

ETHICAL ISSUES OF ASSET PROTECTION PLANNING

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A. Sources of Authority & Applicable Law

1. Lawyer's Duty of Loyalty

- a) The duty of the lawyer, subject to the duty as an officer of the court, is to further the interests of the client by all lawful means, even when those interests are in conflict with the interests of the State.
- b) The ABA Model Code, Section 7-101, *Representing a Client Zealously*, provides that a lawyer shall not intentionally fail to seek the lawful objectives of the client through reasonably available means permitted by law.
- c) ABA Model Rules of Professional Conduct Rule 1.3, *Diligence*, provides that a lawyer shall act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.
- d) California has no comparable duty provision.

2. Fraudulent Conveyances

- a) The duty of loyalty comes up against the prohibition against fraudulent conveyances very quickly.
- b) A fraudulent conveyance is a transfer of property for little or no consideration, made for the purpose of hindering or delaying a creditor by putting the property beyond the creditor's reach.
- c) A flowchart or decision tree for examining a potential fraudulent conveyance is set forth in the Appendix.
- d) California Civil Code Sections 3439 et. Seq. sets forth specific civil prohibitions and an abridged presentation of those rules is set also forth in the Appendix.
- e) California Penal Code Section 531 sets forth criminal sanctions.

3. Rule 3-210. Advising the Violation of Law

- a) The California Rules of Professional conduct state that a member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid.
- b) Rule 3-210 also applies to the crime of aiding abetting a fraudulent conveyance.

4. Statute of Elizabeth

- a) The English Statute of Elizabeth of 1571 is the basis of fraudulent conveyance law throughout the common law world. Of significance, however, is the fact that although the Statute of Elizabeth provides that all parties to a fraudulent conveyance are guilty of a misdemeanor, the imposition of criminal liability for effectuating a fraudulent conveyance has generally not been followed in the United States. But California is an exception.

- b) California Penal Code 531 provides:

“Every person who is a party to a fraudulent conveyance of any lands, tenements, or hereditaments, goods, or chattels, or any rights or interest issuing out of the same, or to any bond, suit, judgment, or execution, contract or conveyance, had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others or their just debts, damages, or demands; or who, being a party as aforesaid, at any time wittingly and willingly puts in, uses, avows, maintains, justifies, or defend the same, or any of them, as true, and done, had, or made in good faith, or upon good consideration, or aliens, assigns or sells any of the lands, tenements, hereditaments, goods, chattels, or other things before mentioned, to him or them conveyed as aforesaid, or any part thereof, is guilty of a misdemeanor.”

In the case of Allen v. State Bar, (1977) 20 Cal.3d 172, [141 Cal. Rptr. 808] a California court found that participating in a scheme to defraud creditors is a crime under the Penal Code §531 and subjected the attorney to disciplinary action.

5. Connecticut Bar Association

In *Connecticut Informal Opinion 91-23*, an attorney requested the opinion of the Connecticut Bar Association's Committee on Professional Ethics as to whether the attorney could ethically recommend and/or assist the attorney's client in transferring the client's jointly owned home to the client's wife at a time when the client had substantial debts beyond the client's ability to repay. Basing its opinion on the ABA Model Rules, the Committee ruled that a lawyer may not counsel or assist a client to engage in a fraudulent transfer that the lawyer knows is either intended to deceive creditors or that has no substantial purpose other than to delay or burden creditors. The Committee further stated that:

“Although the inquirer invites us to focus on fraudulent transfers, we wish to point out that whether or not a particular transaction is a fraudulent transfer as a matter of substantive law is not the decisive factor in applying the Rules. The decisive factors are whether the lawyer knows that the transfer constitutes conduct having a purpose to deceive or whether in counseling or assisting the client the lawyer is using means that have no substantial purpose other than to embarrass, delay or burden third parties.”

6. San Diego County Ethics Opinion on Asset Protection Planning

a) The complete text of Opinion is set forth in the Appendix and is available on-line. It covers a lawyer who reported that a potential Client seeks advice to protect personal assets from existing and identifiable creditors. The Client expresses an intent to transfer assets out of the creditors' reach. Client asked the lawyer to advise, prepare, and assist in the implementation of an asset protection plan, which may include certain trust instruments, family limited partnerships, and similar techniques. The lawyer asked for an opinion.

b) The committee stated the issue in this way: “To what extent may a member of the State Bar of California advise or assist a Client with respect to an avoidance of existing and identifiable creditors' rights and a protection of the Client's assets?”

c) The committee concluded: “A member who furnishes advice and institutes asset protection techniques may not do so unless the member complies with Rule 3-210 of the California State Bar Rules of Professional Conduct. The member may not participate in violations of criminal and civil law against fraudulent transfers.”

7. California State Bar Ethics Opinion

a) In an implicit acknowledgment that asset protection planning is not unethical except where it involves a fraudulent conveyance, the State Bar of California Committee on Professional Responsibility and Conduct declined to rule on two requests for ethics opinions, stating that this matter is primarily a legal matter rather than an ethics matter.

b) So, there is a duty to a client but no clear guidelines outside of San Diego. If you are too zealous, you may commit a crime. If you are too cautious, you risk malpractice exposure for neglect. It is a delicious, intense bind.

B. Civil Liability

1. A lawyer frequently must advance a client's cause at the expense of the opponent. Creditors who have lost a lawsuit because of actions of opposing counsel lawyer often feel that they have been unjustly dealt with by the lawyer. Exposure to suit is heightened in the asset protecting planning context since by its very nature, effective asset protection planning serves to frustrate enforcement of a judgment.

2. In general, however, a lawyer acting at the direction of the client is not liable for the consequences of the client's actions. But the privilege does not extend to participating in a fraudulent conveyance.

3. Whether a lawyer has violated this standard, is dependent upon the facts and circumstances. Here are the ways that the complaint gets drafted:

a) Conspiracy A civil conspiracy is a combination by two or more persons to commit an unlawful act that causes damage to a person or property. The elements of civil conspiracy include an agreement between two or more persons to participate in an unlawful act, or a lawful act in an unlawful manner.

b) Aiding and Abetting The distinction between a civil conspiracy and liability for aiding-abetting is that a conspiracy involves an agreement to participate in a wrongful activity. By contrast, aiding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct. The

elements of "aiding and abetting" liability are: (1) the party whom a defendant aids and abets must perform a wrongful act that causes injury; (2) the defendant must be generally aware of his or her role as part of an overall tortious activity at the time that he provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation.

c) Malpractice Distinguishable from the foregoing is legal malpractice. Legal malpractice is distinguishable because it looks to the potential of the attorney being held liable to *his or her own client*, rather than to a professional disciplinary body or the client's adversaries. Traditionally, the absence of privity of contract between an attorney and a non-client of the attorney has resulted in the general rule that an attorney may not be held liable for unintentional or merely negligent conduct, even if such conduct is the proximate cause of injury. However, there is a trend in estate planning to find privity between the attorney and certain third parties, such as a client's intended beneficiaries. Can and should a lawyer be held responsible for a negligent asset protection plan?

