest of our list of key strategies for protecting yourself. (And for even more information on how to be judgment proof, we strongly encourage you to watch Alan's powerful video, "12 Asset Protection Strategies Every Physician Must Know to Reduce Their Personal and Practice Exposure." You can watch this video for free at www.GrowMyMedicalPractice.com. See Appendix A for full details.)

First, review your internal systems to make sure that your billing and other processes are compliant with medical law. Every medical practice should be able to document that it has relied on competent legal counsel or consultants hired through legal counsel under attorney/ client privilege to confirm appropriate protocol, billing codes, and procedures. Indeed, a four- to eight-hour visit by a billing consultant not only reduces risk and increases compliance, but it can also enhance profitability and identify new billable services. A great many physicians are amazed to discover how many gaps existed in their billing practices—and how easily such problems can be resolved with the help of a competent consultant. Also, consider whether you should eliminate certain high-risk procedures, patient categories, and problem patients entirely from your practice.

In the case of problem patients, and thanks to the 80/20 rule that we discussed back in Chapter 2, we know that 80 percent of your problems will come from 20 percent of your patients. Part of protecting yourself from a lawsuit is considering whether a difficult patient is someone you want to continue treating. While it's important to take a dispassionate look at the feedback such patients provide—because they may be sharing a complaint that other patients have been too polite to raise—you may need to take action if you're dealing with someone who continually complains. Perhaps they don't belong at your practice. Consider terminating them.

If a patient does sue you, and if you are ordered to pay, we want your assets organized so there's nothing of value for the plaintiff's lawyer to take. Remember that even if you're found primarily not at fault, the cost can still be considerable. In one memorable case at Alan's firm, a jury found a doctor only "30 percent negligent," but the damages were assessed at $3 million—and 30 percent of $3 million is $900,000. To avoid that nightmare, here are steps to make yourself, your family, and your practice judgment proof:

- Have the medical practice owe debt that is secured by liens filed in the public record, called UCC-1 Financing Statements. This debt should be almost as large as the value of the practice assets, including accounts receivable. If for any reason the practice can't borrow money, you can personally borrow from a friendly lender, such as parents or another family member, and have your medical practice guarantee the debt and pledge its assets as collateral. In the event of a judgment, the friendly creditor can repossess the collateral of the medical practice.

- Have valuable assets, like equipment and real estate, held outside of the medical practice in another entity. If your tax advisor tells you that this may trigger tax liability, get a second opinion from a corporate-tax expert and ask about something called "New Parent F Reorganization."

- If you own the building in which your practice operates, you can have it held by a separate LLC or other entity to shield you from liability if someone gets injured on-site. You can also have the owning entity owe a mortgage to the bank or family member and have the medical practice guarantee the mortgage and pledge its assets as collateral such that, if the practice suffers a judgment against it, that will serve as a violation of the loan covenants. The bank will then call in the loan and repossess the practice's assets, in which case there is nothing left for the plaintiff's lawyer.

- If you rent the building in which your practice operates, you can set up a twenty-year lease with the landlord company stating that, if the practice goes bankrupt, twenty years of rent is suddenly due, and the landlord has a lien to enforce it.

- Consider separating your practice into different companies. If you have a general practice and an urgent-care location, for instance, these could be distinct companies. Though they will likely need to be owned by a common parent company for Medicare billing purposes, this still creates a legal hurdle.

- Review all partnership and shareholder agreements, buy-sell agreements, life insurance, and disability insurance policies to ensure that they are properly situated and inaccessible to creditors.

- Understand and make use of assets that are creditor protected in your state (these vary significantly from state to state). Oftentimes a homestead, assets owned jointly as "tenants by the entireties with a spouse," annuity contracts, pensions, IRAs, and 529 college savings plans are protected. It is crucial to work with a lawyer who is familiar with the laws in your state.

- Consider holding valuable personal assets in your spouse's name to protect from creditors. Also consider a marital agreement in which your spouse pledges to put those assets into joint names, or as otherwise requested, in the event of a divorce.

