Hearsay

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In This Issue

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If you have any questions about the publication or would like to submit an article for a future issue, please contact Shanda Pearson or Samuel Edmunds.

MSBA

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Greetings from the Chair

Erika Donner

I am thrilled to start off another "Greetings" with a congratulations to everyone who planned the Annual Tri-Bar Spring Social. From MSBA-NLS, that means a big thank-you to Chanel Melin, our Social Chair. She, along with the social chairs from HCBA NLS and RCBA NLS, made the entire evening go off without a hitch, all while donating hundreds of cans of food and hundreds of dollars to Great Harvest. For the first time in recent memory, our Spring Social was truly a tri-bar event, as it was held in St. Paul, instead of its traditional Minneapolis location. We were thrilled with the turn out and look forward to returning to Ramsey County in future years.

While I am on the topic of thanking people, I also want to give a big thanks to Jennifer Daugherty, who has represented MSBA NLS in disaster legal services responses to the flooded areas in northwestern Minnesota. MSBA NLS is thankful to have someone with experience from last year's federal disaster declaration from flooding in the Winona area representing our organization.

It is only because of the work of countless other new lawyers like Chanel and Jennifer that our Bar is the successful organization that it is.

We are looking for officer nominations for the 2009-2010 Bar year. If you are interested, or you know of someone who is interested, please nominate yourself or him/her! Please email your nomination to me by May 1, 2009. Additionally, if you are interested in attending the ABA Annual Meeting in Chicago on July 30th through August 1st, and you want to be considered for partial reimbursement, please email me by May 7th with your statement of interest.

Finally, there's still time to get involved this year! Please join us for our last meeting of the year, on Thursday, May 21st, at 5:30 p.m., at the MSBA offices in City Center, Minneapolis. We will be discussing the Annual Convention, voting on funding for the ABA Annual Meeting, and voting on officers. We also will go out for happy hour drinks and appetizers afterwards. I hope you can join us.

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Don't Lose "New" Business Clients Before You Fully Retain Them: Key Domain Name Considerations Needed Before Incorporating New Businesses

Jon Farnsworth

Imagine the following hypothetical: Bill is the perfect business client. He is a successful entrepreneur, always starting new ventures and selling them, and creating loads of legal work in the process. Bill has retained you to assist with his newest project: incorporating a bicycle shop called "Bicycle Bill's, Inc." You are psyched. The name Bicycle Bill's, Inc., is available on the Minnesota Secretary of State's website, so you immediately draft and file Articles of Incorporation.

Months later, Bill contacts you. His new venture has been so successful he wants to launch a website. To his dismay, his desired domain name (BicycleBills.com) is unavailable. Additionally, he finds there is already another company named Bicycle Bills located in Ohio. By this time, Bill has invested several thousand dollars in marketing his new business and is angry. "I pay big bucks," Bill exclaims, "to ensure problems like this do not happen. I'll seek alternative counsel in the future."

This vignette illustrates a painful scenario that may result if you inadequately advise clients at the outset of incorporating a new business regarding domain name issues.[1] This article provides a brief overview of key domain name considerations as well as how to register and protect a domain name.

What is a Domain Name?

A domain name acts as a type of Internet address for a website. For instance, the Minnesota State Bar Association's ("MSBA") domain name is MNBar.org. In addition to a domain name, the MSBA also has a website with its marketing information. Put simply, MSBA members know that they must go to the domain name MNBar.org in order to access the MSBA's website. To have an effective Internet presence, your client needs both a domain name and a website.

When to Acquire a Domain Name

Your client should register its domain name as soon as possible. There are over 100 million domain names registered worldwide. As you may expect, there are far more domain names registered than there are business entities registered at the Minnesota Secretary of State's Office. This means your client has a significantly lower chance of obtaining its desired domain name than obtaining its desired business entity name at the Minnesota Secretary of State's Office.

One recent anecdote demonstrating this fact stems from a new business that was going to register its domain on a Friday, but decided to wait until Monday. While the domain was available on Friday, another party registered the domain on Sunday. The company then needed legal counsel to attempt to acquire the domain. In this particular situation, there was a happy ending. With legal assistance, the client obtained the domain, albeit at a much higher cost than if the client had registered the domain on Friday. This story demonstrates the importance of immediately registering domains in which your new client is interested.

A method to ensure your client obtains a registered corporate entity with a matching domain name is to first search for an available domain name and then for the availability of the business name at the Secretary's Office. If both the domain and business names are available, immediately register the domain name and file the Articles of Incorporation (or Reserved Name application).

Note: There are intellectual property considerations whenever you register a domain name. To minimize the chances of intellectual property litigation, it is advisable to obtain an opinion from an experienced trademark counsel before registering domain names that may infringe on other businesses' trade names or marks.

Picking a Domain Name

Domain names consist of two parts: (1) a "keyword" (e.g., "MNBar"), and (2) an extension (e.g., .org). Clients usually desire to have a domain's keyword reflect the company's name (e.g., "BicycleBills"), which, among other things, assists the client in building a consistent brand for the business.

After settling on a domain keyword, the next step is picking the domain extension. The .com extension is the most commonly used domain extension in the world, thereby making it the first choice for many companies. Other popular extensions for for-profit companies in the United States include .net, .biz, and .us (generally .org domains are used by non-profits).

Choosing a Domain Registration Company

When it comes time for the client to register its domain name, it is important to choose a reputable domain registration company (commonly referred to as a "registrar"). Pricing and customer service vary greatly between registrars. It is advisable to choose a registrar located in the United States that is a member of the Better Business Bureau and that has email and phone customer support.

Registering a Domain Name

When registering a domain, your client will be asked to provide contact information. This contact information will be stored not only at the registrar, but will also be placed in a public database called the "whois." If your client wants to protect its identity, a service called "whois privacy" may be purchased. Whois privacy replaces your client's contact information with the registrar's contact information, reducing privacy concerns and partially eliminating junk mail and email spam.

Registration terms for domain names range from one to ten years. Some registrars offer discounts for multiple-year registration terms. While there are advantages and drawbacks to longer registration terms, a one-year registration term is generally advisable (your client has exclusive renewal rights to the domain in the future). A one-year registration period prevents your client from overpaying for a domain that they may not need in the future (e.g., if the business changes its name or closes) as well as ensures regular interaction with the registrar. A client's regular interaction with the registrar generally reduces the risk the client will forget to renew the domain.

After choosing the length of the registration term, your client must pay for the domain, which is usually done via credit card. If paying by credit card, your client may also consider enabling "auto renew." The auto renew feature decreases the chances a domain will inadvertently expire. Once the domain's expiration date nears, the registrar

automatically renews the domain, charging your client's credit card for the renewal fee.

Note: There are pros and cons of using auto renew, but using this feature is generally helpful.

Someone Already Registered My Client's Desired Domain! What Do I Do Next?

It is not uncommon for your client's desired domain name to be unavailable. Assuming a domain registrant did not purchase a whois privacy service, information about a registrant may be looked up in the "whois" information. Websites like www.who.is, www.whois.net, or www.whois.sc provide access to the domain's whois information.

Just because a domain has been registered does not mean that it cannot be acquired. For instance, some domain registrants are willing to sell the rights to a domain name, although often times the registrants will extract a hefty premium. Sale prices of up to $100,000 are not uncommon for domain names.

In certain egregious situations, your client may be able to obtain the domain name through legal avenues. Regardless of what information is shown in the public whois database, contacting a domain name registrant may adversely impact your client's rights. It is advisable to seek advice from a domain name attorney before initiating any contact with a domain name registrant.

