

Dark Side Tales – Watch Your Back: Common Threats to High-Net-Worth Individuals

January 26, 2022

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Summary

- This Presentation will cover the following topics:
 - Tax Issues Facing High Net Worth Individuals and Their Estates.
 - Value of Trusts as Protective Mechanisms.
 - Planning Opportunities With Community Property.
 - Conservatorship of the Person and Estate.
 - Red Flags and Safety Issues in Relationships.
 - Joint Representation Issues.
 - The Very Dark Side: The ‘Perfect’ Murder and Being Aware of Potential Risks to your Clients’ Person and Property.

Tax Issues Facing High Net Worth Individuals and Their Estates

Introduction

- Experience can be a great teacher - let us help your clients learn from experiences that have been costly to others, without your clients having to experience similar potential loss or risk;
- It is difficult for clients who “follow the rules” to be prepared for potential encounters with those who do not – learning the warning signs and red flags to alert you when something may be amiss is well worth investing some time; and
- Sometimes our clients do not want to follow the rules and need to be redirected back.

Tax Issues Facing High Net Worth Individuals and Their Estates

- Planning and Post Death:
 - Not planning for the estate tax.
 - Not electing portability.
 - Not filing accurate gift tax returns (which could lead to an open statute of limitations).
 - Not getting impartial and defensible valuations.
 - S corporation issues, after the death of a grantor owner.
 - Not properly reporting cryptocurrencies, NFTs or other virtual currencies; not keeping related records.

Tax Issues Facing High Net Worth Individuals and Their Estates (cont.)

- Foreign:
 - The dreaded foreign grantor trust with US beneficiaries.
 - Not reporting gifts from foreign persons or trusts (or foreign financial/bank accounts).
 - Not planning to account for a non-US spouse.
 - Not planning for foreign assets.
 - How to handle varying estate tax regimes when a client is a dual resident (of the US and another country).
 - Forced heirship rules.

IRS Global High-Wealth Group

- The wealthy have become more mobile.
- The IRS recognizes that notable shifts in mobility and wealth concentration are occurring.
- Thus, on July 15, 2020, the IRS Large Business and International Division launched a campaign to audit high-net-worth individuals.
- Data from the IRS's 2019 Data Book ,1 Table 17A, demonstrates a three-part division in taxpayer type: those with under \$100,000 in positive income, those with \$100,000-\$1 million in positive income, and those with over \$1 million in positive income. The third category is that group of U.S. taxpayers with the highest positive income, and is further classified in \$5 million increments.

Compliance Data Evaluated

- Taxpayer audits are selected based on data analytics within the IRS.
- LB&I Compliance Planning and Analytics provides LB&I Global High Wealth (GHW) a list of high-net-wealth taxpayers to identify businesses and financial enterprises controlled by individuals with assets and earnings in the tens of millions of dollars.
- The Compliance Planning and Analytics division uses available “compliance data warehouse data” to analyze the compliance risk of filed or unfiled returns.
- Next, the workload services group (WLS) analyzes these returns and flags those with the highest risk indicators for GHW examination.

Annual Gross Tax Gap

- The IRS estimates that the average annual gross tax gap, which is the estimated variance between the amount of tax due and actually paid voluntarily and on time, was \$441 billion for tax years 2011 through 2013.
- The IRS further estimates that approximately \$39 billion (9 percent) of this gap is caused by non-filers.
- According to the IRS, high-income non-filers constitute the majority of the non-filer tax gap, despite their small number.
- Therefore, the IRS has announced a series of new campaigns to identify and expand reviews and is targeting the high-net-wealth and international taxpayer population in an effort to close this part of the tax gap.
- These efforts are consistent with, but separate from, new compliance developments, such as the Corporate Transparency Act (discussed later).

LB&I and the “Wealth Squad”

- LB&I serves subchapter C corporations, subchapter S corporations, and partnerships with assets greater than \$10 million.
- These businesses typically employ numerous employees, conduct business in an expanding global environment, and deal with complicated issues involving tax law and accounting principles.
- In 2009 the IRS created the GHW (global high wealth) program, commonly referred to as the IRS “Wealth Squad.”
- GHW was formed to take a holistic approach in auditing and collecting tax from high-net-worth taxpayers and their related entities.
- GHW audits are typically broad and comprehensive, emphasizing the taxpayer’s total economic picture, while assessing tax compliance across all income sources and investments.

Audits Coming

- Wealth Squad auditors are trained to examine the individual's income tax return and the related income tax returns of any entity in which the individual has a controlling interest, including C corporations, S corporations, partnerships, private foundations and trusts.
- The first wave of new IRS audits by the GHW has recently begun, and the IRS is using information first collected 10 years ago when the GHW program began.
- The IRS is also reportedly retraining certain agents to enable them to better understand relevant complex areas of the tax law.

The Wealth Squad In Practice

- LB&I's Compliance Planning and Analytics has the main responsibility of compiling a list of the high-wealth taxpayer population and then conducting a risk assessment analysis to identify returns with high-risk indicators for noncompliance. The returns with the highest risk indicators are referred to WLS for a further assessment, potentially resulting in the taxpayer being selected for Wealth Squad examination.
- WLS also accepts referral forms submitted by other IRS departments. If a referral is determined to be appropriate for GHW, the enterprise is subjected to the risk assessment process. Referrals that are not accepted by WLS are forwarded to the appropriate planning and special programs office or sent back to the originating department.
- Further, WLS receives whistleblower claims from the Whistleblower Office.
- WLS may also flag significant issues related to high-net-worth individuals and perform more analysis to determine whether a campaign should be launched.

How To Avoid Being Targeted and Be Prepared If You Are

For clients: do all required reporting and keep backup documentation.

