

WEALTH STRATEGIES



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Smooth Transitions: Three Steps for Successful Succession Planning

by Kristin Nelson, Head of Business Owner Solutions, Wealth Management Group at Bank of the West

Over the next 15 years, the youngest of America’s Baby Boomers will turn 65, and waves of business owners across the country will get ready to cash out.

In fact, according to the Small Business Administration, half of small business owners are currently over the age of 50 and sales of Boomer-owned small businesses are expected to reach an apex by the end of the decade¹.

While many business owners believe they’ll never fully retire, the succession planning process is more straightforward than most realize. Thinking about it early and planning ahead can lead to rich rewards: creating a legacy, building wealth, and offering protection for family members moving forward.

Successful succession planning begins with three steps.

Step One: Have a Candid Family Conversation

When it comes to thinking about succession, there is one simple question that is often overlooked: Are family members interested in running the business?

Money and business succession topics can be difficult for families to address, but talking openly about what happens with a business when the owner is ready to retire or move on is a necessary first step.

Transitioning the business to a family member can also have significant trust and estate advantages. Work with a trusted wealth advisor on transfer strategies — such as gifting, trusts, annuities, annuity trusts, family limited partnerships, and self-cancelling installment notes — that could be beneficial for your particular needs. Certain transfer strategies, such as gifts or sales to certain types of trusts, can make use of discounted values. This allows significant estate reduction and gives the business owner a chance to transition larger actual amounts of the business than may be allowed using other techniques².

Consider having someone from the outside moderate and lead your candid family conversation. A wealth management firm that offers family governance assistance can guide your family through these conversations to get to the best solution everyone can agree on.

Step Two: Weigh Your Options

There are three primary choices a business owner has when thinking about succession:

1. Transfer the business to family members, as outlined above.
2. Sell the business to people within the organization (e.g., a partner, management team, employees).
3. Sell the business to an outside third party.

Business owner transfer options	Potential transfer strategies
Family	Gift trusts, annuities, family limited partnership, self-cancelling installment notes
Employees	Employee Stock Ownership Plan (ESOP), management buyout (MBO), options, phantom stock and stock appreciation rights (SARs)
Charitable trusts	Charitable remainder trust, charitable lead trust
Co-owners or partners	Negotiate buy-out by co-owner or partners, new partner buys in
Third party	Sale, merger, recapitalization, private equity, partial purchase
Go public	Initial public offering (IPO), direct public offering (DPO), reverse merger

For illustrative purposes only. Not a recommendation of a specific strategy.

It’s also important to allow enough time for due diligence and preparation. That’s because business succession is a process, not an event. One rule of thumb to follow: If you are planning on selling your business, the minimum amount of time it will take to find a buyer, sell and exit the business is about 18 months.

Step Three: Know Your Business’s Value

The next step in the succession planning process is to understand what the business is really worth.

Family businesses often outlast their peers due to their long-term vision, resilience, loyalty, and shared values. It is because of this that valuing a family-owned business can be difficult and nuanced.

One mistake that business owners often make is to overestimate the value of their business by focusing on annual revenues rather than the more accurate valuation metric of future earnings potential.

Additional Keys to Success

Successful transitions require preparation and a willingness to answer hard

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questions. Some of these questions are technical and are rooted in accounting, law, estate planning, retirement planning, and business modeling. Others are deeply personal, shaped by family dynamics, values, career goals, and a desire to leave something of value to family members.

Among the key questions to consider:

- ▶ Are there successors I trust within my family who want to run the business?
- ▶ Do I want to leave my business in the hands of my employees?
- ▶ What are the trust and estate implications of my succession plan?
- ▶ Am I thinking clearly about my succession options?
- ▶ How quickly do I need to monetize the business to generate retirement income?
- ▶ Have I accurately determined my income replacement needs?
- ▶ Is my business structured the right way for succession?
- ▶ Do I have the right buy-sell agreements in place to maximize the value of the transfer?
- ▶ Do I have insurance in place to cover unforeseen events during the succession process — and beyond?
- ▶ How important is it to leave something of value to my family and/or co-workers?

The Bottom Line

While letting go of your business and stepping aside can be an emotional and complex process, many business owners eventually will need to make decisions about business transfer. Those who make informed choices will have the best chance of achieving a smooth, rewarding transition.

Smart succession planning is important. It starts with family conversations, a comprehensive review of transition options, and a business valuation. Handled correctly, it may end with tax savings³, retirement income, and a legacy of family wealth.

For more information, please visit www.bankofthewest.com/wealth-management and Bank of the West’s White Paper “Smooth Transitions: Three Steps for Wholesaler Succession.”

¹ “Demographic Characteristics of Business Owners and Employees: 2013,” SBA Office of Advocacy, no. 6 (2013): 2, URL: <https://www.sba.gov/sites/default/files/advocacy/Issue_Brief_6_Demographic_Characteristics_2013.pdf>

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Kristin Nelson Head of Wealth Management Strategy, Senior Vice President

As Head of Wealth Management Strategy, Nelson is responsible for the development and implementation of strategies to drive growth for the Wealth Management Group. This includes managing the direction of client segments, such as the Private Business Owner focus, as well as digital and innovation projects. Nelson also sets the direction for training and marketing programs to align with business development for the Wealth Management Group. Based in San Francisco, Nelson joined Bank of the West in 2014. Previously, she was Managing Director at Deutsche Bank in New York and San Francisco. She has also served as Senior Vice President at Bank of America in Los Angeles, and Senior Wealth Director for BNY Mellon in Newport Beach. Kristin holds Series 7, 63, and 65 Securities Licenses and a California State Insurance License. She holds a B.A. in Economics from Scripps College in Southern California.