C. Criminal Liability

1. Section 7206 False Returns

a) Section 7206 of the Internal Revenue Code states that it is a felony if any person willfully aids or assists in the preparation of any document under the Internal Revenue laws that are fraudulent or false. In a prosecution brought under Section 7206, venue lies in the district in which the return was signed, or in which the return was filed or in which the acts of aiding and assisting took place.

b) Section 7206 is used by the government where it is possible to prove the falsity of a return but where it would be difficult to establish the requirement of a Section 7201 "tax evasion" violation. Thus, a Section 7206 violation is a lesser included offense in the felony of tax evasion. Importantly, Section 7206(1) proscribes the making and subscribing of a return and only the taxpayer himself may be prosecuted under this provision. Advisors, including attorneys, are covered by subsection (2).

c) The necessary elements of a violation of Section 7206(2), which is generally used to prosecute return preparers and their advisors, are: (1) the defendant aided or assisted in the preparation of a return; (2) the return was fraudulent or false as to a material matter; and (3) the defendant's act was willful. Willfulness requires that the defendant have the specific intent to defraud the government in its enforcement of the tax laws. A false statement is material when it has the potential for hindering the IRS's efforts to monitor and verify the tax liability of the taxpayer. The government is not required to prove a tax deficiency in order to convict under Section 7206 (2).

d) Section 7206(2) is designed to reach all those who knowingly participate in providing information that would result in a materially fraudulent tax return. This places additional burden on anyone who "structures" an effective transaction that prevents the payment of taxes.

e) Section 7206(2) has been used to convict tax shelter promoters who had fair notice of the illegality of their tax schemes. On the other hand, there are no published cases of criminal willfulness in setting up a foreign asset protection trust.

f) A lawyer or accountant may be guilty under Section 7206(2) even if the taxpayer was not aware of the false statements, or had not participated in any wrongdoing. A leading example is a lawyer who set up various corporations to assist money-laundering transactions. Another example is the promoter of a fraudulent tax shelter who may be charged with aiding in the preparation of false returns even though the taxpayers who took advantage of the improper deductions are innocent.

g) A taxpayer may report taxable income without divulging on a tax return the illegal source of the income. Nevertheless, some taxpayers who are unaware of their "rights" construct a "laundry" whereby they report their true income but misclassify it. For example, a bookmaker may give currency to a friendly businessman in exchange for a check and an I.R.S. Form reflecting "commission income." Three problems: first, the tax return of the bookmaker misclassified the income which is a violation of Section 7206(1); second, the tax return of the businessman overstates deductions which is a violation of

Section 7206(2) as to the bookmaker and a violation of Section 7206(1) as to the businessman; and third, there is conspiracy against both parties.

2. Related Federal Crimes and Misdemeanors

a) Conspiracy: Title 18 U.S.C. Section 371 describes two separate offenses: (1) conspiracy to commit an offense against the United States, and (2) conspiracy to defraud the United States. Conspiracy to defraud the United States is a felony, while conspiracy to commit an offense against the United States is only a felony if the object of the conspiracy is a felony. Both offenses require an agreement and an overt act committed in furtherance thereof. A conspirator, therefore, is one who cooperates with others for the specific purpose of furthering a common unlawful end. Thus, knowledge, approval, or acquiescence in the purpose of the conspiracy is insufficient to make one a conspirator absent an agreement to cooperate. The statute is often used in cases involving several defendants, as where corporate officers and/or employees participate in the filing of the corporate tax return.

(i) A conspiracy charge is a separate offense from the substantive crime, for example of tax evasion or false returns

(ii) With respect to a defendant's knowledge of the conspiratorial agreement and voluntary participation in it, the government need not prove that the defendant knew all the details or objects of the conspiracy or all the participants in it. The government may use circumstantial evidence, like the acts committed by the lawyer defendant in furtherance of the objectives of the conspiracy, to show that the defendant was a knowing and voluntary participant in the conspiracy. Once the government proves the existence of the conspiracy, it need only show that the defendant had a "slight connection" to the conspiracy (perhaps only setting up the foreign trust) to prove that he was a member of the conspiracy. A defendant cannot deliberately avoid knowledge of the conspiracy, also known as "willful blindness," to escape liability for the conspiracy.

(iii) In a tax conspiracy, it must be shown that each defendant was not only aware of the tax consequences of his actions, but also that he had

the specific intent to violate the tax laws. The overt act required to sustain a conspiracy charge may consist of the preparation of documents attached to a tax return, e.g. a foreign trust. It is not necessary, however, to show that the government suffered any monetary loss as a result of the conspiracy.

(iv) Bottom line, do not use a foreign asset protection trust to avoid an I.R.S. liability. Lawrence was convicted of a conspiracy associated with evading income taxes and then was held in contempt when he refused to return to the bankruptcy court assets that were stashed in a foreign asset protection trust. He may still be in jail.

b) Aiding and Abetting: Under 18 U.S.C. Section 2, whoever "aids, abets, counsels, commands, induces or procures" the commission of a federal crime, or "causes" its commission by another, is guilty as a principal of the crime of aiding and abetting. To a great extent, this section overlaps Section 7206(2). Courts have held that even when the principal is not identified, a defendant can be convicted of aiding and abetting if the prosecution proves that the substantive offense has been committed by someone. This encourages clients to cut a deal and let the lawyer twist in the wind. So, there are other potential tax crimes to be concerned about if asset protection is practiced against the IRS.

c) False Statements: Title 18 of U.S.C. Section 1001 makes it a crime to knowingly and willfully make false statements or make or use any false documents in any manner within the jurisdiction of any department or agency of the United States. The five elements which the government must prove in a prosecution under 18 U.S.C. §1001 are: (1) the defendant made a statement; (2) the statement was false, fictitious or fraudulent; (3) the statement was made knowingly and willfully; (4) the statement was within the jurisdiction of the federal agency; and (5) the statement was material.

(i) There is no requirement that the government suffer any pecuniary or property loss as a result of the false or fraudulent statements or representations. But, the government must prove that the false statement was material. Materiality is said to depend on whether the

falsification is calculated to induce action or reliance by an agency (e.g., the I.R.S.), or a prosecutor in a White House leak.

(ii) Where the taxpayer has filed a false return but no tax deficiency results, 18 U.S.C. §1001 has often been used by the government as an alternative to §7206(1). Since 18 U.S.C. §1001 does not require that the false statement be made under oath, the provision may also be used against taxpayers who submit false information to IRS Agents in the course of their tax investigations. Thus, a prosecution under 18 U.S.C. §1001 may result where a taxpayer willfully makes a false written or oral statement to an IRS Agent in an effort to justify a position he has taken on his tax return.

(iii) Statements made by the taxpayer's attorney during an IRS investigation may also fall within the ambit of 18 U.S.C. §1001. One defense that had been asserted to an 18 U.S.C. §1001 prosecution relied on the "exculpatory no" doctrine. The "exculpatory no" doctrine provided, in essence, that under certain circumstances, the government may not prosecute an individual for false or fraudulent statements which are made in response to questioning initiated by the government where a truthful statement would have incriminated the defendant. This is where the duty of loyalty and confidentiality create a bind in the course of an I.R.S. investigation. Better practice, get a waiver from the client or immunity ruling from the court.

d) Money Laundering: In recent years, prosecutors have sought to include money laundering charges in indictments charging tax and other fraud violations. The reason is because the punishments for money laundering charges are far greater than for the underlying fraudulent conduct. At the same time, the evidence needed to prove money laundering violations is often just marginally greater than that needed to establish the fraudulent conduct itself.

(i) The Money Laundering Control Act of 1986 defined and criminalized for the first time a category of activity known as "money laundering." Unlike earlier efforts, like the Bank Secrecy Act and the Currency and Foreign Transactions Reporting Act, that unsuccessfully attempted to control the movement of illegal income through financial

institution reporting requirements, the Money Laundering Control Act was aimed at "the lifeblood of organized crime": the act of converting funds derived from illegal activities into spendable forms.

(ii) The Money Laundering Control Act consists of two sections: 18 U.S.C. §1956 which addresses the knowing and intentional transaction in, transportation or transfer of monetary funds derived from, certain specified unlawful activities; and 18 U.S.C. §1957 which deals with financial transactions over \$10,000 from criminally derived property.

