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A QUARTERLY ELECTRONIC PUBLICATION FROM RPTE

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REAL PROPERTY

SECTION ARTICLES AND NEWS

TRUST AND ESTATE

Relief from International Information Return Penalties for Doctors Victimized by Foreign Trust Schemes

By Stephen J. Dunn[1]

U.S. taxpayers are subject to substantial penalties assessed by the for failure to file international information returns. The author outlines procedure and defenses that have proved successful in avoiding such penalties.

In the 1990s lawyers and others traversed the United States promoting "asset protection" schemes to doctors. The schemes involved transfer of the doctors' financial assets to purported trusts in foreign countries. The schemes capitalized on doctors' fears of financial consequences of malpractice liability.

In the pre-internet days, Dr. Able heard one such promoter, Barker, speak on a cassette-tape newsletter. Barker's scheme resonated with Dr. Able. Dr. Able called Barker, and soon Barker was on retainer with Dr. Able.

Dr. Able's concern about malpractice liability was unfounded. He has never incurred a malpractice claim, and he has always had malpractice insurance coverage.

Barker transferred Dr. Able's financial assets to a custodian in a Caribbean country. Barker then disappeared, without advising Dr. Able on reporting required by the U.S. government of America concerning his foreign financial assets.

Americans are subject to U.S. income tax on their worldwide income. Some Americans have used foreign accounts, trusts, and companies to evade U.S. income tax. For this reason, U.S. law requires rigorous reporting of Americans' interests in such devices, and imposes heavy penalties for failure to perform the required reporting.

The Caribbean custodian invested Dr. Able's financial assets in foreign mutual funds, and gouged the funds periodically for heavy fees. The foreign mutual funds performed poorly.

The scheme made no sense. Dr. Able's financial assets were far less secure in the hands of strangers in Caribbean than they would have been under the protection of our laws in the United States. Dr. Able's financial assets in the Caribbean surely would have been reachable by his judgment creditors, if any he had.

Fortunately, Dr. Able timely reported the gross income from his Caribbean financial assets on his Forms 1040, U.S. Individual Income Tax Return. Tax evasion was not part of his plan.

Dr. Able is not the only physician I have represented who was taken by such an "asset protection" scheme.

Eventually Dr. Able began to doubt the efficacy of his Caribbean investments. Through an attorney in the United States, Dr. Able requested return of his financial assets. The Caribbean custodian, through its attorney in the U.S., requested that a Form 3520-A, Annual Information Return of Foreign Trust with a U.S. Owner, be prepared and filed with the Internal Revenue Service reporting Dr. Able's Caribbean financial assets. A foreign trust with a U.S. owner must annually file Form 3520-A reporting the trust. If the trust fails to file the Form 3520-A, then the U.S. owner is required to file it. In the latter case, the Form 3520-A must be labeled a "substitute" Form 3520-A.

The custodian requested a Form 3520-A concerning Dr. Able's Caribbean financial assets on the theory that the custodian was a trustee with respect to the assets. The custodian styled itself a "trust company." But the custodian really was not a trustee with respect to Dr. Able's Caribbean financial assets. Dr. Able never signed a trust indenture concerning the Caribbean financial assets. At all times Dr. Able retained dominion and control of the assets. Dr. Able and his U.S.-based financial advisor managed investment of the Caribbean financial assets. Whenever Dr. Able requested a distribution from the assets, the Caribbean custodian complied. The Caribbean assets were ultimately repatriated to Dr. Able at his discretion. The arrangement was not a trust but a brokerage account controlled and beneficially owned by Dr. Able.

Dr. Able was referred to a large law firm to secure repatriation of his Caribbean financial assets. The law firm did not demand that the custodian return Dr. Able's Caribbean financial assets to him. The law firm did, however, direct Dr. Able's accounting firm to prepare Forms 3520-A as well as Forms 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, reporting the Caribbean financial assets. The accounting prepared Forms 3520 and 3520-A reporting Dr. Able's Caribbean financial assets not for one year but for the preceding five years. Remember that the Caribbean custodian had requested only that a Form 3520-A be filed with respect to Dr. Able's Caribbean financial assets, and for only one year. Generally, when a Form 3520-A is filed with respect to a U.S. person's foreign financial assets, the IRS will look for a Form 3520 also to be filed with respect to those assets.

Apparently, it did not occur to the law firm or the accounting firm retained by Dr. Able that the arrangement for Dr. Able's Caribbean financial assets was a brokerage account not a trust.

Dr. Able faced much higher penalties with the arrangement for his Caribbean financial assets characterized as a trust rather than a brokerage account. The penalty for failure to timely file a Form 3520 is the greater of $10,000 or the following:

- 35 percent of the gross value of any property transferred by the U.S. person to a foreign trust, for failure of a U.S. person to report the creation of, or transfer to, a foreign trust;

- 35 percent of the gross value of distributions received by the U.S. person from a foreign trust, for failure by a U.S. person to report receipt of a distribution from a foreign trust; or

- 5 percent of the gross value of a foreign trust's assets treated as owned by a U.S.
  person under the grantor trust rules of Internal Revenue Code Sections 671-679 as of the close of the tax year.[2]

The penalty for failure to timely file Form 3520-A is the greater of $10,000 or 5 percent of the gross value of the foreign trust's assets treated as owned by the U.S. person under the grantor trust rules as of the close of the tax year.[3]

In contrast, the penalty for failure to file a Form 8938, Statement of Specified Foreign Financial Assets, reporting foreign financial accounts is a discrete $10,000.[4]

A practitioner is required to inform a client of penalty consequences reasonably likely to ensue from the practitioner's tax advice. IRS Circular 230, Regulations Governing Practice Before the Internal Revenue Service, Section 10(c) provides in part:

(c) Advising clients on potential penalties —

(1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —

(i) A position taken on a tax return if —

(A) The practitioner advised the client with respect to the position; or

(B) The practitioner prepared or signed the tax return; and

(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.

(2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.[5]

The Forms 3520-A were prepared in Dr. Able's name. The Forms 3520-A should have been prepared in the foreign custodian's name; this likely would have satisfied the foreign custodian. The IRS cannot assess a penalty against a non-U.S. person.

The Forms 3520-A were not labeled "substitute" Forms 3520-A. The law firm and the accounting firm that worked on the Forms 3520 and Forms 3520-A and the reasonable cause statement and filed them truly did not know what they were doing.

The Forms 3520 were signed by Dr. Able as the taxpayer and the law firm as preparer. The Forms 3520-A were signed for the Caribbean custodian as trustee.

At the direction of the law firm retained by Dr. Able, Dr. Able's accounting firm prepared a reasonable cause statement to file with the Forms 3520-A and 3520. To avoid penalties Dr. Able needed the reasonable cause statement to clearly make the case that Dr. Able is an Ophthalmologist; that his tax returns are complicated; that he relied, reasonably, upon his accounting firm for tax compliance; and that the accounting firm failed him. But the accounting firm could not get past its conflict of interest. It vaguely, falsely attributed Dr. Able's noncompliance to unnamed "prior advisors." The reasonable cause statement was weak and ineffectual. It should have been prepared by a law firm independent of the accounting firm responsible for Dr. Alward's noncompliance.

The reasonable cause statement was signed by Dr. Able and no one else. The reasonable cause statement should have been signed under oath by the preparer as having prepared it, and by Dr. Able as having read it. Again, it was a completely incompetent effort.

The law firm and the accounting firm were both involved in preparation of the Forms 3520 and 3520-A and the reasonable cause statement. It is unclear which of them filed the documents with the IRS.

Soon after the Forms 3520 and 3520-A and the reasonable cause statement were filed, the IRS assessed penalties in substantial amounts against Dr. Able for late filing of the Forms 3520-A and 3520. Later the IRS Appeals Office acknowledged that written, supervisory approval of the penalties for failure to timely file Forms 3520 required under Section 6751(b)(1) had not been obtained, and it abated the Form 3520 penalties. But the penalties for failure to timely file Forms 3520-A remained.

Neither the law firm nor the accounting firm ever suggested to Dr. Able that they had erred in filing the Forms 3520 or 3520-A. But they were delighted to contest the penalties. After five years of contesting the penalties, the law firm finally advised Dr. Able to "just pay" the remaining balances of penalties. At that point, the penalties with accrued interest totaled over $1.5 million. That is when the case came to me.

I immediately called the IRS Appeals Officer on the case. She was about to sustain the penalties. I asked her to please allow me an opportunity to make a supplemental submission concerning the penalties. She acceded to my request.

A. Defenses Against the Penalties.

When the IRS asserts international information return penalties, it is important for the taxpayer to raise available defenses, including the following:

1. Reasonable cause.
2. Failure to secure written, supervisory approval of the penalties required by Section 6751(b)(1).
3. That a purported trust is not a trust.
4. That assessment of the penalties was made in violation of the taxpayer's right to due process of law guaranteed by the Fifth Amendment to the U.S. Constitution.

The taxpayer should make a Freedom of Information Act request for a copy of the IRS administrative file concerning the penalties. The taxpayer should specifically request of IRS Disclosure proof, if any, of written, supervisory approval of the penalties required by Section 6751(b)(1). The taxpayer should review IRS Disclosure's response to confirm the absence of required, written approval.

1. Reasonable Cause.

My supplemental submission made four arguments against the penalties. The first concerned reasonable cause. Section 6677, which prescribes penalties for failure to timely file Forms 3520-A or 3520, provides an exception for "any failure which is shown to be due to reasonable cause and not due to willful neglect."[6] Regulation Section 301.6651-1(c)*(1)* provides in part:

> A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described § 1.6161-1(b) of this chapter) if he paid on the due date.[7]

Dr. Able presented quintessential reasonable cause. He is an eye surgeon, immersed in his profession. He has no training in taxes. He relied, completely, reasonably, upon his CPA and his tax attorney for tax compliance. Both failed Dr. Able, resulting in the penalty assessments in controversy.

2. Section 6751(b).

My second argument was that the IRS had failed to obtain prior, written supervisory approval of the penalties required by Section 6751(b). Section 6751(b) provides:

> (b) Approval of assessment.
>
> (1) In general.
>
> No penalty under this title shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.
>
> (2) Exceptions.
>
> Paragraph (1) shall not apply to-
>
> (A) any addition to tax under section 6651, 6654, 6655, or 6662 (but only with respect to an addition to tax by reason of paragraph (9) or (10) of subsection (b) thereof); or
>
> (B) any other penalty automatically calculated through electronic means.

Where the IRS has failed to obtain the required written, supervisory approval, the penalty must be abated.[8]

Cases have applied Section 6751(b)(1)'s written, supervisory approval requirement to Section 6662 accuracy-related penalties,[9] to Section 6662 substantial understatement penalties,[10] and to Section 6663(a) civil fraud penalties.[11] Such penalties involve a judgment, Section 6662 accuracy-related penalties about whether the taxpayer was negligent, and Section 6663 penalties about whether the taxpayer was fraudulent. A reasonable cause argument, under Section 6664, also is available against all Section 6662 penalties as well as against Section 6663 penalties.

Section 6751(b)(2) excepts from Section 6751(b)(1) penalties which, on their face, appear not to involve a judgment. For example, excepted are Section 6651 penalties, for failure to timely report or pay tax, or failure to timely file a tax return.[12] International information return penalties, too, penalize the failure to file an international information return.[13] But each of these penalties has a reasonable cause exception: the penalty is not to be exacted for noncompliance due to reasonable cause and not willful neglect.[14] Section 7491(c) allocates to the taxpayer the burden to raise reasonable cause. But once the taxpayer raises reasonable cause against an asserted penalty, it is up to the IRS to decide whether there is reasonable cause for abatement of the penalty. And the decision of whether the taxpayer's noncompliance is due to reasonable cause surely does involve a judgment.