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"Repeal the Estate Tax!" And Other Sound Bites

By: Timothy J. Kay and Steffi Gascón Hafen

Next up on the agenda – tax reform. Long the battle cry of the Republican Party, repealing the estate tax has been at the forefront of the battle. With a Republican controlled Congress and White House, what will this mean?

The Much Discussed, but Rarely Applicable, Estate Tax

- *Is Estate Tax as American as Apple Pie?* The modern estate tax was enacted in 1916, repealed for deaths in 2010, but came back to life in 2011. Gift tax was enacted in 1924 (and repealed in 1926, and reintroduced in 1932).
- *99.8% of Estates Are Unaffected.* Today's estate tax exemption shelters the first \$5.49 Million of a person's estate from the 40% "death tax" (\$10.98 Million for married couples). After accounting for deductions, credits, and advanced planning techniques, very few estates are affected. The Tax Policy Center predicts that in 2017, 11,020 estates will have to file a Federal estate tax return (of the 2.7 million estates). Of that, 5,190 will owe federal tax. Of the estates that owe tax, the average estate tax rate is estimated at 17%.

Planning That Still Works Amid Uncertainty

- *Annual Exclusion Gifts.* The annual exclusion allows a donor to gift \$14,000 to as many donees as he/she chooses each year (\$28,000 if a spouse joins in the gift) without triggering the gift tax. Use of "Crummey Trusts" allow those gifts to be invested and compounded over time for the beneficiary.
- *Grantor Retained Annuity Trusts.* These trusts allow a trustor to effectively make a low interest loan of investment assets for the benefit of beneficiaries, with all appreciation and earnings in excess of the interest rate passing to the beneficiaries transfer-tax-free. Supercharge this by utilizing valuation discounts on the investment assets contributed to the GRAT.
- *Estate Freeze Installment Sales.* This has the grantor sell assets to a "grantor trust", a trust which is treated as owned by the grantor for income tax but not transfer tax purposes. Again, all appreciation on the assets will pass via the trust to his/her beneficiaries. Supercharge this by utilizing valuation discounts on the assets and have the donor(s) pay the income tax on the earnings of the grantor trust.
- *Charitable Remainder Trusts.* The grantor contributes highly appreciated assets to a trust exempt from income tax, retaining an income

stream for life, with the remainder going to charity at the donor's death or the end of the term. The sale of the highly appreciated assets by the CRT is income-tax-free so that 100% of the sales proceeds can be invested to produce a larger income stream for the donor.

"Tax reform. Long the battle cry of the Republican Party, repealing the estate tax has been at the forefront of the battle. With a Republican controlled Congress and White House, what will this mean?"

Much Ado About Nothing?

- *If Estate Tax is Repealed, Other Taxes May Fill the Void.* If the estate tax is repealed, the gift tax may remain in place. President Trump has floated the elimination of the "step up" in income tax basis at death, instead applying a capital gains tax at death. The gift tax would serve as a backstop to eliminate death bed transfers to avoid capital gains tax. Under this scenario, it is critical that irrevocable trusts be flexible and the grantors retain the ability to swap low and high basis assets.
- *Any Relief May be Short-Lived.* The Senate does not have 60 Republican votes so it is not filibuster proof. This means that tax legislation may need to be passed as a Reconciliation Bill which requires only 51 votes and cannot be filibustered. However, a Reconciliation Bill can be in effect for no more than 10 years.
- *Bottom Line.* No one knows what will happen. Effective planning depends upon flexibility. A check-up with your estate planner is advised to take advantage of the laws available to you today and ensure flexibility for future changes.

For more information about Wealth Strategies, please visit www.swlaw.com/services/private-client-services.



Timothy J. Kay is a Certified Specialist in Estate Planning, Trust and Probate Law, California Board of Legal Specialization and is a partner in the Orange County office of Snell & Wilmer. His practice is concentrated in tax, trust and estate matters with emphasis in estate planning, trust and probate administration, estate and gift taxation and trust and estate litigation. Reach Tim at 714.427.7400 or tkay@swlaw.com.



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Wealth Strategies

with Loreen Gilbert, CIMA, AIF, CRC, CLTC

Insights With the Experts

“Wealth management” has many different facets including managing assets, minimizing income tax and estate tax liabilities, accessing capital, maximizing retirement benefits and reducing potential risks. However, it is also an opportunity for experts in the field of wealth management to understand the core values of the clients and the businesses whom they serve. These experts want to know what is most important to

their clients and to assist them in uncovering pitfalls along the way. In our dialogue, we meet the Orange County specialists who work in these various aspects of wealth management and who view their clients as representing families as well as future generations of families. Also, as we are now in the last quarter of the year, so we will also focus on strategies that can be implemented before year-end.



Betty Mower Potalivo

We will start with the idea of what is important about money to clients by asking **Betty Mower Potalivo, President, Orange County Region for Northern Trust** the following:

Loreen: You mentioned that it is important to help people determine the purpose of their wealth. Why is this important?