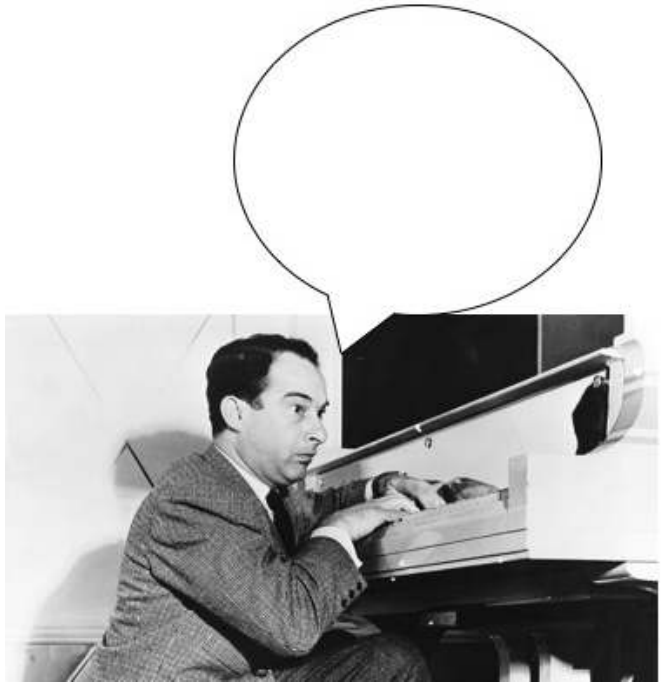
- Consider employing your children. Since their IRAs are also protected from your creditors, you can employ your kids and pay them up to $5,500 a year, and put those wages into IRAs that may be creditor-proof for the entire lifetime of the child.

- Be strategic with how you pay yourself out of your practice. The most protected financial vehicle is a pension. Have a skilled actuary custom design your pension, and consider using a defined benefit plan or a cash balance plan to maximize contributions. Many states also provide for the protection of wages and investments purchased with wages, if state-specific rules are met.

- Consider using family limited partnerships, multiple-member LLCs, irrevocable trusts, and other vehicles that will protect assets from creditors.

- Properly structure any inheritances that may be coming your way. If you're expecting to inherit money from your parents, structure the inheritance so it will be paid into a trust for your benefit and not directly to you, in order to protect it from creditors. You can even serve as the trustee of the trust if it is properly drafted.

- Integrate the above with your personal estate and financial planning in order to ensure that you and your family are fully protected.



Redd Foxx

Throwback Thursday-*A Very Common Portability Misconception*

By Alan Gassman

Throwback Thursday is a new feature where we re-examine articles from the past which still hold great lessons and information pertinent to today's situations. Enjoy!...or at least tell Alan you did.

The portability allowance enables a surviving spouse to use any remaining portion of their deceased spouse's unused exemption ("DSUE") amount if a proper election is made. For those spouses who pass away in 2016, the estate tax exemption amount is $5,450,000 ($5,430,000 for those dying in 2015), and is reduced by lifetime "taxable gifts" made by the deceased spouse.

In order to take advantage of the portability allowance, the deceased spouse's executor must properly prepare, and timely file an estate tax return (Form 706). A Form 706 is timely filed nine months after the date of the decedent's death, plus an additional six months if an extension of time has been obtained. In general, the portability rules divide estates into two separate groups: 1) estates over the exemption amount; and 2) estates below the exemption amount.

If the decedent's gross taxable estate is over the exemption amount, the estate is statutorily required to file an estate tax return. On the other hand, when the decedent's gross taxable estate is below the exemption amount, the estate is not required to file an estate tax return, unless the portability election is desired. Furthermore, any prior taxable gifts made by a deceased spouse, in excess of the annual gift-tax exclusion, will reduce the threshold amount by which an estate must file a Form 706. For example, if the deceased spouse gifted an additional $3 million beyond the annual gift-tax exclusion, the total DSUE amount available to the surviving spouse, as well as the applicable Form 706 filing threshold will be $2.45 million instead of $5.45 million.

Whether an estate must, or may file an estate tax return is important when determining the appropriate extension(s) available to an estate that makes an error on a Form 706, or fails to elect portability altogether. These "extensions" are known as "9100 relief," and can be found in Treasury Regulation § 301.9100.