When a taxpayer submits a response, written or otherwise, challenging a penalty or the tax liability to which the penalty relates, Section 6751(b)(1) written, supervisory approval of the penalty is required before the IRS sends the taxpayer a written communication asking the taxpayer to sign consenting to assessment of the penalty. This is true of all penalties, even those listed in Section 6751(b)(2)(A). Internal Revenue Manual 20.1.5.2.3, Supervisory Approval of Penalties – IRC 6751 Procedural Requirements, provides in part:

> (6) Any penalties automatically calculated through electronic means are excluded from IRC 6751(b)(1) requirement.
>
> a. AUR (Automated Underreporter) and CEAS (Correspondence Examination Automation Support) cases in which the Substantial Understatement Penalty is systemically asserted, will fall within the exception for penalties automatically calculated through electronic means if the taxpayer does not submit any response to the 30-day letter that proposes the penalty.
>
> b. However, if a taxpayer submits a response, written or otherwise,that challenges the penalty or the liability to which the penalty relates, written supervisory approval under IRC 6751(b)(l) is required before any written communication of penalties that offers the taxpayer an opportunity to sign an agreement, or consent to assessment or proposal of the penalty. See IRM 20.1.1.2.3.1, Timing of Supervisory Approval. The exception

for penalties automatically calculated through electronic means no longer applies once a Service employee makes an independent determination to pursue a penalty or to pursue adjustments to tax for which a penalty is attributable.

Similarly, Proposed Regulation § 301.6751(b)-1(a)*(3)*(iv) provides:

> (vi) Automatically calculated through electronic means. A penalty, as defined in paragraph (a)(3)(i) of this section, is automatically calculated through electronic means if an IRS computer program automatically generates a notice to the taxpayer that proposes the penalty. If a taxpayer responds in writing or otherwise to the automatically-generated notice and challenges the proposed penalty, or the amount of tax to which the proposed penalty is attributable, and an IRS employee considers the response prior to assessment (or the issuance of a notice of deficiency that includes the penalty), then the penalty is no longer considered "automatically calculated through electronic means."

Thus, once a taxpayer challenges a penalty, the Section 6751(b)(1) written, supervisory approval requirement applies to the penalty. This underscores how important it is for a taxpayer to challenge penalties.

I made a Freedom of Information Act request to the IRS for its administrative file concerning the penalties assessed against Dr. Able. The IRS' response included no evidence whatsoever of written, supervisory approval of the penalties.

I repeatedly asked the Appeals Officers assigned to the case for proof of the required, written supervisory approval of the penalties. Not surprisingly, the Appeals Officers produced no proof of written, supervisory approval.

Sometimes, in a letter in response to a FOIA request, IRS Disclosure will admit the absence of written, supervisory approval of penalties.

3. No Foreign Trust.

My third argument was that Dr. Able's Caribbean financial assets were not held in a trust, and, therefore, that Forms 3520-A were not required to be filed for the assets. The elements of a private express trust at common law are: (1) the settlor's capacity to create a trust; (2) his intention to create a trust; (3) a declaration of trust or a present disposition of the res; (4) an identifiable trust res; (5) a trustee; and (6) identifiable beneficiaries.[15]

The language or conduct creating the trust must be clear and unambiguous. A statement will be sufficient evidence of a trust if the beneficiary, the trust property, and the purpose of the trust all are identified therein.[16]

Dr. Able never signed a written agreement or declaration of trust. Generally, to establish a trust by acts alone in the absence of an express trust agreement there must be shown unequivocally an intent on the part of the maker to divest himself of control and dominion of the res. The maker might retain certain benefits of the res, but there must be more than creation of an agency relationship; the trustee must have control or dominion of the property, in addition to bare legal title.[17]

A private express trust likely could not be created, under the laws of the United States or of the United Kingdom, where, as here, there was no written agreement or declaration of trust. Indeed, without a written agreement or declaration of trust, the terms of a trust cannot be "expressed."

There is nothing to indicate that Dr. Able intended to create a trust, or that he even understood what a trust is. To the contrary, Dr. Able at all times exercised complete dominion and control over his Caribbean assets. Through his investment advisor in the U.S. Dr. Able directed investment of the Caribbean assets. The Caribbean custodian of the assets reported on the performance of investments to Dr. Able and to no one else. Whenever Dr. Able requested a distribution from the Caribbean assets, the custodian complied. Dr. Able reported the income of his Caribbean assets on his U.S. income tax return, as noted above. The Caribbean assets were ultimately repatriated to Dr. Able at his direction.

In *Sullivan's Petition,* the Orphans' Court of Pennsylvania, Berks County, said:

> "If the donor has full control and dominion over the trust property, so that according to the terms of the trust he can use it as and when he pleases, the trustee becomes his mere agent to hold title to the property, invest, sell, and collect income for him and pay as he directs. The donor has parted with no dominion over his property nor any part thereof by the terms of the trust, and such an agreement is no valid trust agreement": Warsco, Admr., v. Oshkosh Savings & Trust Co. et al., 183 Wis. 156, 160, 161, 196 N. W. 829.[18]

In *Coosa River Water, Sewer and Protection Authority v. Southwest Trust of Alabama,* the Supreme Court of Alabama quoted American Jurisprudence 2d, Trusts § 29 (1992):

> [A] revocable living trust is valid even though the settlor reserves an extensive power of control over administration of the corpus. However, where the powers retained by the settlor amount, in cumulative effect, to ownership of the trust estate, with such control over the administrative functions of the

trustee as to make of him simply the settlor's representative, no valid trust is established. Similarly, while a trust instrument may purport to name a beneficiary, if the settlor reserves a substantial interest or unbridled control over management of the operations that is not for the benefit of the purported beneficiary, the trust may be found to be illusory. In such circumstances, it has been stated that the settlor remains the owner of the property and there is no beneficiary.[19]

United Kingdom authorities are in accord that where, as here, the settlor retains dominion and control for his benefit of property purportedly held in trust, the trust is illusory, there is no valid trust, and the settlor is deemed the owner of the property.[20]

4. Assessment Lacked Due Process of Law.

My fourth argument was that the penalties were assessed against Dr. Able, and the assessment immediately began accruing interest (as of the third quarter, 2024, at the rate of 8 percent per annum, compounded daily[21]), and the unpaid assessment immediately operated as a federal tax lien against all of Dr. Able's property, and the IRS maintained the right to levy Dr. Able's property to satisfy the lien, without any due process whatsoever afforded to Dr. Able. The assessments thus violated Dr. Able's right to due process of law guaranteed by the Fifth Amendment to the U.S. Constitution.

B. **Where the Case Stands Now.**

C. Several months after I made my supplemental submission asserting the above defenses, the IRS Appeals Office abated the penalty assessments against Dr. Able, without any communication to us.[22] But there was one problem. Prior counsel had neglected to make a Section 6330 collection due process appeal for one year's penalty, and, as a result, that year's penalty was not before the Appeals Office, and hence was not abated. We filed a Form 843, Claim for Refund and Request for Abatement, requesting abatement of that year's penalty, on the same grounds the other years' penalties were abated. If our request is denied we will request IRS Appeals Office review of the denial.

D. **Conclusion.**

When the IRS asserts international information return penalties, the taxpayer must raise available defenses, including the following:

1. Reasonable cause.
2. Failure to secure written, supervisory approval of the penalties required by Section 6751(b)(1).
3. The purported trust is not a trust.
4. The penalties were assessed in violation of the taxpayer's right to due process of law guaranteed by the Fifth Amendment to the U.S. Constitution.

The taxpayer should make a Freedom of Information Act request for a copy of the IRS administrative file on the penalties, specifically requesting proof of written, supervisory approval of the penalties required by Section 6751(b)(1). The taxpayer should review IRS Disclosure's response to confirm absence of required, written, supervisory approval.

Endnotes

1. Stephen J. Dunn is founder and member of Dunn Counsel PLC, Troy, Michigan. He thanks Joseph Trytten, of the law firm of Golan Christie Taglia, Chicago, for reviewing and commenting on this article.
2. Internal Revenue Service, Instructions for Form 3520 (Dec. 2023), at 3.
3. IRS, Instructions for Form 3520-A (Dec. 2023), at 2.
4. Section 6038D(d)(1). If the taxpayer fails to file a delinquent Form 8938 within 90 days after the IRS requests it, then the penalty increases to an additional $10,000 for each 30-day period for which the delinquency persists after the IRS makes the request, up to a maximum additional penalty of $50,000. Section 6038D(d)(2).
5. Treasury Department Circular 230, Regulations Governing Practice Before the Internal Revenue Service, 31 CFR Subtitle A, Part 10, § 34(c) (Jun. 12, 2014).
6. Section 6677(d).
7. *See also* Internal Revenue Manual 20.1.1.3.2.
8. *Clay v. Commissioner,* 152 T.C. 223, 250 (2019), *aff'd,* 990 F.3d 1296 (11th Cir.), *cert. denied,* 142 S.Ct. 342 (2021); *Chai v. Commissioner,* 851 F.3d 190, 221-223 (2d Cir. 2017); *Beland v. Commissioner,* 156 T.C. 80, 84, 90 (2021); *Belair Woods, LLC, et al. v. Commissioner,* 154 T.C. 1, 17 (2020).
9. *See, e.g., Chai v. Commissioner,* 851 F.3d 190 (2d Cir. 2017); *Carter v. Commissioner,* T.C. Memo 2020-21, *aff'd,* 2022 WL 4232170 (11th Cir. 2022); *Castro v. Commissioner,* T.C. Memo 2022-120; *Kroner v. Commissioner,* T.C. Memo 2020-73, *rev'd,* 48 F.4th 1272 (11th Cir. 2022); *Simpson v. Commissioner,* T.C. Memo 2023-4.
10. *See, e.g., Clay v. Commissioner,* 152 T.C. 233 (2019), *aff'd,* 990 F.3d 1296 (11th Cir.), *cert. denied,* 142 S.Ct. 342 (2021).
11. *See, e.g., Minemyer v. Commissioner,* 2023 WL 314832 (10th Cir. 2023); *Belanger v. Commissioner,* T.C. Memo 2020-130; *Benavides & Co., P.C. v. Commissioner,* T.C. Memo 2019-115; *Beland v. Commissioner,* 156 T.C. 80 (2021); *Estate of Clemons v. Commissioner,* T.C. Memo 2022-95; *Degourville v. Commissioner,* T.C. Memo 2022-93; *Dorval v. Commissioner,* T.C. Memo 2018-167; *Purvis v. Commissioner,* T.C. Memo 2020-13.
12. Section 6651(a)(1) imposes a penalty for failure to file a tax return when due (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not willful neglect. Section 6651(a)(2) imposes a penalty for failure to pay tax reported on any return by the date prescribed therefor (determined with regard to any extension of time for payment), unless it is shown that such failure is due to reasonable cause and not willful neglect. Section 6651(a)(3) imposes a penalty for failure to pay tax reportable on a return, which is not so reported,

within 21 days after notice and demand therefor, unless it is shown that such failure is due to reasonable cause and not willful neglect.
13. Section 6677 imposes a penalty for failure to timely file Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts, reporting information required in Parts I-III thereof. Section 6677 also imposes a penalty or for failure to timely file Form 3520-A, Annual Information Return of Foreign Trust With a U.S. Owner. Section 6039F(c) imposes a penalty for failure to timely report on Form 3520, Part IV, the receipt of large gifts or bequests from foreign sources. 6679(a) imposes a penalty for failure to timely file Form 5471, Information Return of U.S. Persons With Respect To Certain Foreign Corporations, or Form 8865, Return of U.S. Persons With Respect to Certain Foreign Partnerships. Section 6038B(c) imposes a penalty for failure to timely file Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation.
14. Sections 6651(a)(1), (2), and (3) each contains a reasonable cause exception. The Section 6677 penalty "shall [not] be imposed . . . on any failure which is shown to be due to reasonable cause and not willful neglect." Section 6677(d). The Section 6039F penalty "shall not apply to any failure to report a foreign gift if the United States person shows that the failure is due to reasonable cause and not due to willful neglect." Section 6039F(c)(2). The Section 6038D penalty "shall [not] be imposed . . . on any failure which is shown to be due to reasonable cause and not due to willful neglect." Section 6038D(g). The 6679(a) penalty does not apply if "it is shown that [the] failure [to timely file Form 5471 or Form 8865] is due to reasonable cause." Section 6679(a)(1).
The Section 6038B(c) penalty "shall not apply to any failure [to file Form 926] if the United States person shows that such failure is due to reasonable cause and not to willful neglect." Section 6038B(c)(2).
15. *In re Baum,* 22 F.3d 1014, 1017-1018 (10th Cir. 1994).
16. *Rebidas v. Murasko,* 50 Pa.Super. 546, 550, 677 A.2d 331 (1996).
17. *In re Fitzpatrick's Estate,* 17 N.Y.S.2d 280, 291 (Surrogate's Court, Franklin County, 1940).
18. 34 Pa. D. & C. 154, 161 (1938).
19. 611 So.2d 1058, 1062 (Ala. 1993). *See also Baldwin v. Estate of Baldwin,* 875 So.2d 1138, 1141 (Ala. 2003); *Honea v. Raymond James Financial Services, Inc.,* 240 So.3d 550 (Ala. 2017).
20. *E.g., JSC Mezhdunarodniy Promyshlenniy Bank, et al. v. Viktorovich Pugachev,* [2017] EWHC 2426 (Ch), 2017 WL 04529994 (High Court of Justice Chancery Division, 2017); *Webb v. Webb,* [2020] UKPC 22, 2020 WL 04439336 (Privy Council, from Court of Appeal of Cook Islands, 2020); *The Law Society v. Dua,* [2020] EWHC 3528 (Ch), 2020 WL 07496316 (High Court of Justice Business and Property Courts in England and Wales Chancery Division 2020).
21. IR-2024-138 (May 9, 2024); Rev. Rul. 2024-11.
22. We learned of the abatements by obtaining current penalty account transcripts for Dr. Able, and reviewing them.