Betty: I find that wealth is often created by those who never deliberately planned their lives around creating wealth. Rather wealth is a by-product of an unfolding

vision to create value in the world. The concept of wealth having a purpose is rarely a consideration.

What is the purpose of wealth? The answer lies in a process of discovery when vision, values and purpose become clear, during and after wealth creation. Every client has unique priorities and objectives. To uncover the purpose of wealth, we challenge our clients to engage in a discovery process, which helps them elucidate their most important hopes and dreams, and organize and implement a plan to help achieve them.

We start with Lifestyle: A common question is, “If I am no longer working,

or if I sell my company, how much money do I need to make sure I can live the lifestyle I want?” At Northern Trust we help clients quantify “their number”. We work with our clients in an iterative process to ensure assets are available to meet our client’s goals. We strive to provide clarity around attainment of goals, using total transparency and realistic assumptions.

The next purpose of wealth often has to do with Family. “How much do I give my children, and when do I give it to them? To this question we ask, “What is the purpose behind transferring wealth to your children?” There is no universal answer. Each family is unique. We have worked with many generations of families of great wealth. We have seen and guided best practices of legacy wealth, where family values remain intact over many generations.

Loreen: Markets go in cycles. How do you make sure your clients have enough money even if the markets go down?

Betty: At Northern Trust, we collaborate with our clients to understand their asset sufficiency and their asset efficiency. Our holistic advisory process helps our clients design a plan to meet a lifetime of goals in spite of market cycles.

We help clients determine the appropriate asset mix. The purpose of risk assets is to generate long term growth. Risk control assets: Imagine having five or fifteen years’ worth of “reserve” funds in risk control assets allowing you to sustain your lifestyle goals as your risk assets are recuperating from a down cycle, thereafter achieving their long-term expected return. We determine this allocation mix by engaging our clients and using a proprietary technology that models assets against a lifetime of goals in present value terms. We understand that our client’s allocation needs to be dynamic as their assets tackle specific goal funding over time: lifestyle, major purchases, wealth transfer, philanthropy and typically a minimization of taxes.

Betty brings up the transfer of money from one generation to another, so we now turn to **Timothy J. McElfish, Partner at Ferruzzo & Ferruzzo** to ask the following:

Loreen: Tim, how can a family create multi-generational planning and protect their beneficiaries at the same time?

Tim: The use of lifetime benefit trusts can provide flexibility to the beneficiaries while also protecting the assets. In addition, the use of corporate trustees in lieu of beneficiaries being the sole trustees is a useful tool. Therefore, the assets are never fully handed down to the next generation. Instead, they are held in trust utilizing a corporate trustee with a lifetime income stream to the beneficiary. Ultimately, this protects the assets from creditors and potential divorce situations. There can also be provisions within the trust to provide loans to the income beneficiaries for specific purposes such as to start a business or to purchase a primary residence.

Loreen: If a family business is a part of the estate, how do parents determine if their children are willing and capable of taking over a family business?

Tim: If the family would like for the children to take on the family business, it is important to integrate the children into the business early on. In doing this, you will find out who is interested and able to carry on the family business. For those who are not interested in carrying on the business, there can be equalization provisions set up in the trust to allow for an equal distribution of the trust estate to your children. One pitfall is that many family business owners do not think about setting up these provisions properly in their trust and if something unexpected were to happen, it can tear apart a family.



Timothy J. McElfish



Kristin Nelson

Speaking of family businesses, another topic that is top of mind at the end of the year is on business exit strategies. To answer some questions, I asked **Kristin Nelson, SVP and Head of Wealth Management Strategies for Bank of the West** the following:

Loreen: When do you advise your business owner clients to start planning for their exit strategy?

Kristin: We see it as a dynamic process and one that evolves over time, as circumstances may change.

Transitions – whether to another family member or selling the business to an outside party – always take time, and always take longer than people can anticipate. So really it’s a situation where the sooner you start thinking about it, the better prepared you’ll be for when that exit happens, even if it is years down the road. It also ensures that you can

execute the strategy that you truly want, versus one that may not be ideal because you didn’t have time to do the proper pre-planning and comparing alternatives. In addition, it’s important to consider your family and the implications that any choice has for them. This is a significant decision that has any number of complex factors at play, and one of the first to really consider is – does someone within the family want to take over the business? The topic of money can be extraordinarily tough for some families to discuss, but it is inevitable that at some point a business owner will want to retire, step back from ownership or pass that business on to the next generation.

Loreen: For someone who will finalize the sale of their business in 2017, what strategies do you suggest?

Kristin: By now, there should be a transition plan in place and a timeline for what those interim steps will be to reach the deal’s completion. Those steps can both be internal and external – and they should be thinking about what the communication plan is for vendors and clients and when employees have to be informed about the deal, along with incorporating a retention strategy. At this point, the owner should have a good handle on what their future personal needs will be, and prioritized how to address them in the future state. I would also advise that they continue to rely on the counsel and perspective of their support team of accountants, lawyers and financial advisers through those last steps, and as they head into their new circumstances. The last mile of any sale is sometimes the toughest, and that support team of experts has been through these situations many times before. Their professional experience can be invaluable in times like these.