The <u>only</u> 9100 relief available for estates over the exemption amount is 9100-2, which provides an automatic 6-month extension <u>*if*</u> the estate tax return has been timely filed within nine months of death. Therefore, the automatic 6-month extension available under 9100-2 is only helpful to those estates that timely file, but fail to complete or properly prepare the estate tax return. To take advantage of this relief, the estate must file a Form 4768 "by the original due date of the applicable return," which is nine months after the date of the decedent's death.

For example, decedent dies on January 1, 2016 with a gross taxable estate over the estate tax exemption amount. The executor must file a Form 706, and does so three months after the decedent's date of death. In May, the executor realizes that they failed to complete some portion of the estate tax return, which would cause the estate to miss out on the portability allowance. Here, the estate should be granted an automatic 6-month extension to cure any defects because they timely filed the return, and requested an extension before the end of the nine month period following the decedent's death. The same outcome would have occurred even if the estate had been below the exemption amount.

Remember that when no estate tax return is required, because the estate is below the exemption amount, the portability allowance can <u>only</u> be obtained by filing an estate tax return

Form 706 within nine months of the date of death of the first dying spouse. The same 9100-2 relief discussed above is available to such estates if they file a Form 4768 "by the original due date of the applicable return," which again is at the end of the nine month period following the decedent's date of death. In addition to 9100-2 relief, estates below the exemption amount can request 9100-3 relief, which is a non-automatic (i.e., discretionary) extension of time. Here, the estate must prove through the use of affidavits and other documents to the satisfaction of the IRS that:

1. They acted reasonably and in good faith[1]; and
2. That by granting such relief, the interests of the government will not be prejudiced.[2]

Now assume the decedent died on January 1, 2016 with a gross taxable estate below the exemption amount. The executor did not believe it was necessary to take advantage of the portability allowance and therefore failed to file an estate tax return. Ten months after the decedent's date of death the executor changed his mind and wanted to use the portability allowance. Here, relief under 9100-2 would not be available because they failed to timely file an estate tax return. However, under 9100-3, the IRS may allow the executor to file a new estate tax return within 5 months (which is fifteen months after the decedent's death), thus enabling them to take advantage of the portability allowance. The estate must prove they acted reasonably and in good faith, and that by granting such relief, the interests of the government will not be prejudiced.

To summarize the above rules please refer to the following list of possibilities for estates above and below the exemption amount:

A: <u>The estate is **over** $5,450,000 and must file a Form 706</u>:

1. If Form 706 is filed within 9 months of the decedent's date of death, then the portability election has been properly made.
2. If Form 706 is filed within 9 months of the decedent's date of death, but the estate fails to complete or properly fill out the Form 706, they can file a Form 4768 requesting an automatic 6-month extension pursuant to 9100-2 (acts as a means to amend the return for errors and omissions).
3. If no Form 706 is filed within 9 months of the decedent's date of death, then they have failed to make a portability election and no relief options are available.

B: <u>The estate is **under** $5,450,000 and does not need to file a Form 706 (however, must file if they want to elect portability)</u>:

1. If the estate does want to make a portability election they <u>must</u> file a Form 706 within 9 months of the decedent's date of death.

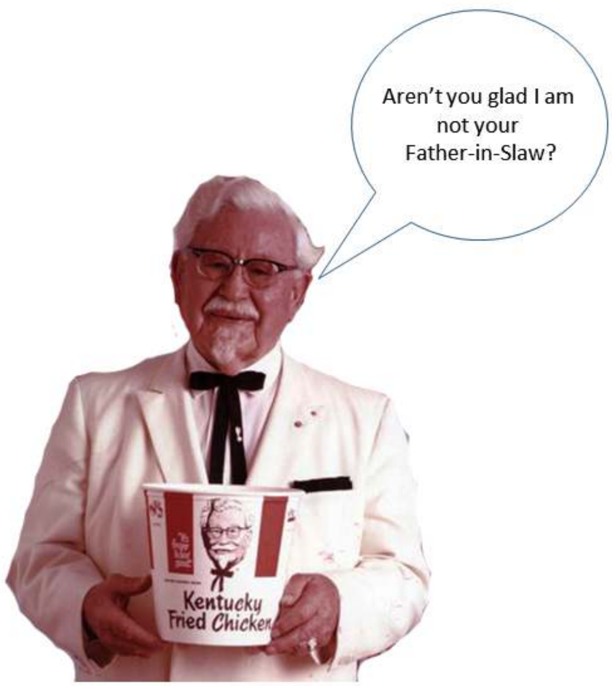
[1] 26 C.F.R. 301.9100-3(b).