(iii) Both 18 U.S.C. Sections 1956 and 1957 require that the property or money in question be, in fact, the proceeds of a specified unlawful activity. 18 U.S.C. §1957 requires that the defendant know that property involved in the monetary transaction derives from criminal activity; however, the individual need not know from what specific criminal activity the property was derived, only that it was derived from some form of criminal conduct. Similarly, 18 U.S.C. §1956 mandates that the individual know that the property involved in the financial transaction represents the proceeds of "some form of unlawful activity," that is, some form of felonious conduct under state, federal or foreign law, though the individual need not know the specific criminal activity from which the proceeds were derived.

(iv) See Appendix for a list of the 172 specific criminal activities that give rise to potential exposure to money laundering charges. Securities and tax violations are included.

(v) Moreover, if the illegal proceeds are commingled in a bank account with legitimate income, the government need not segregate the tainted funds from the untainted funds to prosecute the money laundering offense; this avoids allowing money launderers to escape prosecution by commingling legitimate funds with proceeds of the crime.

(vi) The IRS has authority to investigate all violations of 18 U.S.C. §1956 and 1957 that are discovered in the course of an ongoing IRS or Bank Secrecy Act investigation. In fact, the IRS is required to

coordinate its investigation with the FBI which has jurisdiction over the specific unlawful activity. Thus, the IRS has recently played a larger role in the enforcement of these laws and expect more.

e) Failure to File Currency Transaction Reports and Related "Structuring" Violations: The Bank Secrecy Act of 1970 was enacted, in part, to provide the government with certain reports or records "which have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings. Pursuant to 31 U.S.C. §5313(a), all domestic "financial institutions" are required to file a Currency Transaction Report (FINCEN Form 104), commonly referred to as a "CTR," for all cash transactions of more than \$10,000. Congress strengthened the 1970 Act by passing the Money Laundering Control Act of 1986. Pursuant to 31 U.S.C. §§5324(a)(3) and 5324(d)(1), it is a crime for any person to attempt to, or in fact, "structure" or assist in "structuring" a transaction for the purpose of evading the reporting requirements. For example, if one desires to deposit in a bank \$15,000 in cash but breaks down the transaction into three \$5,000 deposits over three days with the purpose to evade having the bank file a CTR, then one commits a felony in violation of 31 U.S.C. §5324(a)(3).

(i) Under 31 U.S.C. §5312, the term "financial institution" literally ranges from A to Z. It includes insured federal banks, commercial banks or trust companies, private bankers, agencies or branches of a foreign bank in the United States, thrift institutions, credit unions, SEC registered brokers or dealers, investment bankers or investment companies, currency exchanges, a futures commission merchant, commodity trading advisor, an issuer, redeemer or cashier of travelers' checks, checks, money orders or similar instruments, travel agencies, operators of credit card systems, business engaged in vehicle sales, people involved in real estate closings and settlements, the U.S. Postal Service and certain specified casinos. An individual can be a "financial institution" for currency transaction reporting purposes. As a practical matter, most assets in a foreign asset protection trust wind up in a financial institution. .

(ii) The Bank Secrecy Act of 1970 also requires that a Currency and Monetary Instrument Report, commonly referred to as a "CMIR," be

filed with the U.S. Customs Service when more than \$10,000 in currency or monetary instruments is transported into or out of the United States.

(iii) In addition, the Act requires that a Foreign Bank Act Report (Form TD F 90-22.1), commonly referred to as an "FBAR," be filed by any person who holds an interest of a value in excess of \$10,000 in an account in a foreign country. So, foreign asset protection trusts with bank accounts require reporting. New penalties risk loss of 50% of account balances.

(iv) In 1996, new regulations became effective concerning the reporting of suspicious transactions by financial institutions. The old Criminal Referral Form and the "suspicious transaction" check-off box were replaced by a new form, the Suspicious Activity Report ("SAR"). SARs have to be filed with the Department of Treasury's Financial Crimes Enforcement Network ("FinCEN") if the financial institution knows, suspects or has reason to suspect that a customer has violated a federal law or regulation, and the transaction involves or totals \$5,000 or more. The financial institution is barred under the regulations from disclosing the fact that they filed an SAR or the information it contains to the customer. The financial institution is subject to civil penalties if it fails to file a SAR in appropriate circumstances. This set of SAR filings and laws has revolutionized foreign asset protection trust planning: foreign bank accounts with U.S. bank correspondents are watching, not just creditors and tax authorities.

3. California Tax Crimes

While the California tax crime statutes generally parallel the federal statutes, there are two significant exceptions. Under both California and federal statutes, a person is guilty of willfully failing to file or willfully making a false or fraudulent return and of willfully failing to collect, account for or pay over withholding tax.

- a) However, in California, there are statutes which make it a misdemeanor -- even absent a showing of intent or willfulness -- to fail to file or to file a false or fraudulent return, or to fail to withhold or pay over tax withheld. Thus,

in California, a defendant may be convicted of failure to file or failure to withhold, regardless of his intent.

b) California law is also different in that the state has no all-encompassing tax evasion statute.

c) Further, the federal penalties are greater. While the maximum fine for the most serious criminal tax offenses in California is \$50,000, the maximum listed federal fine under 18 U.S.C. §3571 is \$250,000.

D. Circular 230

While Circular 230 generally governs practice before the IRS, it also includes a list of “best practices”. Best practices include: (a) communicating clearly to the client the terms of the engagement (e.g., determining the client's purpose for the advice and making clear the form and scope of the advice); (b) establishing the facts, determining the relevant facts, evaluating the reasonableness of assumptions and representations, and relating the law (including potentially applicable judicial doctrines) to the facts, and reaching a conclusion supported by the law and facts; (c) advising the client regarding the import of the conclusions reached (e.g., whether a taxpayer may avoid accuracy-related penalties by relying on the advice); and (d) acting fairly and with integrity in practice before the IRS.

a) Tax advisors "should provide clients with the highest quality representation" by using best practices in preparing advice and in preparing or assisting in the preparation of submissions to the IRS.

b) Tax advisors who have responsibility for overseeing a tax practice, those responsible for overseeing a firm's practice of providing advice concerning federal tax issues or assisting in the preparation of submissions to the IRS should take reasonable steps to ensure that the firm's procedures for all members, associates, and employees are consistent with best practices.

c) Tax lawyers are now deputy regulators if IRS attitudes prevail.

E. Risk Minimization

1. Introduction In order to minimize the potential risks associated with assisting a client with asset protection planning, the planner should, at a minimum, make sure to (a) follow established "know your client" procedures, (b) conduct or obtain a solvency analysis of the client, and (c) conduct a careful "due diligence" review with regard to the client's circumstances.

2. Know Your Client In the first instance, the planner should know his or her client, including: (a) the source of the client's wealth; (b) the particulars of the client's business or employment; (c) the client's reasons for seeking advice and/or assistance with regard to asset protection planning; (d) whether the client has been referred by a reputable source, and finally; (e) whether the client has any current creditor issues (especially with the I.R.S.) or is merely insuring against as yet unknown, but nevertheless potentially problematic, future creditor risks. Based upon an analysis of the foregoing, the planner should ask whether, and to what extent, the client is an appropriate candidate for asset protection planning.

3. Solvency Analysis At a minimum the planner should obtain from the potential client tax returns and financial statements, and a statement whereby the client swears or affirms to the fact: (a) that the client has no pending or threatened claims; (b) that the client is not presently under any investigation of any nature by the government; (c) that the client is not involved in any administrative proceedings; (d) that no situation has occurred which the client has reason to believe will develop into a legal problem in the future; (e) that following any transfers to an asset protection structure, the client will remain solvent and able to pay the client's reasonably anticipated debts as they become due, including taxes; and (f) that none of the assets which the client may transfer was derived from any of the "specified unlawful activities" which are set forth under the Money Laundering Control Act of 1986. A sample Affidavit of Solvency and Declaration of Financial Condition are set forth in the Appendix.