Another important wealth consideration includes asset protection strategies. For this topic, I asked **Jeffrey M. Verdon, Managing Partner, Jeffrey M. Verdon Law Group**, the following:

Loreen: Jeff, what are some of the asset protection strategies that people should consider implementing?

Jeffrey: Protecting assets is about separating the “ownership” from the “control” and using the proper form of entity for the asset one desires to protect. For example, rental real estate is one of the most heavily litigated asset class, yet we see far too many individuals own rental real estate in their personal name or in their family trust. One lawsuit can wipeout the equity in all of the real estate because there is no way to contain the “inside” liability. A family limited partnership (LP) with a corporate or LLC GP, or using a limited liability company (LLC) to own each parcel is a smart and safe way to avoid personal liability from an unforeseen lawsuit, or if one of your properties has a claim, the damages will not spill over into the other LP or LLC.

Seventeen states and a good number of countries have adopted very protective trust law far more protective than you can achieve in CA. Our law firm rarely, if ever, establishes a CA situs trust anymore, because there are far more safe and secure places to establish the trust. Just because you live in CA doesn’t mean your “family trust” has to. We use the foreign and domestic asset protection trusts to achieve these protections for our wealthy clients, as the penultimate “firewall” protection for many kinds of assets, including liquid assets.

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Jeffrey M. Verdon



Shaun M. Skeris

With the possibility of tax reform being passed by Congress, I asked **Shaun M. Skeris, CFA, Senior Vice President with City National Bank** to address the following:

Loreen: Shaun, we are now in the fourth quarter of the year and facing the uncertainty of tax reform being passed this year or next. How are you advising your clients?

Shaun: No matter what happens with tax reform, we are focused during this last quarter of the year on optimizing our

clients’ portfolios by taking capital gains against any carry forward tax losses and making sure that we are being tax efficient with our clients’ portfolios. Many of our clients have family foundations that we help them establish. Since the markets have had gains in the last year, donating appreciated stock to their foundation is a tax efficient strategy which minimizes taxation.

Loreen: Shaun, since your division is part of a bank, how do you assist your clients when they need access to capital?

Shaun: We sit down with our clients to determine the best way for them to access the capital that they need. One way we can help our clients with access to capital is to collateralize their investment portfolios to borrow funds. This can give them the funds that they need, without having to sell or take gains on the portfolio. Another way to access capital might be with a loan on an existing property that they own. We look at all of the options and find creative ways for clients to access capital.



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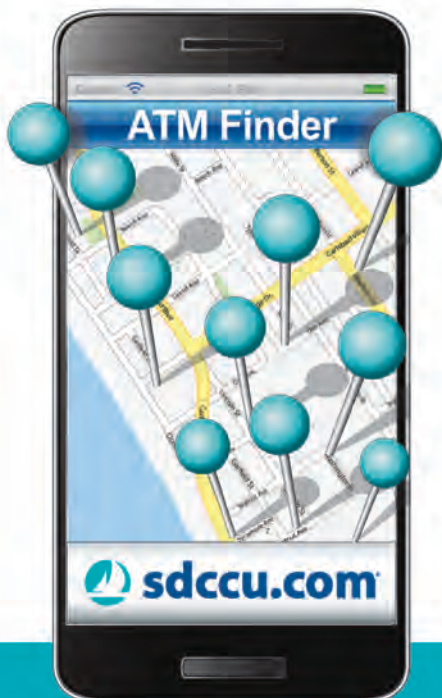
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The Department of Labor Fiduciary Rules Key Points for Retirement Plan Sponsors

by Loreen Gilbert, President and Founder, WealthWise Financial Services

The significant growth of 401(k) plans and IRAs led the U.S. Department of Labor (DOL) to do something that it hadn't since 1975: implement stronger protections for investors who rely on advice from a financial advisor.

The rules expand the definition of who is a fiduciary, and include prohibited transaction exemptions that allow certain advisors who act as fiduciaries to continue to receive common forms of compensation if they provide advice that is impartial and in the best interest of the investor.

To stay in compliance with the DOL rules, financial services firms must be sure their investment recommendations are prudent for the client, their compensation reasonable and they have not made any material misleading statements.

Reviewing the following questions and answers should help you prepare for implementation of the new rule.

Q. What are the purposes of the new regulations?

A. The DOL wants to ensure that financial advisors who provide advice about retirement accounts put their clients' interests first. Another goal is to require transparency about the cost of investment advice and the costs of financial products recommended by an investment advisor. These rules also apply to plan-to-IRA transfers.

Q. What is the definition of fiduciary?

A. A person provides fiduciary investment advice to a plan if, among other things, he or she provides a recommendation regarding investment securities for a fee or other compensation. Further, fiduciary advice is present if the person making the recommendation indicates he or she is acting as a fiduciary within the meaning of ERISA or the Internal Revenue Code, offers the advice pursuant to a written or verbal agreement that is based on the specific needs of the recipient of the advice, or directs the advice to a specific recipient.

Q. What constitutes a recommendation?

A. It is a communication that would reasonably be seen as a suggestion that the advice recipient take or refrain from a particular course of action.

