

## Steve Leimberg's Income Tax Planning Email Newsletter Archive Message #193

Date:16-Mar-20

### Subject: Alan Gassman & Brandon Ketron - Planning with Coronavirus and Coronavirus & the Workplace

*“The Coronavirus gives employers the opportunity to review and improve their practices for best facilitating doing the right thing for the right people, including team members and customers. A great many workers will be handling more, if not all, of their tasks from home or remote offices as the result of the Coronavirus.*

*This will enable many employers and employees to re-characterize the relationship that they have with one another from being an employee/employer relationship to an independent contractor relationship. Individuals who are paid as legitimate independent contractors may qualify for the 20% income tax deduction under Internal Revenue Code Section 199A, but will have to pay significantly higher employment taxes, or may use S corporations or partnerships that have a non-working spouse as a majority partner in order to reduce employment tax exposure.*

*Insolvency planning will involve helping investors and business owners work logically and with courage to take the right steps at the right time to preserve cash, and understand the risks ahead while instituting layoffs and work hour reductions to allow the business to survive and save jobs in the long run.*

*Estate tax planning opportunities include taking full advantage of values that are hopefully much lower than they will be over the next few months, locking in low-interest rate family loans, refinancing and extending such loans now, and educating clients on the advantages of using self-cancelling installment sales, private annuities and SCGRAT's as ways to avoid estate tax for individuals with short life expectancies, and how these can be reversed with little cost if an illness turns out to be not as problematic as feared.”*

**Alan Gassman** and **Brandon Ketron** provide members with commentary that examines the impact the coronavirus could have on the workplace and what estate planners should be doing during the Coronavirus crisis.

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**Brandon Ketron, CPA, JD, LL.M.** is an associate at the law firm of Gassman, Crotty & Denicolo, P.A., in Clearwater, Florida and practices in the areas of Estate Planning, Tax, and Corporate and Business Law. Brandon is a frequent contributor to LISI and presents webinars on various topics for both clients and practitioners. Brandon attended Stetson University College of Law where he graduated cum laude, and received his LL.M. in Taxation from the University of Florida. He received his undergraduate degree at Roanoke College where he graduated cum laude with a degree in Business Administration and a concentration in both Accounting and Finance. Brandon is also a licensed CPA in the states of Florida and Virginia. His email address is [brandon@gassmanpa.com](mailto:brandon@gassmanpa.com).

Here is their commentary:

## **EXECUTIVE SUMMARY:**

The Coronavirus gives employers the opportunity to review and improve their practices for best facilitating doing the right thing for the right people, including team members and customers. A great many workers will be handling more, if not all, of their tasks from home or remote offices as the result of the Coronavirus.

This will enable many employers and employees to re-characterize the relationship that they have with one another from being an employee/employer relationship to an independent contractor relationship. Individuals who are paid as legitimate independent contractors may qualify for the 20% income tax deduction under Internal Revenue Code Section 199A, but will have to pay significantly higher

employment taxes, or may use S corporations or partnerships that have a non-working spouse as a majority partner in order to reduce employment tax exposure.

Insolvency planning will involve helping investors and business owners work logically and with courage to take the right steps at the right time to preserve cash, and understand the risks ahead while instituting layoffs and work hour reductions to allow the business to survive and save jobs in the long run.

Estate tax planning opportunities include taking full advantage of values that are hopefully much lower than they will be over the next few months, locking in low interest rate family loans, refinancing and extending such loans now, and educating clients on the advantages of using self-cancelling installment sales, private annuities and SCGRAT's as ways to avoid estate tax for individuals with short life expectancies, and how these can be reversed with little cost if an illness turns out to be not as problematic as feared.

## **COMMENT:**

The Coronavirus gives employers the opportunity to review and improve their practices for best facilitating doing the right thing for the right people, including team members and customers.

We had Stetson Law student, Alex Matras and Ian MacLean, peruse presently available literature on what many different companies are doing with respect to the Coronavirus, and his findings are set forth below.