[2] 26 C.F.R. 301.9100-3(c).

2. If Form 706 is filed within 9 months of the decedent's date of death, thus electing portability, but the estate fails to complete or properly fill out the Form 706, they can file a Form 4768 requesting an automatic 6-month extension pursuant to 9100-2 (acts as a means to amend the return for errors and omissions).
3. If the estate does <u>not</u> want to make portability election they do not need to file a Form 706.
4. If the estate does <u>not</u> file a Form 706 within nine months of the decedent's date of death, but later determines that they should have, a discretionary six-month extension under 9100-3 may be available if the taxpayer can prove to the satisfaction of the IRS that they (a) acted reasonably and in good faith; and (b) the grant of relief will not prejudice the interests of the government.

This is obviously a confusing area, and many mistakes will continue be made with respect to the timing of portability elections.

When you go to read about this, what we indicate above will not always be crystal clear.



A Summary of Selected Considerations After the 2017 Tax Act – part 1

by Martin Shenkman & Jonathan Blattmachr

Originally printed in Leimberg Estate Planning Newsletter, issue 2628

EXECUTIVE SUMMARY:

This newsletter explains several new planning opportunities and key planning points based on the new Federal tax act commonly known as Tax Cut and Jobs Act of 2017 ("TCJA") that practitioners in all disciplines related to financial and tax advice should consider.

TCJA includes sweeping provisions that affect almost every aspect of tax, estate and other financial planning. More specifically, on December 20, 2017, the House of Representatives passed, as the Senate had a few days earlier, legislation initially called (and still referred to by many as) the Tax Cuts and Jobs Act of 2017. That short title was deleted in the reconciliation

process so that the official name became: "an Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018." President Trump then signed the Act into law on December 22, 2017. It is Public Law 115-97.

COMMENT:

The TCJA is worrisome, complex, disjointed, nettlesome, and worse. The legislation was formulated and made final in a very short time frame. Challenges for advisers and clients include:

- Many changes turn upside down traditional tax treatments advisers and clients have long been accustomed to (e.g., C corporation rates lower than individual rates, alimony not being deductible).
- The complexity is daunting (e.g., new IRC Sec. 199A).
- Tax provisions changed from the House, to the Senate, and again to

  the Conference Report. And if that wasn't confusing enough, there were even three more changes made by the Parliamentarian.

- There are at least several inconsistencies between the Conference

  Report and the statute enacted.

- The array of sunset provisions is disconcerting.

Major Topics Covered by this Newsletter

While the scope of the TCJA is incredibly broad, this newsletter will address five topics:

1-Planning for increased temporary wealth transfer tax exemptions. 2-Large estate planning during the current window of opportunity. 3-Trusts to capture income tax deductions.
4-IRC Sec.199A – some additional thoughts.

5-Miscellaneous planning ideas post TCJA.

Increased Temporary Exemptions

TCJA doubled the transfer (gift, estate and generation-skipping transfer or GST) tax exemption from $5M to $10M (both adjusted for inflation since 2012) but this increase sunsets after 2025. This presents an incredible

planning opportunity for many clients. The nature of this change, how it should be used, present unique challenges as will be explained.

The new increased exemption is a "use it or lose it" benefit. Practitioners should explain this to clients so they can plan to take action. The "lose it" is not only the 2025 sunset but could occur if a future administration takes legislative action to change the law before 2026.

Both clients and practitioners need to understand the broader implications of the exemption. Many will dismiss planning for moderate wealth clients as their net worth may be sufficiently below the new high exemptions that they may not perceive a need to plan. But it would be a mistake to only compare the client's current net worth to the current exemption. Consider the client's current wealth but also potential future wealth. A net worth of $5M might be $10M+ in 2026 when the increased exemption sunsets. And, over a longer period, a client's wealth may increase significantly. For example, if the client's wealth grows at seven percent annually, a $5 million base today would grow to $10 million by 2028, to $20 million by 2038 and to $40 million by 2048 and, in each of those cases, the exemption will remain at only $5 million (adjusted for inflation). Even if a client is not concerned with estate and GST taxes, asset protection and other goals may remain vital for him or her. Indeed, asset protection, as one example, has been affected in surprising ways that advisers should consider, as will be discussed below. The current exemptions are now approximately $11 million, but will revert to around $5.5 million (adjust for further inflation) after 2025.