Q. Does the investment advice rule apply to a recommendation to roll money out of a 401(k) plan into an IRA?

A. Yes, the DOL's final rule indicates that a recommendation of a distribution or rollover from a 401(k) into an IRA constitutes fiduciary advice under ERISA. Plan sponsors should confer with the plan's recordkeeper to determine how requests for plan distributions are handled.

Q. What is not viewed as covered investment recommendations?

A. Non-fiduciary communications include:

- ▶ Education – Regardless of who is providing the education or in what form, presentation of plan information and/or objective information about investment choices in the plan (such as fees, expenses, investment objectives, risk and return characteristics and historical return information) is non-fiduciary.
- ▶ General Communications – These include descriptions of investment concepts, market data about performance, price quotes and newsletters.
- ▶ Platform Providers – Making available a platform of investment alternatives without regard to individual investor needs is not considered investment advice as long as the plan fiduciary is independent of the service provider.

Other categories of communications not considered investment advice include asset allocation models and interactive investment materials, so long as they are designated investment alternatives selected or monitored by an independent plan fiduciary, and certain other conditions are met.

Q. Are there exemptions from the DOL fiduciary rules?

A. Yes. The Best Interest Contract (BIC) exemption allows firms to avoid conflict of interest violations when they use their former compensation and fee practices as long as they mitigate conflicts of interest and provide advice designed to be in the best interest of their client. For this BIC exemption to apply, advisors must adhere to impartial conduct standards and provide various disclosures. One requirement of the Best Interest Contract (BICE) is disclosure on the firm's website.

Q. Are our employees who work on various aspects of the plan considered fiduciaries under the DOL rules?

A. If employees who work in payroll, accounting, human resources or finance routinely prepare reports or recommendations for the company or named fiduciaries as part of their normal job duties and do not receive any compensation

beyond their normal pay, they will not be viewed as fiduciaries.

So long as they make no recommendations to a participant, these employees can provide non-fiduciary education including general financial, investment and retirement information. They also can:

- ▶ Help participants enroll, decide how much to save and learn more about the basics of the plan.
- ▶ Provide education on an individual or group basis, in writing or orally, via a call center, or by way of video or computer software.
- ▶ For plans, use of hypothetical asset allocation models or interactive investment materials intended to educate participants and beneficiaries as to what investment options are available and permitted, so long as they are designated investment alternatives selected or monitored by an independent plan fiduciary.

Q. What plan decisions made by a plan sponsor are affected by the new rule?

A. The same fiduciary standards apply, whether the plan sponsor hires someone to manage the plan, or does some or all of the plan management itself. The plan sponsor remains a fiduciary with respect to selecting and monitoring investments for the plan unless working with a 3(38) fiduciary (including default investments for automatic employee contributions), meeting conditions for fiduciary liability relief for these investments, hiring a service provider and disclosing information to participants, and reporting to Government Agencies, among other decisions.

Q. What should we as a plan sponsor do to endeavor to comply with the DOL fiduciary rules?

A. There are several steps you can take to help maintain compliance with DOL rules, including:

- ▶ Review your existing relationships with plan service providers to identify who may be treated as a fiduciary under the DOL rules.
- ▶ Review any written agreements with service providers to ensure compliance with the new regulations.
- ▶ Refresh your knowledge of fiduciary best practices.
- ▶ Review any education materials with your financial advisor to determine if there are inadvertent investment recommendations.
- ▶ Make sure that employees working on various aspects of the plan understand the fiduciary rules.

Q. Where can I get more information about recent changes to the fiduciary rules?

A. Contact us at 949.748.1177 or email me directly at loreeng@wealthwisefinancial.com. More information can also be found at the Department of Labor's website (www.DOL.gov) including the full rules, Fact Sheets and Frequently Asked Questions.

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Loreen Gilbert

Loreen Gilbert is the President and Founder of WealthWise Financial Services. She is celebrating her 20th year of running a private wealth management practice. Gilbert serves on the Executive Board of National Association of Women Business Owners (NAWBO), representing more than 13 million women business owners in the US. Gilbert is the Chair Elect of the NAWBO Institute which provides resources and tools to women business owners around the globe. Gilbert was also awarded the Remarkable Woman Award as "2016 Business Owner of the Year" and "2017 Advocate of the Year" for NAWBO-Orange County, California. She was recently honored by *Enterprising Women Magazine* as the national winner of the 2017 Enterprising Women of the Year award in her category. Gilbert currently sits on the regional board of HOPE International, a micro-lending organization helping mainly women in third world countries to start or expand a business. She has been covered by US News & World Report, Investor's Business Daily, Yahoo! Finance, Money Magazine, Reuters, and Financial Advisor Magazine. Gilbert also hosts on-air segments for KX 93.5 FM where she resides in Laguna Beach, California, to educate listeners on financial matters. Her iTunes podcast is called *WealthWise Moment*. Contact us at 949.748.1177 or wealthwisefinancial.com.



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The potential tax reform can also have an impact on estate planning. For an estate planning perspective on tax reform, I asked **Timothy J. Kay, Partner at Snell & Wilmer** the following:

Loreen: Tim, with tax reform on the congressional agenda, how do you think estate taxes will be impacted?

Tim: The opener is that the estate and generation skipping taxes are to be abolished. However, whenever there is tax reform, there is always a give and take. In 1981, the Congress made significant changes to the availability of the estate tax marital deduction, and people had to review their estate plans. Each attorney uses different formula approaches in a married couple's estate plan; therefore, if the estate tax code changes, the formulas will probably be wrong and will need to be updated. As soon as tax reform is passed, people should call their estate attorney, their CPA and their financial advisor to see how it impacts them.