Legal Methods to Obtain Domain Names

There are two primary legal methods to obtain a domain name that is already registered by another individual. The first is arbitration and the other is litigation. While the elements of bringing a successful arbitration and litigation suit are slightly different, at a basic level your client must demonstrate it has legitimate rights to the domain and the registrant does not.

All domain registrants agree to arbitration under the Uniform Domain Name Dispute Resolution Policy ("UDRP"). The UDRP is a policy established by the Internet Corporation for Assigned Names and Numbers, commonly referred to as ICANN. Among other things, ICANN is responsible for overseeing the dispute process of domain names.

UDRP actions may be brought in several venues, but the World Intellectual Property Organization ("WIPO") and National Arbitration Forum ("NAF") are the two most prominent. Overall, UDRP is a relatively fast and low-cost method to obtain legal rights to a domain, but there is no provision for damages or attorney's fees.

Litigation may also be commenced in federal court under the Anti-Cybersquatting Consumer Protection Act ("ACPA"). The ACPA allows for damages of up to $100,000 per domain name as well as attorney's fees; however, there are additional complexities regarding venue and jurisdiction. As with all litigation, actions under the ACPA may be expensive and lengthy.

Before commencing a legal action against a domain registrant, you should seek the opinion of a domain name attorney who will provide a more in-depth analysis of your client's options and chances of success.

Filing Articles of Incorporation Is Not Enough

Simply filing Articles of Incorporation is insufficient to satisfactorily represent a client's interests. Attorneys representing new businesses should proactively encourage clients to appreciate and consider domain name issues before incorporating.

Investigating domain name issues at the outset of a corporate entity's creation will minimize the client's exposure to unnecessary litigation and the possibility your client will end up in a similar situation as Bill and his hypothetical bicycle shop.

This article is for educational purposes only and does not constitute legal advice.

Note

[1] This vignette also highlights potential trademark and intellectual property right issues. This article focuses solely on domain name issues.

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Online Resource Available for Pro Bono Work

John Freeman

ProJusticeMN.org is Minnesota's online resource for poverty law advocates. The Minnesota Legal Services Coalition partners with the Minnesota State Bar Association to administer this website for pro bono and legal services practitioners who serve low-income and otherwise disadvantaged clients.

ProJusticeMN.org provides online poverty law resources in numerous areas, including consumer, family, foreclosure, government benefits, immigration, landlord/tenant, and others. The website is divided into four practice areas, each with its own resource library containing pleadings and other forms, practice aids, legal research materials, and links. Other features include a calendar of poverty law CLEs and news relevant to the poverty law community.

Additionally, attorneys who seek pro bono opportunities can search the Volunteer Opportunities Guide, a database of organizations that need volunteer legal assistance. Potential volunteers can search for organizations by area of law, location, hours required, and populations served.

Go to the ProJusticeMN.org practice areas to apply for membership and access to these resources. Please note that the ProJusticeMN.org administrators will approve only those applicants who demonstrate a commitment to the public interest and who will use the website for the exclusive purpose of pro bono work.

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Lost in Translation: Strategies and Suggestions to Overcome the Challenges of Working with Cross-Cultural Clients

Karen Lundquist

The United States is an increasingly multi-ethnic society. During the 1990s, the nation's immigrant population grew by 11.3 million — faster than at any other time in the country's history.[1] In 2006, approximately 6.6% of Minnesota residents were foreign born, a 30.2% increase from 2000, and approximately 10% of the population spoke a language other than English at home.[2] Thus, the chance that an attorney will work with a cross-cultural client is greater than ever before, bringing with it many challenges and considerations. This article will discuss working with cross-cultural clients in a legal setting and address some of the issues that an attorney should consider in order to facilitate a cross-cultural interaction.

Working with Interpreters

Working with an interpreter[3] adds complexity to dealing with cross-cultural individuals. Interpreters should be used in any client interaction – meeting, deposition or courtroom testimony – in which the client has no English skills, or even limited skills, but is not fluent. Clients with limited skills can confuse or guess the meaning of a question or a word, potentially causing inaccurate testimony or misunderstanding of the facts.[4] Even clients who speak English might prefer to have an interpreter for events such as a deposition, as many people find it more comfortable to express themselves in their mother tongue than in their second language.

Lawyers are encouraged to plan ahead when they know that an interpreter will be needed, especially if the subject matter is technical.[5] For example, in a patent or other complex civil case, the interpreter should be knowledgeable of the relevant technical terms; otherwise there is the risk of an inaccurate translation.[6] Other technical areas include medicine, engineering, telecommunications, and finance. All interpreters who interpret in legal matters should be familiar with legal terminology and the U.S. legal system.

It is the lawyer's responsibility to verify the interpreter's skills and abilities.[7] At present, federal certification is available for only three languages: Spanish, Navajo, and Haitian-Creole.[8] Minnesota also has a court interpreter's program and lists individuals who are both rostered and certified.[9] Certification is available in more languages than the federal system,[10] and although rostered individuals have not passed the same rigid qualifications as certified interpreters, the fact that an individual is on the Minnesota roster is a good indication of his or her abilities. Otherwise, there are few if any guidelines for competency and the attorney is usually unable to gauge the interpreter's skills.[11] It is always best to deal with a trustworthy agency to ensure that the interpreter is qualified and familiar with any technical terminology. A conflict of interest check should also be run to make certain that the interpreter is impartial, has no conflicts with any party, and is not a friend or a relative.[12] In smaller, more close-knit ethnic

communities, where competent translators are likely few, it might be difficult to find an impartial interpreter. In these cases, it is advisable to bring one in from another city or state.

Language and dialect are also important when selecting an interpreter. For example, an Arab interpreter is often automatically called to interpret for a client from the Middle East, but a Moroccan client might prefer a French interpreter rather than an Arab one.[13] In addition, regional variations are important to consider when selecting an interpreter. The Arab spoken in different countries can vary greatly and it is advisable, when possible, to request an interpreter from the same country as your client.[14] Chinese has many regional variations as well. Knowing your client's preferred language and regional dialect will help to eliminate any problems once the interpreter begins his or her work.

Cross-Cultural Negotiation and Mediation

A cross-cultural negotiation or mediation may take place with parties who are residents of Minnesota, or with one party who lives abroad, such as in an international trade context. In any type of cross-cultural mediation or negotiation, cultural differences will play a part and should be addressed for the transaction to be successfully concluded.

Interests may be shaped culturally; without recognizing this, a negotiator may fail to understand a client's position.[15] For example, many cultures, such as the Chinese and Japanese, are collectivist, where the parties may have a special interest in saving one's reputation and social standing in the community.[16] In the United States, "saving face" has a negative connotation. Understanding this aspect of the client's culture can help an attorney to understand why a client refuses an offer, for example, and to represent the client more effectively.[17]

For lawyers dealing with the immigrant Latino communities, which now account for nearly half of the foreign-born population,[18] education about mediation will be important. Until the last decade or so, when most Latin American countries began reforming their criminal justice systems,[19] mediation was not a common part of the legal system. Thus, many Latino immigrants are likely to be unfamiliar with the process. A low level of education among this population group can also lead to a lack of knowledge about the legal system in general, making it even more important for the attorney to educate the client about all aspects of it, not just mediation.[20]

Your Own Cultural Awareness

Cross-cultural lawyering also requires awareness of one's own culture and an ability to see beyond it in order to understand another culture and better represent a cross-cultural client. There are many cultural-specific mannerisms that are part of non-verbal communication and can affect your opinion about other cultures. For example, in U.S. culture, we are taught to look someone straight in the eye when we speak; it is seen as a sign of strength and honesty, while diverting our eyes shows dishonesty.[21] However, in some Asian cultures, it is disrespectful to look a person in the eye, even when telling the truth.[22] Understanding this cultural mannerism before a client interview or deposition helps to understand that the individual is not being evasive, but is rather showing respect.