Using the temporary enhanced exemption will have different implications for ultra-high net worth ("UHNW") client than for more moderate wealth clients. Critically, planning for more moderately wealthy clients, perhaps from $5M to $50M of net worth, will in many instances be more complex and require novel planning approaches. Given the large size of current exemptions, planning for these more "moderately" wealth clients will have to balance competing goals of access to assets transferred, income tax issues resulting from the TCJA, and completed gift challenges to use the new temporary enhanced exemption. One factor is an important one to emphasize to clients: a taxpayer may not just use the $5 million increase in the exemption (which is to disappear after 2025); rather, to use the increase, the taxpayer must use it all (e.g., make a gift before 2026 of $11 million and not just $5.5 million). This is because the use of $5.5 million of

exemption before sunset, would result in approximately $5.5 million remaining. If sunset then occurs, the incremental $5.5 million of new exemption enacted by the JCJA would disappear leaving no remaining exemption. Thus, using more of, if not the entirety of, the exemption is the only way to secure it from the impact of sunset.

For UHNW clients, planning in many respects might proceed as "business as usual." The new exemptions may be modest relative to their estates and thus be readily used to augment existing plans. For example, a UHNW client might simply gift discounted interests in entities to existing irrevocable trusts to use their enhanced exemptions. But there are several new planning ideas that might be added to the practitioner's quiver for these clients, as discussed below.

Common Plans to Use Doubled Exemptions

For moderate wealth clients, using the exemption will require more access to assets to achieve a sufficient level of comfort to make gifts. Several options exist to meet this goal post-TCJA.

A planning structure that has become relatively common will serve as good foundation for many moderate wealth clients post-TCJA. That plan is the use of non-reciprocal, grantor, dynastic (long term), GST exempt, spousal lifetime access trusts ("SLATs"). SLATs have and continue to serve many clients well as a means to use exemption, but nonetheless preserve access to the assets transferred to the trusts. A planning issue for SLATs has always been to avoid the reciprocal trust doctrine which might be used by the IRS to uncross the trusts causing estate inclusion, or be creditors to pierce the plan. Post-JCJA avoiding the reciprocal trust doctrine might be more difficult in light of the larger portion of wealth moderate wealth clients may commit to such plans in order to use exemption.

For single clients, they might do non-reciprocal trusts with another family member. Indeed, the first significant estate tax reciprocal trust doctrine involved two brothers. Lehman v. Commissioner, 109 F.2d 99 (2nd Cir. 1940). Alternatively, a non-married person (or a married one but who does not wish to do non-reciprocal trusts with his or her spouse) might use a domestic asset protection trusts ("DAPT") or variations of a self-settled trust, which likely will be more common to facilitate single clients using more of his or her exemption. Because of the concern some commentators

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have over the use of DAPTs variations, which might be referred to as "almost-DAPTs" may be more popular. For almost-DAPTs the settlor is not named as an immediate beneficiary but rather a person in a non-fiduciary capacity is given the power to add settlor as beneficiary. Another approach might be to provide for distributions to the settlor (or to descendants of the Settlor's grandparents) only in the discretion of a non-fiduciary. This may enhance asset protection of the trust as a trust which does not permit distributions to the settlor by the trust is, by definition, not a self-settled trust. (The Restatement (Second) of Trusts Section 156(2) (1959) provides in relevant part "[w]here a person creates for his own benefit, a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount *which the trustee under the terms of the trust could pay to him or apply for his benefit*." Emphasis added.)

A power to loan has traditionally been used to achieve grantor trust status. See IRC Sec. 675(2). Perhaps, that power should be revisited and strengthened for the purpose of permitting the settlor access to assets. Perhaps, the power to loan to beneficiaries should generally be evaluated so that if a much greater portion of moderate family wealth is transferred to irrevocable trusts another option to access those assets will exist. (Caution must be taken to ensure that any power to borrow held by the settlor or a beneficiary will not cause the property in the trust to be included in the gross estate of the settlor or the beneficiary.)