Loreen: Tim, since trust and estate litigation is on the rise, how are you advising your clients?

Tim: With the aging demographics of our country and the baby boomers being of retirement age, the probate courts are completely overwhelmed with their case loads. And trust litigation is indeed on the rise. Therefore, in an attempt to reduce post-death trust and estate litigation and particularly where family conflict already exists, we advise our clients to require their beneficiaries to sign a general release before receiving an inheritance.



Timothy J. Kay



Jordan Cross

Finally, when it comes to year-end strategies, businesses should review their retirement plans to make sure they are maximizing retirement plan benefits. To answer key questions on retirement plans, we turn to **Jordan Cross, Principal with CrossPlans:**

Loreen: Jordan, what retirement plan strategies can a company or business owner make in the fourth quarter of the year that will help reduce income tax obligations?

Jordan: The deadline to implement a new Safe Harbor 401(k) Plan (an incredibly common Plan design strategy that guarantees business owners and Highly Compensated

Employees can maximize their personal 401(k) contributions) for 2017 was 10/1/2017, but we can still set up an optimized Profit Sharing Plan with the 401(k) and Safe Harbor effective in 2018 or we can always utilize a Defined Benefit Plan with or without a 401(k) Profit Sharing Plan for 2017. If a

business has been maximizing Employer Contributions to a Defined Contribution Plan, it would be a great time to explore and consider a Cash Balance Defined Benefit Plan for even more Employer Contributions and Deductions before year end.

Loreen: Jordan, What is new in the retirement plan industry?

Jordan: One interesting trend in the retirement plan industry is that technology is bringing big market and large Plan solutions to the small and micro markets. We are seeing more Vendors and Recordkeepers utilizing technology to assist with mailing services and transactions to help Plans with Auto-Enroll, Participant Notices, Fee Disclosures, etc. The auto-enroll portion is particularly exciting because it takes the burden off the Plan Sponsor while still helping them meet the notice requirements. Regardless of the DOL Fiduciary Rules or Tax Reform – there is no doubt that we have a retirement savings problem in America, so the more ways we can leverage technology to help people enroll in Plans, increase savings in Plans and save for Retirement, the better!

Jordan mentions the Department of Labor Fiduciary Rules. The Department of Labor has recently come out with their guidelines on the new rules as they relate to Plan Sponsors. See the Frequently Asked Questions in this edition that reviews some of those details.

In closing, I hope that you gained some insights from our experts and that this wealth management feature will help you, your family and your business in the last quarter of the year.



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Sibling Rivalry, Entitled Beneficiaries, or Defending Your Estate Plan: Trust Litigation

Some parents have unrealistic expectations for their family. Claims that their children will **never** litigate over their estate often results in claims being filed. As far back as the story of Cain and Abel, sibling rivalry has torn apart families. Similarly, litigating over an estate plan can forever break a family apart. Too often, parents recognize the rivalry between their children, but they do not recognize that they are actually the “glue” holding the family together. Then, after the death and the loss of the leader, litigation ensues. Briefly, some of the types of estate litigation can be categorized into the following categories: Instrument Litigation, Trustee Breaches, and Faulty Planning.

Instrument Litigation

A contest over the estate planning instrument will usually relate to the construction of a will or trust. These types of contests include lack of capacity claims, undue influence, or simply a failure to follow the formalities to establish a proper trust or will. A will or trust contest is a direct attack or challenge of the instrument. Essentially, the party contesting the will or trust may allege that the creator did not have sufficient capacity to create the instrument. The outcome of this litigation will be dependent on the facts related to mental capacity, medications, medical impairments or medical procedures around the time the document was drafted.

Litigating over the construction of a will or trust (i.e. court determination of the legal effect or meaning of a particular section) can also be a form of estate litigation. Without a well-drafted estate plan, ambiguity can result in seeking court clarification of your intentions. By seeking instructions from the Court, litigation may result in the Court’s interpretation of the documents rather than your intentions.

Trustee: Fiduciary Duties

When selecting a trustee, it is important to understand that a trustee has a fiduciary duty to the beneficiaries. That fiduciary duty and the actions of a trustee often result in trust litigation. Typically, parents will select one child to serve as trustee, often an elder child or a child with a financial or entrepreneurial spirit. While the child may excel in his or her career, it does not mean that the child will fatefully execute the duties as trustee. Being a trustee requires a special knowledge of duties under the *California Probate Code* and an understanding of his or her duties as a fiduciary.

A typical example of trustee litigation relates to the trustee’s duties to account to the beneficiaries. A trust administration over a number of years without an accounting could draw an accounting litigation. During this type of litigation, the trustee is required to justify and defend each of the trustee’s actions, expenses, and investments of the trust estate while the individual served as trustee. The rules governing the administration are codified within the trust instrument, and the *California Probate Code*, including the California Uniform Principal and Income Act. Litigation over accountings requires clear record management, distributions authorized by the trust instrument, and clarity over compensation. In some instances, a trustee is selected because the individual already works within the family-owned business. Careful attention is required when nominating a trustee who works for a business. A salary drawn for working in the company would be an authorized business expense. But, if a nominated trustee is receiving both a trustee fee and a salary for working at the business, it could result in a successful breach of fiduciary claim for receiving such compensation.