Active steps for advisors:

- Develop a comprehensive overview of the client's assets, income, and activities to develop a complete understanding. Include individual income and assets, business entities and related assets and income, charitable organizations and activities, organizational charts, and estate planning documents;
- Differentiate among U.S. versus non-U.S. assets and income sources, and related U.S. and non-U.S. reporting requirements;
- Develop a detailed understanding of the taxpayer's business interests and related income and activities. This should also differentiate among U.S. versus non-U.S., and related U.S. and non-U.S. reporting requirements;
- Review gifts, trusts and charitable activities;
- Work with the clients CPA and other attorneys (when applicable) on an audit plan.

Build Back Better Act Aims to Reduce Tax Gap

- The Build Back Better Act, if passed, intends to make transformational investments to improve the economic security of our nation's families while advancing climate crisis solutions.
- These investments will be funded by tax policies that require the wealthiest Americans and largest corporations to pay more.
- The bill (currently) includes:
 1. About \$1.5 trillion in tax increases on corporations and wealthy individuals, according to the Joint Committee on Taxation;
 2. the bill would “modernize” the IRS to enhance the agency’s ability to crack down on tax evasion by the wealthy and corporate entities.

Revenue Goals Target the High-Net-Worth and Businesses

- Increased IRS funding is intended to raise revenue, reverse long-standing neglect, and address inequities.
- Estimates of the annual revenue loss (tax gap cited again) from taxes that are legally owed but not paid range from roughly \$600 billion, as provided by the Treasury Department, to more than \$1 trillion identified by IRS Commissioner Charles Rettig in testimony before the Senate Finance Committee.
- Additionally estimated is that absent additional resources, nearly \$1 out of every \$6 in taxes will go unpaid over the next decade.

Tax Gap Has Been Worsening

- The tax gap, mentioned earlier, has been accused of worsening inequities in the tax code.
- The less wealthy are arguably less able to avoid paying tax since they likely earn ordinary income, and pay sales and other use tax disproportionate to their income.
- The wealthy taxpayers are accused of avoiding a share of what they owe, with the top 5 percent of earners estimated to account for over half of the tax gap.
- The wealthy earn more income from capital gains, and can hire professionals to help minimize taxes paid.

IRS Enforcement To Increase

- The IRS has lost an estimated 17,000 enforcement personnel over the past decade, which has made enforcement more challenging, especially for complex tax returns and for addressing new areas of complexity and potential evasion, like cryptocurrency.
- While reduced resources have caused a sharp decline in audit rates of large corporations and wealthy individuals, enforcement efforts targeting low-income workers (those who file simple returns but claim the earned income tax credit) have declined more slowly so that they are now audited at similar rates to the top 1 percent.
- The Build Back Better Act explicitly aims to provide new resources for efforts that address this inequity, giving the IRS added capacity to tackle “sophisticated tax evasion” and to target efforts aimed at high-income individuals and corporate taxpayers.

AML (Anti Money Laundering) Reforms

- On January 1, 2021, Congress enacted the National Defense Authorization Act for Fiscal Year 2021 (the “NDAA”), after overriding a presidential veto.
- Within the NDAA is the Anti-Money Laundering Act of 2020 (the “AMLA”), which introduces substantial reforms to U.S. anti-money laundering (“AML”) and counter-terrorism financing (“CFT”) laws.
- The AMLA demonstrates Congressional intent to combat money laundering and terrorist financing through expanding the Financial Crimes Enforcement Network’s (“FinCEN”) regulatory power.

Legislative Reforms

Major legislative reforms include:

- Establishing the “FinCEN Exchange” to facilitate information sharing;
- Modifying the AML whistleblower program;
- Extending BSA (Bank Secrecy Act) enforcement to dealers in antiquities;
- Extending BSA enforcement to digital currency;
- Expanding foreign bank access to U.S. SARs (suspicious activity reports);
- Expanding subpoena powers;
- Extending the scope of BSA violations; and
- Increasing penalties.

The most significant reforms involve the new beneficial ownership rules, which provide law enforcement access to essential data for investigations.

Corporate Transparency Act

Within the AMLA, Congress passed the Corporate Transparency Act (“CTA”) which:

- Requires certain corporations and limited liability companies (“reporting companies”) to disclose beneficial owner information with FinCEN and update ownership information within one year of any changes;
- Directs FinCEN to create a non-public registry tracking the beneficial owners of reporting companies which may be shared with law enforcement and financial institutions conducting due diligence under certain circumstances; and
- Requires FinCEN to issue regulations on beneficial ownership disclosures within one year of its enactment.

Beneficial Owner Defined

“Beneficial owner” applies to an individual who directly or indirectly:

- i. exercises “substantial control” over an entity, or
- ii. owns or controls not less than 25 percent of an entity.

The definition of “substantial control” is expected to be addressed in the FinCEN regulations.

Overview of Proposed Regulations

- FinCEN) released proposed regulations on Dec. 7, 2021, seeking to implement the "beneficial ownership information" (BOI) requirement of the Corporate Transparency Act (CTA).
- FinCEN expects that the proposed regulations will address the lack of BOI "critical for money laundering investigations," bring the United States into alignment with international anti-money laundering/combating the financing of terrorism (AML/CFT) standards and clarify CTA ambiguities.
- The Notice of Proposed Rulemaking (NPRM), clarifies who must file a report, what constitutes beneficial ownership, what information must be disclosed in a BOI report and when such information must be reported.

Who Must File a Report

- The NPRM recognizes two types of "reporting companies" that are required to disclose BOI to FinCEN – foreign and domestic. See Proposed 31 CFR 1010.380(c)(1).
- The proposed rule defines a "domestic reporting company" to include any "corporation," "limited liability company" or "other entity that is created by the filing of a document with a secretary of state or a similar office under the law of a state or Indian tribe."
- Similarly, a "foreign reporting company" would be any entity that is a "corporation," "limited liability company," or other entity formed under the law of a foreign country and "registered to do business in the United States by the filing of a document with a secretary of state or equivalent office under the law of a state or Indian Tribe."

Practical Implications and Earlier Guidance

- While these definitions are expansive, the CTA specifically excludes from the definition of a "reporting company" 23 different types of entities which operate in heavily regulated settings, including banks, domestic credit unions, securities issuers, money transmitting businesses, registered investment advisors, insurance companies and other entities.
- Also exempt are "large operating companies," which are companies that:
 1. employ more than 20 employees on a full-time basis in the U.S.,
 2. "filed in the previous year Federal income tax returns in the United States demonstrating more than \$5,000,000 in gross receipts or sales in the aggregate," and 3) have an "operating presence at a physical office within the United States." See § 31 U.S.C. § 5336(a)(11)(B)(xxi).

Practical Implications and Earlier Guidance (cont.)

- Under the proposed regulations, an entity with an "operating presence" at a physical office within the U.S. would "be one for which the physical office is owned or leased by the entity, is not a residence, and is not shared space (beyond being shared with affiliated entities) – in short, a genuine working office of the entity."
- The CTA exempts other entities, such as "public utilities" and entities owned or controlled by one or more entities that do not qualify as reporting companies.
- The NPRM seeks to define those terms and close any ambiguities in the statute.

Exempt Issuers List

- The list of exempt entities includes securities issuers, domestic governmental authorities, banks, domestic credit unions, depository institution holding companies, money transmitting businesses, brokers or dealers in securities, securities exchange or clearing agencies, other Securities Exchange Act of 1934 entities, registered investment companies and advisers, venture capital fund advisers, insurance companies, state licensed insurance producers, Commodity Exchange Act registered entities, accounting firms, public utilities, financial market utilities, pooled investment vehicles, tax exempt entities, entities assisting tax exempt entities, large operating companies, subsidiaries of certain exempt entities and inactive businesses. See 31 U.S.C. § 5336(a)(11)(B)(i)-(xxiii).

No Other Exemptions Presently Proposed

- Currently, FinCEN is not recommending any additional exemptions under the CTA provision stating "any entity or class of entities that the Secretary of the Treasury, with the written concurrence of the Attorney General and the Secretary of Homeland Security," determines should be exempt. 31 U.S.C. § 5336(a)(11)(B)(xxiv).

Who is a Beneficial Owner and Company Applicant

- The CTA requires reporting companies to report to FinCEN certain identifying information for both "beneficial owners" and company "applicants." *Id.* § 5336(b)(2)(A). The proposed regulations attempt to fill in the meaning of those terms.

Beneficial Owners (Revisited)

- Under the CTA, a "beneficial owner" is "any individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise 1) exercises substantial control over the entity; or 2) owns or controls not less than 25 percent of the ownership interests of the entity."
- The proposed rule seeks to clarify the meaning of "beneficial owner" by defining the terms "substantial control" and "ownership interests."

Substantial Control

The proposed regulations set forth three specific indicators of "substantial control:"

1. Service as a senior officer of a reporting company.
2. Authority over the appointment or removal of any officer or dominant majority of the board of directors (or similar body) of a reporting company.
3. Direction, determination or decision of, or substantial influence over, important matters of a reporting company, including, for example, the sale, lease or transfer of any principal assets of the company, the entry into or termination of significant contracts, major expenditures and investments by the company and compensation schemes for senior officers.

See Proposed 31 CFR 1010.380(d)(1). As noted in the NPRM, "[e]ach of these indicators supports the basic goal of requiring a reporting company to identify the individuals who stand behind the reporting company and direct its actions."

Substantial Control (cont.)

- Additionally, the proposed regulations include a catch-all provision defining "substantial control" to include "[a]ny other form of substantial control over the reporting company."
- FinCEN states that it included this "catch-all" provision to clarify that "substantial control can take additional forms not specifically listed" in the regulations and to hinder individuals from evading identification by "hiding behind formalisms."
- The NPRM clarifies that there can exist more than one person who exercises "substantial control" over a reporting company, and the rule will necessitate the identity of each person to be disclosed.
- FinCEN purposefully diverged from the Customer Due Diligence (CDD) Rule's definition of "significant degree of control" because "the CTA does not require the identification of only one person in substantial control," but rather the identification of "all" such persons.

Ownership or Control of Ownership Interests

- The proposed regulations also take an expansive view of what constitutes an "ownership interest."
- Under the proposed rule, "ownership interests" include both equity in the reporting company and other forms of interests, including capital or profit interests (such as partnership interests) or convertible instruments, warrants or rights, or other options or privileges to acquire equity, capital or other interests in a reporting company.
- An "ownership interest" would also include any ownership interest by another person that an individual has the ability to control.
- FinCEN is broadening a reporting company's analysis of who has an "ownership interest" by using language in the proposed rule reminding reporting companies that ownership interests can be owned or controlled directly or indirectly or "through a variety of means."
- For example, the proposed rule specifies that an individual may directly or indirectly own or control an ownership interest in a reporting company through a trust or similar arrangement.
- The proposed rule details that percentage of ownership is determined by aggregating all an individual's ownership interests in comparison to the undiluted ownership interests of the company.

Excluded from the Definition of Beneficial Owner

The NPRM excludes five categories of individuals from the definition of "beneficial owner:"

1. minor children, as long as the reporting company provides information of a parent or legal guardian as required under the rule;
2. individuals acting as nominees;
3. employees acting solely as employees and not as senior officers;
4. individuals whose only interest in a reporting company is a future interest through the right of inheritance; and
5. creditors of a reporting company.

Company Applicants

- The proposed regulations adopt the statutory definition of a company "applicant."
- Thus, for domestic reporting companies, the company applicant is the person who files the document that forms the entity.
- Meanwhile, for foreign reporting companies, that applicant is the individual who files the document that first registers the entity to do business in the United States.
- A company applicant also "includes anyone who directs or controls the filing of the document by another."

Information Which Must Be Disclosed

- The statute and proposed rule require reporting companies to disclose four pieces of information about each of its beneficial owners and company applicants:
 1. full legal name;
 2. date of birth;
 3. current residential or business street address ;and
 4. a unique identifying number from an acceptable identification document or FinCEN identifier.
- The NPRM states that the statute "does not specify when or whether one type of address should be used in preference to another or resolve more specific questions regarding secondary addresses or whether addresses should be domestic, if possible, or can be foreign."
- Therefore, the proposed rule would require individual beneficial owners and company applicants who do not act as formation agents to report their residential address for tax residency purposes, as such information would be most "useful for establishing the unambiguous identity of an identified beneficial owner."

Bifurcated Approach for Company Applicants

- For company applicants, FinCEN proposes a "bifurcated approach."
- Company applicants who provide a business service as a corporate or formation agent would need to report their business address.
- The NPRM clarifies that such applicants are "of particular interest" to FinCEN because of their role in creating or registering reporting companies.
- Therefore, requiring these applicants to disclose their business addresses will, according to FinCEN's, allow law enforcement and other government agencies to identify patterns that may indicate individuals are "engaged in the business of creating legal entities for the purpose of obscuring the beneficiaries of transactions or the owners of valuable assets."
- For all other company applicants, the reporting company will be required to report the residential street address that the individual uses for tax residency purposes.

Company Identification Less Than Clear

- Although the CTA specifies what constitutes an "acceptable identification document" for purposes of the BOI report [see 31 U.S.C. § 5336(a)(1)], not specified is how an entity is to be identified by such a document.
- Based on other language included in the statute, FinCEN has determined it has authority to require reporting companies to provide scanned copies of identification documents to the agency in connection with reporting the unique identifying number.
- Seemingly, collecting such images would "significantly contribute to the creation of a highly useful database for law enforcement and other authorized users" and the requirement will "make it more difficult to provide false identification information" to the agency because it will be "significantly" harder to falsify an image of an identification document than to merely report an inaccurate number.

Reporting Information Required From Reporting Company

- While not specified by statute, under the proposed rule, reporting companies are required to provide specified information about themselves to FinCEN.
- The proposed rule requires reporting companies to include the following information in a BOI report:
 1. name and any alternative names;
 2. business street address;
 3. jurisdiction of formation or registration and 4) a unique identification number. For purposes of the unique identification number, reporting companies may submit their taxpayer identification number (TIN) – including an Employer Identification Number (EIN) – or if a TIN is not yet issued, a Dun & Bradstreet Data Universal Numbering System (DUNS) number or a Legal Entity Identifier (LEI).

When Disclosures Must Be Made

- As specified in the NPRM, the CTA requires FinCEN to prescribe regulations "for when exactly reporting companies must file" BOI reports.
- When related disclosures are required varies based upon when a reporting company is formed, relative to the effective date of the regulations.
- Under the proposed rule, companies formed or registered on or after the effective date of the regulations must file initial reports within 14 calendar days of the date the company was formed as specified by a secretary of state or similar office, or, if a foreign reporting company, the date it first became a foreign reporting company.
- FinCEN believes the timeframe is "reasonable" and necessary to provide the agency with "timely and highly useful" information.
- Reporting companies formed before the effective date of regulation would be required under the proposed rule to file reports "not later than one year after the effective date of the regulation."
- Any previously exempt company that no longer meets any exemption criteria would be required to file a report within 30 calendar days after the date on which the entity no longer meets any exemption criteria.

Correcting Inaccurate Information Previously Filed

- A company that reports inaccurate information to FinCEN must file a corrected report within 14 calendar days after the date on which the company becomes aware or has reason to know that any required information contained in any report was inaccurate.
- The NPRM notes that this time period is consistent with FinCEN's belief that "quickly correcting errors is essential for fulfilling Congress's instruction that BOI reported to the agency be 'accurate, complete and highly useful.'"
- Similarly, the NPRM requires reporting companies to disclose "update[d] information" to FinCEN within 30 calendar days "after the date on which there is any change."

Comment Period and Future Rulemakings

- While focused only on the beneficial owner information requirement of the CTA, the NPRM covers extensive areas and provides valuable insight into how FinCEN might interpret and implement the CTA.
- However, we will need to analyze the final rules when published sometime in the next year.
- Comments on the proposed rule may be submitted to FinCEN on or before Feb. 7, 2022.
- Future rulemakings will address other aspects of the CTA, including the establishment of protocols to determine access to and disclosure of BOI and revisions to the CDD rule.

Value of Trusts as Protective Mechanisms

Value of Trusts as Protective Mechanisms

- Protection from:
- Third Party Creditors:
 - Unexpected plaintiff bringing a lawsuit.
 - Watch for dating issues (be careful about emails containing “promises”; gift or reimbursement later characterized as a loan or overreaching; baseless strike suits; liability insurance is likely not to cover breach of contract claims; be aware of palimony claims; any promise or reliance; consider cohabitation agreement).
- Business Downturn:
 - Watch for breach of fiduciary issues.
 - Check for underfunded pension plans and recourse debtor in retirement plans.

Value of Trusts as Protective Mechanisms (cont.)

- Vulnerability:
 - Be aware of biochemical reaction to love, spending, lack of diversification.
 - Studies have shown that the frontal cortex (the part dealing with judgment) de-activates when in love or shown a photo of person that they love (Prof. Semir Zeki of University College London), revealing also that brain scans show shutting down of parts of brain controlling fear.
 - Favorite asset class/emotional attachment to the initial investment.
 - Overly trusting/lack of awareness or possible manipulation.

Value of Trusts as Protective Mechanisms *(cont.)*

- Pressure from Spouse Even in a Happy Marriage:
 - Watch for signs before marriage.
 - Note reaction to proposed/negotiated prenuptial agreement.
 - Note if spouse hires his/her own attorney after marriage to pursue other spouse's assets.
 - Trustee can provide buffer.
 - Watch for red flags.
- Trusts can also provide substantial transfer tax and income tax savings and long-range planning opportunities, including use of the GST exemption with current unlimited duration.

Homestead

- Article X, Section 4 of Florida Constitution exempts from forced sale a Florida resident's primary residence, except to pay taxes, contracts to repairer, improve property obligations and to people who performed labor on the residence.
- *Havoco v. Hill*, 790 So.2d 1018 (2001): allowed to convert non-exempt assets to exempt asset (Florida homestead) even with outstanding judgement.
- What qualifies as a homestead? It is not restricted in value but is restricted in amount of land. Homestead may be up to .5 acres within a municipality and 180 acres outside of a municipality.
 - Applies the first day that person moves into home with intent to make Florida his or her permanent home.
- Texas has homestead law that exempts up to 200 acres, but does not allow person to use proceeds from criminal conduct to purchase the homestead.

Your Residence Can Be Owned By Your Trust

- Protection from lawsuits by neighbors.
- Privacy.
- Maintain GST exempt status.
- Protection in event of divorce.
 - Example of opportunity for the court to protect the trust beneficiary even where state law is generally less protective of trust assets.
 - Consider relevant state law.
 - Use of note to protect house, where title to the house must be held in name of beneficiary under local law.
- A residence can also be owned by an LLC, which can provide protection in the event of a claim, such as by a household employee, and can provide some privacy for the owner of the house. In turn, the LLC can be owned by a trust or can be owned by another LLC, for added privacy and protection.

Marriage and Trust Protection

- Trusts can provide some protection for beneficiary even if no prenuptial agreement.
- Consider use of the reciprocal *in terrorem* clause.
 - Example of spouse of beneficiary claiming against one trust and risking losing interest in all family trusts.
 - Include exculpation and indemnification of trustees.
 - Include right to pay legal fees on a current basis to protect against claims.
- Consider limiting right to remove trustee to protect the beneficiary from him or herself and so that the trustee can protect the trust assets from third-party claimants, including undue influence by the spouse of the beneficiary.
 - Especially helpful for elderly beneficiary subject to elder abuse/threat of abandonment by spouse caregiver.

Planning Opportunities With Community Property

Traps for the Unwary: Assets That Can Circumvent Community Property Laws

- IRAs – Federal ERISA laws take precedence over state community property laws.
 - As a spouse in a community property state the expectation of receiving one half of the other spouse’s property can be circumvented through funding of certain retirement benefits (for example, to benefit children from a prior marriage).
 - Expectations can be frustrated, even though the IRA beneficiary designation conflicts with state law.
 - *Boggs v. Boggs*, 117 U.S. 1754 (1997).
- Life Insurance.
 - Similarly, the beneficiary designation in a life insurance contract will trump expectations of a spouse under state community property laws.
 - *Orr v. Prudential Insurance Co., et al.*, 2012 U.S. Dist. LEXIS 82022 (June 12, 2012).
 - *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

Traps for the Unwary: Assets That Can Circumvent Community Property Laws *(cont.)*

- Note that while the foregoing can frustrate the expectations of a client, conversely these assets can be a useful tool for a client who wishes to circumvent community property expectations – it can provide a planning opportunity.
- To protect expectations either way, consider a binding contract between the spouses, either prenuptial or post nuptial, as to the amount of insurance and IRA savings anticipated and the allocation of the beneficiary designation among the spouse, children from a prior marriage and other possible beneficiaries.

Traps for the Unwary: Assets That Can Circumvent Community Property Laws *(cont.)*

- Use of insurance trusts.
 - Can be an excellent way to segregate assets for children from a prior marriage from those of a subsequent spouse.
 - Should be exempt from claims of a second spouse as these represent completed gifts by the donor spouse.
 - These provide transfer tax savings as they should be excluded from the estate of the donor spouse for estate tax purposes.

Safety in a Business Relationship Context

- This can be hard to determine early.
- Be aware of state and federal employment and labor laws and rules.
- Subject to observing legal obligations, be conscious of signs of antisocial behavior.
 - An employee who doesn't get along with many others.
 - On overly suspicious employee.
 - A selfish employee who demands outsize compensation without regard for the needs of the group or for others.
- Employees who are very focused on their own needs and wants may later prove to be damaging to the firm and to prior business relationships.
- Be aware of your physiological reaction to individuals – do they make you feel calm and connected or do they make you feel uncomfortable?
- If the person or the comments he or she make have the effect of making you feel uncomfortable, do not override your physical reactions, listen to them.

Safety in a Business Relationship Context *(cont.)*

- Be aware of how the person responds to give and take – do they only give in the context of getting something in return? For them, is giving mechanical or transactional? Are they able to receive in a healthy way but not give in a genuine, caring way?
- Does a person look you in the eye? Even if they look you in the eye do their eyes feel empty or blank?
- We are looking to see if they can connect to other people in a genuine, warm way.
- Be aware that antisocial behavior, like sociopathy is on a spectrum – it is possible to be mildly antisocial or entirely so. Early detection using your physical responses and by maintaining your objectivity as you assess their interpersonal reactions can help you become more attuned to behaviors that can later emerge as narcissistic, destructive or just selfish, any of which could be problematic for your client's business and your professional relationships.

Personal

- The Hospital.
 - Always have a family member present who can advocate for your clients when they're in the hospital.
 - A family member should be present when the attending doctor visits your client's hospital room and talk to the residents not just the main doctor.
 - Read the doctors' reports and look at the X-rays.
 - Advise your client to be cautious regarding hospital/doctor input regarding end-of-life decisions.
 - Also advise your clients to be extra cautious regarding invasive procedures – of course they should rely on medical opinions, be wary of what might go wrong.
 - Be sure your client's usual treating physician is involved; that doctor may need to coordinate for example with ICU doctors.

Segregate Assets & Make Transfers to Ensure Recipients: The Second Spouse Syndrome

- Children cannot count on inheritance – they may have been brought up to expect inheritance and may not have a high-paying job.
- Be aware that a second spouse could end up with the fortune – not the children.
- To protect those your client loves, your client may wish to complete transfers such as into an insurance trust or into a long-term GST trust during life, to protect the children and to ensure against last-minute changes. On the other hand, be careful not to transfer more than your client can afford to give away – maintain enough for your client's own lifestyle.

Conservatorship of the Person and Estate

Conservatorship of the Person and the Estate

- Under most state laws, an interested person can bring a petition to “conserve” the estate and/or the person of another person whom they are concerned about.
- Can be used to control a vulnerable person.
- Be aware of the overwhelming impact of such a proceeding, should this procedure be invoked.
- Can be part of a scheme to take control of the vulnerable person’s assets; sometimes in a marriage which has declined.
- In certain states, such as California, a spouse in a divorce does not have standing to petition to conserve the spouse, due to conflict of interest.

Britney's Law

- Signed into law by California Governor Gavin Newsom on September 30, 2021 (bill AB 1194) .
- Britney's Spears conservatorship came to an end after 13 years.
- Her pleas to end the arguably abusive conservatorship were ignored as she performed professionally the entire time, and her father conservator paid himself a percentage of her earnings.
- The new law emphasizes transparency and requires conservators overseeing estate of over \$1 million to register as professionals and receive training.
- It also establishes the standards and procedures for appointment and termination of the appointment of a conservator or guardian.
- Conservatees are allowed more control over their legal representation and conservators who a court finds have not acted in the best interest of the conservatee can be fined up to \$50,000.

Red Flags and Safety Issues in Relationships

The Red Flags

- The cash user:
 - Note the constant and repeated withdrawals of small amounts of cash from the spouse's own checking account; in a community property state this can indicate theft from the community property.
 - Clients should carefully check their checking account for regular withdrawals of small amounts of cash; this can indicate the spouse's withdrawing cash from the client's account without his/her knowledge.
 - Telltale signs are several withdrawals of small amounts on the same day within minutes of each other; withdrawals from the client's hometown ATM when the client is out of town.
 - Wire transfers – always confirm the destination of the transfer.
 - A spouse who uses only cash and never credit cards may be attempting to hide his or her whereabouts and activities.

The Red Flags *(cont.)*

- The undisclosed safety deposit box:
 - Repeated cash withdrawals may indicate the existence of a safety deposit box or boxes that are not known to the other spouse.
 - This is a method whereby a spouse can accumulate cash that he/she intends not to disclose in the event of a divorce.
 - The cash in the safety deposit box may be used for illicit activities including gambling, drugs or extramarital affairs if there is one in his or her name.
 - It can be difficult to locate a safety deposit box, as banking records for these can be old-fashioned, such as a manual box of index cards, which can be manipulated by the spouse hiding assets.
 - A possible way to determine if a safety deposit box exists is to look for the charge for the safety deposit box in the checking account of the spouse.

The Red Flags *(cont.)*

- The secret PO Box:
 - These can be used by a spouse who is hiding assets in order to receive statements and information about investments that the spouse doesn't want his/her mate to know about.
 - These can be used for a spouse to communicate with extramarital connections.
 - You may find a reference to a PO Box in an address book of the spouse; you can check at the local post office to see if there is one in his or her name.
- Oil and gas interests:
 - It can be difficult to trace these; they can be used by a spouse who is trying to hide assets.
 - A “land man” is required to find the ownership of oil and gas interests.
 - If the investment is through an LLC, it can be almost impossible to locate.

The Red Flags *(cont.)*

- The secret cell phone(s):
 - A spouse can have several phone numbers, some of which the other spouse is unaware.
 - These can be used to communicate with illicit personnel, secret investment connections, drug providers and other bad actors.
 - It may be possible to find the extra phone numbers in the address book of the other spouse.
 - Today it is possible to obtain “burner phones” which can be disposed of; these can be used for dishonest purposes.
- Facebook:
 - Check the relationship status of the spouse as shown on Facebook.
 - Look for numerous persons of the opposite sex who are not known to your client as his/her friends.
 - Look at the photos to see if he/she holds him/herself out as single – no pictures of your client at family events?

The Red Flags *(cont.)*

- The locked file cabinet:
 - Your client should know what is in his/her spouse's locked file cabinet as its contents could have serious implication.
 - The locked file cabinet can hold surprising documents such as secret plans for a divorce, your client's personal financial records and indications of the other spouse's undisclosed investments.
 - In many states, state laws require spouses to be honest and open with each other, so your client can insist on having entry to the locked file cabinet.
 - Since many states establish a fiduciary duty from one spouse to the other, if your client's spouse has been dishonest, there may be a claim for breach of fiduciary duty.
- Cryptocurrency and other cyber assets:
 - Cryptocurrency and other cyber assets are stored online and require passwords or unique digital codes to access them.
 - Numerous stories, based on fact, document how individuals lost access to such assets when losing the "key" or not leaving access information to loved ones for use after death.
 - Reporting requirements for such assets continue to evolve, making tracking them more difficult.
 - Once lost, getting these assets back can prove impossible.

Dating Issues

- Hospitality/Generosity:
 - Reimbursements from partner later claimed to be unfairly large or just a loan.
- Emails:
 - Confidential statements.
 - Be aware of emails as permanent records of statements, promises, any imprudent comments.
 - Trusted confidences later revealed or used against a party.
- Palimony Claims:
 - Claims for payment for services rendered, such as working on improvements to a residence.
 - Caution should be taken about making promises.
 - Use cohabitation agreement – include general release/confirmation of no other promises.

Joint Representation Issues

Joint Representation Issues

- When you represent both spouses or a spouse and children in estate planning, there can be complications:
 - Confidential information shared by one spouse, if relevant to the representation of both should be shared.
 - If one spouse declines to allow that information to be shared, the lawyer may have to resign from representing both spouses.
 - If there is a dispute between the spouses, both are entitled access to privileged communications that were part of the joint representation.
 - A joint representation may preclude subsequently representing one of the spouses adverse to the other.
 - At the outset consider whether it would be better to represent one spouse or include language in the engagement letter allowing the lawyer to do so.

The Very Dark Side: The 'Perfect' Murder and Being Aware of Potential Risks to your Clients' Person and Property

The Very Dark Side: The “Perfect” Murders

- The Black Widow Case:
 - In a North Texas case commonly known as “The Black Widow Case,” Michele Williams initially told police her husband was murdered by an intruder.
 - After many twists, the evidence began to contradict her intruder story.
 - Ms. Williams tampered with the scene, repositioned her dead husband’s hands, cleaned them, and took the gun to a backdoor along with a shell casing and wrench. Ms. Williams got a screwdriver to make it look like someone used it to enter through the back door. She then freshened her makeup, rehearsed her story and called the police.
 - Williams pleaded guilty to a charge of deadly conduct and tampering with evidence for a reduced prison sentence.

The Very Dark Side: The “Perfect” Murders (*cont.*)

- *People v. Bechler*, No. G028930, 2003 BL 3428 (Cal.App. 4th Dist. Nov. 14, 2003):
 - Wife disappeared on a boating excursion with husband and her body was never found.
 - Husband was convicted of “first degree murder while lying in wait.”
 - Employment and financial issues strained the Bechler marriage.
 - Wife had started and built up a lucrative company called Gericare which was later bought by another company. Husband and wife stayed on as employees with the acquiring company but were later let go (in March 1997).
 - After March of ‘97, the Bechlers had to dip into reserves to make house payments and pay bills.
 - The Bechlers did make sure they were secure in the event of a tragedy.
 - Husband and wife were each other’s beneficiary of \$2.6 million in life insurance.

The Very Dark Side: The “Perfect” Murders *(cont.)*

- *Rhodes v. State of Minnesota*, 875 N.W.2d 779 (2016):
 - Husband convicted of first-degree pre-meditated murder after taking his wife on a boat ride.
 - Husband and wife took a boat ride on the lake.
 - Husband returned to shore and told police his wife accidentally fell overboard.
 - Wife’s body was found 13 hours later, floating near shore.
 - The cause of her death was drowning, but court testimony also indicated some type of trauma to the outer surface of the skin in the neck area, with enough force to cause breakage of blood vessels, possibly caused by a hand.

The Very Dark Side: The “Perfect” Murders (*cont.*)

- *United States of America v. \$1,026,781.61 in Funds from Florida Capital Bank*, No. SACV 09-04381-MLG, 2012 BL 305220 (C.D. Cal. Nov. 20, 2012):
 - Proceedings stemming from the government’s claim that man killed ex-wife during a Mediterranean cruise.
 - Couple filed for divorce in order to protect assets from the reach of a potential judgment in a civil lawsuit filed against them. They continued to live together as a couple. Relationship continued to deteriorate, ex-wife, Kanesaki, became physically abusive towards ex-husband and the police were called on several occasions. They eventually reconciled in the Fall of 2005 after attending counseling and then each executed a will naming the other as the sole beneficiary. Kanesaki was again arrested for battery upon ex-husband.
 - In early May 2006, the couple took a cruise to Spain.
 - That evening, after dinner and wine, they returned to their cabin and ex-husband took an Ambien sleeping pill. The ex-husband said that shortly thereafter ex-wife stepped out for tea. Her body was found one day later, and the cause of death was determined to be strangulation in a homicidal assault.
 - A grand jury later failed to issue any indictment.

The Very Dark Side: The “Perfect” Murders (*cont.*)

- *United States of America v. Roston, 986 F.2d 1287 (1993):*
 - While husband and wife were on a honeymoon cruise aboard the “Stardancer,” wife disappears.
 - Husband was later convicted of second-degree murder of his wife and sentenced to life in prison.
 - Cause of death was determined to be strangulation with evidence that the victim’s head had been pushed against the ship’s deck (her hair, pieces of her earrings found in deck) prior to being pushed or thrown into the ocean twenty miles out to sea.
 - They had been observed arguing on deck; his story was inconsistent (she fell overboard; she was “blown” overboard); evidence of air pockets in her clothes evidencing that she had not tried to swim – she was unconscious when she hit the water.

The Very Dark Side: The “Perfect” Murders (*cont.*)

- *State v. Race*, 383 N.W.2d 656 (Minn. 1986):
 - Husband convicted of first-degree murder of his wife after taking a ride in husband’s boat on Lake Superior to celebrate their 14th wedding anniversary.
 - Wife’s death was the result of immersion hypothermia due to exposure to the cold water (35 – 37 degrees Fahrenheit) of Lake Superior.
 - Evidence included slash marks on raft; a missing raft; missing dive knives; unexplained missing scuba tank and inconsistent story.

The Very Dark Side: The “Perfect” Murders *(cont.)*

- *United States of America v. Manzanares, United States District Court, District of Alaska; Case No. 3:17-mj-00311-KFM:*
 - Criminal complaint made in support of complaint charging Manzanares with the murder of his wife onboard the cruise ship Emerald Princess.
 - Wife was found in the cabin with a severe head wound and blood was found throughout the room.
 - When asked what happened, Husband said, “She would not stop laughing at me.”

The Very Dark Side: The “Perfect” Murders *(cont.)*

- *U.S. v. Graham*, 630 Fed.Appx. 712 (2015):
 - The defendant/wife Jordan Linn Graham pled guilty to second-degree murder and was sentenced to 30 years in prison for pushing her husband of eight days off a cliff in Glacier National Park.
 - She appealed her conviction to the 9th Circuit where the court affirmed the district court ruling.
 - Graham later confessed to an FBI agent that she had pushed Johnson in a moment of anger after the couple had been arguing about their fledgling marriage.

The Very Dark Side: The “Perfect” Murders *(cont.)*

- Scott Peterson Case:

- In 2003 Scott Peterson was charged with the capital murder of his wife, Laci Peterson and their unborn son, Conner.
- The state claimed Scott wanted to rid himself of his marriage and upcoming fatherhood to start a life with the woman he had been having an affair with, Amber Frey.
- It was alleged that Scott murdered his pregnant wife at their home by suffocating her. He then took her dead body on his fishing boat, tied four weights to her and dumped her overboard in the San Francisco Bay.
- The bodies were later found washed ashore.
- Scott Peterson is currently on death row at San Quentin State Prison.

The Very Dark Side: The “Perfect” Murders (*cont.*)

- *The People of the State of New York vs. Sante Kimes*, 37 A.D. 1 (2006):
 - In this chilling case, involving the murder of an elderly lady on New York’s upper East Side by a mother and son duo, we see many warning signs:
 - you are vulnerable when you rent a room in your house out to strangers;
 - trust your instincts if you think something is wrong with your tenant;
 - be aware that a person who drops the name of a friend to gain your client’s trust may not actually know that person;
 - be aware that real property records, including a title company, may reveal the identity of the owner of your client’s house and if there is a lien against it or not;
 - protect your client’s social security number (can be used to transfer ownership in their house).
 - Here, the duo mother and son were serial killers and criminals, who used false names and disguises, stole the identities of homeless people whom they engaged to work for them, talked in open about a “good place to hide a body”, used off-shore accounts to wire money used to pay real property transfer taxes, forged the signature of the elderly victim on a deed to her house, tricked a notary into notarizing the signature, then killed the house owner to cover up their theft of her house.
 - No body was ever found, but they were convicted of murder due to circumstantial evidence. As it turned out, the mother/killer was a compulsive note taker, and her notebooks contained the key amount of circumstantial evidence used to convict them.

The Very Dark Side: The “Perfect” Murders *(cont.)*

- The Menendez Brothers:
 - On August 20, 1989, Jose and Kitty Menendez were shot and killed in their Beverly Hills house.
 - Their sons Lyle and Erik, were 21 and 18 respectively at the time of the murders. Lyle went to Princeton and Erik was a ranked tennis player.
 - Their father pushed them both very hard.
 - The brothers called 911, claiming to have found their murdered parents.
 - After the murders, both boys spent large sums on luxuries for themselves.
 - After three trials, the brothers were convicted of murdering their parents and sentenced to life without parole.

The Very Dark Side: The “Perfect” Murders *(cont.)*

- Gabby Petito and Brian Laundrie:
 - Gabrielle Petito (“Gabby”) disappeared while on a cross-country road trip this summer with her fiancé Brian Laundrie (“Brian”).
 - Prior to her disappearance, Gabby and Brian were involved in a physical altercation which resulted in police intervention. No arrests were made and neither Gabby or Brian pressed charges against the other.
 - Brian Laundrie returned to his parents’ home without Gabby on September 1, 2021 and Gabby’s mother reported her missing on September 11, 2021.
 - On September 19, 2021, Gabby’s body was found, and it was determined that she died three to four weeks before her body was found. The autopsy revealed that Gabby was strangled to death.
 - Brian Laundrie was identified as a person of interest in the case after he refused to sit down with investigators to discuss Gabby’s whereabouts. Soon after, he also went missing and was the subject of a massive manhunt being conducted by several law enforcement agencies including the FBI. His remains (which have been described as “bones”) were discovered in Florida park on October 20, 2021. An autopsy has failed to establish a cause or manner of death.
 - Gabby’s disappearance was highly publicized and received tremendous media coverage. On average 90,000 people are missing in the USA at any given time, according to NamUS, however most of their cases go unnoticed.

About Pillsbury

- First established in 1868 in New York City, Pillsbury is a leading international law firm whose dedicated private wealth attorneys are consistently recognized as being at the very pinnacle of the profession.
- Today, the firm has more than 700 lawyers in 19 offices, including Hong Kong, and is recognized year after year by the Financial Times as one of the most innovative law firms in the world.

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Ms. McCall, has been recognized by both the Chambers USA and Chambers High Net Worth guides and by numerous other industry award organizations.

Ms. McCall focuses on the representation of individuals, families, foundations, museums and charities regarding domestic and international income, gift and estate planning. She has advised clients with respect to estate, gift and generation-skipping transfer taxes, complex estate administration, estate-related litigation, and the integration of these matters with the client's business objectives.

Ms. McCall is a Fellow of the American College of Trust and Estate Counsel (ACTEC), where she serves as a member of the Estate and Gift Tax Committee and the International Tax Planning Committee. She has lectured extensively and conducts seminars on estate and tax planning.

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Megan frequently advises foreign individuals and companies moving to the U.S. on pre-immigration, structural and tax issues, and helps those leaving the United States or California. Having a corporate background, she also assists clients in tax and corporate planning relating to entity formation and the acquisition, disposition and restructuring of businesses, corporations and partnerships.

She is also an adjunct professor at the USC Gould School of Law, teaching International Business Transactions.