In addition to assuring access to trust assets, steps should be considered to facilitate basis inclusion. Consider, for example, adding the power for someone to grant an IRC Sec. 2038 power to the trust settlor to create a mechanism to cause the trust estate to be included in the client's estate to achieve a basis step up.

Asset Protection and Irrevocable Trust Planning

The TCJA's large "use it or lose it" exemptions will encourage some clients to gift larger portions of their wealth to secure those temporary exemptions. This will have significant impact on planning and the actions different types of planners might consider.

Some trust companies and other advisers have rules of thumb they have long used as to what portion of a client's asset should be transferred to a DAPT or other irrevocable trust structure or otherwise given away. Should

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advisers and trust companies loosen old rules of thumb on percentage of wealth that can be transferred? If not, those old rules of thumb, created when exemptions were not only smaller but perhaps when exemptions were perceived as permanent (acknowledging the similar fear of exemption decline that existed in 2012), are not loosened, those rules could prove the limiting constraint preventing a client from maximizing the use of the new temporary exemptions. What other types of assurances, and what new benchmarks, will trust companies and other planners accept to be comfortable with higher percentages of asset transfers to irrevocable trusts?

Should solvency affidavits and other due diligence be used more frequently with plans that include greater portions of the client's wealth being transferred? Perhaps, even if state law does not require these items, they should be used given the larger percentages of wealth moderate wealth client may and often should transfer post-TCJA.

Access to transferred assets, if more of wealth transferred to use the new higher exemption, is critical. Does this change the calculus of using long term care and life insurance to protect transferors and their families? Perhaps, more insurance should be used to backstop planning to use the exemption, regardless of the fact that the large exemption might on initial reaction suggest less need for insurance. Maybe, the need for life insurance coverage is not less, just different.

A Few Planning Ideas for UHNW Clients

While, as noted above, for many UHNW client planning as usual should continue. The estate tax is not being repealed. If there is a change in administrations in Washington there could be a backlash to the perceived favoritism shown UNHW taxpayers in the future. With high exemptions and the Proposed Regulations under IRC Sec. 2704 off the table, now may prove to be that proverbial “window of opportunity” to plan for UHNW clients. There might be a few new approaches or spins on traditional planning that might be considered in appropriate circumstances.

Sale to Non-Grantor Trust: Note sales (that is, installment sales) to grantor trusts have been and will remain foundations of many UHNW plans. But what about note sales to non-grantor trusts? Many UHNW clients have large existing irrevocable trusts that once the client has died are obviously

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no longer grantor trusts. Those non-grantor trusts might be useful in note sale transactions. The loss of grantor trust status will accompany the death of the settlor. So, the assets passing from the estate of the settlor/decedent will have a basis step up and current value which might be used by the surviving spouse in a sale to a non-grantor trust. It is possible that the risk of selling those assets to a non-grantor trust may not be intolerable. Because the assets received a stepped-up basis on death no gain might be realized on the sale. This type of sale might be combined with a more traditional note sale to a grantor trust, e.g. by the surviving spouse, to fractionalize ownership of a controlling equity position as between sales to the grantor and non-grantor trusts.

If the assets pass on first spouse’s death to a QTIP trust ,that trust should have sufficient flexibility to permit the distribution of the equity to the surviving spouse to consummate the sale. If that QTIP trust has a HEMS standard or limitation on principal will that prevent the plan from proceeding? Not necessarily.

If a sale is consummated to a non-grantor trust, a defined value clause of the type described and “approved” by the United States Tax Court in *Wan dry v. Commissioner,* TC Memo 2012-88 (even though the IRS has non- acquiesced to the case) could be used because of the large size of a hard to value asset. But will a traditional defined value mechanism suffice? Perhaps, not as a two-tier mechanism may be required as there could be both income and gift tax audits because the sale is to a non-grantor trust so gain for income tax purposes could be recognized. If the IRS challenged the sale on an income tax audit they could argue that for income tax purposes the shares were worth more so that the sale should be recast as a part gift-part sale. The income tax audit would not preclude a separate gift tax audit challenge to the same transaction.

Another approach might be integrated into the traditional note sale to maybe make a challenge by the IRS more difficult. There could be a collateral swap. Assume an existing now no longer grantor trust has substantial assets that have grown over the years. In a typical note sale transaction, the client would sell stock to an irrevocable trust for note and secure that note with the stock sold. But for some older trusts that might not be the only option. Consider using different assets of the old trust as collateral for the note and not the assets sold. Example: Old no-longer grantor trust holds LLC interests in XYZ. These interests were sold years

ago when valued at $5 million and have appreciated to $25 million. Surviving spouse sells interests in ABC, LLC to that trust valued at $20 million. There is no concern about gain because the basis was stepped-up at death of the first to die spouse. The transaction might be structured using $20 million in value of XYZ, LLC as collateral for the note the trust issues to surviving spouse instead of using interests in ABC, LLC. Might that reduce the linkage between the surviving spouse and the interests in ABC, LLC sold in the event of an IRS challenge of the transaction as still included in the surviving spouse's estate?

Another interesting technique for large clients pursuing aggressive planning is the melting a grantor retained annuity trust (GRAT) described in Reg. 25.2702-3 by combining the borrowing of securities from a dynasty trust and gifting those securities, subject to the loan agreement, to a GRAT. See Gooen, Snow and Harris, "The Estate "Melt": GRATs Are Only the Tip of the Iceberg," VOL. No. 44 Estate Planning 3 (Nov. 2017).

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 Forbes reports:

Just when you thought you'd read about all of the tax scams: The Internal Revenue Service (IRS) is warning taxpayers about a new - and growing - scam involving erroneous tax refunds being deposited into real taxpayer bank accounts. Then, the crooks use various tactics to con taxpayers into turning over the funds.

It's a new twist on an old scam.

To View the Full Article Click Here

Steve Martin

Florida Lawyer is Disbarred for “Egregious Misconduct” and a Pattern of Disruptive and “Obnoxious” Behavior

by Joseph Corsmeier

Hello everyone and welcome to this Ethics Alert which will discuss the recent disbarment of a lawyer in south Florida attorney for, *inter alia*, engaging in "escalating misconduct," including loudly kicking a table and muttering "lie, lie, lie" during court proceedings. The case is *The Florida Bar v. Robert Joseph Ratiner*, No. SC13-539 (Florida Supreme Court 2/22/18), and the opinion is here: http://www.floridasupremecourt.org/decisions/2018/sc13-539.pdf

The lawyer was admitted in 1990 and was disciplined in 2007 after engaging in a rant against opposing counsel for DuPont during a deposition. He represented some orchid growers who had alleged that DuPont's fungicide called Benlate had killed their plants. DuPont's lawyer attempted to put an exhibit sticker on the lawyer's laptop. He then attempted to run around the table toward the other lawyer and yelled at him which, according to the referee's report, caused the court reporter to state "I can't work like this!" That conduct resulted in a 60 day suspension and probation.

The lawyer was then involved in a document review session with DuPont in 2009 and, according to the referee's report, he loudly called DuPont's lawyer a "dominatrix," with "no substantial purpose other than to embarrass" her. He later tried to forcibly take papers from another DuPont lawyer after she told him, "Don't grab (me) ever again." That conduct resulted in a three year suspension.

The most recent complaint against the lawyer was related to his conduct in Miami-Dade Circuit Court proceedings that began in late 2011. The presiding judge stated that she heard the lawyer state "lie, lie, lie" while a DuPont lawyer was conducting a direct examination of his law partner; however, he denied making the comment. The judge also terminated a hearing because the lawyer was kicking his table so loudly that it was disrupted the proceedings.

The assigned referee conducted hearings and The Florida Bar argued that the lawyer should be disbarred. The referee recommended a three year suspension to begin at the end of the lawyer's current three year suspension. In its opinion, the Florida Supreme Court found that the lawyer's cumulative and egregious misconduct required disbarment. According to the opinion:

"Disbarment is an extreme form of discipline and is reserved for the most egregious misconduct. See *Fla. Bar v. Summers*, 728 So. 2d 739, 742 (Fla. 1999); see also *Fla. Bar v. Kassier*, 711 So. 2d 515, 517 (Fla.