Faulty Planning

Faulty planning can encompass sibling rivalry; however, the so-called “second marriage” or “blended family” can be a source of real contention. Given the nature of a blended family, and the fact that

the wealth was not built by a single family unit, wealth is usually disproportionate between each side. Estate plans that do not address this disproportionate wealth can result in litigation between one side of the family and the other. Moreover, without adequate planning the “new” spouse can be the catalyst for filing the trust litigation.

Appointing a surviving spouse as trustee of a blended family can place the spouse in a difficult position. A “new” spouse that is substantially younger can have unsettling consequences. Moreover, a surviving spouse that has power and control over the management and distribution of those assets may result in litigation being filed, which may include claims of the manner and amount of monies that the spouse is using for care and maintenance. To that end, it is important to consider the implications of having a blended-family spouse serve as trustee. In this instance, it may be best to appoint a professional trustee, such as a private professional or trust company, to serve in this fiduciary role.

An unequal disposition of your estate between your beneficiaries may be justified, but without a well-articulated purpose, it could come under fire. Treating one beneficiary differently or disinheriting a child could result in litigation. Also, gifts and loans to one child over another should be well-documented. All too typically, loans are issued with the intention that they only be repaid at death, and equalized between the beneficiaries. But, if they are not properly documented or even enforceable at the time of your death, it could result in the loans never being repaid, thereby resulting in a disproportionate amount of your estate being distributed to one beneficiary over another.

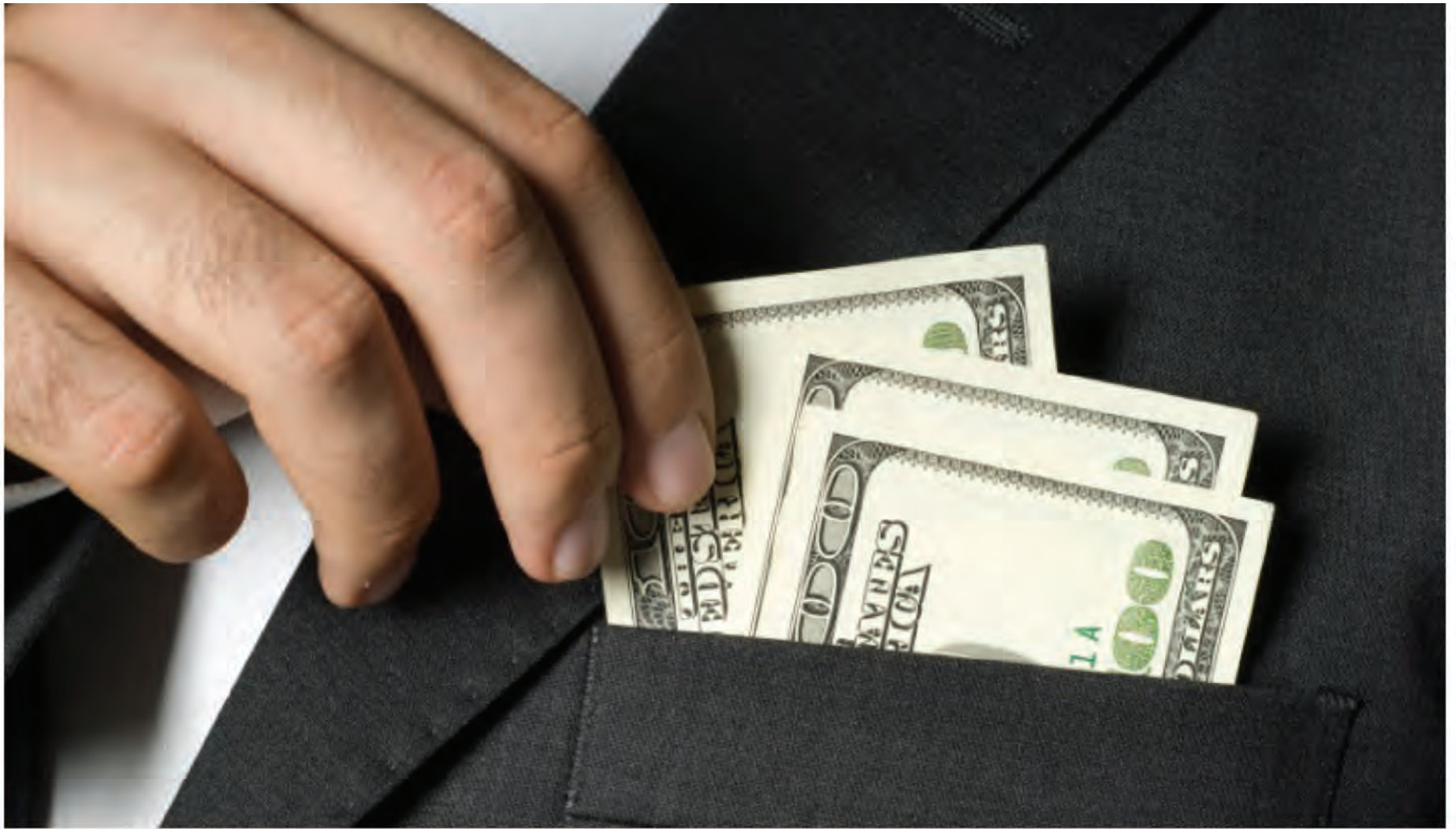
Two important steps that can be taken toward mitigating a trust or estate litigation include: (1) updating your estate planning documents; and (2) communication to your beneficiaries. Often, clients draft an estate plan and place it on the shelf, thinking it never has to be reviewed. Your estate plan is only as good as the information given at the time it is drafted. Over time, your assets will change, your estate planning goals will change, and the documents need to be updated to reflect those changes. To that end, it is important to occasionally review with your estate planning professional your goals and needs.