With an infectious virus making its presence known across the world, countries, states, and even companies are altering their policies to adjust for the COVID-19 virus. Currently, the entire country of Italy is on lock-down to prevent the spread of the virus, at least 40 states and territories in the United States have declared a state of emergency, and schools across the globe are transitioning their students into electronic classrooms accessible from home. As of March 16th, there are more than 175,000 confirmed cases of the COVID-19 virus worldwide.

There is no denying that the COVID-19 virus is having an impact on everyday life. It is also having a significant impact on major economies, with workers kept at home and supply chains disrupted. Businesses have

felt the pressure and are accordingly changing their policies in attempts to keep business as usual in otherwise unusual times.

The Center for Disease Control and Prevention (CDC) released a guide for businesses and employers that focuses on preventing the spread of the COVID-19 virus.<sup>i</sup> This guide released a list of actions businesses could take immediately to help reduce the spread of the virus. The list is quite standard, like ensuring employees that are sick stay home, or if they are at work, separated from other healthy employees, and that the work environment is routinely cleaned. These policies are actively being implemented by businesses across the United States, and large companies like WeWork and TIAA are even closing down their buildings in major cities like Manhattan to sanitize them following outbreaks there.<sup>ii</sup>

Beyond the practices recommended by the CDC, major Wall Street banks like Morgan Stanley have completely halted international travel, while Goldman Sachs reportedly switched a 400-person conference to an audio-only webcast citing COVID-19 concerns earlier this month. Other large companies, like UBS, Google, Amazon, Microsoft, and Facebook have implemented work-from-home policies for their employees where applicable, and some have restricted travel in particularly infectious areas. Additionally, many businesses that deal with clients directly are attempting to limit in-person meetings and replace them with virtual ones.

The idea behind these policy changes is that preventative practices will help stymie the spread of the virus. However, should these policies not halt the virus in its tracks, many businesses have also updated their policies should the virus spread to its employees. Companies like Apple, Uber, Darden Restaurants, and Walmart have all updated their sick leave policies to either incorporate specific COVID-19 policy changes or to provide a blanket-change to their policies that will help address the problems COVID-19 raises.<sup>iii</sup>

Walmart has announced it will not penalize its workers who call in sick. America's largest employer has also provided that those who are diagnosed with the COVID-19 virus or placed in quarantine will receive up to two weeks of pay while off work, and will not be asked to dip into their pre-existing paid sick leave during that time. This policy will apply for both full-time and part-time workers, and if those infected are not able to return to work after two weeks, additional pay replacement may be provided for up to 26 weeks.

Darden Restaurants, Inc., which encompasses eight chain restaurants including Olive Garden and Capital Grille, announced it would be offering up to 40 hours of paid sick leave each year to all hourly employees—making it one of the first in the industry to do so—citing the COVID-19 virus as part of the reason why the decision was made. Employees will receive an hour of sick time for every 30 hours they work. The policy will have a retroactive effect for current employees, which will award sick time immediately based on the hours worked by the employee over the last six months.

Uber and Lyft, despite classifying their drivers as independent contractors and not employees, which does not entitle them to these benefits, have both announced they will be providing funds to drivers who are diagnosed with the COVID-19 virus or who are in quarantine. Uber has stated it will provide up to fourteen days of sick pay, while Lyft has simply stated it will provide funds to drivers. Other app-based businesses like Instacart that follow a similar independent contracting structure have also followed suit; Instacart's policy copies Uber's, and will provide for up to fourteen days of sick pay to anyone with the virus or who is under mandatory quarantine.

Apple has taken an even larger step, offering unlimited paid leave to any employee—hourly or full-time—who becomes sick with cold or flu symptoms similar to COVID-19. The company also is urging corporate employees to work from home.

While smaller businesses are likely to follow the preventative policies that larger corporations are implementing, it remains to be seen whether smaller businesses will offer the same sort of sick leave compensation that some larger corporations are now offering. Regardless, the impacts of the COVID-19 virus are tangible, and as long as they are, everyone should make sure they wash their hands and limit touching their face to best avoid infection.

### **Recharacterizing Employment Relationships To Save Income Tax**

A great many workers will be handling more, if not all, of their tasks from home or remote offices as the result of the Coronavirus. This will enable many employers and employees to re-characterize the relationship that they have with one another from being an employee/employer relationship to an independent contractor relationship.

Individuals who are paid as legitimate independent contractors may qualify for the 20% income tax deduction under Internal Revenue Code Section

199A, but will have to pay significantly higher employment taxes, or may use S corporations or partnerships that have a non-working spouse as a majority partner in order to reduce employment tax exposure.

The new Section 199A Regulations provide that there is a presumption that an individual who was employed and becomes an independent contractor must be characterized as an employee, but the presumption is only a presumption, and can be rebutted by changing the employee's duties, and reducing the control and amenities provided by the employer.

The following are excerpts from our Section 199A book on independent contractor classification and the presumption:

Convert wage income into trade or business income by becoming a Schedule C independent contractor or operating an S corporation that owns a trade or business. The Final Regulations provide that a former employee will be presumed to be in the trade or business of performing services as an employee that will not qualify for Section 199A purposes. This presumption continues for three years after the employee becomes an independent contractor but can be overcome by appropriate evidence and documentation that the individual is no longer appropriately classified as an employee. The Final Regulations make this transition somewhat difficult, but not impossible. Individuals who are presently classified and treated as employees may elect to pay 80% of the federal income tax otherwise incurred upon their net employment income by satisfying the criteria of being classified and paid as an independent contractor instead of an employee. The above planning technique is only available for true independent contractors; thus, employee relationships will be viewed as "sticky" and not easy to change or adapt.

A number of employers will welcome the opportunity to no longer contribute 7.65% in employment taxes on the first \$128,400 (or \$132,900 for 2019) per year of salary (the Social Security Tax cap), plus worker's compensation, unemployment taxes, state payroll taxes, and expenses associated with payroll tax compliance. 7.65% is the combined Social Security and Medicare tax rates, which are 6.2% and 1.45%, respectively. On salaries in excess of \$128,400, (\$132,900 for 2019) the employer will save 1.45% of Medicare tax.

This strategy can be especially useful for taxpayers below both Section 199A thresholds, who will be able to claim their 20% deduction regardless of Specified Service status or wages paid and Qualified Property

held. Therefore, below-threshold business owners should focus on reducing other tax liabilities like the employment tax.

The Section 199A Final Regulations include an example where a lawyer employed by Law Firm 1 leaves and forms Law Firm 2 with several associates from Law Firm 1 who all have taxable income below the threshold amount. Law Firm 2 provides services for Law Firm 1 in a contractual relationship and the lawyers are generally providing the same services that they were previously providing directly to Law Firm 1. The Final Regulations state that the lawyer will be presumed to be in the trade or business of performing services as an employee, and thus her income from Law Firm 2 will not qualify for the Section 199A deduction unless she can prove that she is truly an independent contractor as to Law Firm 1.

The Final Regulations provide that this presumption can be rebutted by providing the IRS with “records, such as contracts or partnership agreements that provide sufficient evidence to corroborate the individual’s status as a non-employee”

A second example, which was added under the Final Regulations provides guidance on how the presumption can be rebutted and reads as follows:

F is a financial advisor employed by a financial advisory firm, Advisory Firm, a partnership for Federal tax purposes, as a fulltime employee and is treated as such for federal employment tax purposes. F has taxable income below the threshold amount. Advisory Firm is a partnership and offers F the opportunity to be admitted as a partner. F elects to be admitted as a partner to Advisory Firm and is admitted as a partner to Advisory Firm. As a partner in Advisory Firm, F shares in the net profits of Advisory Firm, is obligated to Advisory Firm in ways that F was not previously obligated as an employee, is no longer entitled to certain benefits available only to employees of Advisory Firm and has materially modified his relationship with Advisory Firm. F’s share of net profits is not subject to a floor or capped at a dollar amount. F is presumed (solely for purposes of Section 199A(d)(1)(B) and paragraphs (a)(3) and (d) of this Section) to be in the trade or business of performing services as an employee with respect to the services F provides to Advisory Firm. However, F is able to rebut the presumption by showing that F became a partner in Advisory Firm by sharing in the profits of Advisory Firm, materially modifying F’s relationship with Advisory Firm, and otherwise satisfying the requirements under

federal tax law, regulations, and principles (including common-law employee classification rules) to be respected as a partner.

On the other hand, the S corporation or independent contractor arrangements must be carefully considered with reference to the following:

- The possible loss of medical insurance benefits when a person is not employed and cannot qualify to be included on a group medical insurance plan,
- 401(k) employer matching,
- Making sure that health insurance will cover on-the-job injuries and understanding the cost of worker's compensation insurance or the risk of not having lifetime support benefits if the taxpayer cannot work because of an employment-related injury, and
- Loss of unemployment compensation if and when terminated.

The distinction between independent contractors and employees has long been examined but is worth reviewing here. An employee-employer relationship normally exists "when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished."<sup>iv</sup> An independent contractor is typically someone "who is entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it."<sup>v</sup>

For many years, the IRS used a 20 common law factor test to determine if an individual is an employee, including the right to terminate employment, whether the worker is required to bring their own tools and materials, whether there are set work hours, and whether work is completed on an employer's premises.<sup>vi</sup> In 1996, the IRS reworked this test into three major categories:

1. Behavioral control,
2. Financial control, and
3. Relationship of the parties.<sup>vii</sup>

In reality, the 20 common law factors can be plugged into the above three categories as follows, so nothing significant really changed in 1996:



**Chart 19 - 3 Factors / 20 Factors Combination Chart**

	Common Law Test Factor	Behavioral Control	Financial Control	Relationship of the Parties
1	Compliance with instructions	X		
2	Training	X		
3	Integration	X		
4	Services rendered personally	X		
5	Hiring, supervision, and paying assistants	X		
6	Set hours to work	X		
7	Full time required	X		
8	Doing work on employer's premises	X		X
9	Order or sequence test	X		
10	Oral or written reports	X		
11	Payment by the hour, week, or month		X	
12	Payment of business and/or traveling expenses		X	
13	Furnishing tools and materials		X	
14	Significant investment		X	
15	Realization of profit or loss		X	
16	Making services available to the general public		X	
17	Continuing relationship			X
18	Working for more than one firm at a time			X
19	Right to discharge			X
20	Right to terminate			X

Further, under Internal Revenue Code Section 3121 the following categories of workers will be treated as employees, notwithstanding that they would normally be considered as independent contractors under the traditional tests:<sup>viii</sup>

- An agent-driver/commission-driver engaged in distributing meat, vegetables, bakery, or beverage products, or laundry or dry-cleaning services;
- A full-time life insurance salesman;
- A home-worker using material furnished by the person employing their services if such material must be returned to the employer; or
- A traveling or city salesman.

**Employee v. Statutory Employee v. Independent Contractor**

Employee v. Statutory Employee v. Independent Contractor			
Definition	Individual worker who follows explicit instructions of the employer as a traditional employee.	Individual worker classified as Independent Contractor under traditional tests but treated as a “Statutory Employee” under Internal Revenue Code Section 3121(d)*.	Individual worker who is not an employee / not required to follow the instructions of the employer and compensation causes risk to be allocated to the contractor.
Are compensation payments treated as wages for the Wage/Qualified Property Test?	YES	NO	NO
Is income received by the individual Section 199A “Qualified Business Income”?	NO	YES (If an active trade or business and other requirements are met).	YES (If an active trade or business).

Employer withholds income taxes.	YES	NO	NO
Employer withholds Social Security and Medicare taxes.	YES (And employer pays one-half of FICA).	YES (But all FICA comes from Statutory Employee's share).	NO
Are professional/employment related expenses deductible on Schedule C (above the line)?	NO	YES	YES

\* See also Treasury Regulation 3121(d)-1(d)(3)(ii), Revenue Ruling 69-287 and Private Letter Ruling 9242003.

Many advisors are not aware of the safe harbor statute under Section 530 of the Revenue Act of 1978 which allows employers to treat certain individuals as independent contractors, notwithstanding that they would otherwise be considered as employees, where (1) the taxpayer relies on a “long standing practice of a significant segment of the industry” and (2) the taxpayer has filed all federal tax returns on a basis consistent with independent contractor classification.

It is noteworthy that an individual treated as an independent contractor may have to be retroactively included in a pension plan, if and when re-characterized as an employee, except when the pension plan provisions define eligible employees to not include independent contractors who have been reclassified as common law employees.<sup>ix</sup>

It is important for tax advisors to let clients know that they should assure that their pension plan documents include such a provision.

In addition, incorrectly classified workers may have causes of action against their employers and affiliates for loss of unemployment compensation, worker's compensation, medical insurance rights, and other benefits that they would have received as employees but were deprived of. There have been a number of national class action suits presently being waged against “employers” such as Uber, Lyft, and FedEx, and many state or local class action suits against strip bars, restaurants, and residential construction companies in an attempt to claim compensation for these benefits. Arbitration clauses in agreements signed by independent contractors may prevent them from joining in class action lawsuits.<sup>x</sup>

## **The Urgent Need for Creditor and Insolvency Planning**

Our experience from 2008 and its aftermath is that a great many clients who own and operate businesses do not see the danger facing them, and do not take all major steps to save a business or investment arrangement. Instead they "hope for the best" or experience anxiety and lack of guidance to make hard decisions and changes while there is still cash or credit available to do this.

Simply referring your clients to a bankruptcy lawyer, or letting them know that this is not your area of expertise is not in the client's best interests. If you care about the client and they know you and trust you for advice, please go with the client to the debtor/creditor lawyer consult, and closely follow the advice of the debtor/creditor lawyer, while making sure that it seems sound. In addition, understand that communications should be handled very carefully given the many nuances that apply in the attorney-client and work product context under bankruptcy and state creditor laws.

All business clients should engage in a stress test by reviewing all assets and sources of capital, and all expenses and liabilities and walking through a worst-case scenario with advisors who have "been there and done that". Clients should know what assets are protected from creditors, and what actions creditors may take in order to plan ahead and act both rationally and legally, while also taking into account what lenders may think of creditor protection moves, and what difference it may make if the business has to be shut down and restarted at a later time.

For example, if the client is a wage earner and earns a wage that would be protected from creditors under the wage statute by being the head of household then those monies may be moved into a variable annuity, cash value life insurance policy, a homestead, or a tenancy by the entirety account (if both spouses are not going to be sued) and therefore be creditor protected while the client may spend down assets that are otherwise exposed.

While reasonable wages earned contemporaneously with work performed for a business by the business owner can usually be taken out without a problem, paying the owner for shareholder loans she has made, or paying dividends when the company is arguably insolvent can have severe circumstances under both state and bankruptcy preferential transfer rules. For this and other reasons, a knowledgeable and seasoned debtor/creditor

lawyer with bankruptcy experience should be consulted with as soon as possible to keep as many avenues open as possible.

For advisors with clients who have a lot of real estate and a lot of leverage, the question is, how much in assets can they move to a protected status, recognizing that they do not normally want to make transfers that will render them insolvent, but that doing so may put them in a better position to negotiate with lenders and others. Where there are multiple lenders it can be very useful to "favor a friendly lender" by giving that lender a first lien on the applicable assets and ownership interests at least a year before a bankruptcy would ever occur.

Make sure that the client knows how much cash they have and what their "burn rate" is. How soon will they run out of money, what can they do to reduce the burn rate, what can they do to increase revenues and what might fall apart on them? Working with a CPA on this will be invaluable, but there is no CPA/Client privilege in bankruptcy, so having a lawyer hire an independent CPA to assist with this is often the best path.

Please keep in mind that the above discussion only scratches the surface in the creditor planning arena and that clients, no matter how smart they are, and no matter how well they have done historically, are often a deer in the headlights and need quality meeting and conversation time with caring and responsible advisors.

### **Planning for Estate Taxable Taxpayers with Short Life Expectancies**

It is always unfortunate to find out that an individual has a shorter than normal life expectancy, but this can be a significant advantage under the estate tax laws.

For example, an individual with a short life expectancy, may sell assets to a grantor trust that will be outside of his estate for estate tax purposes, in exchange for a "self-cancelling installment note," that will vanish in the event of death.

Traditionally, these notes have been thought to avoid both gift and estate tax, if established when the Grantor/Seller has a better than 50% chance of living at least 12 months after the transaction, but actually lives at least 18 months after the transaction.

The IRS challenged the use of self-cancelling installment notes in the case of *Estate of Davidson v. Commissioner*, and eventually settled the case. If

the Grantor has a shorter than normal life expectancy, a gift may be considered as made at the time that the note is established.

Alternatives include using private annuities, which can have income tax disadvantages, or using a SCGRAT (Self-Cancelling Installment Note GRAT, which is discussed in more detail in [Estate Planning Newsletter #2230](#) (June 3, 2014).

It would be possible for someone with the Coronavirus to enter into a self-canceling installment note for private annuity, and to reverse it immediately upon recovery from the virus.

We have also used these in the past when clients are undergoing high-risk surgeries, just to cover the bases, in case there would be a negative result.

### **Intra-Family Installment Sales – Lowest Interest Rates Ever and Low Values Makes These Great Tools for Estate Tax Planning Now**

A great many clients are well aware of how we establish special irrevocable trusts for family members, make sure that they have seed capital, and sell part ownership interests in family LLCs and limited partnerships in exchange for long-term promissory notes.

The hopefully temporary reduction in the values of stocks and other assets make this a very good opportunity for smart taxpayers who have confidence that our medical technology will overcome this virus within a reasonably short period of time.

Our video explanation of the installment sale to a defective grantor trust can be viewed on YouTube by clicking here: <https://youtu.be/qw6e-HZDjs4>

Please consider this if you are otherwise estate taxable, keeping in mind that the \$11,580,000 exemption will be reduced by half on January 1, 2026, unless the House of Representatives, the Senate and the President all sign legislation to the contrary.

This is another possible pitcher of lemonade to be made from the lemons that we find ourselves viewing on television and otherwise with respect to the Coronavirus.

The S&P 500 Index has always recovered from every significant downturn by reaching levels much higher than pre-downturn values. Here's to history and the fact that it almost always repeats itself.

## **Legislation Related to the Coronavirus**

As of the writing of this article, the United States House of Representatives has passed H.R. 6201 which would require employers with less than 500 employees to provide paid family and sick leave for employees affected by the Coronavirus. Employers who provide paid leave will receive a refundable payroll tax credit to help offset the cost up to \$511 per day per employee for sick leave (or \$200 per day if the leave is to care for a family member) through the end of 2020. The bill leaves open the ability for the Department of Labor to exempt employers with less than 50 employees. Stay tuned as President Trump has tweeted his support for the bill and it is currently being considered by the Senate. Updates will be provided as the bill progresses through the legislative system.

## **Have Significant Losses in a 529 Plan? Time to Buy a New One!**

Under IRC Section 529, each state has the ability to designate one or more “plans” that can hold approved investment combinations, and be used to pay for up to \$10,000 a year of tuition for Kindergarten through 12th Grade, and then college and graduate school tuition and qualified expenses.

A great many 529 Plans are now worth less than what was invested, and families will receive the best financial benefit using existing 529 Plans to have the equivalent of tax-free gains, until the plans reach their cost amount, while purchasing new 529 Plans that will grow on a tax-free basis if used for qualified educational expenses.

Let's say that you bought a 529 Plan for \$10,000 that is now worth \$8,000. The next \$2,000 of gains under the Plan are tax-free.

As opposed to waiting for the 529 Plan to come back up above \$10,000 to recognize tax savings when it is spent on education, it will be better to buy a new 529 Plan for \$10,000 to be used for education expenses, and to liquidate the old 529 Plan when it comes back up to \$10,000.

Here's a mathematical example:

You can wait for the \$8,000 529 Plan to increase in value by 25% to \$10,000, and there will be no new tax savings.

If you buy a new 529 Plan for \$10,000, and it goes up by 25% to \$12,500, you can use the new 529 Plan for tax-free educational costs, and cash in

the old 529 Plan and therefore have an additional tax savings on a \$2,000 capital gain.

### **Expanding the Number and Qualifications of Agents/Surrogates Appointed Under Health Care Powers of Attorney**

The authors do not follow the conventional wisdom of having only one person, such as the spouse of the client, appointed as the sole Agent under a Health Care Power of Attorney, and then having successive alternates to act if the appointed Agent is unable or unwilling to serve.

In our opinion, clients need multiple Agents so that whoever can appear first on the scene of an emergency situation is able to act and lobby for the patient's health, including choosing specialist doctors while the patient is still in the emergency room or intensive care, reviewing medical charts, medications, and treatment options, and making sure that all doctors and other professionals involved with treatment are coordinating with one another.

This epidemic will certainly impact multiple family members, so a client's first choice and second choice may have the virus at the same time as the client.

Multiple Agents can be appointed with the right to serve without joinder or consent of the other. If there is concern that there would ever be a disagreement over treatment, then a tie-breaker provision can be put into the Health Care Power of Attorney, or at least a request that all Agents would cooperate with what a spouse or other single important person might request.

We typically tell clients to name as many people as they know who they would trust to visit them in the hospital at 2:00 a.m. in the morning, and ask a nurse for access to the medical chart, and to request a Tylenol or other medication.

We always put the person's name and cell phone number on the Power of Attorney form.

Elderly clients may request DO NOT RESUSCITATE ORDERS, which will need to be signed by a doctor after due conversation with the patient, in order to provide that cardiopulmonary resuscitation (CPR), and other



“drastic measures” that could cause great pain to an elderly or frail individual will not have to be administered if and when the time comes.

### **Ask Again – Have Your Clients Provided for Their Parents’ Estate Plans?**

We typically ask affluent clients whether they expect to inherit, and if the answer is “yes,” we ask them about coordination of their parents’ estate plans with theirs.

In particular, this normally involves having any inheritance pass to the client as trustee of a trust for his or her health, education and maintenance, in lieu of an outright disposition.

Such a trust can give the client the ability to make distributions for the health, education and maintenance of family members, and to direct how the trust assets will pass on the subsequent death of the child.

This can obviously have significant estate tax avoidance and creditor protection advantages.

Many clients attempt to have this conversation with their parents, or the lawyer for their parents, but sometimes this is overlooked, or not made to be a priority.

It may be time to nudge your clients to nudge their parents again.

We often prepare an irrevocable trust for the client and fund it with a nominal amount, and then give the name and date of the trust to the lawyer for their parents, requesting that the will or trust of their parents be updated so that the share of the child would pass directly to the trust that we have drafted.

This helps to assure that the trust is properly prepared and that the parents have little or nothing to do, and minimal expenditures, in order to properly plan for the inheritance of a well-advised child.

Elderly individuals may be more responsive to suggestions for this type of planning in the present Coronavirus environment.

### **Get Life Insurance in Place While We Can**

Many clients are under-insured, from a life insurance standpoint, and need encouragement to do so.

To our knowledge, the life insurance industry has not considered rate hikes or moratoriums on issuing coverage, but it is conceivable that this could happen if actuaries are not able to predict life expectancy.

Shorter life expectancy can also cause the weaker life insurance carriers to fail, or to have to increase their charges under policies that allow this.

Encouraging clients to apply for and receive as much life insurance as they will reasonably need in the upcoming years is never a bad idea, and the Coronavirus gives good reason - and hopefully good motivation to get that done.

As the public's fear over Coronavirus has grown, life insurance agencies have seen a large increase in the number of requests for life insurance applications.<sup>xi</sup>

### **Handing Documents to Other People in Your Office**

We need to be very mindful that physical contact with paper that has been marked up and handed between individuals could carry the Coronavirus.

The possibility of microwaving documents (after removing all paperclips), wearing gloves or doing more of our own editing and having less physical markups handed between individuals will all be something to consider until we know more about how this virus is transmitted.

### **Quarantine Planning**

Five minutes of rational, calm planning done well in advance of if and when bad news might hit can have an important impact.

What is your "What If I Am Quarantined?" Checklist, and what happens if certain items that are now readily available become unavailable and you or someone important has to be quarantined? Listed below are items that should be on every checklist:

- Devices and supplies.
- Medical and comfort-related devices and supplies.
- Availability of a home, apartment or another place for use.
- Registration with a private nursing service or hiring an individual who may help.
- Who will take care of pets, children and elderly individuals?

- Having needed medications well in advance – converting 30-day prescriptions into 90-day prescriptions and getting them refilled now.

#### Your Flu Bug Checklist.

- A. Gatorade.
- B. Vitamin C and Zinc.
- C. That book you have been meaning to read.
- D. Backup books and supplies in case either the Internet or cable goes down.

#### **Take Good Care of Yourself**

The best thing that most of us can do for the Coronavirus risk is to be in excellent physical condition, to have regular physical examinations, to exercise every day, and to help assure that our family members are also healthy, so that surviving the Coronavirus will be much more likely than not. Encouraging loved ones, employees, clients and others to be in their best possible physical shape over the next few months can be very helpful, and will undoubtedly save lives, regardless of whether an individual in better health becomes subject to the Coronavirus or not.

#### **Good Thing, Bad Thing, Who Knows**

Those LISI leaders who have seen the webinar entitled *Successfully Handling Ethical and Professional Challenges for Estate Planners and Tax Professionals* by Srikumar Rao, Ph.D. and Alan Gassman know that good things often come out of challenging situations, and that the worst thing about a particular situation may simply be the viewpoint and attitude that one ascribes to it. A YouTube video of a presentation recently given by Alan Gassman explaining this story to LL.M. and Taxation students at the University of Florida can be viewed on YouTube at [https://youtu.be/\\_U7dzztrSF4](https://youtu.be/_U7dzztrSF4).

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

# Alan Gassman

# Brandon Ketron

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## CITATIONS:

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<sup>i</sup> U.S. CDC, Interim Guidance for Businesses and Employers, Centers for Disease Control and Prevention (2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last visited Mar 11, 2020).

<sup>ii</sup> Simon Dawson & Samantha Lee, From travel bans to disaster-recovery sites, here's everything we know about how Wall Street banks are handling the spread of coronavirus, Business Insider, March 11, 2020, <https://www.businessinsider.com/wall-street-contingency-plans-and-policies-for-coronavirus-2020-3> (last visited Mar 11, 2020).

<sup>iii</sup> Abha Bhattari, Walmart, Apple and Olive Garden are among major employers updating sick leave policies as coronavirus cases spread,

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Washington Post, March 10, 2020,  
<https://www.washingtonpost.com/business/2020/03/10/walmart-apple-olive-garden-are-among-major-employers-updating-sick-leave-policies-coronavirus-cases-spread/> (last visited Mar 11, 2020).

<sup>iv</sup> Treas. Reg. § 31.3121(d)-1.

<sup>v</sup> Black's Law Dictionary, 9th Ed. (2009). Additionally, the work of an independent contractor generally does not create liability for the person hiring the contractor.

<sup>vi</sup> Rev. Rul. 87-41.

<sup>vii</sup> Department of the Treasury, Internal Revenue Service, Independent Contractor or Employee? Training Materials, Training 3320-102 (1996), available at <https://www.irs.gov/pub/irs-utl/emporind.pdf>. The IRS lists the facts that illustrate if there is a right to direct or control work under each category. For behavioral control, this is instructions or training; for financial control, this is significant investments, unreimbursed expenses, method of payment, etc.; and for relationship of the parties, this is intent of the parties/written contracts, employee benefits, terms regarding each category. For behavioral control, this is instructions or training; for financial control, this is significant investments, unreimbursed expenses, method of payment, etc.; and for relationship of the parties, this is intent of the parties/written contracts, employee benefits, terms regarding discharge/termination, and regular business activity.

<sup>viii</sup> IRC § 3121. If they also meet the following three elements, they will be classified as employees: (A) the service contract states or implies that substantially all of the services are to be performed by them, (B) they do not have a substantial investment in the equipment or property used to perform the services, and (C) the services are performed on a continuing basis for the same payer.

<sup>ix</sup> *Vizcaino v. Microsoft Corporation*, 97 F.3d 1187, (9th Cir. 1997).

<sup>x</sup> *Epic Systems Corp. v. Lewis*, No. 16-285 (2018).

<sup>xi</sup> Amy Danise, Consumers Panic Shopping for Life Insurance in the Face of Coronavirus, *Forbes*, March 12, 2020,

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<https://www.forbes.com/sites/advisor/2020/03/12/consumers-panic-shopping-for-life-insurance-in-the-face-of-coronavirus/#58783c916a6f> (Last Visited Mar 16, 2020).