1998) (holding that disbarment is an extreme sanction that should be imposed only in those rare cases where rehabilitation is highly improbable). Ratiner's intentional and egregious misconduct continues to demonstrate an attitude that is wholly inconsistent with professional standards, and there is no indication that he is willing to follow the professional ethics of the legal profession. As we observed in (*The Florida Bar v*.) *Norkin*,

One can be professional and aggressive without being obnoxious.

Attorneys should focus on the substance of their cases, treating judges and opposing counsel with civility, rather than trying to prevail by being insolent toward judges and purposefully offensive toward opposing counsel. This Court has been discussing professionalism and civility for years. We do not tolerate unprofessional and discourteous behavior. We do not take any pleasure in sanctioning [Respondent], but if we are to have an honored and respected profession, we are required to hold ourselves to a higher standard.

132 So. 3d at 92-93.

Thus, based upon the foregoing discussion, the Court is left with but one course of action, and that is to disbar Ratiner."

Bottom line: This lawyer clearly failed to get the message. The Supreme Court also did not accept his claims of innocence. As a result, he was disbarred.

Be careful out there.

Humor! (Or lack thereof!)

In The News with Ron Ross

Tsar Peter the Great forced to drop "Great" title after doping scandal. Now known as Peter the "Meh"

Pluto, Mickey Mouse's dog, has been demoted by astronomers to a puppy, the Pluto parking lot continues to be too far away from the Magic Kingdom.

On "America's Worst Cook" they have chosed the worst dish of all time. Chicken pot pie narrowly edged out by Chicken Pol Pot.

the Lawyer's Brain

1. Cerebellum
2. Antebellum (unreasonable nostalgia for the old South)
3. Amygdala
4. Caligula (belief that a horse would make a better counsel than that other guy)
5. Parietal Lobe (desire to party hearty after big court victory)
6. Occipital lobe (tendency to tell everyone your occupation within the first few seconds of meeting them, then saying, "No, not a lawyer, an <u>attorney</u>.")

Upcoming Seminars and Webinars

Calendar of Events

Newly announced events are shown in RED

EVENT	DATE/TIME	LOCATION	DESCRIPTION	REGISTRATION	FLYER
Webinar with Jasmine Alexander	Thursday, March 8, 2018	Gotowebinar.com	"How to Motivate Your Clients to Organize Their Information"	Contact: Agassman@gassmanpa.com	
Ethics Webinar with Joe Corsmeier	Friday, March 9, 2018, 12:00 PM – 1:00 PM	Gotowebinar.com	Recent Ethical Decisions That Impact Florida Lawyers	Contact: Agassman@gassmanpa.com	Click Here
Leimberg Services Webinar with Marty Shenkman	Thursday, March 22, 3:00 PM – 4:00 PM	Gotowebinar.com	OLD TRUSTS, NEW TRICKS. NEW TRUST, ESTATE AND TAX PLANNING STRATEGIES AFTER TAX REFORM	Click Here	Click Here
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: Agassman@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: Agassman@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	May 17-18, 2018	Nassau, Bahamas - Atlantis Paradise Island Resort	1. Lawsuits 101 2. Ten Biggest Mistakes That Physicians Make in Their Investment and Business Planning 3. 50 Ways to Leave Your Overhead & Increase Personal Productivity.	Contact: Agassman@gassmanpa.com	

Maui Mastermind Conference	June 15, 2018	1001 N Westshore Blvd, Tampa, FL 33607	Wealth 101 for Business Owners	Contact: Agassman@gassmanpa.com	
MER Primary Care Conference	Thursday, July 5-7, 2018	Yellowstone, Wyoming	Alan will be speaking at the Medical Education Resources (MER) event	Contact: Agassman@gassmanpa.com	
Florida Osteopathic Medical Association Conference	September 13-16, 2018	2900 Bayport Drive Tampa, Florida 33607	Mid-Year Seminar	Contact: Agassman@gassmanpa.com	
Notre Dame Tax Institute	October 11-12, 2018	South Bend Indiana	Planning Under Section 199A and Associated Tax and Practical Considerations	Contact: Agassman@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 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.	Contact: Agassman@gassmanpa.com	