Next, communication to your beneficiaries is important to avoid a later litigation. Should you desire to have an unequal disposition between your children, explaining to them your rationale could resolve some issues. Understandably, that discussion could be a difficult and awkward conversation to have with a child. But, in the alternative, without your guidance and explanation, it could result in litigation. As the holiday season approaches this year, take an honest look at your family dynamics; if your family has any sibling rivalry or is a blended family that could result in litigation, get to an estate planning professional to address these issues.

At Ferruzzo & Ferruzzo, LLP our Estate Planning and Estate Litigation Practice Groups focus on your estate planning goals, and work together to achieve the results you have in mind. Legal issues regarding the selection of trustees and the disposition of your assets are regularly part of our client discussions.



Timothy J McElfish, Esq. is a Partner and chairs the Firm’s Trust and Estate Litigation Practices Group. His practice group dedicates themselves to protecting and defending trust and estate. Additionally, Mr. McElfish also handles all aspects of Estate Planning, Business Succession Planning, and Fiduciary Representation.



Businesses Need Asset Protection, Too

By Jeffrey M. Verdon, Managing Partner, Jeffrey M. Verdon Law Group, LLP

Here are several ways for family-owned and privately owned companies to place assets out of reach.

Affluent families and high-net-worth individuals have been using asset protection planning since the mid-1980s. Well, guess what? Businesses get sued, too. Yet, when you ask those in the C suite what they are doing to protect their company's assets from lawsuits, you mostly get a blank stare.

Small privately held businesses are often most at risk because litigation costs and expenses come out of the owner/executive pockets, not those of many multiples of shareholders.

Sometimes lawyers look to pile on a community of individual plaintiffs to scare the company into a settlement or face years of costly litigation and a drag on company morale.

The latest twist: so-called "Wage and Hour" disputes. A group of employees bands together, typically through the instigation of a plaintiff lawyer, who then sues the company about some issue surrounding the hours they worked and the wages they were paid.

These cases often start out small. But the plaintiff attorneys then contact many more employees, even past employees, to see if they want to join the "class." Worse, many insurers are now excluding

coverage for these sorts of claims.

What Can YOU Do to Protect Your Business?

If your company has substantial retained earnings and liquid assets, you might be able to create a foreign asset protection trust (FAPT) where the company is both the settlor and discretionary beneficiary of the trust. Absent a fraudulent transfer, once titled in the FAPT and subject to the more protective laws of the FAPT jurisdiction, a subsequent creditor won't be able to enforce a judgment against the FAPT. This will discourage most lawsuits and encourage the parties to reach a settlement, generally far more favorable for the company than would have been the case had the FAPT not been created.

Private Retirement Plan

In California, business owners can also create a Private Retirement Plan (PRP), a type of retirement savings plan that, by statutory law, is exempt from lawsuits, even if you have to file for bankruptcy. Qualified plans are generally exempt but require the business owner to comply with complex ERISA and tax laws.

The PRP may be set up as a non-ERISA qualified plan taking it outside of the regulatory scheme and thus, not subject to the more complex rules.

There are few limitations on the amount that may be contributed to non-ERISA

qualified plans, because contributions are not income-tax-deductible, yet the statutory exemptions from creditor claims applies. This makes the PRP a useful tool to insure there will be supplemental retirement income for the employer.

More Options Companies Can Consider to Protect Their Assets

1. Leasing equipment, rather than owning it, reduces a company's assets on its balance sheet.
2. Some corporations create separate companies for each brand that they own to reduce exposure.
3. Creating separate entities for the company's intellectual property (IP) and then licensing them to the operating company so the IP is not owned by the

target of a future lawsuit.

4. Distributing retained earnings to shareholders and stakeholders so the funds aren't exposed to business liability. There's also the option of having the company owned by a foreign asset protection trust so the distributions are not subject to personal liability.

One of the best ways to level the litigation playing field is to place the assets out of reach of future potential plaintiffs or convert non-exempt assets to exempt assets ahead of any future claim. Once this is done, your company won't be so attractive to litigious plaintiff attorneys who only get paid if they recover assets from the judgments they obtain. Asset protection planning neutralizes this.



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Jeffrey M. Verdon, Esq. is the Managing Partner of the Jeffrey M. Verdon Law Group, LLP, a Trusts & Estates boutique law firm located in Newport Beach, Calif. With more than 30 years of experience in designing and implementing comprehensive estate planning and asset protection structures, the law firm serves affluent families and successful business owners in solving their most complex and vexing estate tax, income tax, and asset protection goals and objectives. Please call us for a complimentary consultation.

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