Respect for the cross-cultural client's ethnic identity is also fundamental in establishing a

good rapport with a cross-cultural client. For example, attorneys should realize that most Latin Americans refer to themselves as Americans and see the U.S. habit of referring only to themselves as Americans as a sign of U.S. arrogance.[23] Likewise, after the collapse of the Soviet Union, many former Soviet republics with non-Russian populations elevated their national languages to the status of official languages. Thus, it would also be offensive to refer to a client from Lithuania or Armenia as Russian.[24] An attorney should take the time to learn about an individual's culture before any dealings with him or her.

Conclusion

Working with cross-cultural clients, whether they are foreign-born residents in Minnesota or Italians in an international business deal, adds stimulating depth but also challenging complexity to a legal matter. The first step in working with such clients is to better understand your own culture in order to appreciate the differences from the foreign culture. By learning about the client's language and culture, the attorney can improve the interaction and represent the individual more effectively.

Notes

[1] Steven A. Camarota, Ctr. for Immigration Studies, *Where Immigrants Live: An Examination of State Residency of the Foreign Born by Country of Origin in 1990 and 2000* (Sept. 2003), available at http://www.cis.org/articles/2003/back1203.html.

[2] U.S. Census Bureau, 2003 American Community Survey (ACS), available at http://www.census.gov/acs/www/Products/Ranking/2003/R03T040.htm; http://www.migrationpolicy.org/pubs/MPI-ImmigrantsandVoting-MINNESOTA.pdf. This number is lower than in the rest of the United States, where approximately 20% of the population speaks a language other than English at home. William H. Frey, Multilingual America, 24 Am. Demographics 20 (July/Aug. 2002), cited in Nina Ivanichvili, *A Lawyer's Guide to Cross-Cultural Depositions,* 28 Champion 38 (Sept./Oct. 2004).

[3] Although often used interchangeably, interpreters and translators are separate and distinct professions. Interpreters translate orally from one language to the other (either simultaneously or consecutively) and translators work with written texts. Ivanchvili, *supra* note 2, at 38.

[4] *Id*.

[5] *Id*. at 39.

[6] *Id*.

[7] *Id*. at 38-39.

[8] *See* U.S. Courts, Federal Court Interpreter Program, available at http://www.uscourts.gov/interpretprog/interp_prog.html, for further information about the federal interpreter's program and what is required to achieve federal certification.

[9] *See* Minnesota Judicial Branch, *What is the Function of the Minnesota Court Interpreter Program?*, available at http://www.courts.state.mn.us/?page=455, for further information about the requirements to be court rostered and certified in the Minnesota court system.

[10] Minnesota offers certification in the following languages: Spanish, Hmong, Somali, Arabic, Mandarin, Cantonese, Haitian-Creole, Laotian, Korean, Russian, Vietnamese, French, and Portuguese.

[11] However, there are often clues that the interpreter is not skilled or is interpreting poorly. For example, if the client testifies that he or she does not remember something, and the interpreter says "he said that he doesn't remember," the attorney should be on notice that the interpreter is not accurately and faithfully translating. It is the duty of an interpreter to translate exactly what is said and at the same level of discourse as the speaker. This means that an interpreter should not summarize, explain, or verbalize his or her personal opinions. Ivanchvili, *supra* note 2, at 39.

[12] *Id*.

[13] *Id*. at 40.

[14] A well-known example of how important it is to use an interpreter who is at least familiar with the client's regional dialect is a Cuban defendant convicted on drug charges for the words "!Hombre, ni tengo diez kilos!" which can be properly translated as "man, I don't even have ten cents" by a Cuban speaker, or as "man I don't even have ten kilos," which is how the court interpreter translated them. The speaker used the words in response to a request for a loan. However, because of the interpreter's translation, the man was unjustly convicted of the drug charge. Fortunately, the error was identified and the conviction overturned. Michael B. Schulman, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 Vand. L. Rev. 175, 176 (1993).

[15] Harold Abramson, *Selecting Mediators and Representing Clients in Cross-Cultural Disputes*, 7 Cardozo J. Conflict Resol., 253, 255 (Spring 2006).

[16] *Id*.

[17] An example of the influence of a collectivist culture on an individual's behavior in a legal setting is the following. In one case, a Chinese woman killed her husband and faced a 25-year sentence if convicted for murder. She had a strong self-defense claim but refused to plead to a lesser offense because she did not want to humiliate herself, her children, and her ancestors by admitting guilt for the murder. She felt that it was less humiliating to face the years in prison than the shame that would be experienced by her family if she were to plead to even a lesser crime. Understanding the importance of community and family within a different cultural context than the American culture allowed the woman's attorney to understand the motivation behind her decision. Sue Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 Clin. L. Rev. 33, 47 (2001).

[18] Camarota, *supra* note 1, at 1.

[19] *See* the website of the Justice Studies Center of the Americas, an intergovernmental agency that researches the reforms and carries out training and courses for participants in the legal systems throughout Latin America. http://www.cejamericas.org/.

[20] Immigrants from Central America accounted for 36.9% of the foreign-born population in the United States in 2003; only 37.7% of those immigrants had a high school education. In contrast, 87.4% of the Asian immigrants had a completed high school education. U.S. Government Census Bureau, *The Foreign Born Population in the United States: 2003*, 1, 5 (2003), available at http://www.census.gov/prod/2004pubs/p20-551.pdf.

[21] Ivanchvili, *supra* note 2, at 40-41.

[22] *Id*.

[23] Latin Americans refer to citizens of the United States as "North Americans." A U.S. attorney, when dealing with someone from Latin America, should therefore refer to the person as "Latin American" or "South American" or use the appropriate national origin adjective (Cuban, Chilean, Ecuadorian, etc.).

[24] Ivanchvili, *supra* note 2, at 40-41.

Karen Lundquist (William Mitchell 2005) is a partner and owner of the law firm Lundquist & Lange, LLC and deals in employment and business law matters, representing both employers and employees. She is also an adjunct professor at William Mitchell College of Law and co-director of the Business Practicum course. Ms. Lundquist has spent considerable time living and traveling abroad and speaks Italian and Spanish; she has drawn on her own experiences in writing this article. Before going to law school, she lived in Rome, Italy for 12 years, where she taught English as a foreign language. Ms. Lundquist also spent 8 months in Santiago, Chile doing a research project on the Chilean criminal justice system in 2005 - 2006.

An Introduction to Representing Taxpayers: From Audit Through Tax Court

Mike O'Brien and Ben Wagner

Understanding the phases of a tax controversy with the Internal Revenue Service (hereinafter, "IRS") is essential to efficiently and successfully resolving a taxpayer's claim. Unlike many litigation arenas, practitioners can often resolve tax controversies at the administrative level, without asking for the court's assistance. This article is an introduction on how to represent a taxpayer through the different phases of a tax controversy.

The Audit Examination

There are two types of audits, "letter audits" where the IRS proposes adjustments to a tax return by letter, and "field audits" where the IRS assigns an employee, called a Revenue Agent (hereinafter, "Agent"), to conduct a thorough examination of the taxpayer's return. The focus of this section is how to represent a taxpayer who is subject to a field audit.

When resolving a case in a field audit, the practitioner must be aware that the Agent is the initial finder of fact. This is the Agent's greatest power. A good presentation of the facts can eliminate an issue at the earliest stages. The Agent will likely ask to conduct an in-person interview with the taxpayer to collect information. In most circumstances, this interview is helpful as it gives the practitioner the chance to stress the important facts and eliminate any misunderstandings. The practitioner should accompany the taxpayer to this interview and supply the Agent with all of the factual and legal information to persuade the Agent to make a favorable determination. The Agent may ask the taxpayer to provide additional information. If this happens, the practitioner should ask the Agent to issue a written information request to both track the course of the examination and verify that the taxpayer is complying with these requests.

If there is a dispute over a legal issue, the practitioner should provide any relevant legal authority which supports the taxpayer's position. The Agent, however, does not have the authority to act contrary to a stated IRS position. Thus, even if the practitioner presents strong legal arguments, the Agent may still choose to propose an assessment.

In most cases, the statute of limitations for the IRS to assess additional taxes is three years from the date when the taxpayer filed the tax return. Sometimes, during the course of an audit, the time for assessing additional taxes is close to expiring. If the Agent believes he or she will not complete the audit with enough time for the taxpayer to appeal the determination, the Agent may ask the taxpayer to voluntarily extend the statute of limitations for assessment. If the taxpayer does not extend the statute of limitations, the Agent will issue a final report and assess any additional taxes and penalties based on the information the Agent has collected to that point.

Whether to extend the statute of limitations for assessment is a judgment call. If the practitioner is making progress with the Agent in a timely manner, extending the period will most likely be the best decision as it leaves the period open for later adjustments in the taxpayer's favor. If the Agent is delaying, searching for more adjustments, or simply harassing the taxpayer, the practitioner should ask the Agent to complete the final

report so the taxpayer can file an appeal. A practitioner must examine all implications, good and bad, before refusing to sign an extension.

At the end of an examination, the Agent will issue a final report. This final report will show all of the adjustments, and any proposed refund or additional tax and penalty. The Agent should send the "30-day" letter with the final report. The 30-day letter provides a taxpayer 30 days to accept an Agent's final report or request an appeals hearing, in writing, with the IRS Appeals Office. If the statute of limitations for assessment is about to expire, instead of issuing the 30-day letter, the Agent will issue a Statutory Notice of Deficiency. The Statutory Notice of Deficiency allows the taxpayer to file a petition in United States Tax Court (hereinafter, "Tax Court") if he or she does not agree with the Agent's determination. If a taxpayer files a petition in Tax Court without having previously met with an Appeals Officer, then the IRS will still usually give the taxpayer an opportunity to meet with an Appeals Officer to work toward a resolution.

The Appeals Process

Appealing an audit determination gives the taxpayer a second chance to demonstrate his or her position, although this time, to an Appeals Officer. The Appeals Officer's goal is to reach a disposition of the case which reflects the probable result of litigation. The Appeals Officer will work with the evidence provided to the Agent and any additional information the practitioner provides. Unlike the Agent, the Appeals Officer's authority to consider evidence is broad. The Appeals Officer will consider the hazards of litigation, the credibility of the parties involved, the burden of proof, the probative value of the evidence, and relevant legal authorities.

To appeal an audit determination, the practitioner must send a written appeal within 30 days of the Agent's 30-day letter. The written appeal should include:

1. A request for a conference with an Appeals Officer;
2. The name, address, and Tax Identification Number of the taxpayer;
3. Date and symbols contained in the 30-day letter;
4. A schedule of the disputed adjustments;
5. The factual background for the appeal;
6. The legal basis for the appeal; and,
7. Signatures, under penalty of perjury, of the taxpayer and/or the practitioner.

The practitioner should prepare the written appeal as if he or she is preparing for trial. Demonstrate that the appeal is thought-out, documented, and supported with legal authority. Cite legal positions from case law; statutes and regulations; revenue rulings or procedures; private letter rulings; or technical advice memoranda. Also, include copies of any documents which support the taxpayer's position.

The Appeals Officer will generally schedule a hearing within a few months after he or she received the written appeal request. The practitioner's biggest advantage is knowing the case in much greater detail than the Appeals Officer. If the taxpayer's credibility is important to the issue, and assuming the taxpayer is credible, then the taxpayer should attend the hearing. The taxpayer can provide the answers to odd questions which bring the case to life and make it believable. The practitioner should also formulate a settlement proposal in advance of the hearing.

During the hearing, the practitioner should emphasize the taxpayer's strongest points and explain how the Agent misinterpreted the facts or law. Admit the weak points of the

case, but explain why these points are not relevant or how other factors outweigh them. Address all of the Appeals Officer's concerns. Show the Appeals Officer that it will be risky for the IRS to proceed to trial. The greatest hazard for the IRS is the precedential effect of the taxpayer's success. Most importantly, ask the Appeals Officer why he or she disagrees with the taxpayer's position. Ask for the legal authority on which the IRS is relying. Give the Appeals Officer as much ammunition as possible to decide in the taxpayer's favor.

If the Appeals Officer decides against the taxpayer, then the Appeals Officer will issue a Statutory Notice of Deficiency. The taxpayer must then weigh the benefits and costs of filing a petition in Tax Court.

United States Tax Court

For the Tax Court to have jurisdiction to hear a case, the IRS must first issue a Statutory Notice of Deficiency. This notice allows the taxpayer 90 days from the date of the notice to file a petition in Tax Court. Practitioners can review the technical requirements for filing a petition in Rules 30 through 41 of the Tax Court's Rules of Practice and Procedure. IRS Area Counsel must file an answer to the petition within 60 days from the date of the service of the petition.

Discovery in Tax Court is less formal than other litigation arenas. Tax Court Rule 70(a) provides that the Tax Court expects the parties to attempt to achieve the objectives of discovery through informal communications before utilizing formal discovery procedures. Informal conferences between the IRS Counsel and the petitioner for discovery purposes are typically called "*Branerton* conferences," after the leading Tax Court case on discovery procedures.[1] Each side must at least offer the other side the opportunity for a *Branerton* conference before resorting to the formal methods of discovery.

Another unique aspect of practicing in Tax Court is the Court's heavy reliance on the parties agreeing to stipulate to all undisputed facts. The Court treats each stipulation as a conclusive admission. The Court expects the parties to stipulate to all documentary evidence unless either party is questioning the authenticity of the evidence or using it for impeachment. Therefore, there are few issues of fact left in dispute for trial.

Conclusion

The tax practitioner must understand the IRS's powers and limitations at each stage of the tax controversy to efficiently and effectively resolve a tax controversy. Unlike many other areas of the law, a taxpayer has the opportunity to present his or her case to more than one decision maker. In many cases, the practitioner can find a workable solution without asking for the Tax Court's assistance.

Note

[1] The leading cases for discovery procedures in Tax Court are *Branerton v. Comm'r*, 61 T.C. 691 (1974) and *Schneider Interests v. Comm'r*, 119 T.C. 151 (2002). The lesson practitioners should learn from *Branerton* and *Schneider Interests* is that the Tax Court will require the parties to work through discovery on an informal basis before allowing formal discovery.

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Law Clerks' Tips for Practicing in State District Court

Three law clerks share their opinions, and a few secrets, on how to avoid embarrassing situations and successfully navigate through state district court.[1]

Laura Hurd, Jessica Kramlinger Altmann, and Janie Paulson

1. Know Your Judge.[2]

Each judge conducts his or her courtroom and chambers differently. If you are appearing in front of a judge for the first time, ask co-workers or old classmates about the judge.

- **Children, Courtesy Copies, Phone Conferences, and Phone Appearances:** Discovering a judge's preferences represents to the judge that you have reviewed orders and inquired about chambers policy. If you are not able to determine the judge's policies from co-workers, local rules, or previous orders, call the law clerk and ask.

- **Civil Court:** Scheduling orders and pre-trial orders are the road map in a civil case. They provide most of the answers you will have about a civil court judge. Consequences for not following these orders include unfinished discovery, having motions or witnesses stricken, dismissal of a case, and/or sanctions.

- **Family Court:** Family cases can be highly emotional and often involve the well-being of children. Only the litigants truly know the full extent of the family situation. Know what outside resources are available to your client.[3] Think creatively, be proactive, and prepare proposals to present to the family court judge in support of your motion.

- **Criminal Court:** The majority of cases in criminal law settle through plea negotiations. It is important for both parties to consult the judge before entering a plea on the record, especially if the plea is unusual.[4] Each case is unique and the judge may want additional information about why a particular agreement has been reached. Consulting with the judge before trial also gives a new attorney an opportunity to meet the judge.

2. Know Your County.

Individual counties do things differently. Read local rules. Familiarize yourself with practices and procedures in each county. Original documents, with the exception of exhibits, must first be filed with clerk of court in the correct division no later than the submission due date. Do not send or give original memoranda and affidavits directly to the judge.

3. Be Prepared for Court Appearances.

- **Check the Details:** Arrive early to unfamiliar courthouses. Prior to the hearing, find out what courtroom you are in. Double check the date and time. Confirm that an interpreter has been ordered. Do not let a client bring a child, unless it has been cleared with the judge.[5]

- **Pre-trial Hearings:** The judge will expect the parties to discuss the issues scheduled for trial prior to coming into the courtroom. Give the judge details as to what issues will need a separate hearing prior to trial, what issues will be tried, and what issues will be stipulated to.

- **Prepare Your Client:** Make sure your client has realistic expectations and knows what will occur during a court hearing. Prepare your client for the possibility that a judge may take a matter under advisement or rule in favor of the other party. Give your client suggestions on how to follow courtroom decorum rules, i.e. what to wear, whether to talk to the other party, and how to address the judge.

- **Properly Prepare Documents:** Make sure documents are properly filed and fees have been paid. If a filing is missing, the blame will be on the attorney, and the document may be stricken. Do not ask the clerk to make copies or check to make sure your documents are filed.

4. The Court Reporter and Clerk are Vital to Your Success.

Judges rely heavily on their clerk and court reporter. This reliance goes further than administrative duties. Here are a couple of hints to improve your relationship with judges' staffs:

- **"Check In" with the Staff When You Enter Court:** Introduce yourself to the clerk and the court reporter. State which party you represent. Provide a business card if you have one. Make sure your client does not wander off and is ready to start when the case is called.

- **Be Considerate of the Court Reporter:**[6] Organize exhibits with opposing counsel prior to a hearing. Speak slowly and clearly so the court reporter can take down your arguments. Failure to state a case citation or explain a technical term results in incomplete transcripts. Remember, the court reporter simply takes down what you say. If you do not say something on the record clearly, it will not appear in the transcript. An attorney must file a written request for a transcript. Calling a court reporter to request a transcript is not sufficient.

- **Keep the Clerk Informed:** Update the judge's clerk and opposing counsel of scheduling conflicts ahead of time. This keeps the proceedings moving smoothly. Make the clerk aware if you are going to be late for a court hearing. When calling chambers, always have a court file number to reference.

- **Be Respectful of Staff and Opposing Counsel:** Maintaining a professional and respectful attitude toward opposing counsel and all court staff is impressive to the court and sets the tone for your client. Disrespectful behavior often hinders your ability to adequately present your case. Being a zealous advocate does not require you to be personal or aggressive.

5. Clear, Concise, and Clean Written Arguments Are Key to Your Success.

A clear and clean written argument illustrates to the judge that the attorney is prepared, professional, and competent. Judges often read poorly written and un-proofed arguments. Here are the worst offenders:

- **Practice Guides, Syllabus Notes, Incorrect Citations, and Keynotes are Not Rules of Law:** Citing these represents to the judge that a lawyer is overworked, trying to pull off an unviable argument, or both. Online legal sites provide quick ways to cite check. Always double check that legal arguments are correctly cited and are actual rules of law.

- **Proofread:** In addition to using proofreading software, do extra proofreading. Concentrate on proofreading errors spell check cannot catch. This can prevent embarrassing errors such as an incorrect case file number or an incorrect party named throughout the document. When an attorney spends a few extra minutes proofreading, the judge can take more time weighing the argument and less time trying to figure out what the attorney is trying to say.

- **Triple Check Form Memoranda:** Using a form memo or memo from another attorney without cite checking, party checking, and spell checking can result in illogical and unreadable briefs that may be stricken. Make sure that the case file number and parties' names are correct in the caption and throughout the memorandum.

6. **Do Not Burden the Court with Issues That Should Be Resolved Outside of Court.**

- **Be Realistic About Your Caseload:** It is the attorney's responsibility to know what kind of caseload he or she can effectively handle. Mismanagement of a caseload often results in negative outcomes for the client and may lead to mental health and substance abuse problems. If you find yourself in a difficult situation or think a colleague may be suffering, there are many places a lawyer can turn to for help.[7]

- **Resolve Minor Issues Outside of Court:** Failing to resolve issues outside of court reflects poorly on all attorneys involved. If you have a scheduling conflict or discovery issue, attempt to solve these issues with opposing counsel before going to the court for assistance.

- **If You Do Have to Get the Court Involved, Keep It Professional and Short:** Do not get involved in a "correspondence battle" by sending multiple letters that complain about opposing counsel. Keep phone conferences professional and discovery motions short.

Summary: State District Court Quick Tips

1. Be familiar with the specific rules, procedures, and policies of your judge and county.
2. Be prepared for court appearances and know the details of where and when to appear.
3. Be considerate of the judge's staff as they are vital to your success.
4. Be clear and concise in written submissions. Proofread!!!
5. Be proactive and attempt to solve issues without court involvement.

Notes

[1] DISCLAIMER: The opinions contained in this article are meant to provide newer lawyers with tips on conducting cases in state district court. The opinions herein are not meant to be rules for district court or a practice guide. They are solely the opinions of three district court clerks. This article does not reflect the clerks' judges' opinions, the 2nd Judicial District, or any division therein. Each judge and county has

different rules, procedures and polices. Do not rely solely on this article. Consult the rules, procedures, and policies of the judge and county prior to appearing in court or filing a document.

[2] Secret – Knowing the judge's likes and dislikes is the secret to a smoother, often more effective, day in court.

[3] Secret – There are many resources available to family law litigants prior to a hearing before the court, such as Early Neutral Evaluation (ENE), Financial Early Neutral Evaluation (FENE), mediation, or work with a parenting time consultant. These services vary by county. Prior to going to court, try to resolve your issues using these resources.

[4] *See* Minn. R. Crim. P. 15.04, subd. 3(1).

[5] Secret – Bringing a child to court often complicates the court proceedings and can frustrate a judge. Additionally, it can be disturbing and harmful for a child to see their parents fighting or watch a parent go to jail.

[6] Secret – Many attorneys overlook the fact that the court reporter is an integral part of the judge's staff. Being thoughtful of a court reporter's duties may perhaps lead to a more effective relationship with a judge.

[7] Lawyers Concerned for Lawyers is one such organization. *See* http://www.mnlcl.org/.

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Labor Law Developments

Emily Ruhsam

I took a labor law class in law school. There were ten other students in my class. Our professor told us when he was in law school there were two sections of labor law classes, each with well over fifty students. This is just one indication of the interest in labor law all but vanishing from the mainstream; until recently.

Most notably, the Employee Free Choice Act ("EFCA") is reviving interest in labor law as one of the most radical changes ever proposed to the National Labor Relations Act ("NLRA"). Passage will increase unionization levels in the private sector as well as significantly change the union organizing and collective bargaining processes. All employers, not simply unionized employers, will be affected. As such, the general practitioner is well-advised to keep all labor laws, including EFCA, in mind when analyzing a client's workplace issues.

The Employee Free Choice Act

EFCA was the most highly publicized labor and employment law issue during the 2008 presidential election, and possibly in decades. EFCA, first introduced in the 110th Congress, is a bill heavily backed by labor unions and introduced by Democratic lawmakers.[1] Many cite the steady decline in private sector union membership as the driving force behind

EFCA. Specifically, 7.6% of the private sector workforce was unionized in 2008 as compared to 34% in the 1950's.[2] In 2007, EFCA passed the U.S. House of Representatives by a vote of 241 to 185. The vote was drawn along party lines; two Democrats voted against it while thirteen Republicans voted in favor of it.[3] On March 10, 2009, the same bill was introduced in the 111th Congress.[4] As of the date of this writing, no further action has been taken on the bill.

During the presidential campaign many of you saw the infamous commercials featuring Vince Curtola, more widely known as union mafia leader "Johnny Sack" from the HBO series *The Sopranos*, which was sponsored by the Coalition for a Democratic Workforce. In the commercial, while a worker was in a voting booth deciding whether to vote for or against the union, Vince pulls back the curtain and says "just do it already." If EFCA is passed, this may become a reality. EFCA will essentially eliminate secret ballot elections for employees choosing for or against a union. This is a dramatic change from the current election/certification process which requires that the National Labor Relations Board ("NLRB" or "Board") direct a secret ballot election if at least 30 percent of the employees in a bargaining unit sign authorization cards.[5] If the union receives a majority (50 percent plus one) of votes cast by those employees voting, it will win the election.[6] Only if the union prevails in the election will the Board certify the union.[7] Unions may also currently obtain certification via "card check" -- voluntary recognition by the employer if the union receives a majority of authorization cards from the employees -- but recognition is voluntary and not required.[8]

Here is how the process will work if EFCA is passed. Once a majority of employees sign authorization cards and the union is certified or demands recognition, the employer will be forced to commence the bargaining process. If no agreement is reached within 120 days of bargaining, the employer will be subject to an arbitrator-created union contract.[9] Specifically, if there is no agreement within 90 days of bargaining, the employer will be required to enter into mediation.[10] If there is no settlement within 30 days of mediation, an arbitration panel will create a collective bargaining agreement for the parties, which will be binding for two years.[11] This is a significant change from the current process. Currently, if the employer and union are unable to come to an agreement during the collective bargaining process, labor law provides for competing "economic weapons," strike, lockout, replacement of strikers, unilateral imposition of the employer's "final offer" to change one or both parties' positions to achieve an agreement, or no contract may even be reached. In addition to the elimination of the secret ballot election and forced arbitrator-created union contracts, EFCA adds greater penalties for employer non-compliance.[12]

Preservation of Secret Ballots

In an attempt to circumvent EFCA, the Secret Ballot Protection Act of 2009 (S. 478) was introduced in the House and Senate on February 25, 2009.[13] This bill, if passed, will make it an unfair labor practice if an employer does not hold a secret ballot election. This is just the first example of what will likely be many attempts to block the passage of EFCA in its current form.

Minnesota

In Minnesota, a right to work law was introduced on January 22, 2009.[14] Right to work laws are currently in force in twenty-two states and prohibit unions and employers from requiring union membership or payment of union dues as a condition of employment, either before or after hire. In the 110th

Congress, there was a bill introduced that prohibited all right to work laws in all states.[15] As of the date of this writing, this bill has not been introduced in the 111th Congress.

Current Status of the Board

The NLRB is made up of five Presidentially-appointed members and primarily acts as a quasi-judicial body in deciding cases. Traditionally, the Board has two Democratic members, two Republican members, and a fifth member from the President's party. For only the second time in the Board's history, it has been operating with only two members: Wilma B. Liebman (D) and Peter C. Schaumber (R). In keeping with the historical makeup of the Board, President Obama is expected to appoint two Democrats and one Republican to fill the vacancies. As of the date of this writing, President Obama has made two appointments to the Board. Both appointments, Craig Becker and Mark Pearce, are Democrats and represent labor unions. Becker currently serves as Associate General Counsel to the Service Employees International Labor Union and American Federation of Labor & Congress of Industrial Organizations while Pearce is currently a founding partner of New York's pro-labor law firm of Creighton, Pearce, Johnsen & Giroux.

The decisions of the Board change with the shifts in politics. When Democrats control the Board's majority, the decisions tend to favor labor unions while, if Republicans control, the decisions tend to favor management. When the "Obama Board" takes over, many of the "Bush Board" decisions will most likely be overturned, even if EFCA and other bills are not passed. This includes areas such as employees' rights to use their employer's email system, the rules relating to employer's voluntary recognition of unions, "salting rules" (union members and organizers applying for positions with non-union employers) and the definition of a supervisor under NLRA.

Recommendations

Attorneys dealing with any workplace issue are well advised to keep on the lookout for underlying labor law issues. With the new developments and changes, there could be significant labor law issues lurking underneath what appears to be a simple employment law issue.

Notes

1 Employee Free Choice Act, H.R. 800, 110th Cong. (2007).

2 U.S. Bureau of Labor Statistics, Union Members Summary, http://data.bls.gov (last visited Oct. 14, 2008).

3 T.R. Goldman, *Enjoying a Democratic Congress, Labor Movement Urges Reform to Make It Easier to Form Union*, Broward Daily Bus. Rev., at 10 (Mar. 21, 2007).

4 Employee Free Choice Act, H.R. 1409, S. 560, 111th Cong. (Mar. 10, 2009).

5 Taft-Hartley Act § 101, 9 (codified as amended at 29 U.S.C. §§ 159(e) (2000)).

6 *Id.* at § 159(a).

7 *Id.* at § 159(c)(1)(B).

8 *Id.*

9 *See supra* note 1.

10 *Id.*

11 *Id.*

12 *Id.*

13 Secret Ballot Protection Act, H.R. 1176, S. 478, 111th Cong. (Feb. 25, 2009).

14 H.F. 169, 2009 Leg., 86th Sess. (Minn. 2009).

15 To repeal a limitation in the LMRA regarding requirements for labor organization membership as a condition of employment, H.R. 6477, 110th Cong. (2007).

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The Upside to a Down Economy: Two Estate Planning and Retirement Planning Strategies for the Current Recession

Cory Wessman

Over the past year, as the stock market has continued to take a beating, some of my friends and clients have adopted a new approach to their financial planning. Rather than re-balancing their portfolio, researching new investment options, increasing contribution percentages, or switching advisors, they dump their unopened account statements directly into the paper shredder.[1] Apparently, it is better to be ignorant than depressed.