4. Due Diligence Procedures

a) A letter, signed by the client, which clearly acknowledges, (i) what constitutes a fraudulent conveyance under local law, (ii) the potential consequences to the client of the making of a fraudulent conveyance, (iii) that the attorney will not assist the client in any transfer which the attorney believes might constitute a fraudulent conveyance, (iv) that the attorney is relying upon full and continuing disclosure by the client in the attorney's assessment of whether the transfers at issue are, in fact, permissible, and (v) that a breach of the client's required full and continuing disclosure will constitute grounds for the attorney to resign as counsel;

b) The client should be required to disclose (i) any lawsuits in which the client is named as a party, (ii) whether the client, or any company with which the client has been closely connected, has ever filed for relief in bankruptcy, (iii) whether the client's federal, state and local tax reporting is current (and if not, why it is not), (iv) whether the client is currently being audited by any tax authority, (v) whether the client is aware of any legal actions threatened to be brought against the client, (vi) confirming that following any intended transfers the client will be in a position to pay all current bills as they come due and settle all outstanding debt, and that the client will retain sufficient assets to cover both his or her current and anticipated obligations and any potential personal emergencies; (vii) whether the client has any direct or indirect liability for any loan; and (viii) whether the client or any company with which the client has been closely connected has ever been convicted of a crime. Any issues which are brought to light by reason of the information obtained would obviously require further examination;

c) The client should be required to provide the following documentation for the attorney's review, (i) copies of the client's most recent personal income tax returns, as well as a current personal financial statement, and (ii) if the client is closely connected with any company, copies of that company's most recent income tax returns, as well as a current financial statement of the company;

d) The client should be required to provide personal references from one or more of the client's primary banker, the client's personal attorney, the client's personal accountant and, if different, the client's personal tax return preparer, as well;

e) An independent search should be undertaken to uncover, (i) any lawsuit in which the client or any company with which the client is closely connected is named as a defendant, (ii) any judgment under which the client or any company with which the client is closely connected is named as a judgment debtor, (iii) any liens which have been filed against the client, and (iv) any bankruptcy filings which may have been made by the client or any company with which the client is closely connected, at any time.

f) A letter acknowledged by the client on tax reporting obligations of the client following the completion of the asset protection planning.

g) A follow up procedure to determine if the client is complying with tax reporting.

h) If an accountant needs to be hired to evaluate facts or prepare financial analysis, make sure that the lawyers hire the accountant. A sample engagement letter is set forth in the Appendix.

F. Challenges to Foreign Asset Protection Trusts

1. General

Asset protection trusts have regularly been challenged, in the United States and abroad. In the United States, the focus is on the conflict between the law of the domestic forum (which follows the common law spendthrift trust rule) and the law of the controlling foreign jurisdiction (which has repealed or modified the self-settled spendthrift trust rule). A few cases are illustrative and provide guidance on what not to do or permit.

2. Brown

In the 1996 U.S. Bankruptcy Court matter of *In re Brown*, the debtors, husband and wife, argued that certain assets sought by their tort judgment creditor were protected from attachment by reason of the debtors' self-settled spendthrift trust (which the debtors had created under the law of Belize). The Bankruptcy Court found the potential application of the law of Belize to be inappropriate and Alaska law as controlling. Applying Alaska law, the court determined that the asset protection trust's assets were includable in the debtors' bankruptcy estate. The *Brown* court found that the trust was administered as a mere alter-ego of the debtors, rather than as a legally distinct entity. Specifically, the trust was a common law business trust which incorporated features found in both corporations and trusts and the debtors were respectively the president and the secretary of the trust. In such capacity, the debtors exercised complete control over the trust assets to the complete exclusion of the named Belize trustee. For this reason, the court called the trust a sham and cited the settlors' retention of direct control over the trust's assets as the primary reason for finding that the settlors' transfers to the trust were fraudulent. So, lesson one, use a trust and empower a trustee.

3. Portnoy

In the 1996 U.S. Bankruptcy Court case of *In re Portnoy*, the Bankruptcy Court focused on an irrevocable offshore trust into which the debtor placed virtually all of his assets at a time when the debtor knew that his personal guarantee of his corporation's indebtedness was about to be called. The debtor claimed not only that his assets were successfully insulated under the law of the Jersey, Channel Islands, but that he was entitled as a matter of law to a discharge of all debts including the indebtedness which he guaranteed.

When Marine Midland Bank sued Portnoy on his personal guarantee, the court found that Mr. Portnoy had misrepresented that he had been financially ruined by expensive experimental cancer treatments, that his assets other than encumbered real estate were all gone, and that he had no unencumbered assets with which to satisfy his indebtedness to Marine Midland Bank. Moreover, Mr. Portnoy did not disclose the existence of the foreign asset protection trust on his bankruptcy schedules. Mr. Portnoy also was found to have misrepresented his more than \$150,000 annual salary as being only \$1,700 per month.

Marine Midland Bank claimed that Mr. Portnoy's "continuous concealment" of assets barred a discharge. The court agreed and found that Mr. Portnoy had "transferred substantially all of his assets to an offshore trust *before* one year prior to the petition date but remained *de facto* owner by continuing to maintain unlimited control over the assets and conceal the trust within one year of the petition date." Lesson two, give up control, disclose and be transparent.

4. Lawrence

In the matter of *In re Lawrence*, a later 1998 Bankruptcy Court case, following a 42-month arbitration and 66 days before an award in excess of \$20 million was entered against him, the debtor funded an offshore trust governed by law of Jersey, Channel Islands, and about a month later, the law of Mauritius. The Bankruptcy Court found that the sole purpose of the trust was to shield the debtor's assets from a creditor which was about to obtain a staggering \$20 million arbitration award against him and that the timing of the trust's creation was evidence of fraudulent intent. The court also found the debtor's testimony before the court to have not been credible (and on several occasions even perjurious),

and that the debtor had been "shockingly less than candid" with the court. The court, therefore, entered judgment against the debtor, thereby denying the debtor a discharge in bankruptcy and ordered the return of assets. The debtor refused and spent almost six years in jail before the estate used up its assets fighting each of Mr. Lawrence's spurious motions. Lesson three, if the stakes are high enough and the debtor is willing to stay in jail and fight the trustee and force an exhaustion of estate assets, contempt of court cannot force a turn over of properly transferred assets. Moreover, lying is not even necessary and never appropriate.

5. Anderson

In *F.T.C. v. Affordable Media, LLC*, (known as the "*Anderson*" case after its individual defendants), the U.S. District Court for the District of Nevada and the U.S. Court of Appeals for the Ninth Circuit only dealt with the settlors' alleged contempt of court in failing, pursuant to a preliminary injunction, to repatriate trust assets which had been invested offshore in the name of the asset protection trust. Specifically, the settlors, who were also co-trustees of their own trust, as well as the trust protectors, were ordered to instruct their foreign co-trustee to repatriate more than \$6 million in profits collected under an alleged "Ponzi" type investment scheme. In their attempt to comply with the district court's order, however, the settlors either intentionally invoked (or at least intentionally failed to preclude the invocation of), an "anti-duress" clause in the trust agreement which resulted in their removal as trustees and ensured that the assets would not be repatriated pursuant to the district court's order. When the assets were not timely repatriated, the settlors were held in civil contempt for failing to comply with the court order and jailed pending repatriation of the assets and exhaustion of appeal rights.

On appeal, the Ninth Circuit considered the settlors' claimed defense of impossibility of performance, which the U.S. Supreme Court has repeatedly held to constitute an absolute defense to civil contempt because the remedy is not intended as a punishment (which would implicate certain Constitutional rights and concerns), but rather as a coercive measure presumed necessary to obtain compliance with a court order. The Court of Appeals rejected the settlors' claimed defense of impossibility of performance and found that the Andersons were in control of the trust.