Nine Valuation Mistakes that Can Harm Business-Owner Clients

By Evan M. Levine[1] and Nainesh Shah[2]

Obtaining a proper business valuation is critical for business owners and their advisors, if they plan to sell or transfer their business in the next few years. Evan M Levine and Nainesh Shah discuss nine common mistakes in valuing businesses and way to avoid them.

Obtaining a proper business valuation is critical for your business owner clients – whether they plan to sell or transfer their business in the next few years. A professional valuation performed by an accredited specialist based on accurate modelling and sound numbers is more likely to result in maximum financial returns for the business owner – either as an ongoing business or an ultimate sale. In this manuscript, we examine nine common mistakes related to business valuations and offer some helpful guidance for business owners and their advisors to use to avoid those mistakes as they navigate through the complexities of owning, selling or transferring a business.

MISTAKE #1: FAILING TO VALUE AN ONGOING BUSINESS.

Even if an owner is not contemplating the imminent sale or transfer of business, a professional valuation of the company as a going concern is essential. To this point, a formal valuation or appraisal is exceedingly beneficial so the owner will not be left unprepared for triggering events. For example, if there are buyout agreements in place (i.e., a buy-sell agreement), an estimation of the purchase price and establishing funding sources (such as insurance) will be known and can be planned for in advance. Also, a highly valued business will likely have tax ramifications that may require sophisticated estate planning. Finally, a credible professional valuation could be instrumental in obtaining a loan, attracting key employees, and more for an ongoing business.

Once the value of a business has been determined, the owner can focus on value enhancement adjustments to various aspects of the business, including personnel, business planning, sales, marketing, legal, operations, and more. These adjustments can potentially increase profitability as an ongoing business and likely result in a higher selling price when the business is sold. Choosing a professional valuator with experience with value enhancement can help streamline this process.

MISTAKE #2: ELEVENTH-HOUR VALUATION.

Unfortunately, a large percentage of business owners do not prepare a plan for the eventual sale of their company. According to a 2018 report by the Exit Planning Institute, many business owners' "lack of readiness prevents them from harvesting the value of their business..." Of those surveyed, 91 percent lacked a written personal plan of action following the transition of their business, and 30 percent never gave it a thought. [3]

More commonly, business owners wait until the eve of the sale to commission a valuation. By doing so, they may be unable to hire the best possible professional valuator. Moreover, since time is of the essence, the ultimate valuation prepared in haste may be lacking.

MISTAKE # 3: VALUATIONS NOT PERFORMED BY A QUALIFIED PROFESSIONAL.

A proper, credible business valuation includes numerous complex variables that must be considered. If not performed by a qualified professional, the likelihood of mistakes and inaccuracies increases significantly. Although many business brokers and CPAs offer business valuation services, they are not likely to have the experience, expertise, and depth of knowledge as valuation professionals. Several organizations offer professional certification designations, including ASA (American Society of Appraisers), AICPA (American Institute of CPAs), and NACVA (National Association of Certified Valuators and Analysts.)

Moreover, according to a Daubert Challenge, a valuation not prepared by a qualified professional is more likely to be discredited if disputed in court.[4] If an attorney opposing the valuation files a motion for a Daubert Challenge, a judge will conduct a hearing providing the opportunity for the attorney to challenge an expert witness's credentials and expertise. In defending the integrity of the expert and the valuation, it is far less likely that an individual who is not a qualified professional would be able to demonstrate the required expertise to prepare a viable business valuation and/or that the valuation methodology used in the valuation is sound and valid.

MISTAKE #4: LACK OF PROPER DUE DILIGENCE AND/OR INSUFFICIENT DATA GATHERING AND ANALYSIS.

The lack of proper due diligence and insufficient data gathering and analysis are common mistakes in the valuation process. Appropriate due diligence requires a thorough and detailed understanding of both the company's industry and business. To ensure the proper level of due diligence for the business being valued, the qualified professional interviews the owners and other key stakeholders visits the company's offices, and becomes versed in all relevant aspects of the business. As to data gathering, data utilized to formulate calculations must always be readily verifiable from current and credible sources. Unreliable or dated data can be more easily challenged by opposing counsel in legal disputes.

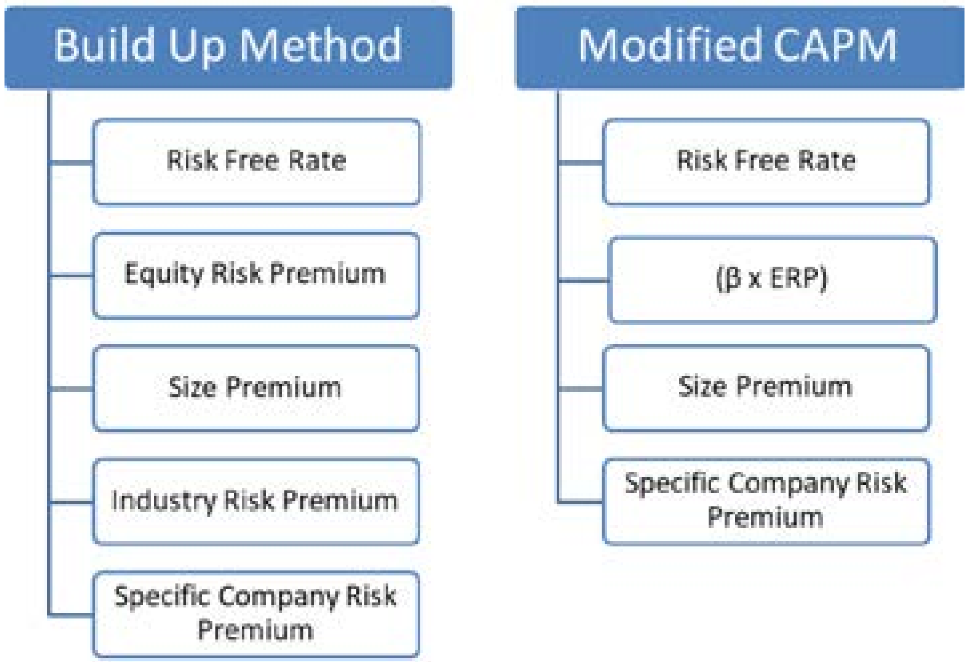
MISTAKE #5: ERRORS IN THE CALCULATION OF DISCOUNT/CAPITALIZATION RATES.

The discount and/or capitalization (cap) rate is one of the critical factors in the income approach to valuation. Numerous errors in computing discount or cap rate calculations can occur in multiple places. Figure 1 illustrates where errors in discount and cap rate calculation components often happen.

When the build-up method is used to calculate these rates, the rates must be applied to their correct and corresponding benefit streams. The capital asset pricing model (CAPM) rates reflect the expected equity return of the business. The numbers can be distorted if the wrong beta is used to calculate discount/cap rate.

For example, using historical industry data or an average of similar companies' betas can be inaccurate because they do not necessarily reflect the valuation of company's dynamics.

Figure 1: Cost of Equity



Failing to assess proper company-specific risk.

Risk assessment is a critical factor in any business valuation. Using discount or cap rates that do not account for a company's specific risk can

lead to misleading results. Every company has business-specific operational and financial factors contributing to its risk profile, such as key-person risk, customer concentration, patent expiration, etc. This risk is indicative of a company's unique discount and cap rates. Additionally, due to a great deal of subjectivity and nuance involved in arriving at these rates, an experienced valuator's knowledge and skill are needed to ensure an accurate estimate of value.

MISTAKE #6 ERRORS IN VALUATION APPROACHES AND METHODS

There are three overall approaches to valuation: the income approach, the market approach, and the asset approach. In revenue ruling 59-60,[5] the IRS ruled that all three approaches were to be considered in a valuation.

The purpose of a valuation assignment is not to create an average of the numbers from the three approaches, but rather to ensure that a rigorous and comprehensive process is undergone so that each approach is considered, compared, and used to help inform the final valuation.

Where different valuation methods yield different indications of value, the valuator must clearly articulate how they arrived at a conclusion of value. While it is sometimes tempting to weigh the indications equally, it is more important to factor the weight of each particular indication of value separately. In Hendrickson Estate v. Commissioner (T.C. Memo 1999- 278),[6] without explanation, the Tax Court criticized the work of a valuator who afforded equal weight to the indications of value.

Mistake #6A Errors in income approach:

Many errors can occur in the Income approach to valuation.

Errors in benefit stream mismatch. The right benefit stream should be adjusted for capital expenditures and working capital so that the matching capitalization rate or discount rate can be appropriately applied. Errors can occur by using accounting or book profit instead of discretionary cash or net cash flow numbers, as shown in Table 1. Using a cash flow number for the entire company when valuing the company for an equity holder would produce erroneous numbers.

Table 1

	Net Income	Net Cash Flow
After-tax Net Income	$ 2,500,000	$ 2,500,000
Cash Flow Adjustments		
Depreciation	-	*200,000*
Capital expenditures	-	*(225,000)*
Change in Net Working Capital	-	*(250,000)*
Change in Interest-Bearing Debt	-	-
Net Cash Flow	2,500,000	2,225,000
Times: (1+ Long-Term Growth Rate)	105.0%	105.0%
Benefit Stream to be Capitalized	2,625,000	2,336,250
Divided By: Capitalization Rate	20.0%	20.0%
Indicated Value	$ 13,125,000	$ 11,681,250
Amount of Overvaluation		**$ (1,443,750)**
Overvaluation %		**-11.0%**

Errors in terminal value calculation. The two methods within the income approach are capitalization of earnings and discounted future earnings. Terminal value, reflected as a present value, is the company's value at the end of the discounted cash flow period. Not discounting the terminal value to the valuation date will inflate the value of the business significantly.

Errors in growth rate factor. Many companies that experience periods of growth that exceed underlying economic growth rates, and capitalization rate[7] depend partially on these growth expectations. Using a growth rate significantly higher than current economic conditions must be considered carefully as it is unlikely to be sustained for long periods. The valuation difference created by calculating with an incorrect growth rate is significant (see table 2).

Table 2

	Reasonable Growth Rate	Inflated Growth Rate
After-tax Net Income	$ 2,500,000	$ 2,500,000
Cash Flow Adjustments		
Depreciation	200,000	200,000
Capital Expenditures	(225,000)	(225,000)
Change in Net Working Capital	(250,000)	(250,000)
Change in Interest-Bearing Debt	-	-
Net Cash Flow	2,225,000	2,225,000
Times: (1+ Long-Term Growth Rate)	*105.0%*	*110.0%*
Benefit Stream to be Capitalized	2,336,250	2,447,500
Divided By: Capitalization Rate	*20.0%*	*15.0%*
Indicated Value	$ 11,681,250	$ 16,316,667
Amount of Overvaluation		**$ 4,635,417**
Overvalution %		**39.7%**

Mistake #6B Errors in market approach

Using incorrect multiples in the market approach to valuation also leads to many common errors.

Improperly applying valuation multiples. When utilizing the market approach, many different multiples are used to calculate a company's value, such as revenue multiples, EBITDA multiples, or earnings multiples. Each multiple relates to a specific measure of financial performance.

However, the resulting numbers will be incorrect when the wrong multiple is applied to the wrong benefit stream or factor. For example, a multiple based on EBITDA should not be applied to the net profit.

Not understanding changes in the company's industry. A market approach valuation requires referencing historical transactions. However, market factors in a given industry can change significantly in a short period. This change can render historical transaction numbers less useful or even inaccurate.

Selecting only the lowest multiples. Using only the lowest multiples to generate value can raise red flags in court – creating the appearance of a company's value being artificially "low-balled" for tax favorable purposes.

Mistake #6C Errors in asset approach

Including a company's operating assets in valuation calculations seems obvious because they are necessary to generate revenues and profits. Without operating assets, the business would be unable to function as a going concern. Therefore, in the asset approach to valuation, failing to revalue assets (and liabilities) with respect to an ongoing business will distort the numbers.

Failing to value non-operating assets when company is no longer a going concern. The asset approach is more commonly used when the company is no longer a going concern when its assets are worth more than if the company was valued as an operating company. In these situations, many companies also own high-value assets that are not essential to their operations. These non-operating assets are sometimes overlooked in valuations. For example, the company may own unused land, access vehicles, or art investments that have no impact the daily business operation. Thus, leaving them out of calculations can deflate the business's total valuation.

Overestimating goodwill or underestimating intangible assets. Assuming that an established business has positive goodwill is a common mistake. Business goodwill only exists if a company generates earnings over and above a fair return on its tangible assets. Conversely, not considering or separately valuing the business's intangible assets, such as developed software or patents, will also lead to inaccurate valuation numbers.

Not considering built-in gains tax.[8] Failing to account for the built-in gains tax with respect to the appreciated assets of an S-corporation (formerly a C corporation) still within the 5-year lookback period can be a mistake. The Tax Court has recognized the economic reality that capital gains taxes are considered by both buyer and sellers in establishing the purchase price of businesses.

MISTAKE #7 SUBJECTIVITY IN MINORITY AND MARKETABILITY DISCOUNTS

Two major valuation discounts are lack of control (DLOC) and lack of marketability (DLOM). DLOC is applicable in the calculation of the value of an interest held by a minority owner, and DLOM is applicable when there are issues that affect the marketability of the business. Depending on the circumstances, the discount and cap rate are adjusted by DLOC and DLOM. Rather than using data relevant to a particular valuation, some valuators rely on case law for the determination of valuation discounts.[9] Consequently, a common mistake is failing to reconcile discount numbers with outside data sources and available studies that provide a quantitative reference point. But, because these numbers can impact the valuation number significantly, extra attentiveness is essential.

MISTAKE # 8 ERRORS IN VALUATION REPORT PRESENTATION.

The final valuation document could be in the form of a summary report or a detailed report. It can be a calculation assignment or a conclusion assignment. But whatever its format, it should follow a clear, logical flow and be free of mistakes and calculation errors. It should also be consistent and cohesive. Additionally, approaches both used and rejected in the valuation computation should be appropriately explained – with all assumptions defended and supported. In Bailey Estate v. Commissioner (T.C. Memo 2002-152),[10] the Tax Court criticized the appraiser for failing to do so. This is critical because attorneys contesting valuations will focus on errors, omissions, and other mistakes to discredit the validity of the valuation as well as the expertise of the valuator.

Due to the subjectivity of valuations, it is imperative that reader be aware that the valuation analysis is the opinion of the qualified professional not fact. Regardless of how "correct" the conclusion of valuation may appear; it will not be acceptable to a court in the absence of a complete and comprehensive analysis. Additionally, the valuation must be replicable by another valuator who reviewed the relevant valuation documents. In Winkler Estate v. Commissioner (T.C. Memo 1989-231), the Tax Court articulated perhaps one of the best arguments for a free-standing, comprehensive appraisal report.[11]

MISTAKE # 9: HIRING A VALUATOR WHO DOES NOT KEEP UP WITH CHANGES IN THE VALUATION SPACE.

It is essential that valuator who is hired to do the valuation is current in his or her knowledge and skills. The art of valuation is dynamic and continually evolving. The valuator must be aware of new precedents and guidelines regularly emanate from court cases and IRS pronouncements.

Additionally, there also are new types of risks that need to be incorporated into valuations. For example, there is the risk of cyber data breaches that could be detrimental to the value of a business.

Historically, valuations for private companies have utilized traditional valuation methods. However, valuators of public companies have been more innovative in the ways they view different businesses and industries. This approach has led to new valuation methods that should be considered in the valuation of certain private companies.

One example of an innovative valuation method is CBCV or Customer-Based Corporate Valuation. Unlike the traditional top-down method, this valuation is a bottom-up method that considers each customer's value. CBCV can be applied to businesses with recurring types of revenue streams, such as subscription models. If performed correctly, a CBCV valuation could result in a higher valuation of a business than the more traditional valuations. A valuator who fails to consider newer and more modern approaches could be leaving money on the table for their clients.

Conclusion

Business valuation is both an art and a science. Not a one size fits all proposition, credible and reliable valuations are based on a variety of factors including historical facts, calculations using past and current data, and subjective judgments. To be assured of accuracy, the valuation should be performed by a qualified professional who is immersed in the relevant facts and details of the company (including the industry of the company) being valued.

As explained in this manuscript, the complex valuation process is prone to a multitude of common mistakes, errors, and omissions that can skew a final valuation number and render it inaccurate and legally inadequate. Hiring a business valuation professional requires thorough, diligent consideration to make sure an accredited, experienced, and reputable valuation partner has been chosen to prevent hassles and save time and money in the process.

Endnotes

1. Evan M Levine is a founding partner and head of Valuation Engagements at Complete Advisors. Evan can be reached at 516-231-2977 or Evan@completeadvisors.com.

2. Nainesh Shah CFA, CVA, is a founding partner and head of Valuation Advisory at Complete Advisors. Nainesh can be reached at 516-240-6162 Nainesh@completeadvisors.com.

3. For more information about the survey, see THE STATE OF OWNER READINESS 2018 GEORGIA REPORT

4. For more information, see Daubert v. Merrell Dow Pharmaceuticals at law.cornell.edu

5. For more information, see Rev. Rul. 59-60.

6. For more information, see US Tax Court T.C.Memo 2000-191 .

7. The capitalization rate is the discount rate less the long-term growth rate.

8. For more information on the built-in gains tax, see manatt.com tax law newsletter January 26, 2016 titled “The Built-In Gains Tax”.

9. In Berg Estate v. Commissioner (T.C. Memo 1991-279), the Tax Court rejected this practice because every case is different.

10. For more information, see ESTATE OF BAILEY v. COMMISSIONER

11. For more information, see ESTATE OF WINKLER v. COMMISSIONER

Delaware Trust Act 2024 Legislative Update

By Morris Nichols Arsht & Tunnell LLP[1]

On August 29, 2024, Delaware Governor John C. Carney signed Senate Bill 268 ("Trust Act 2024") into law. The legislation includes the following highlights:

- Amendment to Section 3301 of Title 12 to define the term "letter of wishes" and amendment to Section 3315 of Title 12 to codify new provisions relating to when a trustee or other fiduciary may exercise its discretion to consider a letter of wishes and the standard of review applicable to a trustee or other fiduciary for the exercise of such discretion.
- Addition of a new "Beneficiary Well-Being Trust" statute as Section 3345 to Title 12 which expressly allows trustors to opt-in to the creation of a so-called Beneficiary Well-Being Trust that sets forth powers, duties, rights and interests of fiduciaries and beneficiaries to provide beneficiaries with "beneficiary well-being programs." This new Beneficiary Well-Being Trust statute is the first of its kind in the country. Additionally, Section 3325 of Title 12 was amended to grant trustees of all Delaware trusts new powers to hire professionals in connection with beneficiary well-being.
- Amendment to Delaware's designated representative statute, Section 3339 of Title 12, to clarify the class of beneficiaries for whom a trustor may appoint a designated representative and to clarify when and to whom notice of such appointment must be provided.
- Amendment of Delaware's virtual representation statute, Section 3547 of Title 12, to allow a designated representative under Section 3339 to virtually represent those who the beneficiary represented by the designated representative could have virtually represented if such beneficiary were representing himself or herself.
- Amendment to Sections 801 and 805 of Title 12, the Uniform Transfer on Death ("TOD") Security Registration Act, to add and amend certain definitions, including clarification that interests in limited liability companies, limited partnerships, statutory trusts and series thereof may be registered in beneficiary form with a TOD or payable on death ("POD") designation.

Letters of Wishes

Generally, a letter of wishes is a writing made by a trustor as a means of assisting fiduciaries to understand the trustor's intent regarding the discretionary terms of the trust's governing instrument, to articulate the trustor's intent regarding the interpretation of a governing instrument's terms, or to assist fiduciaries in exercising distribution discretion. Letters of wishes are sometimes delivered to the trustee or to the beneficiaries of a trust and might be delivered at the time of creation of the trust or anytime thereafter. The trust's governing instrument might expressly contemplate that letters of wishes may be delivered to the trustee or beneficiaries and that the trustee should consider them, or sometimes letters of wishes are delivered to trustees or beneficiaries without being contemplated by the governing instrument.

Trust Act 2024 amended several statutes to codify the concept of a letter of wishes into Delaware law and to address whether and to what extent a trustee or other fiduciary may consider a letter of wishes and the standard of review applicable to a trustee or other fiduciary for exercising its discretion to consider, or not consider, such writings. These new provisions are intended to be consistent with, and not to override, existing Delaware case law addressing such matters, including, without limitation, *Bishop v. McNeil*, 1999 Del. Ch. LEXIS 186, 1999 WL 743489 (Del. Ch. 1999), in which the court declined to take into account a letter from the trustor to the beneficiaries to construe the provisions of an unambiguous governing instrument for a trust because the letter was extrinsic evidence of the trustor's intent.

First, Section 3301 of Title 12 was amended to include a definition for the term "letter of wishes," which is now defined in subsection (g) to mean "any separate writing created by a trustor that makes specific reference to a governing instrument of a trustor and contains statements regarding the trustor's intent regarding the governing instrument, but is not itself a governing instrument." It is notable that the definition is broad, and includes "any separate writing by a trustor," without limitation or qualification based on who it is delivered to, or when, and regardless of whether it is based on the trustor's intent at the time of the creation of a governing instrument.

Next, Section 3315 of Title 12 was modified to add a new subsection (c) to address letters of wishes. First, Section 3315(c) grants a fiduciary discretion with respect to whether or not it should consider a letter of wishes in connection with the exercise of a discretionary power conferred on the trustee or other fiduciary in the trust's governing instrument. A trustee's or other fiduciary's determination as to whether or not it should consider a letter of wishes will be subject to the same abuse of discretion standard that applies to a fiduciary's exercise of discretion in other areas, as described in Section 3315(a) of Title 12. The abuse of discretion standard applied under Section 3315(a) of Title 12 adheres to the Restatement (Second) of Trusts § 187, rather than the Restatement (Third) §§ 50 and 60, meaning that when a governing instrument does not limit the exercise of a trustee's discretion, a court should only interfere if the trustee has acted dishonestly or from an improper motive as opposed to evaluating the reasonableness of the trustee's exercise of discretion. Consequently, in most instances a court should be very unlikely to interfere with a fiduciary's determination as to whether or not to consider a letter of wishes.

Section 3315(c)(1) provides that a trustee may consider one or more letters of wishes, whenever created, and whether or not the governing instrument is ambiguous, but only if the following conditions are met:

1. The letter of wishes must have been delivered to a trustee of the trust, or on behalf of the trustor. This requirement attempts to ensure that the trustor actually wanted the contents of the letter of wishes to be delivered to the trustee by the trustor himself or herself or by someone else as the trustor's proxy or agent (such as the trustor's attorney or someone instructed or authorized to deliver it to the trustee) in order for the trustee to consider it. It would generally not include, for example, a letter that the trustor gave to beneficiaries for their edification, but was never intended to be delivered to the trustee by or on behalf of the trustor for consideration. Also, this requirement does not limit when the letter of wishes can be delivered to the trustee, thus permitting letters of wishes to be considered regardless of when they are delivered to the trustee, whether that be at the time of the creation of the trust or any time thereafter.
2. A trustee or other fiduciary may only consider a letter of wishes that reflects the trustor's intent contemporaneous with the date of execution of the governing instrument. This intent may be reflected in facts and circumstances known to the trustor, as well as those not known to or anticipated by the trustor, as of the time the governing instrument was executed. This concept, that the trustee may only consider a letter of wishes that reflects the trustor's intent contemporaneous with the date of execution of the governing instrument, is consistent with the well-established rule that it is the trustor's intent at the time of the creation of the trust that matters, not subsequent changes in intent. Thus, a letter of wishes can be delivered to the trustee after the trust is created, but it can only be considered if it reflects intent that is or was contemporaneous with the date of the execution of the governing instrument. Trustors cannot alter their original intent with subsequent letters. Additionally, this requirement acknowledges that there may be facts and circumstances that develop after the creation of the trust that were not known to, or were not anticipated by, the trustor as of the date of the execution of the governing instrument. For example, perhaps the

trustor never considered the possibility of a descendant having a drug or alcohol abuse problem which subsequently develops and presents issues for the trust administration. A trustor's letter of wishes that reflects the trustor's intent contemporaneous with the date of execution of the governing instrument, relating to facts and circumstances not known to or anticipated by the trustor, as of the time the governing instrument was executed, can be considered.

3. The letter of wishes cannot be inconsistent with any provision of the governing instrument.

Section 3315(c)(2) provides that a trustee's or other fiduciary's decision not to consider a letter of wishes with respect to an unambiguous provision of a governing instrument is not an abuse of discretion. Section 3315(c)(3) provides that a trustee's or other fiduciary's decision not to consider a letter of wishes that does not meet the requirements of Section 3315(c)(1) is not an abuse of discretion. Section 3315(c)(4) provides that a trustee's or other fiduciary's decision to consider a letter of wishes meeting the requirements of Section 3315(c)(1) with respect to an ambiguous provision of a governing instrument is not an abuse of discretion. Section 3315(c)(5) makes it clear that letters of wishes are not binding on a trustee or other fiduciary. Specifically, "the fact that a trustee or other fiduciary does or does not exercise a discretionary power in accordance with the letter of wishes does not create an inference that the trustee or other fiduciary improperly exercised the power or abused the trustee's or other fiduciary's discretion" under subsection 3315(a) of Title 12. Lastly, Section 3315(c)(5) provides a trustee or other fiduciary will only be required to provide a beneficiary with a copy of a letter of wishes if the trust instrument or a court order so provides.

Beneficiary Well-Being Trusts

Consistent with Delaware's history of providing trustors with freedom of disposition and the ability to carry out their objectives to create trusts that will benefit their beneficiaries, Trust Act 2024 codified the concept of a "Beneficiary Well-Being Trust." Section 3345 of Title 12 provides a new opt-in statute that allows trustors to create a "Beneficiary Well-Being Trust." A Beneficiary Well-Being Trust is a trust where the governing instrument makes express reference to Section 3345. When the governing instrument does this, the trust is deemed to include the powers, duties, rights and interests of the beneficiaries, trustees, and advisers as provided in Section 3345. [1] Delaware's new Beneficiary Well-Being Trust statute is the first of its kind in the country, and it facilitates the design and administration of trusts that can support, rather than inhibit, beneficiary engagement, transparency, education, and, ultimately, beneficiary well-being.

Section 3345(c) states that the trustees and advisers of a Beneficiary Well-Being Trust <u>shall</u> provide the beneficiaries, individually and as a group, with "beneficiary well-being programs" as provided in the governing instrument or, in the absence of such provisions, as the trustee determines in its discretion. Thus, the beneficiaries of a Beneficiary Well-Being Trust have the right to receive these beneficiary well-being programs as a part of their bundle of rights and interests as a beneficiary of the trust.

Section 3345(b) provides what constitutes beneficiary well-being programs. Beneficiary well-being programs are "seminars, courses, programs, workshops, counselors, personal coaches, short-term university programs, group or one-on-one meetings, counseling, family meetings, family retreats, family reunions, and custom programs" which have one or more of the following purposes:

1. Preparing each generation of beneficiaries for inheriting wealth by providing the beneficiaries individually or as a group with multi-generational estate and asset planning, assistance with navigating inter-generational asset transfers, developing wealth management and money skills, financial literacy and acumen, business fundamentals, entrepreneurship, knowledge of family businesses, and philanthropy and/or
2. Educating beneficiaries about the beneficiaries' family history, the family's values, family governance, family dynamics, family mental health and well-being, and connection among family members.

Importantly, Section 3345(e) also provides that the governing instrument may provide for additional powers, duties, rights, and interests that expand the purpose or scope of beneficiary well-being programs. Thus, trustors and drafters are free to work together to craft any manner of beneficiary well-being provisions into the governing instrument to tailor the structure and trust disposition and administration to the trustor's objectives.

A Beneficiary Well-Being Trust can be a financial resource that allows for opportunities for the trustee to provide financial education, hands-on experiences, education about family legacy and family dynamics, and enhance beneficiary well-being and philanthropy, all funded by the trust in the ordinary course of trust administration, in order to enhance the lives of beneficiaries. A Beneficiary Well-Being Trust can provide beneficiaries with the tools they may need to navigate their inheritance with confidence, responsibility, and knowledge, rather than protecting a beneficiary by controlling distribution schemes and silencing the flow of information.

Section 3345(d) provides that the trustees and advisers of a Beneficiary Well-Being Trust shall pay the costs and expenses of beneficiary well-being programs from the trust. Beneficiary well-being programs may be provided by the trustee itself, by an affiliate of the trustee, or by third parties. The trustee is entitled to its full fiduciary compensation to which the trustee is entitled without diminution for the fees and costs of the beneficiary well-being programs without any notice or disclosure to any beneficiary of the trust. As a practical matter, these fee provisions will make it easier and more compelling for the trustee to proactively provide beneficiary well-being programs to beneficiaries and liberally fulfill their duties to provide them as a trustee of a Beneficiary Well-Being Trust.

Trust Act 2024 has also added new paragraph (32) to Delaware's trustee powers statute, Section 3325 of Title 12. This new power provides trustees of *all* Delaware trusts with the power to "provide financial education services to the beneficiaries either individually or as a group, regarding multi-generational estate and asset planning, inter-generational asset transfers, developing wealth management and money skills, financial literacy and acumen, business fundamentals, entrepreneurship, personal financial growth, knowledge of family businesses, and philanthropy." The trustee may itself provide a beneficiary well-being program, or hire a third party to do so, and in each case it may use funds from the trust estate to pay for those services without diminution of the trustee's fees for regular trust service. This compensation provision should encourage trustees to provide these beneficiary well-being services to trust beneficiaries to prepare them for how to handle inherited wealth responsibly. This should be a benefit to all beneficiaries of Delaware trusts.

Designated Representatives

Trust Act 2024 amended Delaware's designated representative statute, Section 3339 of Title 12, to clarify provisions relating to appointments of designated representatives made by a trustor. Prior to 2021, designated representatives could only be appointed to represent and bind a beneficiary whose rights to be informed about his or her interest in a trust were restricted or eliminated under the terms of the trust's governing instrument. As a result of amendments to the statute in 2021, Section 3339 also now allows the appointment of a designated representative to represent and bind minor, incapacitated, unborn, or unascertainable beneficiaries in any non-judicial matter as such term is defined in Section 3303(e), notwithstanding whether such beneficiary's rights to information are restricted or eliminated; provided, however, that when a trustor is appointing a designated representative to represent and bind a minor, incapacitated, unborn, or unascertainable beneficiary (a) the appointed designated representative shall serve in a fiduciary capacity, notwithstanding any provision to the contrary in the governing instrument; (b) the appointed designated representative must not be the trustor or related or subordinate to the trustor within the meaning of § 672(c) of the Internal Revenue Code; and (c) the trustor, within 30 days of appointment of the designated representative, must provide written notice to the surviving and competent parent or parents or custodial parent (in cases where one parent has sole custody of the beneficiary), or guardian of the property of the beneficiary who will be represented by the appointed designated representative. Prior to Trust Act 2024, it was not entirely clear how the notice requirement could be satisfied with respect to unborn and unascertainable beneficiaries because it is not possible in some instances to identify the parent, parents or guardian of an unborn or unascertainable person. Trust Act 2024 resolved this uncertainty by amending Section 3339 to provide that the notice requirement only applies to a parent of a living minor or incapacitated beneficiary, rather than a parent or guardian of an unborn beneficiary or beneficiary whose identity or location is unknown and not reasonably ascertainable.

Designated representatives can serve a key role in trust administration in a variety of contexts. These updates to Section 3339 provide greater certainty regarding the application of the statute in certain contexts.

Virtual Representation

Trust Act 2024 also amended Delaware's virtual representation statute to pave the way for designated representatives to virtually represent certain additional beneficiaries, thus facilitating virtual representation in situations where it was not previously possible. Section 3547(a) of Title 12 of the Delaware Code generally enables a beneficiary to represent and bind minor, incapacitated, unborn, or unascertainable beneficiaries whose interests are substantially identical to their interests with respect to a question or dispute, provided that the representative does not have a material conflict of interest with the represented beneficiary. Similarly, Section 3547(b) of Title 12 of the Delaware Code enables a presumptive remainder beneficiary to represent and bind contingent successor remainder beneficiaries for the same purposes, in the same circumstances, and to the same extent as an ascertainable competent beneficiary may represent and bind a minor or person who is incapacitated, unborn or unascertainable, and further enables a contingent successor remainder beneficiary to represent and bind more remote contingent successor remainder beneficiaries for the same purposes, in the same circumstances, and to the same extent as an ascertainable competent beneficiary may represent and bind a minor or person who is incapacitated, unborn or unascertainable. Additionally, Section 3547(c) of Title 12 of the Delaware Code provides that the holder of a general testamentary or inter vivos power of appointment—or a nongeneral testamentary or inter vivos power of appointment that is expressly exercisable in favor of any person or persons, excepting such holder, his or her estate, his or her creditors, or the creditors of his or her estate—may, with the consent of any person whose consent would be required for the valid exercise of the power, represent and bind persons whose interests, as takers in default, are subject to the power, but, in the case of any such nongeneral power of appointment, only to the extent that there is no material conflict of interest between the holder and the persons represented with respect to the particular question or dispute. In certain circumstances, there may be a designated representative instead of a beneficiary himself or herself who is in the position to act in a non-judicial matter, and in those situations, Section 3547 was not clear whether the designated representative could stand in the shoes of the beneficiary and virtually represent those such as minor, unborn, and unascertainable beneficiaries, and contingent remaindermen, that the beneficiary could have represented.

As a result of Trust Act 2024, Section 3547 has been expanded to provide a tool for virtual representation when it was not clear that it could have been used. Specifically, Trust Act 2024 amended Section 3547(a), (b) and (c) to provide that the designated representative of a beneficiary (a "represented beneficiary") can also represent and bind the beneficiaries who the represented beneficiary could represent and bind under the virtual representation statute. Consequently, in circumstances where a designated representative was appointed to represent one or more, but not all, beneficiaries of a trust, that designated representative will, in some circumstances, be able to represent and bind additional beneficiaries of the trust who the represented beneficiary could represent if the represented beneficiary were directly participating himself or herself. Safeguards on this expanded form of representation were also implemented by Trust Act 2024 by expressly prohibiting a designated representative from representing beneficiaries under the virtual representation statute in circumstances when the designated representative has a material conflict of interest with such beneficiaries with respect to the particular question or dispute.

Ensuring that all beneficiaries are represented and bound is a critical aspect of trust administration and arises in a wide variety of contexts, from trustee releases to non-judicial settlement agreements and modifications by consent. The expanded utility of Sections 3547 and 3339 will provide even greater flexibility to the administration of trusts under Delaware law and will afford greater protection and certainty to fiduciaries, trustors and beneficiaries alike.

Uniform TOD Security Registration Act

Delaware enacted the Uniform TOD Security Registration Act (the "TOD Act") in 1996; versions of this law have been enacted in almost every state except for Texas and Louisiana.[1] It allows for an issuer, transfer agent or some other intermediary to transfer certain investment securities to named beneficiaries at an owner's death.

Trust Act 2024 added and amended several definitions in Sections 801 and 805 of Title 12. First, the definition of "security" was amended to confirm that interests in limited liability companies ("LLCs"), partnerships and trusts, and series thereof, are included as securities. Over the years, we have often seen clients express interest in making TOD or POD beneficiary designations on membership interests in LLCs so those interests can pass to the beneficiary on the holder's death pursuant to the TOD Act. While such registration forms were used (typically using membership interests in the form of certificated shares with the TOD designation), it was never fully clear whether an interest in an LLC was included in the scope of the definition of "security" under the TOD Act. This amendment brings clarity and should be a useful tool for passing interests in LLCs and partnerships pursuant to TOD beneficiary designations.

Also, a new definition for "cash equivalents" was added, which defined that term as "a security or other investment that is easily converted into cash, including treasury bills, treasury notes, money market funds, savings bonds, short-term instruments, and short-term obligations." The definition of a "security account" was expanded to include "[a]n investment management account, securities account, custody account, or other agency account for the investment or custody of securities maintained with a bank, a savings bank, a trust company, a securities dealer, an investment adviser, or other financial institution, including the securities in such account, a cash balance in such an account, cash, cash equivalents, interest, and earnings, dividends or distributions earned or declared on a security in such an account, whether or not credited to the account before the owner's death."

None of these changes will override an entity's operating agreement or governing provisions. The changes in Trust Act 2024 confirm which entities qualify under the statute and give certain entities more flexibility when it comes to listing beneficiaries, rather than mandating they adhere to a new practice. All of these changes improve the utility of the statute by providing certain fiduciaries with better understanding of their obligations and responsibilities.

Endnotes

1. Morris Nichols is a leader in shaping Delaware law.

We offer unparalleled insight, advocacy and counsel to the law firms that we partner with and the clients we serve because of our unique experience. This experience includes crafting many of the statutes that Delaware courts interpret and representing clients in connection with some of the most significant rulings and landmark cases in the state.

Our focus on Delaware has always been clear and consistent. This focus has earned us a national reputation in our core areas of service — corporate litigation, corporate and alternative entity counseling, bankruptcy and restructuring, and intellectual property litigation. It has enabled us to stand apart because of the informed and innovative approaches we offer, grounded in an unmatched understanding of Delaware's laws and courts.

Much of the work we do is at the law's cutting edge. Clients trust us with their most challenging legal issues, significant transactions, and complex litigation. They do so because of our deep, unrivaled understanding of Delaware's law and courts and the quality of our people. It is our people who have led us to achieve national recognition and have enabled us to retain our character as a firm — collegial, dedicated to the community and the bar.

REAL PROPERTY

Preventative Care – Starting Your Retail Medical Lease Off on the Road to Good Health

By Andrew M. Ouvrier[1]

In this article Andrew Ouvrier discusses key considerations for landlords in negotiating retail medical leases.

Medical services found in traditional retail shopping centers (which are often referred to as "medtail") are on the rise. In addition to the COVID–19 pandemic, which made the need for readily available medical care all the more evident, a confluence of factors, such as the aging U.S. population and increasing lifespans, rising medical costs, new medical technologies/outpatient procedures, and insurance companies' push for outpatient care in an effort to reduce costs, has caused an increase in demand for medical services outside of the traditional hospital and medical office settings. As a result, medical services are increasingly found in shopping centers and other retail establishments alongside more traditional retailers. The medtail services being provided today are far broader than just typical urgent care centers. Shopping centers are seeing an increase in, for example, dental offices, specialty medical and wellness services such as holistic and alternative care centers, cosmetic practices, skincare, acupuncture, occupational and physical therapy, and veterinary services.

The increase in medtail leasing is changing the traditional notion of healthcare delivery by merging the everyday convenience of a shopping center experience with the critical services provided by the medical profession. This reflects a change in consumer expectations, and many landlords are eager to work with medtail operators in order capitalize on the benefits found in healthcare services being delivered in a retail setting.

While most landlords' standard retail lease forms are well crafted to address the issues and challenges presented by typical retail uses, those forms might not adequately address some of the unique issues and challenges presented by medical uses. Shopping center owners and medtail operators are both well advised to ensure that their medtail lease documents address these unique issues and challenges, including the more notable issues described below.

Is Medtail Allowed At The Shopping Center?

In general, when preparing a new retail lease, it is important to confirm that there are no existing exclusive use rights that will prevent the intended use under the new lease. While that is true as well with medtail leasing, as a threshold matter it is just as, if not more, important to confirm that medical uses are allowed at the shopping center. Medical uses have long been frowned upon in retail settings due to perceived incompatibilities between retail and medical uses, and there are often regulations and other restrictions in place that prohibit medical uses. Both shopping center owners and medtail operators should review the applicable zoning regulations and any recorded agreements (such as covenants, conditions, and restrictions) to ensure that the intended medical use is not prohibited. Additionally, it is not uncommon for many of the leases with larger "anchor" tenants to include lists of uses that are prohibited in the shopping center; such lease restrictions should be carefully reviewed as well. If the proposed medical use is restricted, then the parties will need to take steps to either amend the applicable document or to obtain the approval and/or waiver of the applicable third-party tenant or parcel owner.

It's Not Just Hazardous Materials, but Medical Waste that Needs to be Addressed.

Almost all retail leases include a prohibition on the tenants' use of hazardous materials. While such prohibitions are desirable, they may not adequately address the concerns raised in a medtail operation with respect to medical waste. It's not a matter of trying to prohibit medical waste since most medtail operations, by their very nature, *will* generate medical waste. Instead, the parties should clearly define what medical waste is, and then delineate the obligations relating to the collection, storage, and disposal of all medical waste (which is typically done by the tenant) and the liabilities and indemnification requirements due to a failure to meet those obligations. The parties should also require that all medical waste be handled in accordance with applicable laws and disposed of separately from the usual trash generated by the other, more typical retailers in the shopping center. If the medtail operation is anticipated to generate significant amounts of medical waste, the parties may want to consider conducting an initial "baseline" survey of the medtail premises to establish what, if any, medical waste is present at the commencement of the lease, followed by a survey and appropriate decommissioning of the medtail premises at the end of the term of the lease.

Utility Infrastructure and the Initial Build-Out of the Medtail Premises.

Medtail operators tend to be heavy users of utilities, especially electricity and water. For example, diagnostic equipment may have specific cooling needs that require more cooling equipment (along with a corresponding increase in the amount of electricity used) than a typical retail operator would use. Also, if the medtail use includes multiple exam rooms, additional plumbing will likely be required to supply the necessary water to each exam room. While most retail leases will place the responsibility for the cost of the electrical and plumbing infrastructure *within* the medtail premises on the tenant, both parties should also confirm whether or not the electrical and plumbing infrastructure providing utilities *to* the medtail premises is of a sufficient capacity and/or size to provide the desired amount of such utilities. If not, the lease should address the obligation to upgrade those utilities, whether that obligation will fall on the landlord or the tenant, and the allocation of any resulting costs.

Additionally, the build-out of medtail tenants' initial improvements are usually more intensive (and more expensive) than the initial improvements found in typical retail space. Accordingly, it may be more expensive to remove the additional infrastructure and other improvements installed in a medtail premises, and to return the medtail premises to its original condition, at the end of the lease. As a result, the medtail lease should clearly delineate all of the medtail tenant's removal and restoration obligations. Moreover, given the target clientele of many medtail operations, landlords should be aware of the likely focus on ADA compliance issues, not just within the medtail premises, but also in the common areas of the shopping center.

Landlord Access Rights.

As with other retail leases, a landlord will have the right to access the medtail premises for various reasons, including inspections and the performance of maintenance and repairs. However, with medical uses come patients, and with patients come patient confidentiality rights. So while the obligation to ensure patient confidentially and compliance with HIPPA requirements and other privacy standards should ultimately fall on the tenant, the parties should carefully structure the landlord's access rights to minimize the risk of a violation of patients' protected health information. This might include, without limitation, the establishment of a "secured" area within the medtail premises where the landlord will not (outside of an emergency) have access rights without being accompanied by a representative of the tenant, and incorporating reasonable parameters surrounding the landlord's ability to access the medtail premises during normal business hours.

Stark Law and Anti-Kickback Statutes.

The Stark Law is intended to protect Medicare patients from improper referrals for certain healthcare services by parties who have a financial interest in the referral. The parties should ensure that they (as well as any subsequent assignees and subtenants) do not have a patient referral arrangement that would violate the Stark Law, and that the corresponding medtail lease includes an acknowledgement it does not require the medtail tenant to refer or admit any patients to any hospital or medical facility owned or operated by the landlord.

Endnotes

1. Andrew Ouvrier is a partner in the Los Angeles office of Cox, Castle & Nicholson LLP. Mr. Ouvrier's practice focuses on all aspects of commercial leasing as well as on acquisitions and dispositions and other transactional matters.

Actual Loss Under A Title Insurance Policy Is Calculated Based On The "Highest And Best Use" Of The Insured Real Property

By John L. Hosack[1] and Jason E. Goldstein[2]

The California Court of Appeals in *Tait* holds that an insured's actual loss under a title insurance policy must be calculated based upon the highest and best use of the insured real property.

In a victory for all insureds who have title insurance policies, and possibly a victory for insureds under other real property related insurance policies, the California Court of Appeal in *Tait v. Commonwealth Land Title Insurance Company* (2024) 103 Cal. App.5th 271, 277 (rev. denied, 10/2/24), held that an insured's actual loss under a title insurance policy must be calculated based upon the highest and best use of the insured real property ("we agree with the Taits that the policy entitles them to reimbursement for the diminution in value of their property based on its highest and best use").

The Taits, in reliance upon the title insurance policy which they had paid for, purchased certain real property with the intent to develop it by first subdividing it into two (2) lots. However, as the Taits moved through the process of subdivision, the Taits discovered an undisclosed recorded maintenance agreement which materially adversely impacted the marketability and value of the insured real property and interfered with its potential development.

The Taits tendered a claim to their title insurer which was accepted. The title insurer then engaged an appraiser who purported to determine that the diminution in value of the insured real property was $43,500.00. The title insurer then cut a check to the Taits in that amount. In stark contrast, the Taits engaged an appraiser who determined that based on the "highest and best use" of the insured real property, the diminution in value was actually $700,000.00.

Based on these authors' experiences, a "battle of the appraisers" frequently occurs in title insurance cases and "lowball" appraisals are a common bad faith tactic used by title insurers to unreasonably withhold policy benefits from insureds. See, e.g., *First American Title Insurance Company v. David Ordin, et al.* (2011) 2011 Cal.App.Unpub.Lexis 6946 (insurer's appraisal $5,000; insured's appraisal $220,000; bad faith award against title insurer affirmed).

The California Court of Appeal, in reaching its opinion in *Tait,* distinguished the earlier opinion of *Overholtzer v. Northern Counties Title Ins. Co.* (1953) 116 Cal.App.2d 113, by holding that, "The loss of the potential to achieve a property's highest and best use presents a smaller magnitude of loss than a completed building or other improvement, like in *Overholtzer,* but the nature of the insured's expectations and reliance interests is similar." *Tait,* 103 Cal.App.5th at 286.

The California Court of Appeal also tethered its "highest and best use" determination to established valuation procedures utilized in eminent domain actions by holding that, "In short, if the highest and best use is sufficiently definite to make it just for a government entity to compensate a property owner for its loss, it is sufficiently definite to constitute a basis for determining the 'actual loss' under a title insurance policy."

The term "actual loss" in the Taits' title insurance policy was not defined and the California Court of Appeal found it ambiguous in conformity with standard insurance law and construed the term "actual loss" in favor of the insured and against the insurer.

Based on these authors' experiences, undefined and ambiguous terms in title insurance policies are frequently misrepresented by title insurers to be "clear and explicit" in order to unreasonably withhold policy benefits from their insureds.

While title insurance policies have many provisions which are improperly interpreted by insurers to unreasonably withhold policy benefits, in whole or in part, the *Tait* opinion's approval of the highest and best use standard in connection with determining an insured's actual loss under a title insurance policy has now removed one such improper interpretation from the title insurer's arsenal.

Endnotes

1. John L. Hosack is a Shareholder in the Firm's Los Angeles office and Co-Chair of Buchalter's Title Insurance & Escrow Industry Group. He represents secured lenders and property owners at trial and on appeal in complex real property disputes, including lender liability, fraud, class actions, breaches of contract, wrongful foreclosures, mechanic's liens, stop notices, judicial foreclosures, receiverships, escrow claims and title insurance claims. His transactional practice includes commercial real property loan documentation, loan workouts, REO sales and foreclosures.

Mr. Hosack, who is AV Preeminent rated by Martindale Hubbell, has been selected as one of Southern California's Super Lawyers from 2006 to 2024 and was also selected as a Southern California Super Lawyer, Corporate Counsel Edition from 2009 to 2024. He has also been selected by Who's Who Legal USA from 2002 to 2024 as "one of the USA's leading practitioners" in the field of real estate.

On September 24, 2016, the American College of Mortgage Attorneys awarded Mr. Hosack a plaque to recognize his twenty years of leadership of the College's Program Committee. In recognition of his decades of contributions to continuing legal education, the California Continuing Education of the Bar awarded Mr. Hosack the Spirit of CEB Award. He has been a lecturer and a speaker for numerous organizations including the American Bar Association, State Bar of California, California Continuing Education of the Bar, University of California, Boalt Hall School of Law, Pasadena Bar Association, Beverly Hills Bar Association and the California Mortgage Association.

2. Jason E. Goldstein specializes in resolving complex business disputes for a diverse cross-section of clients, which include "private money" lenders/brokers/servicers, insureds, mortgage servicers, banks, credit unions, foreclosure trustees, investors, trade secret owners, individuals which own real property and general contractors.

Jason is a Shareholder at Buchalter who primarily practices out of Buchalter's Irvine and Los Angeles offices – but his practice is statewide (and sometimes nationwide). Jason is a Co-Chairman of Buchalter's Title Insurance and Escrow Group, a fellow of the American College of Mortgage Attorneys ("ACMA"), an ACMA Title Insurance Committee member, and former President of the Orange County Bar Association Insurance Law section.

On July 28, 2022, the California Mortgage Association, a pre-eminent organization dedicated to education and the advancement of private money lending, awarded Jason the President's Award plaque to recognize his exemplary service to the organization.

Jason was also included in the 2024 & 2025 edition of The Best Lawyers in America for Insurance Law.

Jason has an extensive legal background in state and federal courts (bankruptcy and district) across the country, which includes litigating claims relating to "private money," title insurance, escrow, real property, mortgage banking, mortgage servicers, foreclosure trustees, businesses, and misappropriation of trade secrets. Jason handles litigation involving wrongful foreclosure, lender liability defense, insurance, leases (commercial, residential, and equipment), general contractors, receivership, and judicial foreclosures. Jason and his team also assist lenders, trustees, and servicers with all aspects of bankruptcy proceedings (chapters 7, 11, and 13).

RPTE LEADERSHIP AND MENTORING 2024

"WHAT'S SO SPECIAL ABOUT THE SECTION'S MENTORING PROGRAM?"

Would you like to be mentored by Michelle Robinson Obama? Me, too!

During her distinguished career to date, she has mentored many individuals, but perhaps none as famous as the then-summer associate at Sidley Austin LLP, Barack Obama. I don't think it's coincidence that he became our 44th President. Here's the point: whether you serve as a Mentor or Mentee in the RPTE Mentoring Program, you can increase your prospects for preeminence.

The RPTE program pairs Mentors, who have a great deal of Section and practice experience, with Mentees, who may be interested in considering Section leadership as well as leadership in his or her workplace or community.

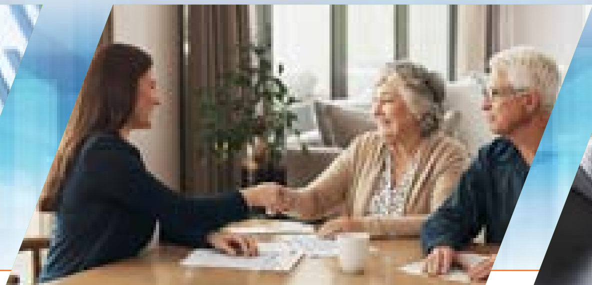
During the year, Mentors and Mentees meet, usually virtually, on a schedule that works for both. Most chat for an hour every month or every other month. Mentees who have completed the program review it highly.

Stay tuned for more on the Mentoring Program, including a list of this year's Mentors and Mentees, and some inspiring success stories, in the next issue of the eReport. In the meanwhile, if you have questions or are interested in being a Mentor or Mentee, please reach out to Dan Orvin dan.orvin@wbd-us.com or Jo Ann Engelhardt joannengelhardt75@gmail.com

ABA Real Property, Trust and Estate Law Virtual Conference | February 11-12, 2025

Real Property, Trust and Estate Law Section

Join us for the inaugural ABA Real Property, Trust and Estate Law Virtual Conference. This two-day program provides practitioners with the latest developments you'll need to best serve your clients while earning up to 12 hours of MCLE credit.



For trusts and estates attorneys, nationally recognized panelists will cover:

- practical planning strategies for a diverse range of clients
- the latest tax-related issues
- asset protection and business planning
- best practices for drafting engagement letters

Real property practitioners will learn negotiation skills and strategies in:

- purchase and sales transactions
- leases
- real estate financing
- title insurance

Our members have shared their feedback, and we've responded. This conference is tailored to deliver the same high-quality learning experience that was once exclusive to our in-person National CLE Conference. Now, busy lawyers can take advantage of this opportunity and gain insights from nationally recognized experts without the time and cost of travel.

Whether your focus is trusts and estates, real property, or a combination of both, this virtual conference will provide the essential information you need to stay up-to-date with the latest trends and developments in these areas.

americanbar.org/rpte

Committee Calls December 2024

Central Time (US and Canada)

HOSPITALITY, TIMESHARING AND COMMON INTERESTS DEVELOPMENT GROUP

Dec 3, 2024 10:00 AM CT
Join Zoom Meeting
[https://americanbar.zoom.us/j/98015508525?p-wd=7D46O4uIgXp5BVFjihf0wOKnS7JUzA.1](https://americanbar.zoom.us/j/98015508525?pwd=7D46O4uIgXp5BVFjihf0wOKnS7JUzA.1)

Meeting ID: 980 1550 8525
Passcode: 825523

CHARITABLE PLANNING AND ORGANIZATIONS GROUP

Dec 4, 2024 11:00 AM CT
Join Zoom Meeting
https://americanbar.zoom.us/j/99903440668?pwd=HksuLSKJGLMJ5ujR6uL-cuVaUUFzSPj.1

Meeting ID: 999 0344 0668
Passcode: 523677

COMMERCIAL REAL ESTATE TRANSACTIONS GROUP

Dec 4, 2024 01:00 PM CT
Join Zoom Meeting
[https://americanbar.zoom.us/j/93023198118?p-wd=hnSMVbSNYtgAUQIx0Eynthg5wdqHzw.1](https://americanbar.zoom.us/j/93023198118?pwd=hnSMVbSNYtgAUQIx0Eynthg5wdqHzw.1)

Meeting ID: 930 2319 8118
Passcode: 450512

RESIDENTIAL, MULTI-FAMILY AND SPECIAL USE GROUP SELLER FRAUD IN REAL ESTATE

Dec 6, 2024 1:00 PM CT
Join Zoom Meeting
[https://americanbar.zoom.us/j/97129274246?p-wd=zBbrqa8hLsUxevMJHySXUlQZzj8qSb.1](https://americanbar.zoom.us/j/97129274246?pwd=zBbrqa8hLsUxevMJHySXUlQZzj8qSb.1)

Meeting ID: 971 2927 4246
Passcode: 304397

LAND USE AND ENVIRONMENTAL GROUP GOVERNMENTAL INCENTIVES

Dec 11, 2024 12:00 PM CT
Join Zoom Meeting
https://americanbar.zoom.us/j/99282902234?pwd=xB168ImeL4EdabQfR9eoX8KZbHvYze.1

Meeting ID: 992 8290 2234
Passcode: 383379

RPTE INCOME AND TRANSFER TAX PLANNING GROUP

Dec 11, 2024 01:00 PM CT
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https://americanbar.zoom.us/j/94468502489?pwd=WIYNIxjKjjIFw2hdX3osk13ZieImOz.1

Meeting ID: 944 6850 2489
Passcode: 817717

REAL ESTATE FINANCE GROUP

Dec 12, 2024 01:00 PM CT
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https://americanbar.zoom.us/j/97991240905?pwd=vwicvR8CboijGfbo6ecFSgVoeGqiPN.1

Meeting ID: 979 9124 0905
Passcode: 323293

JOINT LAW PRACTICE MANAGEMENT GROUP

Dec 17, 2024 12:00 PM CT
Join Zoom Meeting
https://americanbar.zoom.us/j/98400443325?pwd=7TyF20S4iCxjduy9B4t5z-JaZVuwtfy.1

Meeting ID: 984 0044 3325
Passcode: 344418

ELDER LAW AND SPECIAL NEEDS PLANNING GROUP

Dec 17, 2024 03:00 PM CT
Join Zoom Meeting
https://americanbar.zoom.us/j/93962442775?pwd=yPiP61tPi4CdwmB0J7kb7zIerI7aU3.1

Meeting ID: 939 6244 2775
Passcode: 395014

AMERICAN BAR ASSOCIATION
Real Property, Trust and Estate Law Section

Land Use and Environmental Group

The Land Use and Environmental Group includes a diverse range of practitioners from experts in condemnation to environmental regulation. It is excited of a year rich in programing for all of the "dirt lawyers" out there.

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Nicholas Laurent (laurent@barronadler.com)

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Real Property Groups and Committees (americanbar.org)

Leasing Group

The Leasing Group provides its members and the Section as a whole a number of opportunities for growth and learning throughout the year. The group has free monthly calls alternating between 30 minute "nuts and bolts" sessions geared towards new practitioners (including those new to leasing) on basic topics such as property descriptions, rent structures and assignments and more advanced sessions on a variety of leasing topics. Additionally, the group presents programs at the Section's annual National CLE Meeting and eCLEs. The Leasing Group encourages all of its members to get involved in presenting programs, writing articles and working in Section leadership.

Real Property Groups and Committees (americanbar.org)

AMERICAN BAR ASSOCIATION
Real Property, Trust and Estate Law Section

Litigation and Professional Responsibility Group

This Group discusses current developments in fiduciary litigation as well as the ethical implications associated with that practice area. The Group meets quarterly, with each quarterly meeting devoted to hot topics in the fiduciary litigation space. Most recently, new ACTEC member Steve Holinstat presented to the Group regarding accounting obligations when dealing with trusts that own and/or control interests in limited liability companies – a topic that is garnering more and more attention by practitioners. Each quarterly call is designed to be informative and entertaining for those who practice in the field. The Group is also heavily involved in RPTE's national CLE conference and is in the midst of preparing its proposals. Our next quarterly call is scheduled for February 12, 2025 and will include a presentation from our own Ethics and Malpractice Committee.

Trust and Estate Groups and Committees (americanbar.org)

AMERICAN BAR ASSOCIATION
Real Property, Trust and Estate Law Section

Non-Tax Estate Planning Considerations Group

This group is comprised of committees that focus on the myriad estate planning and estate and trust administration issues – other than taxation – that practitioners need to understand and solve for. Its four committees are (1) Asset Protection Planning, (2) Emotional and Psychological Issues in Estate Planning, (3) Financial Planning and Risk Management, and (3) Non-Tax Issues Affecting the Planning and Administration of Estates and Trusts.

The group's mission is to ensure that practitioners are prepared to address their clients' estate planning needs thoughtfully and holistically, and well-equipped to advise and educate fiduciaries and beneficiaries on the legal and practical issues that arise in the administration of estates and trusts. The historically high exemption from federal estate and gift tax has not reduced the need for estate planning. Rather, it requires a renewed focus on simplicity and creativity in planning and drafting, so that clients' assets can be protected, administered, transmitted, and utilized in orderly and productive ways that align with their objectives. As the definition and meaning of "family" evolves and societal trends regarding relationships change over time, successful estate and trust planning will require thoughtful consideration of these non-tax issues – many of which prior generations of planners never encountered.

Trust and Estate Groups and Committees (americanbar.org)

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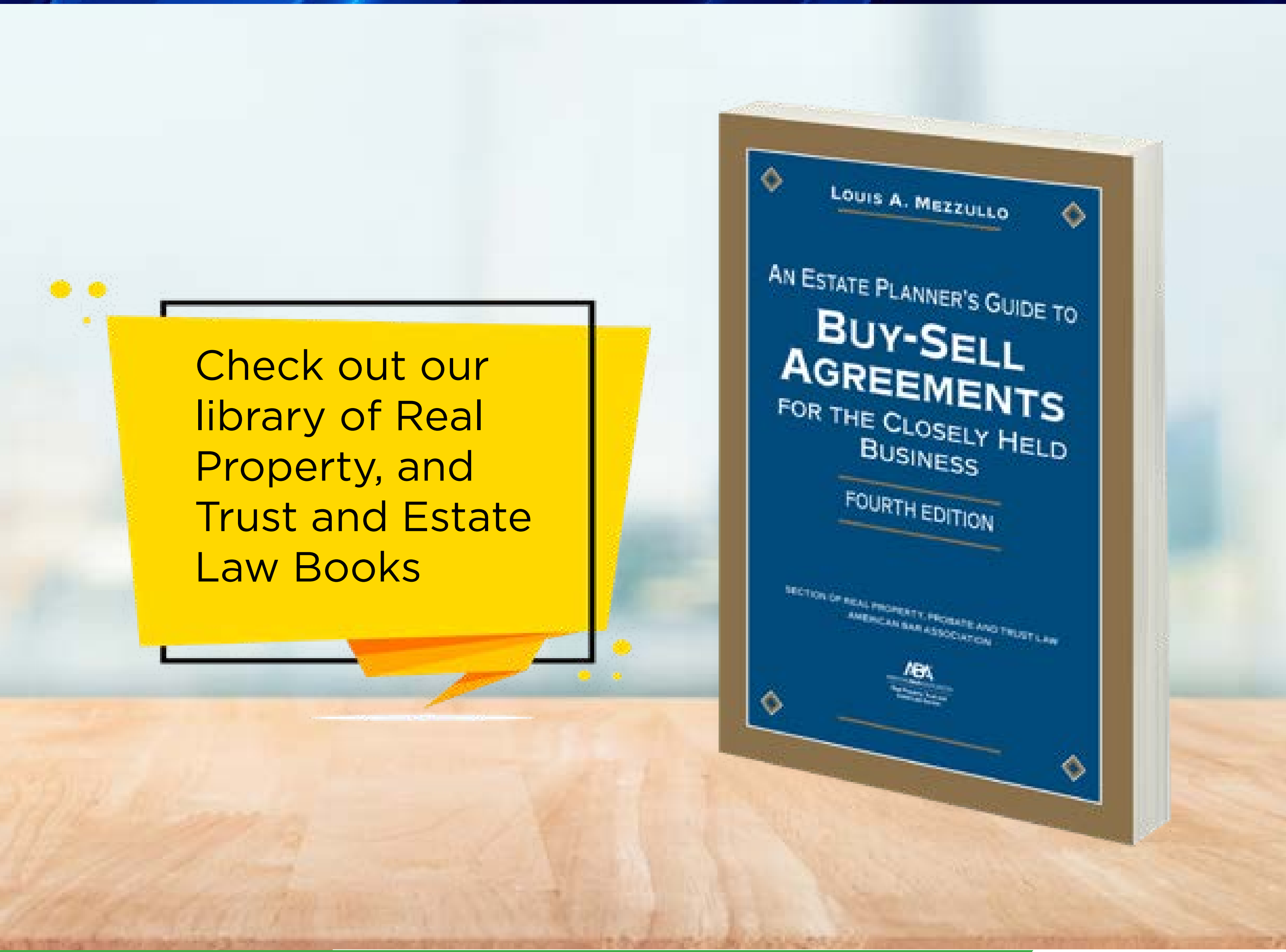
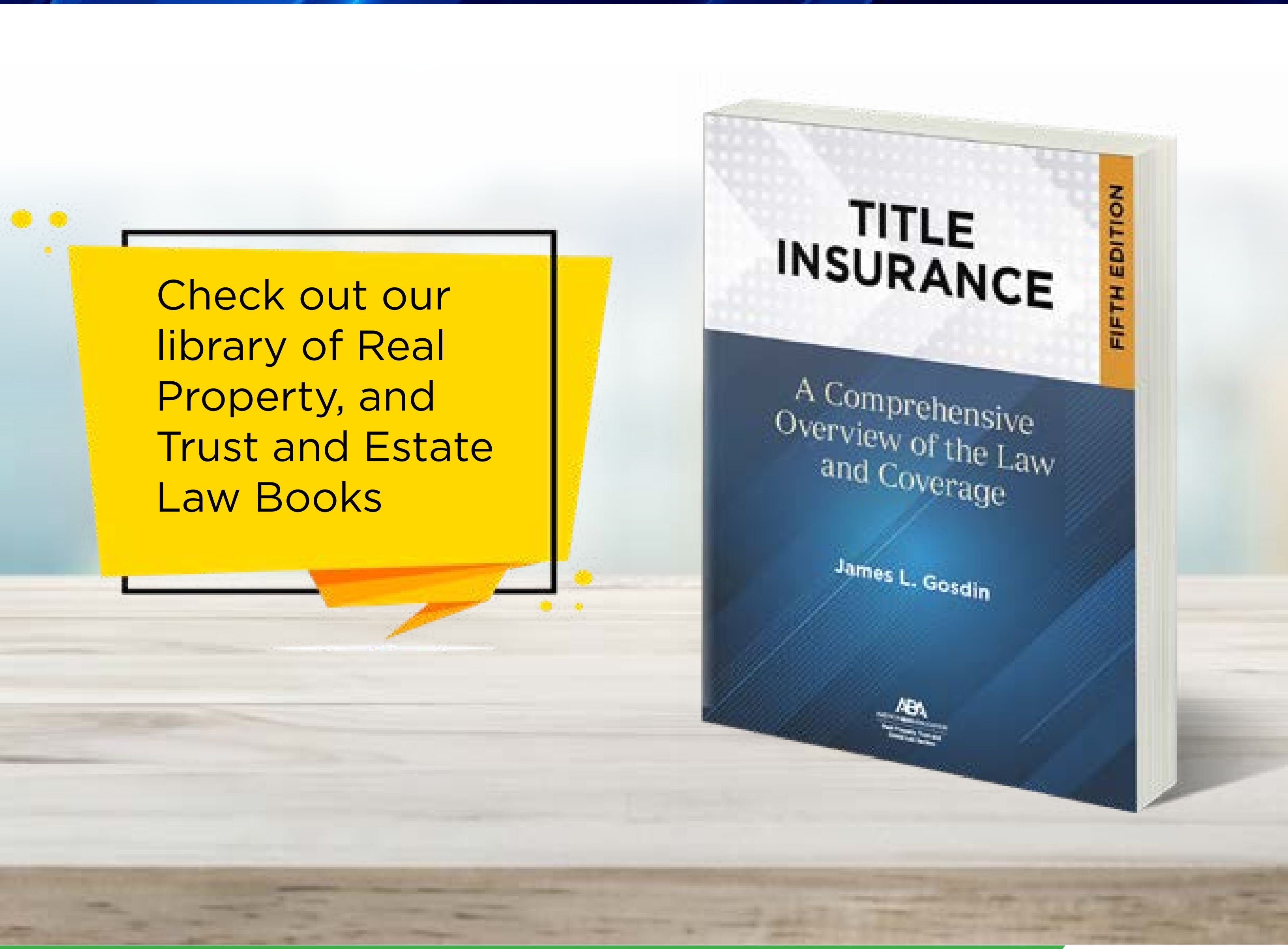
Real Property, Trust and Estate Law Section

RPTE PUBLICATIONS



RPTE PUBLICATIONS



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AMERICAN BAR ASSOCIATION
Real Property, Trust and Estate Law Section

Learn about Section of Real Property, Trust and Estate Law's *eReport*

The *eReport* is the quarterly electronic publication of the American Bar Association Real Property, Trust and Estate Law Section. It includes practical information for lawyers working in the real property and estate planning fields, together with news on Section activities and upcoming events. The *eReport* also provides resources for seasoned and young lawyers and law students to succeed in the practice of law.

For further information on the *eReport* or to submit an article for publication, please contact Robert Steele (Editor), Cheryl Kelly (Real Property Editor), Keri Brown (Trust and Estate Editor), or RPTE staff members Bryan Lambert or Monica Larys. Are you interested in reading FAQs on how to get published in the *eReport*? Download the FAQs here. We welcome your suggestions and submissions!

FREQUENTLY ASKED QUESTIONS BY PROSPECTIVE AUTHORS RTPE eReport

What makes eReport different from the other Section publications? The most important distinction is that eReport is electronic. It is delivered by email only (see below) and consists of links to electronic versions of articles and other items of interest. Since eReport is electronic, it is flexible in many ways.

How is eReport delivered and to whom?

eReport is delivered quarterly via email to all Section members with valid email addresses. At the ABA website, www.americanbar.org, click myABA and then navigate to Email, Lists and Subscriptions. You have the option of receiving eReport. Currently almost 17,000 Section members receive eReport.

What kind of articles are you looking for?

We are looking for timely articles on almost any topic of interest to real estate or trust and estate lawyers. This covers anything from recent case decisions, whether federal or state, if of general interest, administrative rulings, statutory changes, new techniques with practical tips, etc.

How long should my article be?

Since eReport is electronic and therefore very flexible, we can publish a two page case or ruling summary, and we can publish a 150 page article. eReport is able to do this since the main page consists of links to the underlying article, therefore imposing no page restraints. This is a unique feature of eReport.

How do I submit an article for consideration?

Email either a paragraph on a potential topic or a polished draft – the choice is yours – to the Editor, Robert Steele, at rsteele@ssrga.com, and either our Real Estate Editor, Cheryl Kelly, at CKelly@thompsoncoburn.com, or our Trust and Estate Editor, Keri Brown, at keri.brown@bakerbotts.com.

Do I need to have my topic pre-approved before I write my submission?

Not required, but the choice is yours. We welcome topic suggestions and can give guidance at that stage, or you may submit a detailed outline or even a full draft. You may even submit an article previously published (discussed below) for our consideration.

Do citations need to be in formal Bluebook style?

eReport is the most informal publication of the Section. We do not publish with heavy footnotes and all references are in endnotes. If there are citations, however, whether to the case you are writing about, or in endnotes, they should be in proper Bluebook format to allow the reader to find the material. Certainly you may include hyperlinks to materials as well.

Can I revise my article after it is accepted for publication?

While we do not encourage last minute changes, it is possible to make changes since we work on Word documents until right before publication when all articles are converted to pdf format for publication.

What is your editing process?

Our Editor and either the Trust and Estate Editor or the Real Estate Editor work together to finalize your article. The article and the style are yours, however, and you are solely responsible for the content and accuracy. We will just help to polish the article, not re-write it. Our authors have a huge variety of styles and we embrace all variety in our publication.

Do I get to provide feedback on any changes that you make to my article?

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