But instead of sticking one's head in the sand during this recession, we should be aware of how our otherwise dark, dreary, and all-around depressing economic climate affords our clients certain opportunities to minimize income, estate, and/or gift taxes. This article briefly summarizes two different planning strategies for you to consider on behalf of your clients. It describes how each of these two planning strategies could yield significant benefits both (1) during retirement and (2) to the client's family following death.

I. Roth IRA Conversion

The first planning strategy is to convert "traditional" IRA accounts into "Roth" IRA accounts. A traditional IRA is an individually-owned savings account in which the owner can receive a tax deduction upon contribution of assets to the account.[2] Assets accumulate in the traditional IRA account free of income taxes. Then, as assets are withdrawn from the account during retirement, the owner pays ordinary income tax on all withdrawals. In contrast, a Roth IRA is an individually-owned savings account that does not receive an income tax deduction upon contribution. However, most withdrawals from a Roth account following retirement, including all appreciation in the value of the assets initially contributed to the Roth, are free of income tax.[3]

Owners of traditional IRAs can convert their accounts into Roth IRAs if the owner pays income taxes on the full value of the converted IRA assets.[4] In 2009, only taxpayers with less than $100,000 in modified adjusted gross income are permitted to convert traditional IRAs to Roth IRAs. Beginning in 2010, however, there is no such income limitation on Roth conversions; even taxpayers with more than $100,000 in modified adjusted gross income per year can convert some or all of their traditional IRAs to Roth IRAs.[5] Conversions made in 2010 are particularly attractive because taxpayers who convert in 2010 can wait to pay one-half of the income tax liability in 2011 and the other half in 2012.

A. Retirement Planning:

For retirement planning purposes, there are two reasons why now is a good time for some of your clients to consider a Roth conversion:[6]

1. Decline in Asset Value: The upside of this down economy is that, upon conversion, your client will have an income tax liability commensurate with a lower stock portfolio value.

2. Increase in Income Tax Marginal Rates: President Obama has recently indicated that he will consider allowing the income tax rate cuts signed into law by President Bush in 2001 to sunset, thus effectively raising the top marginal income tax rate to 39.6%.[7] For clients who are at or near the highest marginal tax bracket, it will clearly be better to pay income taxes now (at a 35% rate) rather than later (at a 39.6% rate).

Once converted, a Roth IRA provides more flexibility than a traditional IRA in taking distributions. Following a client's retirement (or, if the client retires before age 70.5, then upon the client's reaching age 70.5), clients owning traditional IRAs must take "required minimum distributions" every year and pay income tax on the amount withdrawn.[8] Consequently, the client may be forced to take a required minimum distribution even when the distribution is not necessary to maintain the client's standard of living during retirement. In contrast, a client who owns a Roth IRA can withdraw as much (or as little) from the Roth IRA as the client needs during retirement and allow the unneeded portion to continue to appreciate free of income tax.[9] The owner of a Roth IRA is therefore free to take distributions, free of any income taxes, as his or her budget requires.

For those clients who have many years of work ahead of them and who are fortunate enough to see substantial appreciation in the value of their assets, the Roth IRA will yield tremendous income tax savings during retirement. Even for those clients who are closer to retirement, the factors noted above may make a Roth conversion more attractive vis-à-vis a traditional IRA, depending upon their particular circumstances.

B. Estate Planning:

Traditional IRAs are not tax-efficient wealth transfer vehicles because the client's beneficiaries must pay income taxes when the beneficiaries receive distributions from the inherited traditional IRA. The total value of a traditional IRA is therefore only partially comprised of assets that will actually be received by the client's beneficiaries, as a portion of the traditional IRA will be paid to Uncle Sam in the form of income taxes. Moreover, if a client dies owning assets in excess of estate tax exemption amounts (see summary below), the client's estate will pay estate tax on the total value of the traditional IRA, including the portion that will eventually go to Uncle Sam by way of income taxes.[10] In many instances, the beneficiaries of the traditional IRA may be entitled to an income tax deduction for the estate taxes paid on the traditional IRA.[11] Regardless, the amount received by the beneficiaries from the traditional IRA following death will be reduced by both estate and income taxes. In contrast, while a Roth IRA is subject to estate taxes, the beneficiary of a Roth IRA is not generally subject to income taxes.[12] The Roth IRA is therefore a more tax-efficient wealth transfer vehicle.

II. Spousal Gift Trust

The second planning strategy is the use of a type of irrevocable trust known as a "Spousal Gift Trust." This strategy is appropriate for clients who are Minnesota residents and who have a total net worth in excess of $2 million. This strategy should be in addition to, and not in lieu of, a typical credit shelter trust estate planning strategy.[13]

Under this plan, the client creates an irrevocable trust ("Trust") for the benefit of his spouse and children, and then gifts cash, stock, bonds, life insurance, real estate, or

other assets to the Trust. As long as the client retains no control over the assets in the Trust, these assets are not included in the client's taxable estate at death.[14] Moreover, because the client's spouse is named as the primary beneficiary of the Trust during the spouse's lifetime, distributions can be made to the spouse from the Trust in order to maintain the spouse's standard of living. Provided that the client and his spouse live together until death, distributions to the spouse from the Trust also indirectly benefit the client.[15] Following the spouse's death, all of the assets remaining in the Spousal Gift Trust pass free of estate or gift tax for the benefit of the client's children.

In order to understand the estate planning benefits achieved through the Spousal Gift Trust strategy, clients should be advised of current federal and Minnesota estate and gift tax law:

Gift Taxes. A U.S. citizen can transfer up to $1 million free of federal gift tax.[16] Gifts in excess of the gift tax exemption are taxed at a 45% rate. Minnesota has no state-level gift tax.

Estate Taxes. A U.S. citizen dying in 2009 can gift, at death, up to $3.5 million free of federal estate tax. Gifts in excess of the estate tax exemption are taxed at a 45% rate. Minnesota imposes a separate state-level estate tax on estates over $1 million, with tax rates varying from 9% to 41%.[17]

In 2010, the federal estate tax is scheduled to disappear altogether.[18] President Obama has recently proposed making permanent the 2009 estate tax exemption amount of $3.5 million.[19] Regardless of whether the federal estate tax exemption changes from its current exemption amount, Minnesota residents should not lose sight of the relatively low Minnesota estate tax exemption amount ($1 million per person) and structure a plan to minimize both Minnesota and federal estate taxes.

Federal Unified Credit. The federal estate tax exemption and federal gift tax exemption are tied together through a unified credit. Under this unified credit system, any lifetime gifts *other than* annual exclusion gifts reduce not only one's remaining exemption from federal gift tax but also reduce one's remaining exemption from federal estate taxes.[20]

Annual Exclusion Gifts. If a lifetime gift qualifies as an annual exclusion gift, the gift will not decrease the client's unified credit.[21] Each year, a client can make a certain amount of present interest gifts to any natural person as an annual exclusion gift such that the value of that gift does not reduce the client's unified credit. In 2009, that amount is $13,000. Between a client and his spouse, the couple could together gift each child up to $26,000 without reducing their unified credits.