Following rejection of their appeal, the Andersons signed appropriate documents authorizing and directing the trustee to turn over the assets. But the foreign trustee objected and claimed an independent fiduciary duty to follow local law and the terms of the trust agreement. The Federal Trade Commission engaged Cook Islands legal counsel and had the Andersons sign an instruction removing the then existing Cook Islands trustee and appointing as the new trustee a Cook Islands company organized by the Federal Trade Commission called "F.T.C. Incorporated." The original Cook Islands trustee, however, refused to recognize this instruction as valid and a proceeding was commenced in the High Court of the Cook Islands to determine the legal effect of the dismissal of the local, original trustee. In that case, *U.S. on behalf of its agency the U.S. Federal Trade Commission v. Asiatrusted Limited, as trustee of the Anderson Family Irrevocable Trust*, the High Court of the Cook Islands determined that the FCC instruction was invalid. Specifically, the High Court stated that the deed was made in breach of trust since it was for the benefit of the Federal Trade Commission and the Federal Trade Commission was includible with the trust's class of "excluded persons." In a subsequent application by the original Cook Islands trustee to strike out the action of the Federal Trade Commission, the Cook Islands High Court held for the original trustee under the English common law principle that the Cook Islands courts have no jurisdiction to entertain an action to enforce "penal revenue or other public law of a foreign state. For this purpose "penal" was defined to include not only crimes in the strict sense, but "breaches of public law punishable by pecuniary mullet or otherwise, at the instance of the state, government or someone representing the public."

In December 2002, the Federal Trade Commission announced that a settlement agreement had been entered into by the Federal Trade Commission and the original Cook Islands trustee, Asia Trust Limited. The settlement required Asia Trust Limited to turn over to the Federal Trade Commission \$1.2 million from the Andersons' Cook Islands trust to be distributed to defrauded consumers. Lesson four, local law enforced by local courts stand up to the full power and authority of the United States government, if there is an integral local trustee with a war chest.

6. Riechers

In, *Riechers v. Riechers*, a New York matrimonial action, the court perceived an offshore, self-settled spendthrift trust in a favorable light. In that case, in 1992,

following the defense of several medical malpractice suits, the settlor, Dr. Riechers, established a self-settled spendthrift trust under the law of the Cook Islands ostensibly to guard against the likelihood of future medical malpractice claims. At the same time, Dr. Riechers and his wife were having marital difficulties, but Mrs. Riechers was alleged to have been aware that the trust was being established. In 1994, Mrs. Riechers commenced an action for divorce and sought to have the trust included in computing an equitable distribution award. The New York State Supreme Court noted that since the trust was established "for the legitimate purpose of protecting family assets" the court did not have jurisdiction over the trust and that issues such as whether the wife would be entitled to any trust property should be left to a Cook Islands court to decide. Lesson five, a foreign trust for estate planning purposes will be enforced against creditors.

7. Evseroff

In Evseroff, the U.S. District Court, in September 2006, dismissed the IRS suit seeking to seize domestic trust assets to satisfy an attorney's tax liability, because the IRS failed to show that the trust was his alter ego or that he was only motivated to establish the trust because of his concerns about tax collection. Mr. Evseroff, a former Assistant District Attorney, participated in a series of tax shelters between 1978 and 1982 and a deficiency was assessed the amount of about \$650,000. In a series of transactions, Evseroff purchased retirement property in Florida, set up a domestic trust and transferred to it his residence in Brooklyn and cash. At the time of these transfers his tax liability was about \$771,000.

The IRS tried to seize assets from the trust to satisfy Evseroff's tax liability because he committed intentional fraud in setting up the trust; constructive fraud; and that the trust was only a nominee of Evseroff. In a fact specific analysis, the Court found that Evseroff retained sufficient assets to satisfy his tax liability consisting of cash, retirement accounts, his law practice and his Florida residence.

The IRS argued that the creation of the trust was either intentional fraud or constructive fraud. The Court ruled that the IRS must prove intentional fraud by clear and convincing evidence and constructive fraud by a preponderance of the evidence. But before the Court focused on the burden of proof, it focused on

whether the transfers to the trust rendered Evseroff insolvent. The Court concluded that it did not render Evseroff insolvent and therefore, there could be no fraud. Lesson six, retain sufficient assets to satisfy known liabilities.

The IRS argued that Evseroff's retirement accounts must be excluded from a balance sheet analysis of solvency because a state creditor could not seize these accounts. But the Court pointed out that the ERISA provisions protecting retirement accounts do not apply to the IRS. The IRS could have seized the retirement accounts and so the balances in the retirement accounts could be used to determine if Evseroff was insolvent at the time he transferred assets to the trust especially when the creditor was the IRS. Even though Evseroff was vague and imprecise and even obfuscatory in his testimony, since the IRS did not prove that Evseroff was insolvent at the time of the transfers to the trust, it cannot establish either actual or constructive fraud.

As to the argument that the trust was the alter ego of Evseroff, the Court acknowledged that Evseroff lived in the house, and therefore retained possession. But he paid the operating expenses pursuant to the use agreement, or at least most of them, since his sons helped to pay some expenses. Moreover, even though Evseroff may invade trust corpus in the future, he had not done so at the time of trial and the Court dismissed the IRS argument that his conduct was just a "cynical step in a long course of conduct" to defeat the tax liability.

The Court also found that Evseroff was partially motivated by concerns that the government would seize his assets, but that did not appear to have been the prime consideration when he set up the trust. Evseroff claimed he set up the trust as part of his estate planning associated with his retirement. He said he wanted to provide for his sons, avoid estate tax and prevent his wife, from whom he was separated, but not divorced, from receiving a portion of his estate. Even though the IRS argued that Evseroff could have divorced his estranged wife at any time, the Court found that Evseroff was credible in explaining that he "operated under the theory of let sleeping dogs lie". Evseroff did not seek to divorce his wife because at the time he was not supporting her, and if had asked for a divorce, she might have sought a monetary settlement.

The Court found that the Trust was neither a fraudulent conveyance nor the alter ego of Eversoff. The only factor indicating that it should be set aside was that

Everoff was partly motivated by tax collection. The IRS cited no cases which specifically hold that this factor alone is:

“... a sufficient reason to pierce the Trust. Moreover, when the Trust was established, Evseroff had estate planning motivations, he apparently had sufficient funds to satisfy the amount owed and ever since its establishment, he has respected the rental agreement and left the Trust money untouched. Therefore the government has failed to establish that the Trust should be pierced and used to satisfy his tax debts.”

The Evseroff case is a good example of the importance of factual analysis and non tax, estate planning objectives, the seventh lesson.

8. Summary Conclusions about Litigated Cases

Careful consideration must be given to the powers retained by the settlor, as the protector or as co-trustee. The most protection will be available where the settlor retains the least control. In addition, the circumstances surrounding the creation or funding of the trust must be as distant as possible from a potential creditor's claim. The trust should be set up as early as possible for the purpose of guarding against creditors arising in the distant future, rather than creditors who have a basis, however implausible, to argue that their claims were anticipated by the settlor in establishing the trust. Further, the settlor should retain the least amount of control over the trust. This requires an independent trustee, who has control of the trust's assets exclusive of the settlor.

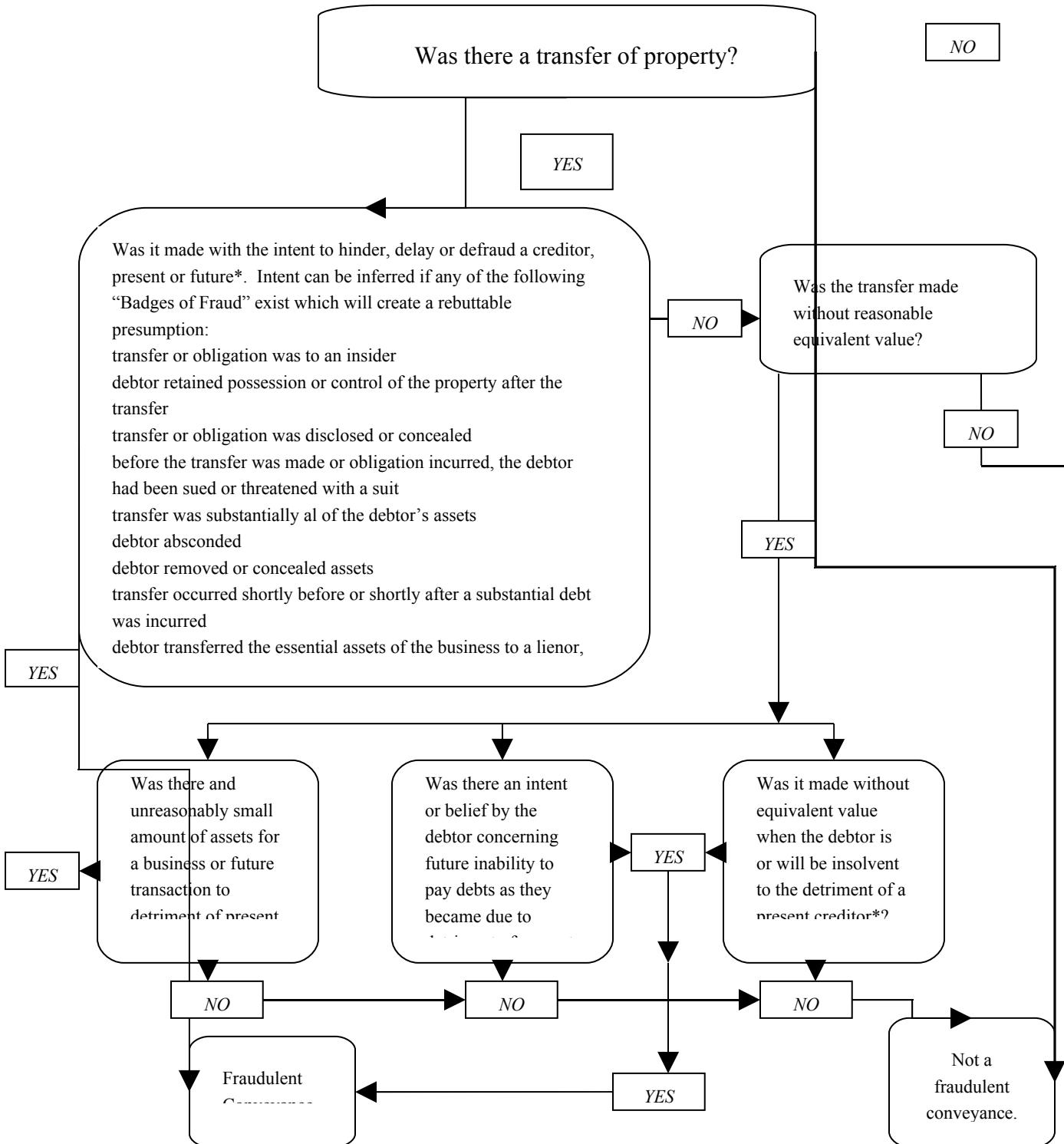
An offshore trust's effectiveness will not depend on whether a U.S. court recognizes foreign trust law when adjudicating a claim against the settlor. Provided that the trust's assets are located offshore (whether that be in the jurisdiction of the trust's governing law or an established financial center such as Switzerland), a creditor with a U.S. judgment will still be faced with significant hurdles before actually being able to levy on any of the trust assets. Since most foreign jurisdictions will not recognize United States judgments, the creditor may be forced to re-litigate its entire fraudulent transfer case against the asset protection trust. Moreover, in most foreign jurisdictions the statute of limitations on fraudulent conveyance claims may be as little as two years. Finally, aside from the United States, many common law jurisdictions (i) do not allow attorneys to

take matters based on a contingency fee; (ii) provide that the losing party plaintiff must pay all of the defendant's expenses, including attorneys' fees; and (iii) require posting of a litigation bond to pay those costs. Combined with an evidentiary standard in some jurisdictions requiring proof beyond a reasonable doubt on fraudulent conveyance claims, assets held in trust may, in the end, be unreachable notwithstanding the fact of a U.S. judgment. At the very least, the process may prove prohibitively expensive for a creditor when the potential reward is so uncertain.

F. Appendix

1. Flowchart on a Fraudulent Conveyance
2. California Civil Code 3439
3. San Diego Ethics Opinion
4. 172 Predicate Acts for Money Laundering
5. Affidavit of Solvency
6. Declaration of Financial Condition
7. Attorney Accountant Engagement Letter

1. Flowchart on a Fraudulent Conveyance



*A future creditor is a person whose claim is foreseeable at the point in time of the asset transfer. A present creditor is a person who has a claim whether or not reduced to judgment, fixed or contingent, mature or un-mature, disputed or undisputed.

2. California Civil Code Extracts

3439.01.

The following definitions are applicable:

*

(b) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

*

(d) "Debt" means liability on a claim.

*

(i) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

3439.02.

(a) A debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all of the debtor's assets.

*

(c) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

*

3439.04.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:

- (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
 - (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.
- (c) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following (the BADGES OF FRAUD):
- i. Whether the transfer or obligation was to an insider.
 - ii. Whether the debtor retained possession or control of the property transferred after the transfer.
 - iii. Whether the transfer or obligation was disclosed or concealed.
 - iv. Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
 - v. Whether the transfer was of substantially all the debtor's assets.
 - vi. Whether the debtor absconded.
 - vii. Whether the debtor removed or concealed assets.
 - viii. Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
 - ix. Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

- x. Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
- xi. Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

3439.05.

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation. (emphasis added)

*

3439.07.

(1) In an action for relief against a transfer or obligation under this chapter, a creditor... may obtain:

- (a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.
- (b) An attachment or other provisional remedy against the asset transferred or its proceeds in accordance with the procedures described in Title 6.5 (commencing with Section 481.010) of Part 2 of the Code of Civil Procedure.
- (c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, the following:
 - (i) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or its proceeds.
 - (ii) Appointment of a receiver to take charge of the asset transferred or its proceeds.
 - (iii) Any other relief the circumstances may require.

*

3439.09.

A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought...:

(a) Under paragraph (1) of subdivision (a) of Section 3439.04, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.

(b) Under paragraph (2) of subdivision (a) of Section 3439.04 or Section 3439.05, within four years after the transfer was made or the obligation was incurred.

(c) Notwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred. (emphasis added)

3. San Diego County Bar Association

Ethics Opinion 1993-1
Propriety of Asset Protection Planning

I QUESTION PRESENTED

To what extent may a member of the State Bar of California advise or assist a Client with respect to an avoidance of existing and identifiable creditors' rights and a protection of the Client's assets?

II SUMMARY

A member who furnishes advice and institutes asset protection techniques may not do so unless the member complies with Rule 3-210 of the California State Bar Rules of Professional Conduct. The member may not participate in violations of criminal and civil law against fraudulent transfers.

III STATEMENT OF FACTS

A potential Client seeks advice to protect personal assets from existing and identifiable creditors. The Client expresses an intent to transfer assets out of the creditors' reach. Client requests Attorney to advise, prepare, and assist in the implementation of an asset protection plan, which may include certain trust instruments, family limited partnerships, and similar techniques.

IV APPLICABLE RULES

Business and Professions Code Section 6128

Civil Code Section 3439 et seq.

Penal Code Section 154(a)

Penal Code Section 531

Rule 3-210. Advising the Violation of Law.