A. Estate Planning:

Now would be a good time for high net-worth clients to consider a Spousal Gift Trust strategy for the following two reasons:

Leverage Low Asset Values for Gift Tax Purposes. First, by gifting assets now, while asset values are low, the client uses a smaller amount of (1) his unified credit and/or (2) his annual exclusion amount to lock in a low value. Following the distribution of assets to the Trust, the assets are owned and controlled by the Trustee, not the client. The distribution of assets to the Trust will therefore be considered a gift for gift tax purposes and any subsequent appreciation in the value of the assets is not subject to estate taxes at the client's death.

Maximize Annual Exclusion Gifts. Second, if the client is not already maximizing his annual exclusion gifting opportunities to children and grandchildren, the Spousal Gift

Trust can be structured to fully utilize these opportunities. Unlike the unified credit, the opportunity to make annual exclusion gifts is a "use it or lose it"-type exemption. It is therefore imperative for wealthy clients to take full advantage of annual exclusion gifting opportunities.

Under this plan, the client will make annual gifts to the Trust of assets having a value equal to the product of: (1) the annual exclusion amount for that particular year times (2) the number of beneficiaries of the Trust. By way of example, a married client who has two children could in 2009 make a gift to the Trust of $52,000 (2 children times $26,000 to each child) without using any unified credit by reason of the gift.[22] In order to make the contributions qualify as present interest gifts, each beneficiary must be notified of the right, for a limited time period, to withdraw some of the assets the client contributed to the Spousal Gift Trust each year.[23] Following the end of this withdrawal period (generally 30 days or more), the contributed assets vest permanently in the Trust.[24] By providing the client's children (or grandchildren) with withdrawal rights, the gifts are considered present interest gifts and thereby qualify for the annual exclusion.

B. Retirement Planning:

While the use of a Spousal Gift Trust is primarily an estate planning strategy, the Spousal Gift Trust also yields retirement planning benefits because of how the Spousal Gift Trust is administered for the client's spouse following retirement. In these times of economic turmoil, clients are less likely to feel wealthy enough to want to make gifts of substantial value to children or grandchildren. Understandably, clients don't want to give away assets that they might later need to maintain the standard of living that they currently enjoy. However, unlike gifts made directly to children or grandchildren, gifts made to the Spousal Gift Trust are owned and administered in the Spousal Gift Trust. If the client's spouse later needs the assets during retirement, those assets will continue to be available to him or her.

While the assets gifted to the Spousal Gift Trust will be available for use by the client's spouse following the client's death, the assets will not be available to the client following the spouse's death. Therefore, the client should not gift any assets which the client may later need if his spouse does not survive him. Here, as with all retirement planning and estate planning matters, the Spousal Gift Trust strategy should not be implemented without the active involvement of the client's financial planner and estate planning attorney. The financial planner's involvement will be instrumental in projecting future cash flows, living expenses, and the amount that can safely be gifted during the client's lifetime without negatively impacting the client's future living standards. The estate planning attorney can provide guidance on additional planning techniques that can provide flexibility without additional estate tax liability.

In summary, now is an excellent time for your clients to consider either a Roth conversion or a Spousal Gift Trust. With a Roth conversion, the client can lock in low asset values for income tax purposes, thereby freeing the savings account, and all future appreciation, from future income taxes. With a Spousal Gift Trust, the client can lock in low asset values for estate and gift tax purposes, thereby freeing the assets, and any future appreciation, from future estate tax.

Notes

[1] The author must disclose that he, too, has recently taken this new highly-sophisticated approach to financial planning.

[2] Internal Revenue Code ("IRC") § 408(a). The amount of the account owner's deduction is limited to $5,000 per year for contributions made in 2009. IRC § 219(a)(1)(A).

[3] Withdrawals from a Roth IRA are not taxable provided that the contributions were held in the Roth for at least five years and the withdrawal was made either (i) on or after the owner reaches 59.5 years of age, (ii) after the death or disability of the contributor, or (iii) for a first-time homebuyer expense. IRC § 408A(d).

[4] If the client is not yet at least 59.5 years of age, then in order to avoid penalties on early distributions from the traditional IRA, the client should use non-retirement assets to pay the income tax on the converted assets.

[5] The Tax Increase Prevention and Reconciliation Act ("TIPRA") of 2005 (P.L. 109-222) repealed IRC §408A(c)(3)(B) effective for taxable years beginning after December 31, 2009.

[6] Those who are disqualified from converting in 2009 by income limitations could start converting on January 1, 2010.

[7] *Inside Obama's Budget: Who Gets A Tax Break?* Star Tribune News Service, Feb. 27, 2009.

[8] The tax code requires the first distribution to occur by April 1 of the calendar year following the later of: (1) the owner's retirement and (2) the owner's attaining age 70.5. IRC § 401(a)(9)(C)(i).

[9] IRC §408A(c)(5).

[10] IRC §§ 2033, 2039.

[11] IRC § 691(c).

[12] The assets must be held in a Roth IRA for at least five years even if the account owner dies within that five-year period. As a result, if the client did not open the Roth IRA at least five years before his death, then the beneficiary must wait until the end of this 5-year waiting period before taking tax-free distributions. IRC § 408A(d).

[13] Married clients with a total net worth near the Minnesota estate tax exemption amount ($1 million) should have an estate planning attorney review the client's current estate planning documents to (1) use Credit Shelter Trust planning to make use of each of the client's and spouse's remaining estate tax exemption amounts and (2) make sure that the Credit Shelter Trust is funded to the appropriate level at the first death (i.e., either the Minnesota or federal exemption amounts, depending upon the client's particular circumstances).

[14] The client should not be a Trustee of the Spousal Gift Trust. IRC § 2036. Also, in order to keep the assets out of the client's spouse's taxable estate, the client should seek qualified legal counsel on who to designate as Trustee of the Spousal Gift Trust.

[15] Since the irrevocable trust only benefits the client's spouse (and children), a healthy marriage is obviously a prerequisite to this planning technique.

[16] IRC § 2001. Please note that most gifts between spouses (either during lifetime or at death) do not trigger gift or estate tax under the unlimited marital deduction. The planning described in this article specifically relates to either single clients or married clients who wish to minimize estate taxes related to distributions to children or other non-charitable beneficiaries at the second death.

[17] Minnesota Department of Revenue website, http://www.taxes.state.mn.us/estate_trust/other_supporting_content/Estate_faq.shtml. Last visited Apr. 1, 2009.

[18] Under the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), Pub.L. 107-16, 115 Stat. 38, June 7, 2001, the federal estate tax exemption is unlimited in 2010. However, EGTRRA expires on January 1, 2011, which means that the federal estate tax rules in effect before 2001 will become law once again. Under those rules, U.S. citizens have an estate tax exemption of only $1 million, with the top marginal estate tax rate at 55%.

[19] *Obama Plans to Keep Estate Tax*, Jonathan Weisman, Wall Street Journal, Jan. 12, 2009.

[20] For example, a $1 million gift not qualifying as an annual exclusion gift will not only exhaust a client's remaining lifetime exemption from federal gift tax, but it will also reduce the client's remaining federal estate tax exemption to $2.5 million ($3.5 million total exemption minus the $1.0 million gift). IRC §§ 2001, 2502, 2505.

[21] IRC § 2503.

[22] If a client and his spouse agree to "split gifts" for gift tax purposes, then a gift made by either the client or the spouse is deemed to have been made equally by each of them, even if the assets were previously titled in the name of only the client or the client's spouse. IRC § 2513.

[23] *Crummey v. Comm'r*, 397 F.2d 82 (9th Cir. 1968).

[24] Once properly advised of the benefits of not withdrawing assets from the Spousal Gift Trust, most family members holding withdrawal rights decide not to withdraw assets.

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