V ANALYSIS

Rule 3-210 of the State Bar of California Rules of Professional Conduct provides:

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

The commentary to Rule 3-210 indicates that the provision applies not only relative to the prospective conduct of the Client but also to the interaction between the member and Client and to the specific legal service sought by the Client.

Civil Implications

3. 176 Specific Crimes That Are Predicate Acts for Money Laundering

Aircraft Piracy, Title 49, USC Sec. 46502
Alien Smuggling, Title 8, USC Secs. 1324*, 1327*, 1328*
Arms Export, Title 22, USC Sec. 2778(c)
Bank Fraud, Title 18, USC Sec. 1344*
Bank Robbery and Burglary of Government Property, Title 18, USC Secs. 2113, 2114
Bank Secrecy Act Crimes, Title 31, USC Secs. 5322*, 5324*
Bankruptcy Fraud, Title 11, USC Sec. 101* and Title 18, USC Sec. 152
Bribery, Title 18, USC Secs. 201*, 215, 224*
Computer Crimes Title 11, USC Sec. 1030
Congressional or Cabinet officer Assassination, Title 18, USC Sec. 351
Conspiracy to kill, kidnap or maim a person or injure certain property in a foreign country, Title 18, USC Sec. 956
Contraband cigarettes, trafficking in Title 18, USC Secs. 2341*, 2342*, 2343*, 2344*, 2345*, 2346*
Copyright Infringement, Title 18, USC Sec. 2319**
Counterfeit goods, trafficking in Title 18, USC Sec. 2320*
Counterfeiting and forgery, Title 18, USC Secs. 471*, 472*, 473*, 500, 501, 502, 503, 513
Customs crimes, Title 18, USC Secs. 541, 542, 545, 549
Destruction by explosives or fire of government property or property affecting interstate commerce, Title 18, USC Secs. 844(f), 844(i)
Destruction of Aircraft, Title 18, USC Sec. 32
Embezzlement and theft, Title 18, USC Secs. 641, 656, 657, 658, 659, 664, 666, 669
Emergency Economic Powers Act crimes, Title 50, USC Sec. 1705
Espionage, Title 18, USC Secs. 793, 794, 798
Export Crimes, Title 50, USC App. 2410
Extortion and Threats, Title 18, USC Sec. 875
Extortionate Credit Transactions, Title 18, USC Secs. 892*, 893*, 894*
Firearms, Title 18, USC Secs. 922(1), 924(n)

Food stamp Crimes, Title 7, USC Sec. 2024
Foreign Agents Registration Act Title 22, USC Secs. 611, 612,
613, 614, 615, 616, 617
Foreign Corrupt Practices, Title 15, USC Secs. 78m, 78dd-1,
78dd-2, 78ff
Foreign law violations: extortion; fraud against a foreign bank; kidnapping; murder or destruction of
property by means of explosive or fire; narcotics; robbery, Title 18, USC Sec.
1956(c)(7)(B)
Fraud and false statements Title 18, USC Secs. 1001, 1005,
1006, 1007, 1014, 1027, 1028, 1029, 1032, 1035
Gambling Title 18, USC Sec. 1084*
Health care fraud Title 18, USC Secs. 287, 371, 1347
Influencing, impeding or retaliating against federal official
by threatening or injuring family member Title 18, USC Sec. 115
Kidnapping Title 18, USC Secs. 1201, 1203
Labor-management financial transaction fraud, union
embezzlement Title 29, USC Secs. 186*, 501(c)*
Mail fraud Title 18, USC Sec. 1341*
Mail, theft from Title 18, USC Sec. 1708
Malicious mischief Title 18, USC Secs. 1361, 1363
Murder on a federal facility Title 18, USC Sec. 1111
Murder of employees of the U.S. Title 18, USC Sec. 1114
Murder of foreign officials, official guests or foreign
protected persons Title 18, USC Sec. 1116
Narcotics offenses Title 21, Secs. 841, 842, 843, 844, 846,
848, 854, 856, 858, 859, 860, 861, 863, 952, 953, 955, 957,
959, 960, 962, 963
National resource conservation Title 42, USC Sec. 6901
Nationality and citizenship, unlawful procurement Title 18, USC
Secs. 1425*, 1426*, 1427*
Obscenity Title 18, USC Secs. 1461*, 1462*, 1463*, 1464*, 1465*
Obstruction of justice Title 18, USC Secs. 1503*, 1510*, 1511*,
1512*, 1513*, 1518
Ocean dumping Title 33, USC Secs. 1401, 1901
Passport and visa crimes Title 18, USC Secs. 1542*, 1543*,
1544*, 1546*
Peonage and slavery Title 18, USC Secs. 1581*, 1582*, 1583*,

1584*, 1585*, 1586*, 1587*, 1588*

Presidential assassination, kidnapping or assault Title 18, USC Sec. 1751

Prohibited transactions involving nuclear materials Title 18, USC Sec. 831

Racketeering Title 18, USC Secs. 1951*, 1952*, 1953*, 1954*, 1955*, 1956***, 1957***, 1958*

Securities, fraud in the sale of(Undefined)****

Sexual activity, transportation for illegal Title 18, USC Secs. 2421*, 2422*, 2423*, 2424*

Sexual exploitation of children Title 18, USC Secs. 2251*, 2251A*, 2252*, 2260*

State felonies: arson, bribery, dealing in obscene matter, extortion, gambling, kidnapping, murder, robbery, narcotics Title 18, USC Sec. 1961(1)(A)*

Stolen property, trafficking in Title 18, USC Secs. 2312*, 2313*, 2314*, 2315*, 2318*, 2321*

Tariff Act Title 19, USC Sec. 1590

Terrorism Title 18, USC Secs. 2332, 2332a, 2332b, 2339A, 2339B

Trading With The Enemy Act Title 50, USC App. 16

Unauthorized sound and video recordings, fixation and trafficking in Title 18, USC Sec. 2319A*

Violence against maritime navigation and fixed platforms, Title 18, USC Secs. 2280, 2281

Violence at international Airports, Title 18, USC Sec. 37

Water Pollution, Title 33, USC Sec. 1251 and Title 42, USC Sec. 300f

Wire Fraud, Title 18, USC Sec. 1343*

4.1 Affidavit of Solvency

The undersigned declares as follows:

1. That to the best of my knowledge and belief the information provided, and any attachments hereto, are true and correct.
2. I contemplate making transfers of property for asset protection purposes.
3. That there are no pending or threatened claims or proceedings that I reasonably anticipate may result in a judgment against me, and I am not a named defendant in any law suit or involved in any administrative proceedings as of this date, or a judgment debtor [other than as disclosed in any attached schedule].
4. That I do not anticipate filing for relief under the provisions of the applicable bankruptcy or insolvency laws, nor am I involved in any situation that I reasonably anticipate would cause me to file for relief under the applicable bankruptcy or insolvency laws in the future.
5. That following any transfer of my property to the trust structure, I will be solvent and able to pay my reasonably anticipated debts (including all taxes and any claims or lawsuits against me) as they come due from the balance of my property after such transfer.
6. That I have full right, title and authority to transfer the assets to the trust.
7. That I have read and understood the annexed description of unlawful activities, and confirm and represent that none of the assets which I may transfer to the trust was derived from any of the activities described therein.
8. That I am not to my knowledge, nor do I reasonably expect to be, under investigation by any Federal or State agency, or in violation of any statutes administered by, or empowering, the Internal Revenue Service, the Federal Trade Commission, the Securities Exchange Commission, the United States Postal Service, the Drug Enforcement Agency, or the Federal Bureau of Investigation.

9. That I am not engaged in or about to become engaged in a business or transaction for which remaining assets will be too small or unreasonable in relation to the business or transaction.
10. That I do not intend to incur or reasonably believe that I will incur debts beyond my ability to pay as they become due and I do not have the actual intent to hinder, delay, or defraud any creditor.

**NOTE TO AFFIDAVIT OF SOLVENCY
CONCERNING UNLAWFUL ACTIVITIES**

The law of a jurisdiction may contain legislation (the “legislation”) making it criminal for anyone to conduct or attempt to conduct certain financial activities which involve the proceeds of unlawful activities. The transfer of assets into a limited partnership, trust, or other entity may constitute a criminal activity within the scope of such legislation if the assets transferred to such entities were derived from any of the unlawful activities specified in the legislation.

The unlawful activities under the legislation commonly consist of tax evasion, tax avoidance, drug-trafficking, financial misconduct and environmental crimes. Drug-trafficking offences include the manufacture, importation, sale, or distribution of controlled substances; the commission of acts constituting a continuing criminal enterprise; and transportation of drug paraphernalia.

Financial misconduct includes the concealment of assets from a receiver, custodian, trustee, marshal, or other officer of the court, from creditors in a bankruptcy proceeding, or from a statutory corporation or similar agency or person; the making of a fraudulent conveyance in contemplation of a bankruptcy proceeding or with intent to defeat the bankruptcy law; the giving of false oaths or claims in relation to a bankruptcy proceeding; bribery; the giving of commissions or gifts for the procurement of loans; theft, embezzlement, or misapplication of bank funds or funds of other lending, credit, or insurance institutions; the making of fraudulent bank or credit institution entries or loan or credit applications; and mail, wire, or bank fraud or bank or postal robbery or theft.

Environmental crimes include violations of statutory or regulatory laws. Other specified unlawful activities in such legislation could include securities laws violations, counterfeiting, espionage, kidnapping or hostage-taking, copyright infringement, entry of goods by means of false statements, smuggling, removing goods from the custody of customs, illegally exporting arms, and trading with a country's enemies.

-

4.2 Declaration of Financial Condition

As of the date stated below, I, _____ state and declare to my current knowledge as follows:

1. I am not a named defendant in any lawsuit or the subject of any administrative proceedings which may require the payment of penalties, fines or other material financial assessments other than the matters identified and substantially described in all material respects in Exhibit A and the attachment thereto.
2. I have no pending claims, lawsuits or administrative proceedings which may require the payment of penalties, fines or other material financial assessments by me other than those identified and described in Exhibit A and the attachments thereto.
3. I do not currently intend to file for relief under the provisions of the United States Federal Bankruptcy Code, and I am not currently involved in any activity that may reasonably be expected to result in any filing under the United States Federal Bankruptcy Code for such relief within the next 12 months.
4. I am currently solvent and reasonably expect to be able to pay all of my reasonably anticipated debts as they come due in the next 12 months.
5. I confirm and represent that none of the assets which I will transfer pursuant to a private retirement plan trust and are described in Exhibit C was derived from any of the activities specified in Exhibit B relating to the United States Federal Money Laundering Control Act.
6. With regard to joint personal financial statements dated as of December 31, 2006 attached as Exhibit D, Joint Form 1040 for the year 2005 attached as D-1, I confirm to my current knowledge that the following statements are true and correct:

- a. The fair market value of each asset shown on the Financial Statement (D) is at least equal to or greater than the respective values set forth on the Financial Statement for each asset.
 - b. All the debts for which I am obligated primarily, secondarily or contingently are listed on the Financial Statement (D) or in the footnotes.
 - c. The amounts of income and expense set forth on the Annual Income Statement in the form of a joint Form 1040 for year 2002 (D-1) are true, accurate, and complete.
7. No promissory note or lease with respect for which I am obligated primarily, secondarily, or contingently is currently in default or under renegotiation.
 8. No event or transaction has occurred with respect to which I reasonably expect any controversy or claim against me personally except possibly the matters described in Exhibit A and the attachments thereto, if any.

I hereby make these statements and declaration effective the 1st day of February, 2007.

EXHIBIT A

CLAIMS

For descriptions see attached correspondence

EXHIBIT B

**OFFENSES UNDER THE UNITED STATES FEDERAL
MONEY LAUNDERING CONTROL ACT**

1. "Financial misconduct" including the concealment of assets from a receiver, custodian, trustee, marshal, or other officer of the court, from creditors in a bankruptcy proceeding, or from the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, or a similar agency or person; the making of a fraudulent conveyance in contemplation of a bankruptcy proceeding or with the intent to defeat the bankruptcy law; the giving of false oaths or claims in relation to a bankruptcy proceeding; bribery; the giving of commissions or gifts for the procurement of loans; theft, embezzlement, or misapplication of bank fund or funds of other lending, credit, or insurance institutions; the making of fraudulent bank or credit institution entries or loan or credit applications; and mail, wire, or bank fraud or bank or postal robbery or theft.
2. Environmental crimes including violations of the Federal Water Pollution Control Act, the Ocean Dumping Act, the Safe Drinking Water Act, the Resources Conservation and Recovery Act, and similar federal statutes.
3. Drug trafficking offenses including the manufacture, importation, sale, or distribution of controlled substances; the commission of acts constituting a continuing enterprise; the illegal procurement of essential or precursor chemicals; and transportation of drug paraphernalia.
4. Other crimes including counterfeiting, espionage, kidnapping or hostage-taking, copyright infringement, entry of goods by means of false statements, smuggling goods into the United States, removing goods from the custody of Customs, illegally exporting arms, and trading with United States enemies.
5. Any other "specified unlawful activity" described in 18 USC §1956(c)(7) (copy attached).

EXHIBIT C

TRANSFERS

Securities held in specified accounts with Smith Barney in the approximate amount of \$1,631,275.

EXHIBIT D

FINANCIAL STATEMENT

as of December 31, 2006

FEDERAL INCOME TAX RETURN FOR 2005

6. Attorney Accountant Engagement Letter

Ladies & Gentlemen:

This will confirm the arrangement agreed to between us on [DATE], whereby your firm is to assist [ATTORNEY] with respect to the tax affairs of [CLIENT'S NAME] for the taxable years [YEARS], inclusive. In connection with the retainer of our firm to render legal services to [CLIENT'S NAME], we have express authority to retain an accountant who shall work under our direction and report directly to us. This work contemplates services of a character and quality that are necessarily adjunct to our services as attorneys. You may bill the client directly for your services, plus out-of-pocket expenditures.

In connection with said employment, all communications between you and our client, [CLIENT'S NAME], as well as communications between you and any attorney, agent or employee acting on their behalf, shall be confidential and made solely for the purpose of assisting counsel in giving legal advice to [CLIENT'S NAME]. You will not disclose to anyone, without written permission, the nature or content of any oral or written communications nor any information gained from you from the inspection of any record or document submitted to you, including information obtained from corporate records or documents; or coming into your possession during the performance of services hereunder; nor permit inspection of any papers or documents without our prior written permission.

In this regard, please open a separate file at your office entitled, "Property of [NAME OF ATTORNEY] -- [CLIENT'S NAME], " and place all work papers, records, or other documents, regardless of their nature and the source from which they emanate in that file. This file shall be held by you solely for our convenience and subject to our unqualified right to instruct you with respect to its possession and control. You will immediately return our file to us at our request. As part of the agreement to provide accounting services in this matter, you will immediately notify this law firm of the happening of any one of the following events:

- (1) The exhibition or surrender of any documents or records prepared by or submitted by you or someone under your direction, in a manner not expressly authorized by this law firm.
- (2) A request by anyone to examine, inspect or copy such documents or records.

- (3) Any attempt to serve or the actual service of any court order, subpoena, or summons upon you that requires the production of any such documents or records.

By signing and returning the copy of this letter, you accept the terms of this retainer, and you further acknowledge that your firm has no proprietary or possessory interest in the work papers prepared by you and that they belong exclusively to [NAME OF ATTORNEY].

AGREED & ACCEPTED: