Planning for Privacy in a Public World: The Ethics and Mechanics of Protecting Your Client's Privacy and Personal Security

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I. Introduction

A. In General

As public access to information increases, clients are seeking solutions to secure their privacy and personal security. The need for privacy is particularly acute for public figures and high net worth clients. This paper will discuss how clients can structure estate plans, charitable gifts, and financial transactions in a confidential manner, prevent the disclosure of confidential information by third parties, avoid public litigation, maximize privacy at death, and protect themselves against physical and cyber-attacks. This paper will also review the ethical issues that practitioners should address when assisting clients with their privacy planning.

B. Overview of Materials

This paper discusses a broad range of privacy-related topics that span the life cycle of a client relationship. Specifically:

- Part II addresses how to incorporate privacy planning into a client's estate plan through the use of a revocable trust.
- Part III discusses how a client may limit the disclosure of information to estate and trust beneficiaries.
- Part IV examines how to title a client's real estate, firearms, and other assets to protect the client's privacy.
- Part V analyzes methods and structures for clients seeking anonymity in their charitable giving.
- Part VI discusses how clients can make anonymous political contributions.
- Part VII reviews financial privacy planning for public executives and lottery winners.
- Part VIII discusses medical privacy planning and the implications it may have on a lawyer's ethical duties.

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- Part IX reviews methods by which clients can limit a third party's ability to disclose confidential information through the use of non-disclosure agreements and litigation alternatives.

- Part X outlines damage control measures if a client's confidential information or criminal activities would otherwise be included as part of a public court record.

- Part XI addresses how to secure a client's privacy in response to specific issues that may arise upon the client's death.

- Part XII briefly discusses cybersecurity issues that pose risks to clients' privacy.

- Part XIII provides a brief overview of measures a client may take to protect the client's personal security.

- Part XIV reviews ethics and best practices for lawyers and law firms to protect clients' privacy.

C. Common Issues

There are certain issues common to most or all of the privacy strategies discussed in this paper. In addition to addressing these issues as necessary with each topic, we have outlined these common issues below.

1. There Is a Basic Right to Privacy

Clients seeking to protect their privacy do not need an independent reason. Rather, a mere desire for privacy is justification in and of itself. Although the U.S. Constitution does not expressly grant a right to privacy, it is implied in the Bill of Rights[2] and has been recognized by the Supreme Court on numerous occasions.[3] After all, "[t]he right to be let alone is indeed the beginning of all freedom."[4]

While most would agree that Americans have a basic right to privacy, things get interesting when that right to privacy intersects with the public domain. This can occur when a person seeks access to capital, desires to own property in a particular jurisdiction, assumes a

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[2] The right to privacy is implicated by the First Amendment (protecting the freedoms of speech and religion), the Third Amendment (protecting the privacy of one's home against the forced occupancy of soldiers), the Fourth Amendment (protecting one's possessions against unreasonable search and seizure), and the Fourteenth Amendment (invalidating laws that deprive a person's right to liberty without due process of law), among others.

[3] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state law prohibition against teaching the German language to a child before he reached the ninth grade); Griswold v. Connecticut, 381 U.S. 479 (1965) (striking down a state law prohibition against the possession, sale, and distribution of contraceptives among married couples); Stanley v. Georgia, 394 U.S. 557 (1969) (reasoning that the right to privacy extended to one's right to possess and view pornography in one's own home); Lawrence v. Texas, 539 U.S. 558 (2003) (invalidating Texas's law against sodomy because the right to liberty under the Due Process Clause protected the petitioners' private lives).

[4] Public Utilities Commission v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting).

certain position in the public or private sector, or simply steps foot onto a public sidewalk. The line between each individual's right to privacy and the public's right to access certain information is often unclear. This paper explores situations in which a client's right to privacy intersects the public's right to information, and seeks to offer guidance to professional advisors who assist clients navigate these issues. Each client's situation will be unique and will require the advisor's independent analysis and judgment.

2. The Importance of Privacy Planning Will Increase as Technology Continues to Evolve

In the movie Shawshank Redemption, when long-time inmate Brooks Hatlen was finally released from prison, he lamented that "[t]he world went and got itself in a big damn hurry." His sentiments ring true today, as technology continues to evolve at either an exciting or alarming rate, depending on one's perspective. What most everyone agrees on, however, is that outside of a few isolated pockets of existence, the world will not reverse course and begin to rely less on technology. Rather, technology will continue to expand into all facets of our lives. As that expansion occurs, the importance of privacy planning will increase, and more clients will seek solutions to protect themselves, their family, and their data. This basic need for privacy should survive changes in the lives and finances of our clients, as well as changes in the law.

3. Absolute Privacy Is Difficult To Achieve

For most clients, absolute privacy is difficult, if not impossible, to achieve.[5] Absent isolation in some remote corner of the globe, nearly everyone leaves a digital footprint. This is particularly true for wealthy clients involved in a wide range of financial ventures, as well as high profile clients burdened by a great degree of public interest. Recognizing the inherent difficulty of attempting to function completely off the grid, many clients only attempt to preserve the privacy of their information when doing so would be relatively simple. In this sense, while clients often place barriers to information that are effective to deter most members of the general public, some must also accept that absolute anonymity may be unattainable in a given situation.

4. Proactive Planning Is Best To Avoid Disclosure of Confidential Information

Just like attempting to put toothpaste back in its tube, it is difficult to reclaim the confidentiality of information once it is disclosed. Privacy planning, therefore, is necessarily proactive in nature, rather than reactive. To the extent possible, clients should safeguard confidential information, carefully vet their personal and professional contacts, and, when necessary, enter into non-disclosure agreements with persons who have or may become privy to sensitive personal information. While this paper is designed to educate advisors regarding these proactive planning techniques, a client's own efforts are often the most effective means of maintaining privacy.

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[5] Speaking at a Boston College conference on cybersecurity, FBI Director James Comey commented that "[t]here is no such thing as absolute privacy in America." *See* Mary Kay Mallonee & Eugene Scott, *Comey: "There Is No Such Thing as Absolute Privacy in America"*, CNN, Mar. 9, 2017, available at http://www.cnn.com/2017/03/08/politics/james-comey-privacy-cybersecurity/.

5. Every Strategy Has a Practical Impact

Much to the chagrin of friends, family members, clients, and anyone else within earshot, a lawyer's favorite answer to a point blank question seems to be, "it depends." Such is the case with this paper, as the success of many privacy strategies depends on the unique facts and circumstances surrounding each client's situation. More specifically, each strategy has a practical impact that the client and the client's advisors must consider in deciding whether to proceed. For instance, certain strategies, such as owning real estate through a trust or business entity, may increase transaction costs and administrative burdens. Other strategies, such as making charitable donations through a donor advised fund, rather than a private foundation, may require a client to part with dominion and control over an asset. Ultimately, the client will need to decide whether the desire for privacy outweighs the practical impediments posed by a particular strategy. As professional advisors, it is our job to guide clients through this decision making process.

6. Privacy Planning Requires a Cross-Disciplinary Approach

Privacy planning is a task that spans multiple disciplines. Meeting a client's privacy needs may involve working with lawyers who specialize in real estate, corporate, labor and employment, trust and estate, family law, intellectual property, and general litigation matters, just to name a few. It may also involve working with financial advisors, accountants, and other advisors. Identifying potential issues and engaging the appropriate professionals is paramount to the protection of a client's privacy. While this type of advice may not fall under the umbrella of traditional estate and business planning, it presents a good opportunity to add value to new and existing client relationships.

7. State and Local Laws Are Often Determinative

Many of the privacy strategies discussed in this paper implicate federal, state, and local laws, which practitioners must always review when evaluating a particular strategy. Oftentimes, the outcome of a particular strategy may depend upon where the client resides, where property is located, where a business entity is created, and/or where a trust is sited. This paper focuses primarily on privacy strategies that may be applicable to a number of common client situations, and does not attempt to address each and every state and local law that may impact the success of such strategies. Advisors should consult state and local law in determining whether a particular privacy strategy will be useful.

8. Strive To Elevate Ethical Duties into Best Practices

Lawyers and other advisors have an ethical duty to preserve their clients' confidentiality. This ethical duty, however, merely sets the baseline for the professional. In acknowledgment of a client's basic right to privacy (or if that is not convincing enough, then in the name of good business development), advisors should adopt best practices to secure sensitive and privileged client information. This paper seeks to identify those best practices, while also discussing the ethical implications of particular client situations and suggested privacy strategies.

D. Disclaimer

This paper is not intended to be, and should not be construed as constituting, the authors' opinion with regard to any specific case or transaction or the authors' legal or tax advice with respect to any specific case or transaction. Furthermore, while this paper seeks to identify solutions to help advisors implement their clients' legitimate privacy objectives, this paper is not intended to offer, and should not be construed as offering, any advice regarding a client's criminal, fraudulent, or other illegal activity.

II. Utilizing Revocable Trusts

A. In General

Estate planning, in its most traditional sense, involves the preparation of certain documents to govern the management and disposition of a client's assets upon death or incapacity. The easiest and most common way to plan for a client's privacy is to suggest that the client's core estate plan include a "pour-over" Will and revocable trust, instead of a "standalone" Will. The paragraphs below highlight the privacy benefits offered by a revocable trust, which are otherwise unavailable with a standalone Will.

Note also that a client's ancillary estate planning documents, such as financial and medical powers of attorney, health care directives, HIPAA authorizations, disposition of remains, and anatomical gift statements, among others, can be drafted with privacy in mind. The scope and structure of these documents vary widely from state to state, and rather than discuss each of these documents in this Part II, they are referenced throughout the remainder of this paper where applicable.

B. Keep Estate Plan from Becoming a Public Record

1. Standalone Wills vs. Pour-Over Wills

To understand the effectiveness of a revocable trust from a privacy perspective, we must first compare a "standalone" Will to a "pour-over" Will. A standalone Will contains all of the substantive provisions regarding the disposition of a client's assets. Because most Wills become a matter of public record upon death, including the dispositive provisions of a client's estate plan in a Will reveals potentially sensitive information to the public. By contrast, a pour-over Will simply provides that a client's assets will be distributed to the client's revocable trust upon death. The revocable trust agreement contains the substantive provisions of the client's estate plan.[6] Although the client's Will may be filed with the probate court upon death, the revocable trust will not be filed, which prevents the client's estate plan from becoming a public record.[7]

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[6] Many practitioners refer to revocable trusts as "Will substitutes."

[7] Although a revocable trust does not become a public record, in some states the trustee may be required to provide copies of the revocable trust agreement, and thus reveal details of the estate plan, to certain individuals. For example, upon a settlor's death, California state law requires the trustee to serve notice on the beneficiaries of a revocable trust and the heirs of the trust's settlor, informing the beneficiaries and heirs that the trust has become irrevocable. *See* CAL. PROB. CODE § 16061.7. Among other things, the notification must include a statement that the trustee will provide the beneficiary or heir with a true and complete copy of the trust

As mentioned above, except in rare circumstances, a client's Will becomes a public record upon its admission to probate.[8] For example, when Harold Simmons, the prominent Dallas billionaire, passed away, the probate court partially denied a request to seal his Will.[9] As a result, his estate plan became a matter of public record, which local and national media outlets used as a resource in reporting the nature and disposition of his assets.[10] Countless other examples exist in the celebrity realm, as the Wills of Jacqueline Kennedy Onassis, Yogi Berra, David Bowie, Frank Gifford, Whitney Houston, Tom Clancy, Philip Seymour Hoffman, James Gandolfini, and Jerry Lewis, just to name a few, have been publicized in recent years.[11] These Wills disclose specific details regarding the nature, value, and disposition of the celebrity's assets. It should not be surprising, then, when news outlets and entertainment publications dissect these Wills with careful detail in order to extract their most personal (and potentially embarrassing) details.[12]

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agreement upon a reasonable request. The notification also begins the limitations period during which the beneficiary or heir may contest the trust agreement.

[8] For example, when the author of *To Kill a Mockingbird*, Harper Lee, passed away, her Will was sealed because the court found by clear and convincing evidence that information in the Will, if made public, would pose a serious threat of "harassment, exploitation, physical intrusion, or other particularized harm" to persons identified in the Will and other court filings. *See* Jennifer Crossley Howard, *Judge Seals Harper Lee's Will from Public's Scrutiny*, N.Y. TIMES, Mar. 4, 2016, available at http://www.nytimes.com/2016/03/05/books/judge-seals-harper-lees-will-from-publics-scrutiny.html?_r=0.

[9] *See* Jeff Mosier, *Billionaire Harold Simmons' Will Partially Opened to the Public*, DALLAS MORNING NEWS, Feb. 3, 2014, available at http://www.dallasnews.com/news/metro/20140203-billionaire-harold-simmons-will-partially-opened-to-the-public.ece.

[10] *See id.; see also* Brendan Coffey, *Hidden Billionaire Daughters Emerge from Simmons Estate*, BLOOMBERG, Feb. 6, 2014, available at http://www.bloomberg.com/news/articles/2014-02-06/hidden-billionaire-daughters-emerge-from-simmons-estate.

[11] Bruce D. Steiner, of the New York City law firm of Kleinberg, Kaplan, Wolff & Cohen, P.C., has authored a series of articles for the Leimberg Information Services list serve, which highlight "Lessons from" the Wills of celebrity clients. *See, e.g.*, *Lessons from Yogi Berra's Will*, LISI ESTATE PLANNING NEWSLETTER #2435 (July 14, 2016), *Lessons from David Bowie's Will*, LISI ESTATE PLANNING NEWSLETTER #2409 (Apr. 28, 2016), *Lessons from Philip Seymour Hoffman's Will*, LISI ESTATE PLANNING NEWSLETTER #2206 (Mar. 25, 2014), and *Lessons from James Gandolfini's Will*, LISI ESTATE PLANNING NEWSLETTER #2114 (July 9, 2013), all of which are available at http://www.leimbergservices.com.

[12] For example, when James Gandolfini died and his Will was made public, it disclosed many details regarding the actor's assets and their disposition. *See* Deborah L. Jacobs, *James Gandolfini's Will Reflects a Parent's Dilemma*, FORBES (Aug. 7, 2013), available at http://www.forbes.com/sites/deborahljacobs/2013/08/07/james-gandolfinis-will-reflects-a-parents-dilemma/#6eb31bca4b8b. Similarly, upon Whitney Houston's death, her estate plan also became a public record. Interestingly, her Will left her residuary estate to a trust for her daughter. Upon her daughter's premature death, the Will required that any remaining trust property be distributed to Whitney Houston's relatives, and not to her daughter's father. *See* Matt Donnelly & Anita Bennett, *Whitney Houston's Millions: What Bobbi Kristina Brown May Leave Behind and Who Stands To Gain*, THE WRAP (Feb. 19, 2015), available at http://www.thewrap.com/whitney-houstons-millions-what-bobbi-kristina-brown-may-leave-behind-and-who-stands-to-gain/. Most recently, when Jerry Lewis passed away and his Will was made public, it was revealed that he disinherited five of his six children in favor of his second wife and their adopted daughter. *See* Jessica Sager, *Jerry Lewis Disinherited Five of His Children*, PAGE SIX (Sept. 22, 2017), available at http://pagesix.com/2017/09/22/jerry-lewis-will-leaves-nothing-to-all-but-one-of-his-children/.

Harold Simmons signed his Will a mere three weeks before his death.[13] If, instead of signing a standalone Will, he had signed a pour-over Will and revocable trust agreement, his estate plan may not have become a public record. Given the keen interest in the private lives of our nation's most public figures, it is unusual that so many of these clients fail to privatize their estate plan through a revocable trust, which typically would not require much added time or expense.[14]

2. Use of Exhibits or Separate Trust Agreements to Privatize Portions of Estate Plan

In addition to protecting the privacy of a client's overall estate plan, a revocable trust can be an effective tool to privatize only certain portions of the plan. For instance, a client may desire to create a charitable trust upon death. In creating and administering the charitable trust, third parties may ask to view the entire trust agreement, which could contain dispositive provisions that the client does not wish to disclose. A simple solution is to reference the creation and funding of the charitable trust in the body of the trust agreement, but include the governing provisions as a separate exhibit or even a separate trust agreement. This approach makes the charitable trust easy to amend during the client's lifetime without disturbing the other trust provisions. It should also enable the trustee to provide third parties with only the information that is relevant to the administration of the charitable trust.[15]

C. Prevent Public Disclosure of Assets upon Death

If it is necessary to appoint an executor to administer a client's probate estate, most states will require the executor to file an inventory with the probate court.[16] The inventory must generally identify the probate assets owned by the client at death, as well as the value of such assets.[17] Many clients would prefer to keep the nature and extent of their assets from becoming a public record, either because of a general desire to limit disclosure of their wealth, or in an effort to prevent their survivors from becoming the target of financial overtures, scams, or even theft.

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[13] *See* Jeff Mosier, *Billionaire Harold Simmons' Will Partially Opened to the Public*, DALLAS MORNING NEWS, Feb. 3, 2014, available at http://www.dallasnews.com/news/metro/20140203-billionaire-harold-simmons-will-partially-opened-to-the-public.ece; Matt Levine, *Texas Billionaire Harold Simmons' Heirs Save Some Money on Taxes*, DALLAS MORNING NEWS, June 27, 2014, available at http://www.dallasnews.com/business/headlines/20140627-texas-billionaires-heirs-save-some-money-on-taxes.ece.

[14] *See* Jeff Baskies, *Why Do Celebrities Still Use Wills: Advisors Please Convince Celebrity Clients To Draft the Dispositive Aspects of Their Estate Plans in Revocable Trusts*, LISI ESTATE PLANNING NEWSLETTER #2124 (Aug. 1, 2013), available at http://www.leimbergservices.com.

[15] Note also that some states permit trustees to provide "Certifications of Trust" to third parties in order to verify the existence of a trust, without disclosing the trust terms. *See, e.g.*, TEX. PROP. CODE § 114.086; FLA. STAT. § 736.1017 (2007); ALASKA STAT. § 13.36.079; CAL. PROB. CODE § 18100.5.

[16] *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 207.20; CAL PROB. CODE § 8800; FLA. STAT. §733.604. *But see* HAW. REV. STAT. § 560:3-706 (requiring an inventory to be prepared and delivered to interested persons who request it and permitting, but not requiring that the personal representative file the inventory with the court).

[17] *See, e.g.*, TEX. EST. CODE § 309.051; N.Y. COMP. CODES R. & REGS. tit. 22, § 207.20; CAL. PROB. CODE §§ 8850—8852; FLA. STAT. §733.604.

To address this, some states permit the filing of an "affidavit in lieu of inventory," which allows the executor to prepare and send an inventory to the beneficiaries of the estate, while not actually filing the substance of the inventory with the probate court.[18]

The more complete solution to secure a client's privacy is for the client to fully fund a revocable trust during lifetime. Because the assets of the revocable trust are not part of a client's probate estate at death, many states do not require the executor to disclose such assets on the estate's inventory. Many clients, therefore, choose to fully fund their revocable trusts simply as a means to ensure the privacy of their assets upon death. This is particularly important if the client owns assets that may be controversial or unusual in nature, as further discussed in Part IV of this paper.

D. Management Tool for Lifetime Incapacity

Typically, when a person becomes incapacitated during lifetime, it is necessary for a court to appoint a guardian to care for the person's physical well-being (*i.e.*, a guardian of the person) and to manage the person's financial affairs (*i.e.*, a guardian of the estate).[19] Not only is a guardianship expensive,[20] it often requires personal information to be disclosed in court filings, which are a public record.[21] A guardianship proceeding, therefore, raises serious privacy concerns. These concerns are heightened when the guardianship is contested, as family squabbles and allegations can be dragged into the public domain.[22]

A funded revocable trust can prevent the expense and publicity of a guardianship proceeding in the event of a client's incapacity. Upon the client's incapacity, the named successor trustee can accept the trusteeship and immediately begin to manage and expend the trust assets for the benefit of the client. Specifically, the trustee can manage the client's financial affairs and pay the client's living and medical expenses. Many financial institutions and medical providers prefer dealing with the trustee of a revocable trust rather than a guardian or an agent under a financial power of attorney.

Even if a client's revocable trust has not been funded prior to incapacity, a financial power of attorney can give the agent authority to transfer assets to the revocable trust. In some states, the authority of a court-appointed guardian may supersede the authority of an agent designated in a financial power of attorney.[23] Because courts generally give priority to family members in the appointment of a guardian, it may be important for a client to sign a document

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[18] *See, e.g.* TEX. EST. CODE § 309.056; N.D. CENT. CODE § 30.1-18-06.

[19] *See, e.g.*, TEX. EST. CODE § 1104.001; FLA. STAT. §§ 744.301—3085; N.Y. MENTAL HYG. LAW § 81.02.

[20] *See* Julie Garber, *How Much Does Guardianship or Conservatorship Cost? Paying the Expenses of the Ward or Guardian*, THE BALANCE, July 3, 2016, available at https://www.thebalance.com/how-much-does-guardianship-or-conservatorship-cost-3505426.

[21] *See, e.g.*, Sam Thielman, *'A Living Ghost': Health Questions Haunt Reclusive Mogul Sumner Redstone*, THE GUARDIAN, Jan. 18, 2016, available at https://www.theguardian.com/media/2016/jan/18/sumner-redstone-health-viacom-cbs-lawsuit.

[22] *See, e.g.*, James Rainey, *Doctor Who Examined Donald Sterling Testifies at Trial*, L.A. TIMES, July 7, 2014, available at http://www.latimes.com/sports/clippers/la-sp-sterling-probate-showdown-20140708-story.html.

[23] *See* TEX. EST. CODE § 751.052.

designating a guardian before the need arises to prevent a family member from judicially overriding the client's financial power of attorney.

E. Facilitate Anonymous Ownership of Assets

Revocable trusts are often recommended as a vehicle to avoid probate, both in the client's state of residence and in other jurisdictions in which the client owns property.[24] While this is certainly true if the client fully funds the trust,[25] a revocable trust may also offer privacy benefits during the client's lifetime. As further explained in Part IV of this paper, a client's revocable trust can own record title to certain assets, such as real estate, vehicles, and firearms. So long as a client chooses a non-identifying name for the revocable trust (and, perhaps, a third party trustee), the client can achieve an added level of privacy with respect to the ownership of assets.

III. Limiting the Disclosure of Information to Trust and Estate Beneficiaries

A. In General

As advisors, we work with many clients who express a desire to limit the information made available to certain trust and estate beneficiaries. The reasoning behind the desire for non-disclosure may be legitimate and prudent. The paragraphs below discuss these motivations in greater detail, along with techniques that clients, executors, and trustees may employ to limit the disclosure of information to beneficiaries.

B. Silent Trusts

Clients transfer wealth to irrevocable trusts, either during lifetime or upon death, for a variety of reasons. Some clients utilize trusts as part of a lifetime planning strategy to reduce transfer taxes at their and future generations' deaths. Others utilize trusts to address their privacy and asset protection concerns for beneficiaries, as well as their concerns that the beneficiaries may not be mature enough at the time of the wealth transfer to directly control the transferred assets.

Clients who create irrevocable trusts may not want to provide immediate financial benefits to the trust beneficiaries, and may not want the beneficiaries to even be aware of the trust's existence for some period of time. Limiting a beneficiary's access to information,

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[24] *See* Mickey R. Davis & Melissa J. Willms, Planning for No Probate: Special Issues with Revocable Trusts and Nonprobate Assets, Hidalgo County Bar Association 2013 Probate, Trust & Guardianship Law Course.

[25] It is a common misconception that the mere existence of a revocable trust in a client's estate plan avoids probate. Rather, the client must take affirmative steps to ensure that the client's estate will not include any "probate assets," which would pass according to the dispositive terms of the client's Will and require a probate proceeding. A client's estate, therefore, must consist entirely of "non-probate assets," which generally include assets owned by a trust (such as a revocable trust), assets that pass pursuant to beneficiary designations (such as retirement benefits, pensions, life insurance, and annuities), and assets that pass pursuant to survivorship agreements (such as payable-on-death bank or brokerage accounts or assets titled as joint tenants with the right of survivorship).

however, requires the trustee's cooperation, which may conflict with the trustee's duty under traditional trust law to keep beneficiaries informed.[26]

A number of states have recently departed from this aspect of traditional trust law by enacting statutes authorizing "silent trusts" or "quiet trusts," while other states have implicitly condoned their use. These statutes permit a settlor to create a trust that allows or requires a trustee to comply with the settlor's desire for secrecy, without violating what would otherwise be the trustee's duty to inform the beneficiaries.

The paragraphs below (i) explain the origin of a trustee's duty to inform, (ii) discuss the nature of silent trusts, (iii) mention several motivations for creating silent trusts, (iv) outline some commonalities and differences in silent trust statutes among various states, and (v) discuss negative policy concerns about silent trusts and the ethical challenges faced by practitioners representing settlors, trustees, or beneficiaries.

1. A Trustee's Duty To Inform

A trustee's duty to keep beneficiaries informed about a trust originates from common law and is provided in Section 813 of the Uniform Trust Code (the "UTC"), captioned "Duty to Inform and Report."[27] Under the UTC, a trustee is required to:

- Keep qualified beneficiaries[28] reasonably informed regarding the administration of the trust and the material facts necessary for them to protect their interests;[29]
- Promptly respond to a beneficiary's reasonable request for information related to the trust administration;[30]
- Promptly furnish a copy of the trust instrument to a beneficiary upon request;[31]
- Notify qualified beneficiaries of (i) its acceptance of the trusteeship within 60 days of acceptance, (ii) the existence of an irrevocable trust and their rights as beneficiaries

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[26] *See* Peter J. Bietz, *The Secret's Out: Silent Trusts Are Worth Shouting About in Delaware*, COMMONWEALTH TRUST COMPANY, Mar. 2, 2015, available at http://www.comtrst.com/trust-our-word/wp-content/uploads/2015/03/2015-03-02-The-Secrets-Out-Silent-Trusts-Are-Worth-Shouting-About-in-Delaware1.pdf.

[27] In 2000, the UTC became the first national codification of the law of trusts, providing states with precise, comprehensive, and easily accessible guidance on trust law issues. To the extent states differ regarding an aspect of trust law, the UTC seeks to provide a uniform rule. A copy of the UTC is available at http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf.

[28] A "qualified beneficiary" is a beneficiary who, on the date of the beneficiary's qualification is determined to be a one who (i) is a distributee or permissible distributee of income or principal, (ii) would be a distributee or permissible distributee of income or principal if the interests of the distributees described in the preceding clause terminated on that date without causing the trust to terminate, or (iii) would be a distributee or permissible distributee of income or principal if the trust terminated on that date. *See* UTC § 103(13).

[29] *Id.* § 813(a).

[30] *Id.*

[31] *Id.* § 813(b).

within 60 days after acquiring knowledge of the trust's existence, and (iii) a change in trustee compensation;[32] and

- Send a report (*i.e.*, an accounting) to beneficiaries who request it, at least annually and upon termination of a trust.[33]

The UTC is designed as a default statute, providing numerous rules upon which a settlor may wish to rely, but can generally override.[34] With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are determined by the trust instrument.[35] Notably, however, the UTC originally precluded a settlor from waiving the trustee's duty to inform a qualified beneficiary who has attained the age of 25.[36] Further, the settlor was precluded from eliminating the trustee's duty to respond to a qualified beneficiary's request for a report or other information reasonably related to the administration of the trust.[37]

Although the UTC imposes a general obligation on a trustee to keep the beneficiaries informed and to comply with several specific notice requirements, its provisions specifying limits on a settlor's ability to waive information and notice requirements were made optional in 2004. So while 31 states (and the District of Columbia) have enacted some version of the UTC,[38] these states have varied widely in their inclusion of these optional provisions.[39] Some states adopted these optional provisions without changes, others modified these provisions slightly, and others chose not to include them at all.[40]

2. What Is a Silent Trust?

A silent trust is an irrevocable trust, the very existence of which is to be kept secret from the beneficiaries, who may one day be made aware of and benefit from the trust.[41] The trustee is

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32 *Id.*

33 *Id.* § 813(c).

34 *Id.* § 105.

35 *Id.* § 105(a).

36 *Id.* § 105(b)(8).

37 *Id.* § 105(b)(9).

38 In addition to the District of Columbia, these states are Alabama, Arizona, Arkansas, Florida, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

39 *See* UTC § 105 cmt.

40 *See id.*; *see also* Article III.B.4.

41 *See* Jocelyn Margolin Borowsky & Adrienne M. Penta, *How Silent Trusts Can Help Your Clients*, FINANCIAL PLANNING, Oct. 16, 2015, available at http://www.financial-planning.com/opinion/how-silent-trusts-can-help-your-clients.

obligated to manage the trust's assets during a specific period of non-disclosure, during which time the beneficiaries are unaware the trust exists.[42]

A silent trust agreement contains many of the same provisions as a traditional trust. Additionally, a silent trust includes a provision requiring the trustee (or allowing a third party to direct the trustee), during a specified time period, to keep the existence or certain aspects of a trust confidential from the beneficiaries, and relieving the trustee of the duty to keep beneficiaries informed. Nevertheless, the trustee is still subject to all other traditional fiduciary duties and remains accountable to the beneficiaries for the trustee's actions.[43]

3. When Might a Silent Trust Be Useful?

There are many situations in which a client may desire to keep information about a trust's existence from its beneficiaries. Even if beneficiaries are aware of the trust, the client may still want to limit the trustee's duty to keep the beneficiaries informed during certain time periods and/or about certain aspects of the trust administration. Consider the following examples:

> *Financially Immature Beneficiary. Mom and Dad view Son as being financially immature and, at times, irresponsible. They are concerned that if Son were to know about a substantial trust fund, Son would become even less fiscally responsible. With this in mind, Mom and Dad structure Son's trust as a silent trust.*
>
> *Career-Oriented Beneficiary. Grandfather wants to establish a trust for Granddaughter, who is just beginning her college education. Grandfather does not want the trust to negatively impact Granddaughter's drive and motivation to use her education to become a productive, self-supporting member of society. Grandfather uses a silent trust.*
>
> *Beneficiary with Substance Abuse Issues. Dad's health is failing and he wants to create a trust for his only Daughter. Daughter, however, has been in and out of jail, and struggles with substance abuse. Dad is concerned that Daughter will draw on the trust for improper purposes, and further exacerbate her substance abuse issues. Even though the trust agreement may limit distributions to Daughter when she is abusing drugs or alcohol, Dad may decide to structure Daughter's trust as a silent trust in order to protect the trustee from Daughter's demands for distributions.*
>
> *Privacy and Safety Concerns. Uncle desires to fund a large trust for Nephew Ned. Uncle is concerned that if the trust agreement references nephew's name (e.g., the "Nephew Ned Trust"), the trust's name would appear on financial statements, which Nephew Ned may casually leave in plain view of others in his dorm room or apartment. Consequently, Nephew Ned may have increased*

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[42] *See* Al W. King III, *Should You Keep a Trust Quiet (Silent) From Beneficiaries?*, TRUSTS & ESTATES, Mar. 25, 2015, available at http://wealthmanagement.com/estate-planning/should-you-keep-trust-quiet-silent-beneficiaries.

[43] *See* UTC § 105 cmt.

exposure to fraud scams, identity theft, frivolous lawsuits, extortion, blackmail, or kidnapping. To avoid these issues, Uncle creates a silent trust.

Trusts for Transfer Tax Savings. Mom and Dad have a sizeable estate (consisting mostly of Family Business) that will be subject to a substantial estate tax at the death of the surviving spouse. Mom and Dad's estate planning attorney advises them to transfer shares in Family Business to a trust for the benefit of their Children to minimize transfer taxes. Mom and Dad, however, do not want the trust to immediately benefit Children, and they do not want their Children's scrutiny regarding the administration of the trust or the operation of Family Business. Mom and Dad follow their attorney's advice and transfer non-voting shares to a Children's trust structured as a silent trust to minimize potential scrutiny by Children.

These are, of course, just a few examples of situations in which a silent trust may be beneficial. For whatever a client's reason, the enactment of silent trust statutes in various states has provided a framework for practitioners to assist clients in achieving their non-disclosure goals.

4. Silent Trust Statutes

A number of states have departed from common law and the UTC by enacting statutes that either implicitly condone certain aspects of a silent trust[44] or expressly permit a waiver of the trustee's duty to keep beneficiaries informed.[45] Due to competing policy considerations regarding the extent to which a settlor should be able to waive the trustee's duty to inform the beneficiaries,[46] these statutes vary considerably from state to state, with the more detailed statutes being enacted by Alaska, Delaware, New Hampshire, Ohio, South Dakota, Tennessee, and Wyoming. It may be prudent for a client who wishes to create a silent trust to do so in a state that has enacted a silent trust statute that best facilitates the client's objectives.[47] A

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[44] *See, e.g.*, TEX. PROP. CODE § 111.0035(c) (stating that "[t]he terms of a trust may not limit any common law duty to keep a beneficiary of an irrevocable trust who is 25 years of age or older informed at any time during which the beneficiary: (1) is entitled or permitted to receive distributions from the trust; or (2) would receive a distribution from the trust if the trust were terminated"); MO. REV. STAT. § 456.1-105 (providing that the trustee of an irrevocable trust must "notify each permissible distribute who has attained the age of twenty-one years of the existence of the trust and of that permissible distributee's rights to request trustee's reports and other information reasonably related to the administration of the trust . . . [although] the settlor may designate by the terms of the trust one or more permissible distributees to receive [such] notification . . . in lieu of providing the notice, information or reports to any permissible distributee who is an ancestor or lineal descendant of the designated permissible distributee").

[45] *See, e.g.*, DEL. CODE ANN. tit. 12 § 3303(a) ("Notwithstanding any other provisions of this Code or other law, the terms of a governing instrument may expand, restrict, eliminate, or otherwise vary any laws of general application to fiduciaries, trusts and trust administration, including, but not limited to, any such laws pertaining to: [t]he rights and interests of beneficiaries . . . to be informed of the beneficiary's interest [in a trust] for a period of time.").

[46] *See* UTC § 105 cmt.

[47] To study the various silent trust statutes, see ALASKA STAT. § 13.36.080; ARIZ. REV. STAT. ANN. § 14-10813; DEL. CODE ANN. tit. 12 § 3534; D.C. CODE § 19-1301.05; ME. REV. STAT. ANN. tit. 18-B § 105; MO. REV. STAT. § 456.1-105; N.C. GEN. STAT. § 36C-1-105; N.H. REV. STAT. ANN. § 564-B:1-105; OHIO REV. CODE

practitioner who assists a client in creating a silent trust in another jurisdiction should associate with local counsel to comply with the practitioner's ethical duties.[48] The paragraphs below discuss some of the fundamental differences among these state statutes.

a. Implementation

Some statutes require the waiver of the trustee's duty to keep beneficiaries informed to be expressly provided in the trust agreement,[49] while others also permit the waiver to be in a separate writing delivered to the trustee.[50] Although most statutes only allow the settlor to waive or modify the trustee's duty to inform, some statutes also allow third parties to do so.[51]

b. Beneficiary Surrogate or Designated Representative

Some silent trust statutes require the appointment of a beneficiary surrogate or designated representative during the period which the trustee is not obligated to keep the beneficiaries informed.[52] Other statutes provide for the permissive appointment of a beneficiary surrogate or designated representative to receive information regarding the trust on behalf of unknowing beneficiaries.[53]

ANN. § 5801.04; 20 PA. CONS. STAT. § 7780.3; S.D. CODIFIED LAWS § 55-2-13; TENN. CODE ANN. § 35-15-813; VA. CODE ANN. § 64.2-703; WYO. STAT. ANN. § 4-10-813. *See also* Daniel G. Worthington & Mark Merric, *Finding the Best Situs for Domestic Asset Protection Trusts*, TRUSTS & ESTATES, Dec. 22, 2014, available at http://wealthmanagement.com/asset-protection/find-best-situs-domestic-asset-protection-trusts (listing statutes providing that a discretionary interest in a trust is not a property right or entitlement that, when combined with silent trust statutes, become even more powerful in meeting a settlor-client's asset protection goals).

[48] *See* MODEL RULES OF PROF'L CONDUCT R. 5.5.

[49] *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-10813 ("Unless the trust instrument provides otherwise, a trustee shall keep the qualified beneficiaries of the trust reasonably informed."); OR. REV. STAT. § 5801.04 ("[T]he settlor, in the trust agreement, may waive or modify the duties of the trustee [to keep the beneficiaries informed].").

[50] *See, e.g*, ALASKA STAT. § 13.36.080 ("The settlor may provide the exemption [from the duty to keep beneficiaries informed] by provision in the instrument creating the trust if the trust is created by a writing, by an amendment of the trust if the settlor reserved the power to amend the trust, or by a written document after the trust is created.").

[51] *See, e.g.*, S.D. CODIFIED LAWS § 55-2-13 ("The settlor, trust advisor, or trust protector, may, by the terms of the governing instrument, or in writing delivered to the trustee, expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to a trust."); TENN. CODE ANN. § 35-15-813 (providing that the duty to keep beneficiaries informed "shall not apply to the extent that the terms of the trust provide otherwise or the settlor of the trust, or a trust protector or trust advisor . . . that holds the power to so direct, directs otherwise in a writing delivered to the trustee").

[52] *See, e.g.*, OR. REV. STAT. § 5801.04(C) ("The waiver or modification may be made only by the settlor designating in the trust instrument one or more beneficiary surrogates to receive any notices, information, or reports otherwise required . . . to be provided to the current beneficiaries. . . . A waiver or modification . . . shall be effective for so long as the beneficiary surrogate or surrogates, or their successor or successors designated in accordance with the terms of the trust instrument, act in that capacity.").

[53] *See, e.g.*, DEL. CODE ANN. tit. 12 § 3303(d) ("During any period of time that a governing instrument restricts or eliminates the right of a beneficiary to be informed of the beneficiary's interest in a trust, unless otherwise provided in the governing instrument, any designated representative . . . then serving shall represent and bind such beneficiary for purposes of any judicial proceeding and for purposes of any nonjudicial matter, and shall

c. Beneficiary Exceptions

Some statutes do not allow the waiver of notice requirements as to the settlor's spouse or surviving spouse.[54] Some seem to imply that the waiver be applied uniformly to all beneficiaries (except the settlor's spouse or surviving spouse),[55] while others expressly allow it to apply to one or more beneficiaries and in varying degrees.[56]

d. Period of Non-Disclosure

Some statutes permit a trustee to be exempt from notice requirements only during the settlor's lifetime or during the settlor's incapacity.[57] Other statutes allow a third party, such as a trust protector or trust advisor, to continue to waive notice requirements even after the incapacity or death of the settlor.[58] The broadest statutes permit a trustee to be exempt from notice requirements for an unlimited duration.[59]

e. Flexibility

All silent trust statutes permit the settlor to specify the manner in which the trustee's duty to keep the beneficiaries informed may be modified, expanded, restricted, or eliminated.[60] Other statutes extend this ability to a trust advisor or trust protector.[61]

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have the authority to, and is a proper party to, initiate a proceeding relating to the trust before a court or administrative tribunal on behalf of any such beneficiary.").

[54] *See, e.g.*, ME. REV. STAT. ANN. tit. 18-B § 105 (permitting the waiver or modification of "the duties of a trustee . . . to give notice, information and reports to qualified beneficiaries . . . as to all qualified beneficiaries except the settlor's surviving spouse during the lifetime of the settlor or the lifetime of the settlor's surviving spouse").

[55] *See, e.g., id.* (providing that the settlor may waive the duty to keep beneficiaries informed by "[w]aiving or modifying such duties as to all qualified beneficiaries except the settlor's [spouse] or surviving spouse").

[56] *See, e.g.*, OR. REV. STAT. § 5801.04 ("With respect to one or more of the current beneficiaries, the settlor, in the trust agreement, may waive or modify the duties of the trustee [to keep the beneficiaries informed].").

[57] *See, e.g.*, ALASKA STAT. § 13.36.080 ("The exemption [from the trustee's duty to keep beneficiaries informed] may not exceed in duration the shorter of the settlor's lifetime or a judicial determination of the settlor's incapacity."); 20 PA. CONS. STAT. § 7780.3 (requiring a trustee of an irrevocable trust to send written notice containing prescribed information to a current beneficiary of the trust, or a designated representative, "[n]o later than 30 days after the date on which the trustee . . . knows that the settlor is then deceased or has been adjudicated incapacitated").

[58] *See, e.g.*, S.D. CODIFIED LAWS § 55-2-13; TENN. CODE ANN. § 35-15-813.

[59] *See*, DEL. CODE ANN. tit. 12 § 3303(c) ("The terms of a governing instrument may expand, restrict, eliminate, or otherwise vary the right of a beneficiary to be informed of the beneficiary's interest in a trust for a period of time, including but not limited to: (1) A period of time related to the age of a beneficiary; (2) A period of time related to the lifetime of each trustor and/or spouse of a trustor; (3) A period of time related to a term of years or specific date; and/or (4) A period of time related to a specific event that is certain to occur.").

[60] *See generally* UTC § 105 cmt. (noting that with limited exceptions, the settlor is generally free to prescribe the conditions under which a trust is to be administered).

[61] *See, e.g.*, S.D. CODIFIED LAWS § 55-2-13 (providing that "the settlor, trust, advisor, or trust protector may, by the terms of the governing instrument, or in a writing delivered to the trustee, expand, restrict, eliminate, or otherwise modify the rights of beneficiaries to information relating to a trust"); TENN. CODE ANN. § 35-15-813

5. Potential Disadvantages to Silent Trusts

While silent trusts are often motivated by legitimate client objectives, they may raise serious concerns for all parties involved, including settlors, trustees, beneficiary surrogates, beneficiaries, and drafting attorneys. These potential disadvantages and ethical considerations are discussed below.

a. Settlors

A silent trust may not be flexible enough to respond to unanticipated changes in circumstances. For example, a client's wishes may not be met if the beneficiary has serious financial needs that, had the trustee been aware of such needs in a conventional trust relationship, could have been addressed through a discretionary distribution.[62] Note, however, that if a settlor is alive and aware of the beneficiary's needs, the settlor could inform the trustee of the change in circumstances. Some silent trust statutes also attempt to address this concern by permitting certain persons, including the settlor, to modify the trust's secret nature.[63]

b. Trustees and Beneficiary Surrogates

Because beneficiaries are not informed of a silent trust's existence or administration, a silent trust may expose trustees to an unlimited statute of limitations for fiduciary liability.[64] A trustee's potential for liability is magnified by the lack of communication with the beneficiaries, as the trustee is unable to identify and address the beneficiaries' needs and concerns. Some statutes attempt to address this concern by providing for the appointment of a beneficiary surrogate, designated representative, or trust protector who receives information on behalf of the beneficiaries.[65] Query, however, whether such appointees are also fiduciaries with similar risk of fiduciary liability under an unlimited statute of limitations?

(providing that a trustee's duties to keep beneficiaries informed "shall not apply to the extent that a trust protector or trust advisor . . . directs otherwise in a writing delivered to the trustee").

62 *See Quiet Trusts Need Not Be Silent: The Delayed Notification Option*, THINK ADVISOR, July 6, 2016, http://www.thinkadvisor.com/2016/07/06/quiet-trusts-need-not-be-silent-the-delayed-notifi, (noting that a trustee who is unable to inquire of a beneficiary's circumstances or make distributions has no way to respond to the beneficiary's needs).

63 *See, e.g.*, S.D. CODIFIED LAWS § 55-2-13; TENN. CODE ANN. § 35-15-813.

64 *See* Dana G. Fitzsimons, Jr., *Navigating the Trustee's Duty to Disclose*, 23 AMERICAN BAR ASSOCIATION, SECTION OF REAL PROPERTY, TRUST & ESTATE 1, Jan./Feb. 2009 (assessing the relationship between disclosure and fiduciary risk in light of the development of silent trusts); *see also* UTC § 1005 (providing that a trustee may shorten the statute of limitations for a breach of trust action from five years to one year by adequately disclosing to the beneficiaries the potential claim for breach of trust and the time allowed for commencing a proceeding).

65 *See*, DEL. CODE ANN. tit. 12 § 3303(c); ME. REV. STAT. ANN. tit. 18-B § 105.

c. Beneficiaries

Beneficiaries who are unaware a trust exists or who have limited access to information may be unable to monitor the trustee's actions and protect their interests.[66] Without communication between the beneficiaries and trustee, there is no way for the beneficiaries to present their needs or investment goals to the trustee. This can lead to potential liability for the trustee, as discussed above, and may be inconsistent with the bedrock principle that a trustee administers a trust in the best interests of the beneficiaries.

d. Ethical Issues

Lastly, silent trusts present unique ethical challenges for practitioners, which vary depending on whether the practitioner represents the settlor, trustee, and/or beneficiaries. When representing a client who would like to create a silent trust, the practitioner should identify the client's motivations, advise the client of the potential disadvantages to silent trusts, and present alternatives that may be sufficient to accomplish the client's objectives.[67] When representing the trustee of a silent trust, the practitioner should advise the trustee of the potential for increased liability given the lack of disclosure and communication to beneficiaries.[68] Finally, the practitioner should be keenly aware of ethical issues that could arise when asked to represent the beneficiaries of a silent trust if the practitioner also represents the settlor and/or trustee. Query whether this dual representation would create a conflict of interest and whether the practitioner would be ethically required to disclose the existence of the silent trust to the beneficiaries?[69]

C. Private Decanting

In certain circumstances, it may be beneficial to modify the provisions of an irrevocable trust to more accurately reflect the settlor's intent, respond to a beneficiary's unanticipated needs and circumstances, address changes in the law, optimize tax consequences, or correct errors in

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66 *See* Jocelyn Margolin Borowsky & Adrienne M. Penta, *How Silent Trusts Can Help Your Clients*, FINANCIAL PLANNING, Oct. 16, 2015, available at http://www.financial-planning.com/opinion/how-silent-trusts-can-help-your-clients.

67 It may be beneficial for the client to consider how beneficiaries will feel and react when the silent trust is ultimately revealed. *See* Caitlin LoCascio-King, *Drafting Irrevocable Silent Trusts: Preserving Privacy of Trust Assets from Spendthrift Beneficiaries*, STRAFFORD, Feb. 25, 2014, available at http://media.straffordpub.com/products/drafting-irrevocable-silent-trusts-preserving-privacy-of-trust-assets-from-spendthrift-beneficiaries-2014-02-25/presentation.pdf (suggesting that a settlor of a silent trust write a letter to the beneficiaries to be delivered at the time of the trust's disclosure, explaining why the settlor believed it was in the beneficiaries' best interest to keep the trust silent).

68 *See* Dana G. Fitzsimons, Jr., *Navigating the Trustee's Duty to Disclose*, 23 AMERICAN BAR ASSOCIATION, SECTION OF REAL PROPERTY, TRUST & ESTATE 1, Jan./Feb. 2009 (assessing the relationship between disclosure and fiduciary risk in light of the development of silent trusts); *see also* UTC § 1005 (providing that a trustee may shorten the statute of limitations for a breach of trust action from five years to one year by adequately disclosing to the beneficiaries the potential claim for breach of trust and the time allowed for commencing a proceeding).

69 *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (providing that "[a] concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer").

the trust agreement. Several mechanisms exist to modify an irrevocable trust, including judicial reformation or modification, trust mergers, non-judicial settlement agreements, and now, with increasing popularity, trust "decanting."[70]

Decanting involves a trustee exercising its power to distribute trust property by transferring such property to a new trust for the benefit of one or more of the beneficiaries of the original trust.[71] Decanting is often framed as the trustee's exercise of a special power of appointment in a fiduciary capacity. Decanting is now available by statute in 25 states, many of which are recent enactments.[72]

Prior to decanting a trust, most states require trustees to provide trust beneficiaries with notice and an opportunity to object.[73] Seven states, however—Arizona, Delaware, New Hampshire, Nevada, South Dakota, Tennessee, and Wyoming—do not expressly require trustees to provide individual beneficiaries with notice prior to decanting. Thus, it may be possible for a trustee to effectuate a "private decanting" in these states.[74] In other words, the trustee may decant an irrevocable trust without informing the beneficiaries of the existence or terms of the new trust. While a private decanting may certainly achieve a client's objective to limit the disclosure of information to trust beneficiaries, it may also conflict with the trustee's fiduciary duty to keep the beneficiaries reasonably informed and implicate ethical issues for the practitioner assisting with the transaction. As with silent trusts, practitioners should be keenly aware of who they represent (*i.e.*, the settlor, trustee, and/or beneficiaries), and should advise trustees whom they represent of the fiduciary risks associated with a private decanting.[75]

D. Basis Consistency Rules

On July 31, 2015, President Obama signed the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (the "Highway Bill")[76] into law. The Highway Bill added Code[77] § 1014(f) to require individuals acquiring property from a decedent to use

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70 For a broader discussion of trust decanting, see Farhad Aghdami & Jeffrey D. Chadwick, Decanting Comes of Age, American Bar Association, Tax Section, Washington, D.C., May 6, 2011.

71 The best way to understand trust decanting is to visualize the physical act of decanting wine, which involves the pouring of wine from one vessel to another for the purpose of removing unwanted sediment and adding oxygen to the wine. In the trust context, practitioners can view decanting as a trustee pouring the assets of an old trust into a new trust, with the less useful provisions (the so-called "sediment") left behind, while the "oxygen" of modern trust provisions breathes life into the trust. *See id.*

72 For an excellent summary of state decanting statutes, see Sidley Austin (originally compiled by Susan T. Bart), *State Decanting Statutes*, available at https://www.sidley.com/en/us/services/trusts-and-estates/sub-pages/state-decanting-statutes/.

73 *See, e.g.*, FLA. STAT. ANN. § 736.04117(4); TEX. PROP. CODE § 112.074; VA. CODE ANN. § 64.2-778.1.G.

74 For a discussion of private decanting, see Pete Melcher, Bob Keebler & Steve Oshins, *The Ultimate Guide to Decanting Trusts: Strategies, Opportunities, Private Decantings, Tax Issues and More*, LISI ESTATE PLANNING NEWSLETTER #2554 (May 24, 2017), available at http://www.leimbergservices.com.

75 See the discussion in Part III.B.5, *supra*, regarding potential disadvantages to silent trusts, much of which also applies to a private decanting.

76 Public Law No. 114-41 (July 31, 2015), available at https://www.congress.gov/bill/114th-congress/house-bill/3236/text.

77 In this paper, all references to the "Code" are to the Internal Revenue Code of 1986 unless noted otherwise.

estate tax values as their income tax basis in the property. The Highway Bill also added Code § 6035, which requires executors to report the income tax basis of certain estate property to the IRS and to beneficiaries of the estate through the filing of a Form 8971. Lastly, the Highway Bill enacted Code § 6662(b)(8), which added these basis consistency rules to the accuracy-related penalty provisions.

The basis consistency rules require executors to disclose asset information to beneficiaries who historically were not entitled to receive such information. While certain aspects of these rules are unclear, there are actions a client may take during lifetime, or an executor may take while administering the client's estate, to minimize disclosure of asset information. The paragraphs below briefly summarize the basis consistency rules, describe the risk these rules pose to our clients' privacy, and provide recommendations to address these privacy concerns.

1. Brief Summary of Basis Consistency Rules

Subject to certain exceptions, Code § 1014(f) provides that the income tax basis of property acquired from a decedent shall not exceed the value of that property as finally determined for federal estate tax purposes. Code § 6035(a), in turn, provides that an executor who is required to file a federal estate tax return (Form 706) under Code § 6018[78] must also furnish an "Information Return" to the IRS and a "Statement" to the recipients of estate property that identifies the value of such property for federal estate tax purposes. Certain property, however, is not subject to this reporting requirement, including cash, income in respect of a decedent, tangible personal property for which an appraisal is not required,[79] and property sold, exchanged, or otherwise disposed of by the estate in a transaction in which capital gain or loss is recognized.[80]

The Information Return required to be filed with the IRS is Form 8971. The Statement required to be furnished to each beneficiary of the estate refers to a separate Schedule A to Form 8971 for each beneficiary. In most cases, the executor must file the Form 8971 with the IRS and send each beneficiary a copy of the Statement within 30 days of filing the estate tax return. On March 2, 2016, the Service published Proposed Regulations to provide guidance for executors attempting to comply with these new basis consistency rules.[81]

2. Privacy Concern

From a privacy perspective, the reporting requirements associated with the basis consistency rules may raise a significant issue when administering a client's estate. Under Prop.

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[78] Treasury's Proposed Regulations confirm that the reporting requirement does not apply to executors who file a federal estate tax return solely for purposes of making a portability election, allocating GST exemption, or protecting a potential claim for refund. *See* Prop. Reg. § 1.6035-1(a)(2).

[79] Treas. Regs. § 20.2031-6(b) does not require an appraisal for tangible personal property with a value of $3,000 or less.

[80] *See* Prop. Regs. § 1.6035-1(b)(1).

[81] Consistent Basis Reporting Between Estate and Person Acquiring Property From Decedent, REG-127923-15, T.D. 9757 available at http://federalregister.gov/a/2016-04718.

Reg. § 1.6035-1(c)(3), "if . . . the executor has not determined what property will be used to satisfy the interest of each beneficiary, the executor must report on the Statement for each such beneficiary all of the property that the executor could use to satisfy that beneficiary's interest." Thus, if an executor is unsure how a bequest will be satisfied under the decedent's Will or revocable trust, the executor must disclose any and all property, along with its value, that could be used to satisfy such bequest. Prop. Reg. § 1.6035-1(c)(3) further provides that "[o]nce the exact distribution has been determined, the executor may, but is not required to, file and furnish a supplemental Information Return and Statement."

The language in Prop. Reg. § 1.6035-1(c)(3) may pose a serious risk to the privacy of a client's estate. Consider the following example:

> *Mom dies with an estate valued at $25 million, survived by Loving Son and Estranged Daughter. Mom's Will gives $500,000 to Estranged Daughter, with her residuary estate passing to Loving Son. Mom's estate planning attorney advised her that giving $500,000 to Estranged Daughter, subject to a no-contest clause, may help prevent Estranged Daughter from challenging the Will. Mom's Will does not require Estranged Daughter's $500,000 gift to be satisfied with cash.*
>
> *Loving Son is appointed as Executor of Mom's Estate and timely files a federal estate tax return. Mom's Estate is tied up in unrelated litigation and lacks the liquidity to satisfy Estranged Daughter's $500,000 gift. Before distributing any assets from Mom's Estate, Loving Son would like some assurances that the litigation is settled and the estate tax return has been accepted as filed.*
>
> *Prop. Reg. § 1.6035-1(c)(3) requires Loving Son to file an Information Return and Statement within 30 days of filing Mom's estate tax return. Because Loving Son has not determined which property will be used to satisfy Estranged Daughter's specific bequest, and the bequest is not required to be satisfied with cash, he must provide Estranged Daughter with a Statement that discloses all of Mom's property, as well as its value.*
>
> *Note that if Mom's $500,000 gift to Estranged Daughter were included in Mom's Revocable Trust, rather than her Will, Loving Son would be required to send the Statement to the trustee of the Revocable Trust.*[82] *Assuming the trustee elects to satisfy Estranged Daughter's gift in kind, it is unclear whether additional reporting would be required when the trustee distributed the property to Estranged Daughter under the so-called "subsequent transfer rule" in the Proposed Regulations.*[83]

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82 *See* Prop. Regs. § 1.6035-1(c)(2).

83 *See id.* at § 1.6035-1(f). For a further discussion of these issues, see Steve Akers, *Basis Consistency Temporary and Proposed Regulations*, BESSEMER TRUST, Mar. 25, 2016, available at http://www.bessemertrust.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Advisor/Presentation/Print%20PDFs/Basis%20Consistency%20Proposed%20Regulations%20Summary%2003%2008%2016.pdf.

Executors are rarely in a position to distribute the entire estate to beneficiaries within 30 days of filing the estate tax return. In situations involving feuding siblings or when an estate plan includes small gifts to various friends, family members, employees, or charities, it may be inappropriate and, in some cases, dangerous to disclose the value of all estate property to all beneficiaries. Moreover, preparing and sending a Statement to each beneficiary of an estate that essentially mirrors the asset information provided on the Form 706 may involve significant time and expense.

3. Possible Solutions

If a client wishes to make small bequests to friends, extended family members, caretakers, employees, or charities, the client can engage in one or more techniques to minimize the disclosure of asset information at death. These planning techniques are discussed below.

a. Fund Bequests with Non-Probate Assets

Perhaps the simplest technique involves designating the gift recipients as beneficiaries of non-probate assets, such as retirement plans, life insurance policies, or bank or brokerage accounts that are payable-on-death or subject to a survivorship agreement. Upon the client's death, the asset should pass directly to the gift recipient and should not be subject to the reporting requirement under the basis consistency rules.

b. Require Bequests Be Satisfied with Cash

If the bequests are to be made through the client's Will or revocable trust agreement, require that such bequests be satisfied with cash. An executor is not required to provide a Statement to a beneficiary who will receive a cash bequest (regardless of when the bequest is satisfied) because cash is not subject to the reporting requirement under the basis consistency rules.[84]

c. Utilize Multiple Funded Revocable Trusts

Another alternative is for the client to create and fund multiple revocable trusts to segregate smaller bequests from the balance of the client's estate. Specifically, the client can create one revocable trust, the sole purpose of which is to make smaller bequests to friends, extended family members, caretakers, employees, and other individuals or charities. In tandem, the client can create another revocable trust to dispose of the balance of the client's estate among children or other named beneficiaries. This structure should ensure that the beneficiaries of the "specific bequests" trust only receive asset information pertaining to that trust, and not the client's other assets.

d. Liquidate Estate Assets To Satisfy Bequests

If a client's estate plan is not structured to avoid the reporting requirements under the basis consistency rules (*i.e.*, if specific bequests may be satisfied in kind), the executor may preserve the client's privacy by liquidating estate assets and utilizing the cash proceeds to satisfy

[84] *See* Prop. Regs. § 1.6035-1(b)(1)(i).

the bequests. Even if the executor does not satisfy the bequests by the Statement's due date, the beneficiaries will not be entitled to receive a Statement because their bequests will be paid in cash.[85] Note, however, that this approach could cause gain to be recognized, which may have been avoided if the executor satisfied the bequests in kind, rather than in cash.

e. Borrow Cash To Satisfy Bequests

If the executor cannot liquidate estate assets to satisfy the bequests, the executor may borrow cash from a third party lender and utilize the borrowed funds to satisfy the bequests.

f. Set Aside Estate Assets To Satisfy Bequests

If an executor cannot obtain cash to satisfy a bequest, consider setting aside a particular asset to fund the bequest. Prop. Reg. § 1.6035-1(c)(3) only requires the executor to disclose all of the estate's property if the executor "has not determined what property will be used to satisfy the interest of each beneficiary." If the executor has "determined" the estate asset that will be used to satisfy a bequest, the Statement furnished to the beneficiary should only include that asset, and may exclude all other estate assets. If the reported asset is sold and the bequest is satisfied in cash, a supplemental Statement should not be required.[86]

IV. Titling Real Estate, Firearms, and Other Assets

Many clients own real estate, vehicles, and other assets, such as firearms, artwork, or other collectibles. As public access to real estate records and other information increases, these assets may pose particular risks to clients' privacy and, in some cases, their personal security. Specific planning for these assets is essential to protect clients' privacy. The paragraphs below provide planning recommendations for particular assets.

A. Real Estate

For a number of reasons, many clients desire to achieve anonymity with respect to their ownership of real estate.[87] A celebrity client or politician, for example, may seek to create a safe and secure haven from overzealous fans and paparazzi.[88] A real estate investor may wish to shield ownership from the prying eyes of other investors in order to gain a competitive advantage. Many clients simply wish to obtain privacy with respect to the ownership of their primary and secondary residences to maintain a low profile.

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85 *See id*.

86 *See* Prop. Regs. § 1.6035-1(b)(1) (providing that no Statement is required when an asset is sold and capital gain or loss is recognized).

87 *See generally* Amnon Lehavi, *Property and Secrecy*, 50 REAL PROPERTY, TRUST, AND ESTATE LAW JOURNAL 381, 410-414 (2016) (discussing real estate owners' arguments for privacy).

88 For an example of negative publicity that can come with the purchase of a new home, *see* Anna Giaritell, *Bernie Sanders Just Bought a Third Home. Tell that to the 99 Percent*, WASHINGTON EXAMINER, Aug. 14, 2016, available at http://www.washingtonexaminer.com/bernie-sanders-just-bought-a-third-home.-tell-that-to-the-99-percent./article/2598973?custom_click=rss.

There are many parties involved in a typical real estate transaction, including a seller, lender, title company, and a county clerk's office or appraisal district. With so many parties involved, it may be easy to identify the owner and value of real estate. The real property records for many cities and counties in the United States can be accessed by the public through online databases. Most of these online databases are free and offer a wide variety of search options.[89] Therefore, the location and value of real estate titled in the client's individual name may be just a few mouse clicks away for even the most inexperienced computer user.[90]

The below paragraphs discuss how a client may use a business entity or a trust to privatize real estate ownership, along with the practical issues that arise in connection with these forms of ownership.

1. Title Real Estate in the Name of a Business Entity or Trust

There are two primary methods of achieving privacy with respect to a client's ownership of real estate—titling property in the name of a business entity or a trust. The most common business entity for this purpose, and the one that is discussed exclusively in this paper, is the limited liability company ("LLC"), although other entities, such as partnerships and corporations, may also be suitable ownership structures.[91] Most clients who utilize a trust to own real estate use a revocable trust instead of an irrevocable trust in order to retain maximum flexibility. While this paper discusses LLCs and trusts separately, it is not uncommon for a trust to be the sole owner of the real estate LLC, reflecting a hybrid approach that may be beneficial.

The paragraphs below discuss the most important considerations involved in structuring a client's ownership of real estate through an LLC or revocable trust. The appropriate ownership structure will depend on the client's unique goals and objectives, as well as the jurisdiction in which the property is located.

Keep in mind, if real estate is currently titled in the client's individual name, the solutions discussed below may not be entirely effective because the client's name will forever be linked in the chain of title. While the client may place a number of intermediate owners between the client

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89 *See, e.g.*, MIAMI-DADE PROPERTY APPRAISER, http://www.miamidade.gov/propertysearch/#/; NEW YORK CITY DEPARTMENT OF FINANCE, AUTOMATED CITY REGISTER INFORMATION SYSTEM (ACRIS), https://a836-acris.nyc.gov/DS/DocumentSearch/Index.

90 Note, however, that for safety reasons, certain states permit government employees, such as judges and police officers, as well as victims of domestic violence or sexual assault, to keep their home addresses confidential in the public records. *See, e.g.*, FLA. STAT. § 119.071(4)(d); TEX. PROP. TAX CODE § 25.025.

91 Series LLCs, which provide for a series of member LLCs owned by a parent LLC, are gaining popularity with real estate investors for their ability to segregate assets and liabilities while maintaining a common management structure. *See, e.g.*, TEX. BUS. ORGS. CODE §§ 101.601—101.622; *see also* Cara Griffith, *Series LLCs: The Next Generation of Passthrough Entities?*, FORBES, Feb. 16, 2015, available at http://www.forbes.com/sites/taxanalysts/2015/02/16/series-llcs-the-next-generation-of-passthrough-entities/#2232d8b072e2.

and the ultimate owner of the property, a simple title search may reveal the client's prior individual ownership.[92]

a. Name of LLC or Trust

Selecting an appropriate name for the real estate LLC or trust is important. For privacy purposes, the name should not be easily recognizable or otherwise associated with the client. One option in identifying an appropriate name for the LLC or trust is to incorporate the property address. A client's home on 1231 Bel Air Avenue, for example, could be owned by "1231 Bel Air, LLC" or the "Bel Air Trust." Some clients may be even more creative in selecting a name. Jennifer Aniston's Manhattan home, for instance, is owned by the "Norman's Nest Trust," which is named after the actress's dog.[93]

b. Managers and Trustees

Once a client has selected an inconspicuous name for the LLC or trust, the client must determine who will be responsible for managing the LLC or trust assets. Generally, the client will want to retain control of the property and may instinctively prefer to serve as manager of the LLC or trustee of the trust. This approach may not secure privacy because the client's name may appear in closing documents, financial paperwork, state filings, and online deed records.

Depending on the jurisdiction, it may be easier to achieve privacy with a trust rather than with an LLC. Typically, trusts are private arrangements, while LLCs are regulated by various state authorities that may be required to file public reports. Most states require LLCs to file public reports each year. Some states require the reports to include the names and addresses of an LLC's members, managers, officers, and/or directors.[94] Several states, including Delaware, New Mexico, Wyoming, and Nevada, appear to have relaxed reporting requirements that offer enhanced privacy for LLCs established in those jurisdictions.[95]

A client who elects to utilize an LLC, but seeks to preserve privacy, may want to establish the LLC in a jurisdiction that does not require disclosure of information regarding the members. For example, while Texas requires an LLC to file an annual Public Information Report (Form 05-102)[96] with the Texas Comptroller's Office, only the names and addresses of

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92 For a good discussion of the difference between "absolute anonymity" and "relative anonymity" in the context of Texas real estate transactions, see David J. Willis, *Anonymity Alternatives in Texas Real Estate* (2015), available at http://www.lonestarlandlaw.com/Anonymity.html.

93 *See* Marc Santora, *Keep My Boldface Name Out of It*, N.Y. TIMES, June 3, 2011, available at http://www.nytimes.com/2011/06/05/realestate/how-celebrities-buy-homes-on-the-qt.html?_r=1.

94 *See generally LLC Annual Report and Tax Filing Requirements: A 50-State Guide*, NOLO.COM, http://www.nolo.com/legal-encyclopedia/50-state-guide-annual-report-tax-filing-requirements-llcs (summarizing each state's LLC disclosure requirements).

95 *See* Libby Watson, *Why Are There So Many Anonymous Companies in Delaware?*, SUNLIGHT FOUNDATION BLOG Apr. 6, 2016, available at https://sunlightfoundation.com/blog/2016/04/06/why-are-there-so-many-anonymous-corporations-in-delaware/; *see also* Philip A. Nicolosi, *Anonymous Corporation or LLC?*, PHIL NICOLOSI LAW, Mar. 5, 2013), available at http://www.internetlegalattorney.com/can-business-owners-stay-anonymous/.

96 Available at http://comptroller.texas.gov/taxinfo/taxforms/05-102-a.pdf.

the LLC managers are required to be disclosed, and not the names and addresses of non-managing members. To secure privacy, a Texas LLC may be structured with the client owning 100% of the economic rights and a third party manager who has no economic interest.

Whether a client elects to utilize an LLC or a trust, a third party should be named as the manager or trustee. This can ensure that the client's name is not listed in any public filings. The LLC or trust agreement, which should not be available to the public, may be structured to allow the client to remove and replace the manager or trustee, preserving the client's control.

In addition to considering state disclosure requirements, clients should also consider any local disclosure rules. In February 2015, the New York Times published a series of articles, entitled "Towers of Secrecy," that discussed the increased use of LLCs by wealthy individuals to anonymously purchase high-end real estate in New York City.[97] The five-part series, which chronicled the secret efforts of public figures from around the world, advocated for greater corporate transparency in real estate transactions to limit money laundering and other illicit activities.

In response to the Times' exposé, New York City imposed new disclosure rules for "shell companies" purchasing or selling property within the city limits, requiring such companies to disclose the names of its individual owners.[98] In January 2016, the Treasury Department announced a pilot program requiring title insurance companies to identify and disclose the individual owners of shell companies using cash to purchase real estate in certain jurisdictions.[99] The pilot program, which operated from March 2016 through August 2016, applied to cash purchases of real estate in Manhattan with a value of $3,000,000 or more, and Miami-Dade County with a value of $1,000,000 or more.[100] The Treasury Department expanded its pilot program to include real estate transactions closing in August 2016 through August 2017 in Florida's Broward and Palm Beach Counties ($1,000,000 or more), California's Los Angeles, San Diego, San Francisco, San Mateo, and Santa Clara Counties ($2,000,000 or more), and Texas's Bexar County ($500,000 or more).[101]

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97 *See* Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES, Feb. 7, 2015, available at http://www.nytimes.com/2015/02/08/nyregion/stream-of-foreign-wealth-flows-to-time-warner-condos.html.

98 *See* Stephanie Saul, *New Disclosure Rules for Shell Companies in New York Luxury Real Estate Sales*, N.Y. TIMES, July 20, 2015, available at http://www.nytimes.com/2015/07/21/nyregion/new-disclosure-rules-for-shell-companies-in-new-york-luxury-real-estate-sales.html.

99 *See* Louise Story, *U.S. Will Track Secret Buyers of Luxury Real Estate*, N.Y. TIMES, Jan. 13, 2016, available at http://www.nytimes.com/2016/01/14/us/us-will-track-secret-buyers-of-luxury-real-estate.html.

100 The pilot program was announced by the Financial Crimes Enforcement Network ("FinCEN"), which is a division of the Treasury Department. Specifically, FinCEN issued Geographic Targeting Orders ("GTOs") for Manhattan and Miami-Dade County, which can be viewed at https://www.fincen.gov/news_room/nr/files/Real_Estate_GTO-NYC.pdf (Manhattan) and https://www.fincen.gov/news_room/nr/files/Real_Estate_GTO-MIA.pdf (Miami-Dade).

101 *See* UNITED STATES DEPARTMENT OF THE TREASURY: FINCEN, *FinCEN Renews Real Estate "Geographic Targeting Orders" To Identify High-End Cash Buyers in Six Major Metropolitan Areas*, Feb. 23, 2017, https://www.fincen.gov/news/news-releases/fincen-renews-real-estate-geographic-targeting-orders-identify-high-end-cash; *see also* E.B. Solomont, *Cracking shells: US Treasury Widens LLC Disclosure Law throughout*

The Treasury Department may decide to further expand its pilot program to other locales in the future. These evolving disclosure rules may potentially undermine a client's privacy goals, and underscore the importance of consulting local professionals to ensure compliance with applicable state and local law.

c. Homestead Exemptions

If the client intends to use the property as a primary or secondary residence, it may be beneficial to qualify for the homestead exemption under applicable state law. Not only will the homestead exemption save the client state property taxes, it may also cause the property to be exempt from the claims of creditors if the client declares bankruptcy. Under Texas and Florida law, for example, a debtor's homestead is exempt from the bankruptcy estate, regardless of such homestead's value.[102] Other states protect a debtor's homestead up to a certain dollar amount.[103]

Trusts may be preferable to LLCs in this context. Many states expressly provide that homes owned by certain trusts are eligible for the homestead exemption.[104] By contrast, homes owned by LLCs are generally treated as separate entities for which no homestead exemption is available.[105]

d. Asset Protection

A common misconception many clients have is that a trust, regardless of how it is structured, offers asset protection benefits. A revocable trust, however, offers no additional asset protection because the client still has unfettered access to the property. By contrast, an LLC, by its very nature, is designed to protect its members from personal liability with respect to property owned by the LLC. In most instances, an LLC may offer a client better overall asset protection than a revocable trust. This may be particularly important for investment or rental real estate, or if dangerous activity is occurring on the property.

NYC, LA, THE REAL DEAL: NEW YORK REAL ESTATE NEWS, July 27, 2016, available at http://therealdeal.com/2016/07/27/cracking-shells-us-treasury-widens-llc-disclosure-law-throughout-nyc-la/.

[102] *See* TEX. PROP. CODE §§ 41.001—41.002; FLA. STAT. §§ 222.01—222.02. There are, of course, exceptions to these general rules, including debts to satisfy a mortgage on the property and acreage limitations. *See id.*

[103] *See generally 50 State Homestead Exemptions & Other Bankruptcy Exemptions*, LEGALCONSUMER.COM, https://www.legalconsumer.com/bankruptcy/laws/, (summarizing each state's homestead and bankruptcy exemptions).

[104] *See, e.g.*, CAL. PROP. TAX CODE § 505.0040; TEX. TAX CODE § 11.13.

[105] *See, e.g.*, CAL. PROP. TAX CODE § 505.0063 ("For property tax exemption law purposes, limited liability companies are, like corporations, separate entities. There is no authority for disregarding a limited liability company's separate entity status for purposes of ownership of property and determining eligibility for the homeowners' exemption. Thus, a claim for exemption should not be allowed for property owned by a limited liability company."); *see also* In re Breece, 2013 WL 197399 (B.A.P. 6th Cir.) (finding that a debtor's home owned by a single-member LLC did not qualify for the homestead exemption); Fla. Att'y Gen. Op. 2007-18, available at http://www.llclawmonitor.com/2013/03/articles/bankruptcy/homestead-exemption-does-not-apply-if-home-is-held-by-debtors-llc/ (determining that a home owned by a single-member LLC did not qualify for the homestead exemption).

e. Real Property Transfer Tax

Most states do not treat the client's transfer of real estate to an LLC or revocable trust as a transfer subject to real property transfer taxes. This is because the transfer is deemed to be a mere change in the client's form of beneficial ownership.[106] To avoid unintended tax consequences, however, clients should always consult with local counsel. Practitioners who are not licensed to practice law in the jurisdiction in which the real estate is located should associate with local counsel to avoid potential ethical violations associated with the unauthorized practice of law.[107]

f. Ideal Structure

As discussed above, the ideal structure for a client seeking to privatize real estate holdings depends on the client's circumstances, including the nature of the property, the availability of trustworthy third party managers and trustees, the client's asset protection goals, and applicable state law. Other factors could influence a client's decisions. For instance, a client may be dealing with a co-op board or homeowners' association that has specific ownership requirements. Advisors should review these considerations with clients and design an ownership structure that balances the client's desire for anonymity with the practical impediments that such a structure may impose.

B. Firearms

Most estate planners have clients who are gun owners. Many estate planners, however, fail to plan appropriately for the ownership and transfer of firearms in their clients' estates, and are generally unfamiliar with the specific federal and local laws that regulate the making, purchase, possession, and transfer of firearms. To protect themselves and their heirs, clients with significant gun collections often desire to keep the nature and extent of such collections private during lifetime and upon death. They may also desire to own certain restricted firearms. A properly structured "gun trust" can enable clients to maintain privacy over their gun collections, while also ensuring compliance with state and federal law with respect to the disposition of such firearms upon death. The paragraphs below briefly describe state and federal laws regulating the ownership and transfer of firearms, and then explain how gun trusts can help clients achieve their privacy objectives.

1. Firearms Regulations in General

While a full examination of state and federal firearms regulations would exceed the scope of this paper, a basic overview is helpful to understand the privacy concerns raised by the ownership and transfer of firearms.[108] As a general matter, federal law categorizes weapons as either "Title I" or "Title II" firearms.[109] Title I firearms include rifles, shotguns, and handguns,

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[106] *See* Maria P. Eberle & Hayes R. Holderness, *The Transfer Tax Trap – It's Real*, TAX ANALYSTS, Sept. 2, 2013, available at http://taxprof.typepad.com/files/69st0605.pdf.

[107] *See* MODEL RULES OF PROF'L CONDUCT R. 5.5.

[108] For an overview of federal gun laws, see Lee-ford Tritt, *Dispatches from the Trenches of America's Great Gun Trust Wars*, 108 NW. U.L. REV. 743, 747—752 (2014).

[109] *See generally* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921—931).

which comprise the majority of privately owned firearms in the United States.[110] Title II firearms, also known as "NFA weapons,"[111] include silencers, machine guns, short-barreled (or sawed-off) shotguns, destructive devices (such as grenades, bombs, mines, and rocket-launchers), and "any other weapon."[112]

Title I firearms are primarily regulated by state law. Federal law, by contrast, regulates Title II firearms, as well as the interstate transfer of Title I firearms. Because Title II firearms are deemed to be more dangerous than Title I firearms, they are subject to strict regulations regarding their registration, transfer, and taxation,[113] which are enforced by the NFA Branch of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (the "ATF"). The ATF maintains the National Firearms Registration and Transfer Record,[114] and it is a crime for any person to transfer or possess a Title II firearm that is not registered to such person.[115]

2. Gun Trusts

Clients seeking to privatize their ownership of firearms generally utilize a revocable trust (known colloquially in this context as a "gun trust").[116] Gun trusts have soared in popularity in recent years,[117] largely due to the relaxed registration requirements that were applicable to gun trusts under prior law. Specifically, before the ATF enacted Final Rule 41F, as further discussed below, individuals desiring to make or acquire a Title II firearm had to satisfy a number of requirements under the National Firearms Act of 1934,[118] including:

- The filing of an application with the ATF;
- The payment of a $200 stamp tax;
- The provision of fingerprints and photographs with the ATF application;
- A background check; and
- The approval of a chief law enforcement officer ("CLEO") prior to making or acquiring the Title II firearm.

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110 *See id.*

111 The term "NFA" refers to the National Firearms Act of 1934, 26 U.S.C. ch. 53, which regulates Title II firearms.

112 *See* 18 U.S.C. § 921.

113 *See, e.g.*, Code §§ 5845(a), 5861(d) (listing specific registration requirements).

114 *See* 27 C.F.R. § 479.101.

115 *See* Code § 5861(d).

116 David Goldman, a lawyer from Jacksonville, Florida, is known for drafting the first gun trust in 2007 just one year after graduating from law school. *See* Margaret Littman, *In Goldman Guns Trust*, 97 A.B.A. J. 12, 13 (2011).

117 *See* Matthew Hector, *Gun Trusts Grow More Popular with Firearms Enthusiasts*, 103 ILL. B.J. 12 (2015), available at https://www.isba.org/ibj/2015/09/lawpulse/guntrustsgrowmorepopularfirearmsent.

118 *See* 26 U.S.C. ch. 53.

Failure to satisfy the above requirements carried stiff penalties, as it is a federal felony for any person other than a registered owner to possess a Title II firearm.[119] In addition, even if federal law permitted the possession of a Title II firearm, state or local law may not.[120]

For many years, gun trusts, in addition to protecting the privacy of their owners, were an effective tool for clients to acquire, possess, and transfer Title II firearms, as they enabled clients to:

- Avoid the submission of fingerprints and photographs as part of the ATF application (although a background check was still required for the individual submitting the application on behalf of the gun trust);
- Avoid the requirement to obtain CLEO approval prior to making or acquiring a Title II firearm;
- Share the possession and use of Title II firearms among friends, family members, and collectors through the designation of such persons in the trust instrument, thereby avoiding the inadvertent commission of a federal felony;
- Avoid the repeated imposition of the $200 stamp tax upon subsequent transfers; and
- Transfer ownership of Title II firearms at death outside of the probate process without risk to executors.

Partially in response to the widespread use of gun trusts to circumvent certain registration requirements, the ATF enacted Final Rule 41F on January 4, 2016, with an effective date of July 13, 2016.[121] The major features of Rule 41F, from an estate planning perspective, are summarized below:

- Rule 41F is applicable to all "responsible persons," which includes, with respect to a trust, partnership, LLC, or other entity, any individual with the authority to direct the management and policies of the trust or entity to receive, possess, or transfer of a firearm. Consequently, trustees of a gun trust are generally responsible persons and, in certain cases, gun trust beneficiaries may be deemed to be responsible persons as well.
- Under Rule 41F, all responsible persons of a gun trust will be required to submit their fingerprints, photographs, and an NFA Responsible Person Questionnaire as part of any new application to make, acquire, or transfer a Title II firearm.

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[119] *See* Code § 5861(d).

[120] For example, New York and California generally prohibit the possession of Title II firearms. *See* N.Y. PENAL LAW § 265.02; CAL. PENAL CODE § 16590.

[121] 27 C.F.R. Part 479 (Jan. 4, 2016), available at https://www.atf.gov/file/100896/download. For a summary of this law and its practical impact, see Alan Gassman, Lee-ford Tritt, Sean Healy, Jonathan Blattmachr, Seaver Brown, and Travis Arango, LISI ESTATE PLANNING NEWSLETTER #2385 (Jan. 27, 2016), available at http://www.leimbergservices.com.

- Notably, however, these new requirements do not apply if the gun trust had an application approved within the preceding 24 months.

- There is no requirement to notify the ATF of a change in responsible persons of a gun trust. These new requirements only apply when the gun trust submits a new application, in which case a new responsible person would need to complete an NFA Responsible Person Questionnaire.

- Rule 41F also requires each applicant to notify the applicable CLEO. Although gun trusts did not have to notify a CLEO under the old rules, this is actually a less stringent requirement for individuals, who were previously required to obtain CLEO approval prior to making or acquiring a Title II firearm. Now, these individuals must simply notify a CLEO.

- Importantly, Rule 41F clarifies that an "executor, administrator, personal representative, or other person authorized under State law to dispose of property in an estate may possess a [Title II] firearm registered to a decedent during the term of probate without such possession being treated as a transfer." This should protect executors administering estates with Title II firearms against criminal penalties.

In spite of the more stringent requirements imposed by Final Rule 41F, gun trusts remain the "weapon of choice" for clients seeking to privatize their ownership of firearms. The terms of a gun trust are not generally subject to public disclosure during the client's lifetime and, upon the client's death, there should be no requirement to list the firearms owned by the gun trust on the estate's inventory. For these reasons, among others, gun trusts should continue to be an attractive option for clients desiring to maintain their privacy and ensure a smooth and legal transfer of firearms to the next generation.

C. Automobiles, Watercrafts, and Aircraft

Many high net worth clients tend to acquire quite a few "toys," including antique and limited edition automobiles, luxury boats and yachts, and private aircraft. Many of these assets, and in particular yachts and aircraft, may be highly regulated. It may be advisable for a lawyer to work with a specialist who is familiar with these regulations to comply with the lawyer's ethical duty to provide competent representation.[122] A client seeking to privatize these assets will generally employ the same ownership options by utilizing an LLC or a revocable trust that take into consideration similar naming conventions and selection of managers and trustees.[123]

D. Other Assets

Some clients may own other assets or collections they wish to keep confidential, including wine, gold, precious stones, coins, or antiques. Clients may also have heightened

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[122] *See* MODEL RULES OF PROF'L CONDUCT 1.1.

[123] For a discussion of issues encountered when dealing with more exotic asset classes, and in particular the ownership of private aircrafts, see Wendy S. Goffe, Regulated Assets: What Do You Do When You Find Out Grandma Had a Gun Collection, Wine, Planes, and Cannabis, North Central Washington Estate Planning Council, Wenatchee, WA, Dec. 2015.

privacy concerns with respect to their ownership of certain assets, including controversial artwork or memorabilia, legal marijuana businesses, or legally restricted items, such as ivory, animal pelts, and eagle feathers.[124] Many clients seeking privacy choose to own these assets through an LLC or a trust, both of which can offer privacy during lifetime and probate avoidance upon death. Lawyers should note that if it is illegal to own a particular asset, assisting a client with the disposition of such asset could violate the lawyer's ethical duty to refrain from participating in a client's illegal conduct.[125]

Clients often use public auctions to dispose of assets and collections. If the client desires to remain anonymous, the advisor should negotiate the consignment agreement to ensure that the client's name is not disclosed. Keep in mind, however, that a prominent client's ownership of an auction item may increase its value.

V. Charitable Planning

Charitable planning is a significant part of many estate planners' practices. While some clients have no desire to keep their charitable endeavors anonymous, others prefer to keep their charitable contributions and activities private. The paragraphs below discuss why clients may seek to keep their charitable activities anonymous and summarize the methods available to accomplish the client's objectives.

A. Motivations for Anonymous Giving

Clients may wish to shield their identity with respect to their charitable gifts from the public or even the charity itself. There are many reasons why clients may wish to remain anonymous. For instance, clients may:

- desire to minimize solicitations from charities and those who support them;
- have religious or philosophical reasons for keeping donations private;
- want to avoid the public spotlight;
- seek to place the focus on the charity rather than themselves; or
- desire to avoid personal security risks if others discover they are wealthy or oppose the charitable causes the client supports.

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[124] *See* Patricia Cohen, *Art's Sale Value? Zero. The Tax Bill? $29 Million*, N.Y. TIMES, July 22, 2012, available at http://www.nytimes.com/2012/07/22/arts/design/a-catch-22-of-art-and-taxes-starring-a-stuffed-eagle.html?_r=1 (discussing the taxation and disposition of "Canyon," a work of art created by Robert Rauschenberg that incorporated a stuffed bald eagle, which made it illegal to possess, sell, or purchase).

[125] *See* MODEL RULES OF PROF'L CONDUCT 1.2(d) ("[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law").

A survey on anonymous giving performed by the Center on Philanthropy at Indiana University reported that 50.6% of people who give anonymously do so to limit solicitations.[126] The next most common motivation for giving anonymously was a donor's religious convictions.[127]

B. Methods of Anonymous Giving

There are many ways a client can give to charity without disclosing the client's identity. While all of these methods should protect the client's identity from the public, some of these methods should also protect the client's identity from the charity itself. These methods of anonymous giving are discussed below.

1. Client Gives Directly to Charity

A client's gift to a public charity is generally not required to be disclosed by the charity.[128] A client seeking additional assurance that a charitable gift is not disclosed to the public should consider entering into a written agreement with the charity prohibiting public disclosure. Of course, a direct gift to charity does not protect the client's identity from the charity. A written agreement between the client and the charity, however, may limit knowledge of the client's gift to a small number of charity personnel.

Public charities are required to file an annual return (Form 990) with the IRS reporting income, expenses, and the name and address of any person who is a substantial contributor to the charity.[129] While a charity's Form 990 can generally be accessed by the public,[130] the IRS is required to redact the names and addresses of substantial contributors before it becomes publicly available.[131]

The nature of the donated property may make it difficult to keep the donation private. If the property is easily linked to the client, such as a well-known work of art, a prominent piece of real estate, an interest in a closely held business, or a large block of public company stock, it may be impossible to protect the client's identity.

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126 *See* Deborah L. Jacobs, *How to Stay Anonymous When You Give to Charity*, FORBES, Sept. 19, 2012, available at http://www.forbes.com/sites/deborahljacobs/2012/09/19/how-to-stay-anonymous-when-you-give-to-charity/#30e24be0129a.

127 *Id*.

128 Organizations that are classified as public charities include schools, churches, hospitals, qualified medical research organizations, publicly supported charitable organizations, supporting organizations, public safety testing organizations, and organizations that receive more than one-third of their support from the public. *See* Code § 509(a).

129 Generally, a substantial contributor is any person who gives the charity $5,000 or more during the taxable year. *See* Form 990, Schedule B, available at https://www.irs.gov/pub/irs-pdf/f990ezb.pdf.

130 GuideStar, a free online database, provides public charities' Form 990s. *See* GUIDESTAR, http://www.guidestar.org/Home.aspx/.

131 *See* Code § 6014(b).

2. Client Gives through an Agent

Clients who desire to make a direct gift to public charity that will be anonymous both as to the public and to the charity should consider giving through an agent. A client should enter into a written agency agreement or limited power of attorney with the client's accountant, financial advisor, attorney, or other trusted party that directs the agent to transfer property to charity on an anonymous basis. The agent would work directly with the charity to transfer the property and obtain the charity's written acknowledgement of the gift, which the client may use in claiming a charitable income tax deduction.[132] The agent should consider asking the charity to sign an anonymous donation agreement to ensure that the client's objectives regarding privacy and use of funds are met. A sample "Anonymous Donation Agreement" is attached as Exhibit A. If the charity is required to report the gift on its Form 990 because the client is deemed to be a substantial contributor, the charity should identify the client as "anonymous," rather than disclosing the client's or the agent's name and address.[133]

3. Client Gives through a Revocable Trust

A client may use a revocable trust to make charitable gifts while protecting the client's identity from both the public and the charity. To maintain the client's privacy, the name of the revocable trust should not be easily recognizable or otherwise associated with the client. A third party who is not easily identified with the client should serve as trustee, and the revocable trust should obtain a separate taxpayer identification number. The trust agreement or a standalone document should set forth the trustee's obligation to transfer to charity assets contributed by the client. The trustee would receive the charity's written acknowledgement of the gift. Because the revocable trust will be a grantor trust as to the client for federal income tax purposes,[134] the client will be entitled to claim a charitable income tax deduction for the gift. If the revocable trust is deemed to be a substantial contributor, the charity would identify the trust, not the client, on its Form 990.

4. Client Gives through an LLC

A client may also utilize a single-member LLC to facilitate a charitable gift that is anonymous as to both the public and the charity. Like a revocable trust, the name and manager of the LLC should not be easily identifiable or otherwise associated with the client, and the LLC should obtain a separate taxpayer identification number. The LLC agreement or a standalone document should set forth the manager's duty to transfer to charity assets contributed by the client. The manager would receive the charity's written acknowledgement of the gift. Provided the LLC is a disregarded entity, the client, as its sole member, would be entitled to claim a charitable income tax deduction for the gift. If the LLC is deemed to be a substantial contributor, the charity would identify the LLC, rather than the client, on its Form 990.

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[132] *See* Deborah L. Jacobs, *How to Stay Anonymous When You Give to Charity*, FORBES, Sept. 19, 2012, available at http://www.forbes.com/sites/deborahljacobs/2012/09/19/how-to-stay-anonymous-when-you-give-to-charity/#30e24be0129a.

[133] *See* Form 990, Schedule B, Instructions, available at https://www.irs.gov/pub/irs-pdf/f990ezb.pdf.

[134] *See* Code § 676.

Unlike a revocable trust, many states require LLCs to file their governing documents with the secretary of state. If an LLC will be used to make anonymous charitable gifts, the client should consider creating the LLC in a jurisdiction with limited disclosure obligations.[135]

5. Client Gives to a Designated Fund at a Community Foundation

A client may make an anonymous gift to a charity by transferring property to a designated fund at a community foundation.[136] The fund agreement will specify the name of the charity and the obligation to transfer funds to such charity. While the community foundation's staff will be aware of the client's identity, the client's identity should be protected from the public and the charity itself. This approach may be appropriate for a client who wishes to make a large one-time gift to a specific charity on an anonymous basis, rather than supporting a number of different charities.

6. Client Gives to a Donor Advised Fund

If a client would like to give anonymously to multiple charities, the client should consider creating and funding a donor advised fund ("DAF"). Many public charities and wealth management firms sponsor DAFs, which allow donors to make charitable contributions, receive an immediate income tax deduction, and retain the right to recommend grants from the DAF over time. Unlike a designated fund at a community foundation, the client cannot direct distributions from the DAF.[137] Practically, however, while the DAF sponsor is not required to follow the donor's recommendations, on most occasions it does.

A client may utilize a DAF to make a charitable gift that is anonymous as to both the public and the ultimate charity. When the DAF makes a distribution to a charity, the client may control the information that is provided to the charity, including withholding the name of the client and the DAF.[138] While employees of the DAF sponsor may be aware of the gift, the client's identity should be protected from the public and the ultimate charity.

From a reporting standpoint, while a DAF is not required to file a Form 990, the DAF sponsor is required to disclose on its Form 990: (i) the total number of DAFs it sponsors; (ii) the total value of assets held in its DAFs at the end of the taxable year; and (iii) the total contributions to and grants made from those DAFs during the year.[139] Regardless of the amount a client contributes to the DAF, the client's name and address should not be disclosed on the DAF sponsor's Form 990.

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135 *See* Part IV.A.1, *supra*.

136 A community foundation is a publicly supported organization that receives charitable donations from unrelated donors, manages donated assets, and makes charitable grants in a specific community or region. *See What is a Community Foundation*, COMMUNITIES FOUNDATION OF TEXAS, http://www.cftexas.org/community-foundation.

137 Code § 4966(d)(2).

138 *See* Ruth Masterson, *The Best of Both Worlds: Using Private Foundations and Donor Advised Funds*, FIDELITY CHARITABLE *(2015)*, available at https://www.fidelitycharitable.org/docs/Using-Private-Foundations-and-Donor-Advised-Funds.pdf.

139 Code § 6033(k).

Despite the anonymity a DAF provides, particularly compared to a private foundation, leaks can still occur. For example, in 2018 the IRS accidentally revealed the identities of three prominent donors to the Goldman Sachs Philanthropy Fund. The IRS should have removed information identifying gifts from Steve Ballmer ($1.9 billion), Laurene Powell Jobs ($526 million), and Jan Koum ($114 million) from a filing it posted on the public website Guidestar, but it did not.[140] Even though these donors' substantial gifts to the Goldman Fund were inadvertently disclosed, the charities that ultimately receive these gifts should not be made public, underscoring the privacy advantages of a DAF.

7. Client's Private Foundation Gives to a Designated Fund or DAF

Private foundations are popular vehicles for clients seeking more control over their charitable gifts. Clients receive an immediate income tax deduction for gifts to a private foundation, while maintaining control of the foundation's investments and grant making process. In addition, clients can retain the authority to select and remove members of the foundation's governing body, and to change the foundation's charitable purposes. Despite what their name suggests, however, grants made from a private foundation are among the most public charitable gifts because they must be reported on a Form 990-PF. The paragraphs below discuss non-operating private foundations in general, identify how state and` federal reporting requirements pose risks to a client's privacy, and discuss how a private foundation may give to a designated fund or DAF to preserve a client's anonymity.

a. Private Foundations in General

Most private foundations receive their funding from only a few sources (such as one or more individuals, family members, or businesses), make grants to public charities, and do not operate their own charitable programs. These types of private foundations are "non-operating" foundations, as opposed to "operating" foundations. In many cases, the client and the client's family members control the private foundation either as trustees or directors.

b. Public Nature of Private Foundations

In the past, information regarding private foundations was difficult to obtain, which enabled clients to protect the privacy of their charitable gifts. Today, however, anyone with Internet access can visit GuideStar or the Foundation Center Library website[141] to obtain detailed information regarding a private foundation. Further, many states, including Florida and California, require annual audits if a charitable organization's gross annual revenue or annual contributions exceed certain threshold amounts.[142] Other states, including Texas, require private foundations structured as non-profit corporations to prepare financial reports that must be made available to the public for inspection and copying.[143]

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[140] *See* Tom Metcalf, *Billionaires Funding a Goldman Charity Unmasked by IRS Snafu*, BLOOMBERG DAILY TAX REALTIME, Mar. 14, 2018. Once the error was discovered, the IRS amended the Goldman filing to remove the donor names.

[141] FOUNDATION CENTER, http://foundationcenter.org/.

[142] *See* FLA. STAT. § 496.407; CAL. GOV'T CODE § 12586(e)(1).

[143] *See* TEX. BUS. ORGS. CODE § 22.352.

Private foundations are required to file an annual tax return (Form 990-PF) with the IRS and one or more attorneys general.[144] Form 990-PF must report a private foundation's revenue and expenses, balance sheet, charitable grants, and names, addresses, and compensation of officers, directors, trustees, and others. Form 990-PF must also report the names, addresses, and contribution amounts of donors who give $5,000 or more to the private foundation during the taxable year.[145] Form 990-PF must be available for public inspection and, unlike public charities, donor names and addresses may not be redacted.[146] Accordingly, third parties often utilize Form 990-PF disclosures to identify potential donors and formulate grant requests.[147]

c. Private Foundation Gives to Designated Fund or DAF

Clients who desire privacy with respect to grants made from a private foundation should consider utilizing a designated fund at a community foundation or DAF to distribute the funds to the ultimate charity. These strategies, which should make the charitable gift anonymous as to both the public and the ultimate charity, are similar to strategies discussed above in paragraphs V.B.5 and V.B.6. Consider the following example, which illustrates the effectiveness of these strategies:

> *A private foundation is created by three brothers, who also serve as the foundation's directors. Pursuant to a decision reached by the board, each director is permitted to direct one-third of the foundation's annual grants to a public charity of his choice. One brother envisions that he will select a controversial charity to receive grants from his one-third portion. For privacy purposes, the brother establishes a DAF. The foundation contributes the funds to the brother's DAF and designates the brother as the donor advisor. Any grant made by the DAF will be attributable to the DAF and not the foundation. Assuming the brother requests that grants from the DAF be kept anonymous, neither the ultimate charity nor the public should be able to identify the grant's origin. This should protect the foundation and the brothers from scrutiny over controversial grants and minimize the risk of increased solicitations.*

VI. Political Contributions

Many clients desire to participate in the political arena through campaign activities and financial contributions. Some clients prefer to keep the amount of their financial contributions confidential to:

- minimize scrutiny from employers, business contacts, social acquaintances, or the general public;

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144 *See Instructions to Form 990-PF*, available at https://www.irs.gov/pub/irs-pdf/i990pf.pdf.

145 *See id.*

146 Code § 6104(b).

147 Brian K. Klontz, *Symbiotic Ways Private Foundations Use Community Foundations and Other Organizations*, PLANNED GIVING DESIGN CENTER, Apr. 23, 2014, available at http://tdf.pgdc.com/pgdc/symbiotic-ways-private-foundations-use-community-foundations-and-other-organizations.

- minimize solicitations from political organizations;
- prevent a political candidate from being associated with an unpopular or controversial client; or
- protect the client and the client's family from physical harm.

Contributions made directly to a candidate or campaign committee can be accessed by the general public through the Federal Election Commission's website, which lists the client's name, city and zip code, employer, and date and amount of contribution.[148] Even if the client gives to a political action committee, the same detailed information is available to the public, including the candidates supported by the political action committee. Clients seeking to privatize their political contributions should consider contributing to a social welfare organization created under Code § 501(c)(4) (a "501(c)(4) organization"), as discussed below.

A. 501(c)(4) Organizations in General

501(c)(4) organizations have become a significant force in political campaigns over the last three election cycles and currently provide a means for donors to make anonymous political contributions. There are two types of 501(c)(4) organizations: (1) social welfare organizations (or civic leagues or organizations operating exclusively for the promotion of social welfare) and (2) local associations of employees of which net earnings are devoted exclusively to educational, charitable, or recreational purposes.[149]

Clients may utilize the first type of 501(c)(4) organization, a social welfare organization, to make anonymous political contributions. To qualify for tax-exempt status, a social welfare organization must not be organized for profit and must be operated exclusively to promote social welfare.[150] 501(c)(4) organizations are permitted to participate in political activities and lobbying so long as that is not their primary purpose.[151] Generally, if the 501(c)(4) organization devotes less than 50% of its funds to political activities, it may be able to influence elections, often through advertising campaigns.

B. Public Disclosure Requirements

Currently, a 501(c)(4) organization may receive unlimited contributions from individuals and companies without having to disclose the names and addresses of contributors on its annual Form 990. While an organization is required to identify its contributors on Schedule B of Form 990, when its Form 990 is made available to the public, the names and addresses of its

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[148] *See* FEDERAL ELECTION COMMISSION, *Transaction Query by Individual Contributor* http://www.fec.gov/finance/disclosure/norindsea.shtml.

[149] *See* INDEPENDENT SECTOR, *Political Activity of 501(c)(4) Tax Exempt Organizations*, https://www.independentsector.org/501c4_organizations.

[150] Code § 501(c)(4).

[151] *See* Rev. Rul. 81-95, 1981-1 CB 332 and "*Political Activity of 501(c)(4) Tax Exempt Organizations*," available at https://www.independentsector.org/501c4_organizations; *see also* Treas. Regs. § 1.501(c)(4)-1(a)(2)(ii).

contributors can be redacted.[152] A client seeking additional privacy should consider contributing funds to an LLC with a third party manager, which in turn contributes the funds to the 501(c)(4) organization.[153]

C. Tax Consequences

A client's contributions to a 501(c)(4) organization do not qualify for a charitable income tax deduction. The client's contributions, however, may be deductible as trade or business expenses provided they are ordinary and necessary in conducting the client's business.[154]

In the past, the gift tax consequences of contributions to a 501(c)(4) organization have been a matter of some controversy. Members of the public and the media have criticized the ability of contributors to make anonymous political contributions through 501(c)(4) organizations (often referred to as "dark money"). The IRS has audited five individual contributors to 501(c)(4) organizations, but ultimately terminated those audits without asserting a gift tax deficiency. The Protecting Americans from Tax Hikes Act of 2015 (the "PATH Act") clarified this issue.[155] Code § 2501(a)(6) now provides that gift tax does not apply to the transfer of money or other property on or after December 18, 2015, to certain exempt organizations, including 501(c)(4) organizations.

VII. Financial Privacy Planning

A. Financial Privacy in General

Clients may be especially concerned with protecting the privacy of their personal finances. This may include information relating to the client's compensation, assets, liabilities, and potential inheritances. In addition to a basic desire for privacy, clients may have other motivations to keep their financial matters confidential. A client may wish to avoid being solicited for investment opportunities, loans, or charitable donations, or being the target of veiled romantic advances, blackmail attempts, identity theft, or even home robbery. While privacy planning may serve legitimate client objectives, a tension exists between a client's desire for privacy and the need to disclose financial information when opening and accessing bank accounts, applying for loans, purchasing assets, filing tax returns, and dealing with other financial matters.

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[152] *See Public Disclosures and Availability of Exempt Organization Returns and Applications: Public Disclosure Overview*, available at https://www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organization-returns-and-applications-public-disclosure-overview.

[153] Jeff Brindle, *New Loophole Means More Anonymous Campaign Cash*, OBSERVER, Feb. 9, 2015, available at http://observer.com/2016/02/new-loophole-means-more-anonymous-campaign-cash/; *see also* Olivia Becker, *Anonymous Donors Are Flooding the 2016 US Election with "Dark Money"*, VICE NEWS, Oct. 17, 2015, available at https://news.vice.com/article/anonymous-donors-are-flooding-the-2016-us-election-with-dark-money.

[154] *See Donations to Section 501(c)(4) Organizations*, available at https://www.irs.gov/charities-non-profits/other-non-profits/donations-to-section-501-c-4-organizations.

[155] Public Law No. 114-113 (Dec. 18, 2015), available at https://www.congress.gov/bill/114th-congress/house-bill/2029/text.

A client's personal efforts to safeguard financial information are often the most effective means of securing financial privacy. In selecting banks, financial advisors, lawyers, and accountants, clients should ensure that the advisors and their firms maintain current security measures to preserve client confidentiality. Discussed below are financial privacy considerations for public companies and insiders, lottery winners, and investors seeking to protect their identities, as well as the negative impact that required banking disclosures may have on a client's privacy efforts.

B. Financial Reporting for Public Companies and Insiders

Clients who are directors, senior officers, and substantial owners of publicly traded companies generally are unable to keep information regarding their ownership and compensation confidential. These reporting requirements reflect the U.S. government's balancing of an individual's right to privacy with the desire to provide investors with information regarding a public company and its owners, officers, and directors. The ultimate goal is to create transparency and confidence in the public markets.

The Securities Act of 1933 and the Securities Exchange Act of 1934 require public companies and insiders to disclose detailed information intended to enable the public to make informed investment decisions.[156] Public company "insiders" include: (i) executive officers, (ii) directors, and (iii) 10% beneficial owners.[157] Public companies and insiders are required to file a number of forms with the Securities and Exchange Commission ("SEC"), including Registration Statements, Proxy Statements (DEF 14A), Annual Reports (Form 10-K), Schedule 13D/13G, and Forms 3, 4, and 5. All of these forms are available to the public through the SEC's EDGAR online filing system.[158] Public companies must also make these forms available on their website.[159] These forms include information regarding the insider's name, age, position, business experience, legal proceedings material to the company, and family relationships between directors and officers.[160] These forms also disclose the insider's compensation, including grants of stock options and stock appreciation rights, long-term incentive plan awards, pension plans, and employment contracts and related arrangements.[161] In addition to insiders, persons owning five percent (5%) or more of the voting or investment power of the public company must disclose their ownership in the registration statement, proxy statements, annual reports, and Schedule 13D/G.[162]

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[156] *See* U.S. SECURITIES AND EXCHANGE COMMISSION, *The Laws That Govern the Securities Industry*, https://www.sec.gov/about/laws.shtml; *see also* Securities Act of 1933 (enacted May 27, 1933, as amended through P.L. 112-106, approved Apr. 5, 2012); Securities Exchange Act of 1934 (enacted June 6, 1934, as amended through P.L. 112-158, approved Aug. 10, 2012).

[157] *See* SEC INVESTOR BULLETIN, *Insider Transactions and Forms 3, 4, and 5*, available at *https://www.sec.gov/investor/alerts/forms-3-4-5.pdf*.

[158] *See* 17 C.F.R. § 232.101.

[159] See 17 C.F.R. § 229.101(e); *see also* 17 C.F.R. § 240.14a-16; 17 C.F.R. § 240.16a-3(k).

[160] See 17 C.F.R. § 229.401.

[161] *See id.*

[162] *See* 17 C.F.R. 229.401; 17 C.F.R. § 240.13d-1.

These reports provide the public with significant information regarding insiders. For example, Facebook's 2015 Annual Report disclosed that Mark Zuckerberg was 31, Chairman and Chief Executive Officer, attended Harvard where he studied computer science, and the largest and controlling stockholder of Facebook.[163] In addition, Facebook's 2012 Registration Statement indicated that his base salary was $500,000, and that he requested it be reduced to $1 per year beginning in 2013.[164] The Registration Statement also revealed that as of March 31, 2012, Mr. Zuckerberg beneficially owned 533,801,850 shares of Class B common stock (or 27.9% of total voting stock).[165]

C. Privacy Planning for Lottery Winners

All lottery winners are, by definition, lucky. The luckiest, though, may be those who live in states that will respect a winner's privacy.[166] A lottery winner may wish to remain anonymous for many reasons, including avoiding jealousy among friends and relatives, deterring requests for gifts and loans from friends, relatives, and charities, and minimizing risks from predators and scammers.

Disclosure requirements for lottery winners are primarily set by state lottery commissions. At least seven jurisdictions, including Delaware, Kansas, Maryland, North Dakota, Ohio, South Carolina, Texas, and Puerto Rico, permit Powerball winners to protect their identities.[167] Lottery winners' names are generally made public in other states,[168] with only rare exceptions.[169] In those states, however, it may be possible to protect the client's identity by

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163 Item 10, Part III, Form 10-K/A (Amendment No. 1), Facebook, Inc. May 16, 2012, at 109.

164 Amendment No. 8 to Form S-1, Registration Statement, Facebook, Inc., May 16, 2012, at 120.

165 Amendment No. 8 to Form S-1, Registration Statement, Facebook, Inc., May 16, 2012, at 142.

166 Larry M. Elkin, *Putting Lottery Winners on Display*, PALISADES HUDSON FINANCIAL GROUP LLC, May 1, 2012, available at www.palisadeshudson.com/2015/05.

167 *See* POWERBALL.NET, *Myth: You Can't Stay Anonymous if You Win Powerball*, www.powerball.net/myths. Powerball is played in 44 states (all except for Arkansas, Alabama, Hawaii, Mississippi, Nevada, and Utah), as well as 3 U.S, jurisdictions (Puerto Rico, U.S. Virgin Islands, and Washington D.C.). It is worth noting that winners must claims prizes in the state in which the ticket was purchased. For details regarding anonymity in Texas, see Texas Lottery Retailer Support, *Frequently Asked Questions – Winner Anonymity*, Dec. 11, 2017, available at https://www.txlottery.org/export/sites/lottery/Documents/retailers/FAQ_Winner_Anonymity_12112017_final.pdf.

168 *See, e.g.*, Erica Jones, *Want to Keep Your Lottery Winnings a Secret? Buy in Maryland*, NBC 4 WASHINGTON, Dec. 17, 2013, available at http://www.nbcwashington.com/news/local/Can-You-Remain-Anonymous-If-You-Win-the-Lottery-236211241.html. If a client purchases a winning ticket in Virginia or Washington D.C., the client's name, hometown, prize amount, date of win, and purchase location are all a matter of public record, and Virginia winners can also be required to participate in a news conference.

169 *See* Yamiche Alcindor & Natalie DiBlasio, *Few Major Lottery Jackpot Winners Get Chance To Be Anonymous*, USA TODAY, May 5, 2012, available at http://usatoday30.usatoday.com/news/nation/story/2012-04-22/lottery-winners-anonymous-mega-millions/54441676/1. Some states view the identities of lottery winners as a matter of public record subject to open-records law, while others say revealing names adds to the lottery's credibility and encourages others to play. Exceptions exist, however, in states such as Illinois and North Carolina for winners with protective restraining orders and for other extreme situations, in which case lottery winners are allowed to remain anonymous. *See id.*

claiming winnings through a trust or LLC.[170] This strategy is not available for lottery winners in Oregon.[171]

A client who utilizes a trust or LLC to claim lottery winnings anonymously should structure the trust or LLC in the manner described in Part IV.A with respect to real estate acquisitions. For example, in 2010, a $260.6 million Powerball jackpot was unclaimed for a month until an attorney, acting as trustee, claimed the winnings on behalf of an anonymous client.[172] By contrast, in 2018, a New Hampshire woman won a $560 million jackpot. While she could have claimed her prize through an anonymous trust, she waived her right to do so when she signed her ticket.[173] Open-record laws required her to divulge her name, town, and amount won, and she petitioned a New Hampshire court for an order allowing her to remain anonymous. In granting her petition, the court found that "her privacy interest in the nondisclosure of her name outweighs the public interest in the disclosure of her name."[174]

D. Privacy Planning for Investors

Clients seeking to keep their financial investments confidential should consider titling such investments in the name of a business entity or trust. The considerations in structuring the business entity or trust are similar to those discussed in Part IV.A with regard to the anonymous acquisition of real estate. These considerations include selecting an inconspicuous name, designating a third party manager or trustee who is not easily identifiable with the client, and

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[170] *See id.* Trusts for lottery winners are often referred to as "blind trusts," although it rare that a true blind trust is created due to its severe disadvantages. *See* John Maxfield, *What is a Blind Trust?*, THE MOTLEY FOOL, June 13, 2015, available at http://www.fool.com/investing/general/2015/06/13/what-is-a-blind-trust.aspx. A true blind trust is a type of trust that is designed to mask its assets from the settlor and beneficiary. Most often associated with politicians, blind trusts theoretically sever any link between a person and control over (and ongoing knowledge of) its assets in order to avoid potential or perceived conflicts of interests. *See id.; see also* Beverly Bird, *Cons of a Blind Trust*, PEOPLE OF OUR EVERYDAY LIFE, http://peopleof.oureverydaylife.com/cons-blind-trust-8117.html (noting that in addition to extra administrative expenses, a "true" blind trust involves the settlor's loss of control over trust assets, inability to communicate with the trustee regarding investments, and inability change the trust agreement in some situations, when compared to (i) the palatability of such disadvantages for political candidates or officials who may want to remove themselves from some of their investments that might raise a public eyebrow or create a conflict of interest and (ii) the unwillingness of most lottery winners to create such a barrier between themselves and their newfound wealth).

[171] *See* Yamiche Alcindor & Natalie DiBlasio, *Few Major Lottery Jackpot Winners Get Chance To Be Anonymous*, USA TODAY, May 5, 2012, available at http://usatoday30.usatoday.com/news/nation/story/2012-04-22/lottery-winners-anonymous-mega-millions/54441676/1.

[172] *See* J. Hirby, *What is a Blind Trust and How Does it Work for Lottery Winners?*, THE LAW DICTIONARY, http://thelawdictionary.org/article/what-is-a-blind-trust-and-how-does-it-work-for-lottery-winners/ (noting that some state lotteries encourage jackpot winners to deposit their prize money into a trust, though not necessarily a blind trust).

[173] *See* Flora Carr, *A New Hampshire Woman Won $560 Million in Powerball. Now She's Suing To Keep Her Name a Secret.* TIME, Feb. 6, 2018, available at http://time.com/5134991/winner-powerball-560-million-anonymity/?xid=homepage.

[174] *See* M.L. Nestel, *New Hampshire Judge Rules $560M Powerball Winner Can Remain Anonymous*, ABC NEWS, Mar. 12, 2018, available at http://abcnews.go.com/US/hampshire-judge-rules-560m-powerball-winner-remain-anonymous/story?id=53689185.

structuring the business entity or trust to ensure that it is disregarded for federal income tax purposes.

This technique may be particularly helpful when an existing irrevocable trust with a name that is easily associated with the client and the client's family wishes to make an anonymous investment. If the trust makes the investment directly, the client's identity will be exposed. The simplest solution is to change the name of the trust so that it is no longer associated with the client or trust beneficiaries. If changing the name of the trust is not possible, an alternative solution is for the trust to form a single-member LLC (with a non-identifying name) that is a disregarded entity for federal income tax purposes. The LLC, not the trust, makes the investment, preserving confidentiality.

E. Banking Disclosures and Client Due Diligence

For decades lawmakers have pushed to create greater transparency in financial transactions as a means of regulating fraudulent or criminal activity. These efforts have resulted in anti-money laundering ("AML") rules and regulations, as well as recommendations to combat the financing of terrorism ("CFT"), which have only increased in number and scope since the terrorist attacks against the United States on September 11, 2001. While these rules and recommendations serve some legitimate objectives, they also intrude on clients' privacy and present challenges for lawyers in the discharge of their ethical duties.

1. Bank Secrecy Act

The Bank Secrecy Act ("BSA") was enacted in 1970 to assist the federal government in detecting and preventing money laundering.[175] The BSA and its regulations impose several reporting requirements on covered financial institutions,[176] individuals, and entities, including forms issued by the Treasury Department through the Financial Crimes Enforcement Network ("FinCEN").[177] Each of these forms requires the filer to gather and disclose significant identifying information about the individual or entity for which the form is being filed, including the party's name, address, tax identification number, and details regarding the transaction. In most cases, these forms are not required to be filed unless the transaction in question involves cash and exceeds $10,000. Failure to file these forms may result in severe fines and/or prison sentences. In addition, persons attempting to "structure" a transaction to evade the BSA filing requirements may result in civil or criminal penalties.[178]

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[175] *See* Bank Secrecy Act, 31 U.S.C. §§ 5311-5314; *see also* UNITED STATES DEPARTMENT OF THE TREASURY: FINCEN, *FinCen's Mandate from Congress,* https://www.fincen.gov/resources/statutes-regulations/fincens-mandate-congress.

[176] "Covered financial institutions" include (i) banks, (ii) brokers or dealers in securities, (iii) mutual funds, and (iv) futures commission merchants and introducing brokers in commodities. *See* 31 C.F.R. §§ 1010, 1020, 1023, 1024, 1026, available at https://www.gpo.gov/fdsys/pkg/FR-2016-05-11/pdf/2016-10567.pdf.

[177] *See, e.g.*, 31 C.F.R. § 1010.311; 31 U.S.C. § 5316(a); 31 C.F.R. § 1010.350; 31 CFR 1020.320; 31 C.F.R. § 103.22(d)(3)(i); 31 C.F.R. § 103.22(d)(5)(i). These forms include Form 105 (Report of International Transportation of Currency or Monetary Instruments), Form 110 (Designation of Exempt Person), Form 112 (Currency Transaction Report), Form 114 (Report of Foreign Bank and Financial Accounts), and Form 90-22.47 (Suspicious Activity Report).

[178] *See* 31 U.S.C. § 5324; *see also* 31 C.F.R. § 1010(xx) (defining "structure" and "structuring").

2. Know Your Customer Rules

The USA PATRIOT Act enhanced the BSA by adding provisions requiring banks and other financial institutions to implement a customer identification program ("CIP"), commonly referred to as the Know Your Customer ("KYC") rules.[179] The KYC rules require banks to obtain, at a minimum, a customer's name, date of birth, address, and identification number.[180] If the customer is a legal entity, the bank must obtain the entity's governing documents and may also obtain information about individuals with authority or control over the account, including signatories.[181]

Pursuant to regulations effective July 11, 2016, FinCEN adopted rules expanding disclosure requirements under the BSA to require covered financial institutions to identify and report the ultimate beneficial owners of legal entity customers, rather than just "nominees" or "straw men."[182] Generally, a "beneficial owner" is an individual who, directly or indirectly, owns 25% or more of the equity interests of a legal entity customer and who has significant responsibility to control, manage, or direct a legal entity customer.[183] Trusts, other than statutory trusts, are not included in the definition of legal entity customers.[184] Persons with control over the account, however, such as trustees, must be identified.[185] In the case of revocable trusts, the settlor, grantor, trustee and other persons with authority to direct the trustee may also need to be identified.[186]

3. Financial Action Task Force

In addition to the BSA and KYC rules, which provide mandatory rules for certain financial institutions, the Financial Action Task Force ("FATF") has issued 40 recommendations (the "FATF Recommendations") regarding customer due diligence and beneficial ownership

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179 *See* 31 U.S.C. § 5318; *see also* 31 C.F.R. § 1010.220; Kathleen A. Scott, *"Know Your Customer" Rules and Credit Providers*, NORTON ROSE FULBRIGHT, June 2015, available at http://www.nortonrosefulbright.com/knowledge/publications/129627/know-your-customer-rules-and-credit-providers.

180 *See* 31 C.F.R. § 103.121.

181 *Id.*

182 *See* 31 C.F.R. §§ 1010, 1020, 1023, 1024, 1026, available at https://www.gpo.gov/fdsys/pkg/FR-2016-05-11/pdf/2016-10567.pdf; *see also* John Terrill & Michael Breslow, *FinCEN Issues Final Customer Due Diligence Regulations Requiring Financial Institutions To Gather Beneficial Ownership Information on Entity Bank Accounts*, LISI ASSET PROTECTION NEWSLETTER #321 (May 11, 2016), available at http://www.leimbergservices.com

183 *See* FinCen Guidance, *Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions*, Question 9, FIN-2016-G003, July 19, 2016, available at https://www.fincen.gov/sites/default/files/2016-09/FAQs_for_CDD_Final_Rule_%287_15_16%29.pdf.

184 *Id.* at Question 22.

185 *Id.*

186 *Id.*

transparency.[187] The FATF was created in 1989 by a handful of countries, including the United States, United Kingdom, and Canada, "to adopt and implement measures designed to counter the abuse of the financial system by criminals."[188] While the FATF cannot issue binding legal rules, its member countries are charged with implementing its principles and peer pressure and administrative sanctions can be applied when countries fail to enforce its recommendations.[189]

FATF Recommendations 22 through 25 may impact lawyers and other professional advisors. Recommendation 22 provides that certain customer due diligence and record-keeping requirements apply to "designated non-financial businesses and professions," or "DNFB"s.[190] DNFBs include lawyers, notaries, and accountants when they assist with certain transactions, including the buying and selling of real estate, the creation, operation, or management of companies, legal persons, or arrangements, and the buying and selling of business entities.[191] Recommendation 23 provides that lawyers and accountants should report a client's suspicious transactions.[192] Recommendation 24 provides that information on beneficial ownership should be accessible in a timely fashion.[193] Recommendation 25 expands this principle by providing that information on express trusts should be available, including information regarding the settlor, trustee, and beneficiaries.[194]

The FATF Recommendations, which attempt to regulate lawyers as "gatekeepers" of financial information, have been widely criticized by practitioners who argue that the FATF failed to consider the importance of client confidentiality in the legal system.[195] While the FATF Recommendations are consistent with the ABA Model Rules of Professional Conduct

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[187] FATF revised its recommendations in 2012. *See* FATF, *The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

[188] *See* Duncan E. Osborne, *The Financial Action Task Force and the Legal Profession*, 59 N.Y.L. SCH. L. REV. 421 (2014-2015), available at http://www.nylslawreview.com/wp-content/uploads/sites/16/2015/05/NYLS_Law_Review_Volume-59-3.Osborne.pdf (quoting Paul Vlaanderen, *Foreword* to *Global Money Laundering & Terrorist Financing Threat Assessment*, FIN. ACTION TASK FORCE 3 (2010)).

[189] *See id.*

[190] *See* FATF, *The FATF Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, Recommendation 22, available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

[191] *See id.* at Recommendation 22(d). Interestingly, DFNBs also include casinos, real estate agents, and dealers in precious metals and stones.

[192] *See id.* at Recommendation 23.

[193] *See id.* at Recommendation 24.

[194] *See id.* at Recommendation 25.

[195] *See, e.g.*, Duncan E. Osborne, *The Financial Action Task Force and the Legal Profession*, 59 N.Y.L. SCH. L. REV. 421 (2014-2015), available at http://www.nylslawreview.com/wp-content/uploads/sites/16/2015/05/NYLS_Law_Review_Volume-59-3.Osborne.pdf; Judith W. McCue, *FATF and PATRIOT Act Requirements: What Should a Trusts and Estates Lawyer Worry About?*, ACTEC Annual Meeting, March 2008, available at http://www.americanbar.org/content/dam/aba/events/real_property_trust_estate/symposia/2008/rp3osborne2.authcheckdam.pdf.

(the "Model Rules") in some instances, they are inconsistent in many others. For example, Model Rule 1.2(d) provides that a lawyer shall not assist a client in criminal or fraudulent activity, which is consistent with the overall purpose of the FATF.[196] Recommendations 22 through 25, however, present challenges for lawyers who are bound by strict rules of confidentiality and communication that prohibit the disclosure of confidential client information without informed consent and impose a duty on lawyers to inform clients of any circumstance that requires such consent.[197]

Independent of the FATF Recommendations, the ABA has issued Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing ("Good Practices Guidance"), which it believes is sufficient to help lawyers avoid counseling a client to engage in money laundering or terrorist financing.[198] In 2013, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 463: Client Due Diligence, Money Laundering, and Terrorist Financing.[199] The Opinion provides that lawyers can abide by the Model Rules and avoid aiding a client's illegal activity by implementing client intake and monitoring procedures consistent with the Good Practices Guidance. The Opinion also suggests that, contrary to the FATF Recommendations, lawyers do not serve a gatekeeper role for their clients, which would be inconsistent with the Model Rules. Specifically, requiring lawyers to report all suspicious activities of their clients would violate a lawyer's duty of confidentiality, which is owed to prospective, current, and former clients.[200]

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196 *See* MODEL RULES OF PROF'L CONDUCT 1.2(d) ("[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law").

197 *See* MODEL RULES OF PROF'L CONDUCT 1.6(a) ("[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted in paragraph (b) [providing exceptions in which a lawyer may reveal confidential information]"); MODEL RULES OF PROF'L CONDUCT 1.4(a)(1) ("[a] lawyer shall promptly inform the client of any decision or circumstance with respect to the client's informed consent . . . is required by these Rules"). In certain circumstances, the FATF Recommendations may implicate Model Rule 1.16, which details situations in which a lawyer may or must decline or withdraw from representing a client. *See* MODEL RULES OF PROF'L CONDUCT 1.16.

198 *See* VOLUNTARY GOOD PRACTICES GUIDANCE FOR LAWYERS TO DETECT AND COMBAT MONEY LAUNDERING AND TERRORIST FINANCING, available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_taskforce_gtfgoodpracticesguidance.authcheckdam.pdf. Connecticut Bar Association, *Formal Opinion 49*, 74 CONN. B.J. 238 (2000)

199 American Bar Association, *Formal Opinion 463*, May 23, 2013, available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf.

200 *See* MODEL RULES OF PROF'L CONDUCT 1.6 (current clients), 1.9 (former clients), and 1.18 (prospective clients). For a good discussion of the FATF Recommendations, ABA Formal Opinion 463, and their practical impact on the legal profession, see Kevin L. Shepherd, *Ethically Speaking . . . Just What Are My Obligations Under the Gatekeeper Initiative?*, 27 A.B.A. REAL PROPERTY, TRUST & ESTATE LAW, PROBATE & PROPERTY MAGAZINE 5 (2013).

4. Tax Justice Network Report

In February 2017, the Tax Justice Network ("TJN"), an international research coalition designed to promote debate and reform regarding tax evasion and tax avoidance, published a scathing report of trusts entitled "Trusts: Weapons of Mass Injustice?"[201] The stated purpose of the report was to "start a debate on the harms that trusts can inflict on societies, and what can be done about this." Among other recommendations, the TJN argues that trusts should be required to be publicly registered, widespread mechanisms should be available to pierce the asset protection benefits of trusts, and settlors should be deemed to be the true owners of trust assets until they are actually received by a beneficiary.[202] While the TJN report has been roundly criticized by professionals as dismissive of the many legitimate uses of trusts, as well as lawyers' ethical duty to protect client confidentiality,[203] the TJN does raise valid concerns regarding abusive trusts, which may ultimately fall on receptive ears. Broader than that, the TJN report is indicative of the global challenge confronting trusts, the clients who seek to form them, and the lawyers they retain to draft them.

The BSA regulations, KYC rules, FATF Recommendations, and TJN report pose serious threats to clients' privacy. Unfortunately, the legitimate objectives these rules and recommendations serve often have unintended consequences, including subjecting good faith clients and lawyers to intrusive requests for confidential information. It is unlikely that efforts to curb money laundering and terrorist financing will slow down in the future, although just how far these efforts will attempt to reach beyond constitutional rights and privileges remains to be seen. Complying with third party requests for information, while also maintaining a client's privacy, may require consultation with a lawyer who is familiar with this complex set of disclosure requirements.[204] It may also require working closely with a client's contacts at banks and other financial institutions, who each may have their own interpretation, adoption, and implementation of the BSA and KYC rules.

VIII. Medical Privacy Planning

Clients may be more concerned about privacy with respect to their medical information than their financial information. As with financial privacy, the client's personal efforts to safeguard medical information may be the most effective method to maintain privacy. Perhaps the most effective measure a client may take is to request that doctors, caretakers, staff, and

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201 Andres Knobel, *Trusts: Weapons of Mass Injustice?*, TAX JUSTICE NETWORK, Feb. 13, 2017, available at http://guengl-panamapapers.eu/wp-content/uploads/2017/04/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB-2017.pdf; *see also* Tax Justice Network, *Trusts – Weapons of Mass Injustice: New Tax Justice Network Report*, Feb. 13, 2017, available at http://www.taxjustice.net/2017/02/13/trusts-weapons-mass-injustice-new-tax-justice-network-report/ (summarizing the report and explaining its purpose).

202 *See* Andres Knobel, *Trusts: Weapons of Mass Injustice?*, TAX JUSTICE NETWORK, Feb. 13, 2017, available at http://guengl-panamapapers.eu/wp-content/uploads/2017/04/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB-2017.pdf.

203 *See, e.g.*, Geoff Cook, *Review by Jersey Finance of Trusts: Weapons of Mass Injustice? Published by Tax Justice Network*, TRUSTS & TRUSTEES, July 24, 2017, available at https://academic.oup.com/tandt/article/doi/10.1093/tandt/ttx098/4004853/Review-by-Jersey-Finance-of-Trusts-Weapons-of-Mass.

204 *See* MODEL RULES OF PROF'L CONDUCT 1.1 (detailing a lawyer's duty of competence).

family members sign a non-disclosure agreement regarding a client's medical history, health status, and ongoing treatments. Non-disclosure agreements are discussed in more detail in Part IX.A of this paper.

A. HIPAA

The Health Insurance Portability and Accountability Act ("HIPAA") requires certain organizations to establish and maintain procedures to protect a patient's medical privacy, and prohibits "covered entities" from disclosing medical records to unauthorized parties.[205] As part of the estate planning process, clients often wish to sign documents authorizing certain family members and friends to have access to their medical information. A client who is especially concerned about the disclosure of medical information may wish to prohibit the re-disclosure of medical information by the authorized individuals and possibly impose liability for unauthorized re-disclosure.

B. Insurance Applications

While clients generally wish to keep medical information confidential, they are often required to disclose such information when applying for medical, disability, and life insurance. Many clients are surprised that the insurance company already has access to the client's medical records. Many insurance companies are members of MIB Group, Inc. ("MIB"), which manages a database of medical information regarding insurance applicants.[206] As MIB members, insurance companies submit medical information received from applicants to MIB and can request information regarding an applicant. Consequently, insurance companies can often access additional medical information that may not be included in a client's application. MIB only provides medical information to insurance companies within its network and only for purposes of the underwriting process. While members of MIB may have access to a client's medical information, it should not be available to the general public.

C. Ethical Duties

Clients often share medical information with their professional advisors as part of the estate planning process. This may implicate a lawyer's ethical duty of confidentiality, as well as ethical duties related to representing a client with diminished capacity.

Generally, a lawyer is required to keep a client's medical information confidential. A lawyer may disclose a client's medical information under certain circumstances, however, including if the lawyer reasonably believes that disclosure is necessary to prevent reasonably certain death or substantial bodily harm.[207] The ethical duty of confidentiality and its exceptions are discussed in further detail in Part XIV.A.

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[205] *See* 45 U.S.C. § 164.502

[206] The facts in this paragraph relating to the nature and operation of MIB are drawn primarily from MIB's website. *See The Facts About MIB,* MIB, https://www.mib.com/facts_about_mib.html.

[207] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6; *see also* CAL. RULES OF PROF'L CONDUCT R. 3-100; HAW. RULES OF PROF'L CONDUCT R. 1.6(b); N.Y. RULES OF PROF'L CONDUCT R. 1.6(b); TEX. DISC. RULES OF PROF'L CONDUCT R. 1.05(e).

A lawyer may also disclose a client's confidential medical information when the client (i) has diminished capacity, (ii) is at risk of substantial physical, financial, or other harm unless action is taken, and (iii) cannot adequately act in the client's own interest.[208] The lawyer's disclosure may include consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian. The comments to the Model Rules suggest that protective action could include consulting with family members or engaging professional services to help protect the client.[209] For example, in a formal opinion, the Connecticut Bar Association opined that an attorney who was asked to prepare an estate plan on a rush basis because the client intended to commit suicide in several weeks was permitted to disclose this information to certain individuals in order to help the client.[210]

IX. Securing Third Party Confidentiality Through Non-Disclosure Agreements and Litigation Alternatives

The first portion of this paper has focused primarily on measures a client may take to protect the client's privacy. As many celebrities, professional athletes, and other public figures have discovered, however, it can be more difficult to prevent a third party's disclosure of confidential information. Indeed, a client's friends, family members, employees, advisors, caretakers, and romantic partners often possess sensitive information regarding the client's finances, health, activities, and relationships. In many instances, if this information were leaked to the public, either through a media report or in contested litigation, the client's reputation, career, and even physical health could suffer. Therefore, it may be important that the client attempt to prevent the disclosure of confidential information by third parties.

Perhaps the best strategy to limit a third party's potential disclosure of confidential information is for the client to proactively use non-disclosure agreements or confidentiality clauses in third party contracts. The client should also strive to keep future disputes out of the public court system by pursuing litigation alternatives, such as mediation or arbitration, and requiring third party contracts to mandate mediation or arbitration. The paragraphs below describe these privacy strategies, with references to sample provisions where appropriate.

A. Non-Disclosure Agreements

1. Non-Disclosure Agreements in General

A non-disclosure agreement (an "NDA") refers to a standalone contract or contractual provision that contains a person's promise not to disclose any information shared by or discovered from another party.[211] If the person violates the promise not to disclose, the protected party may recover damages as set forth in the contract. While some have questioned the true

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[208] *See* MODEL RULES OF PROF'L CONDUCT R. 1.14(b).

[209] *See* MODEL RULES OF PROF'L CONDUCT R. 1.14(b) cmt.

[210] Connecticut Bar Association, *Formal Opinion 49*, 74 CONN. B.J. 238 (2000). Formal Opinion 49 was later revised by *Informal Opinion 00-5* (2000), which states that the attorney should first attempt to gain the client's consent before disclosing information regarding the client's intent to commit suicide.

[211] *See* BLACK'S LAW DICTIONARY (8th ed. 2004).

enforceability of contracts that purport to mandate a person's silence,[212] NDAs remain an effective tool for high profile clients seeking to secure their privacy.

2. Common Uses of Non-Disclosure Agreements

Clients should consider utilizing an NDA when another person, by reason of such person's relationship with the client, possesses or may come to possess confidential information that could harm or embarrass the client. This paper discusses common situations in which NDAs may make sense. NDAs can be extremely flexible and should be employed as a strategy to secure a client's confidential information.

a. Employees

Employees often become aware of confidential information regarding their employers. Many clients employ personal assistants, household staff, nursing staff, and even family offices, and the employees must have access to the client's personal information to perform their jobs. Many clients desire to prevent the disclosure of their confidential information during and after the employment relationship. It is advisable either to include NDA provisions in employment contracts or to require employees to sign a standalone NDA. A sample NDA provision for an employment contract is included as Exhibit B.

b. Professional Advisors

Clients often share confidential information with their professional advisors, including financial advisors, accountants, and lawyers. While many professional advisors have ethical or contractual obligations that prohibit disclosure of a client's personal information, it may be advisable for the client to confirm those obligations to ensure they are adequate. If a professional advisor's ethical or contractual duty of confidentiality is not sufficient, the client should consider requiring the professional advisor to sign a separate NDA.

c. Business Practices and Technology

NDAs are used by many businesses, entrepreneurs, and inventors to protect confidential information regarding a business, investment opportunity, or idea. NDAs often are included in a business's governing documents or as part of the due diligence process.[213] Think tanks and start-up schools often require NDAs to protect intellectual property.[214] These NDA provisions may often implicate other legal disciplines, including corporate and intellectual property law. It is important to work with a specialist in these areas in preparing NDAs.

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[212] *See generally* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998).

[213] *See generally* Model Merger Agreement for the Acquisition of a Public Company, ABA BUS. LAW SECTION, MERG. & ACQ. COMM, (2011) (providing a model confidentiality agreement).

[214] *See id.*

d. Medical Care and Death

During a client's lifetime and after death, third parties may obtain information regarding the client's medical condition and treatment that the client may desire to keep private. Clients who desire to maintain confidentiality should identify third parties who are likely to be exposed to this confidential information. While it may be impossible to identify in advance all the potential persons who may obtain confidential information regarding a client's medical care and death, certain persons, including caregivers, medical personnel, household staff, and friends and family members, are more likely to be privy to such confidential information and should be asked to sign an NDA.[215] Although medical professionals are required to keep medical information confidential under HIPAA, clients desiring to maintain the privacy of their medical care and death should consider requesting that third parties sign an NDA.

Clients often appoint agents under ancillary estate planning documents, including attorneys-in-fact, health care agents, agents to control disposition of remains, and persons who may receive the client's HIPAA information. These individuals may also become aware of confidential information. While many states provide statutory forms for appointing agents and granting consent to the release of medical information under HIPAA, these forms are often silent regarding the agent's duty to keep such information confidential. If a professional advisor's ethical or contractual duty of confidentiality is not sufficient, clients should consider requiring the professional advisor to sign a separate NDA.

While an NDA clause in an ancillary estate planning document may be enforceable as a binding contract between a principal and agent,[216] some jurisdictions may not recognize such a clause. A financial or medical power of attorney may be drafted to condition the agent's authority on compliance with the NDA clause. If the agent violates the NDA clause, the agent's authority terminates. Many states permit ancillary estate planning documents to be modified to include conditions for termination of the agent's authority.[217]

e. Pre- and Post-Marital Agreements

Spouses generally have knowledge regarding each other's most personal and sensitive information. While this may work well leading up to the marriage and during the marriage itself, it may create problems when the marriage terminates by death or divorce. Clients may attempt to protect such information by signing pre- and post-marital agreements that include an NDA clause. A comprehensive NDA provision in a marital agreement that prohibits each spouse from

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[215] After Joan Rivers' death in 2014, it was reported by staff at the clinic where Rivers underwent surgery that her doctor, Gwen Korovin, took a "selfie" on her cell phone with Rivers in the shot, while Rivers was under anesthesia. *See* Jen Heger, *Disgusting! Joan Rivers Doc Gwen Korovin's Sick Selfie Exposed*, RADAR ONLINE, Sept. 18, 2014, available at http://radaronline.com/exclusives/2014/09/joan-rivers-doctor-gwen-korovin-selfie-revealed/.

[216] *See* Nancy E. Delaney, Jonathan Byer, & Michael S. Schwartz, *Rachal v. Reitz and the Evolution of the Enforceability of Arbitration Clauses in Estate Planning Documents*, 27 A.B.A. REAL PROPERTY, TRUST & ESTATE LAW, PROBATE & PROPERTY MAGAZINE 6 (2013).

[217] *See, e.g.*, 755 ILL. COMP. STAT. § 65/10 (containing Illinois's statutory form for the appointment of an agent to control the disposition of remains).

disclosing private details regarding the spouses' marriage, finances, and personal lives may benefit both spouses and facilitate some level of civility in the event of divorce.[218]

A sample NDA clause for a pre-marital agreement is included as Exhibit C. The post-marital agreement between Donald and Ivana Trump included the following NDA provision, which was upheld by a New York appellate court:

> *Without obtaining [husband's] written consent in advance, [wife] shall not directly or indirectly publish, or cause to be published, any diary, memoir, letter, story, photograph, interview, article, essay, account, or description or depiction of any kind whatsoever, whether fictionalized or not, concerning her marriage to [husband] or any other aspect of [husband's] personal, business or financial affairs, or assist or provide information to others in connection with the publication or dissemination of any such material or excerpts thereof.*[219]

President Trump's post-marital agreement provided that a violation of the NDA clause constituted a material breach of the agreement, which would terminate his obligation to make certain payments to his wife. Furthermore, in the event of such a breach, President Trump could seek a temporary or permanent injunction against his wife that would prohibit her from disclosing any confidential information.[220]

f. Social Events and Dating Relationships

While some individuals and families seem more than comfortable gracing the pages of tabloids and occupying airtime on reality shows, many high profile clients prefer to stay out of the limelight. Technological advances, however, have made this very difficult because most

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[218] When Rosie O'Donnell and her long-time partner Kelli Carpenter broke up in 2009, the couple (though not legally married at the time) referenced an NDA when questioned regarding their relationship. *See* Allison Maxwell, *Rosie O'Donnell, Partner May Be Heading Toward Split*, USA TODAY, Oct. 21, 2009 ("We're a family, we remain a family and we're working on the issues. . . . Kelli and I love each other very much and we are working on our issues. Those are the only words I am ever going to say. Ever. And that is something that has been agreed upon by all parties."). *See also* Susan Chana Lask, *Prenuptial Confidentiality Agreements Civilize Divorces*, SCL LAW OFFICES, available at http://www.appellate-brief.com/37-blog/160-prenuptial-confidentiality-agreements-divorce.html.

[219] *Trump v. Trump*, 179 A.D.2d 201, 202 (N.Y. App. Div. 1992).

[220] *Id.* at 203. The remainder of the Trumps' NDA clause provided as follows:

> *Any violation . . . shall constitute a material breach of this agreement. In the event such breach occurs, [husband's] obligations . . . to make payments or provisions to or for the benefit of [wife], shall thereupon terminate.*
>
> *In addition, in the event of any such breach, [wife] hereby consents to the granting of a temporary or permanent injunction against her (or against any agent acting in her behalf) by any court of competent jurisdiction prohibiting her (or her agent) from violating the terms of this Paragraph. In the event that an action for divorce is instituted at any time hereafter by either party against the other in any court of competent jurisdiction, the parties hereto agree that they nevertheless shall be bound by all of the terms of this Agreement. To the extent possible and appropriate this Agreement shall be incorporated in the decree to be entered in such action and shall not be merged therein. If there be anything in such judgment or decree inconsistent with any of the terms or provisions of this Agreement, the terms and conditions of this Agreement shall govern and shall survive such decree.*

friends and partygoers own cell phones with cameras that can capture a client's most damaging moments and publish them to millions of people through social media. Clients wishing to preserve their privacy should consider using NDAs in a wide variety of social settings.

A number of celebrities have reportedly required their romantic partners to sign an NDA.[221] These so-called "cupid contracts" serve many of the same objectives as NDA clauses in marital agreements by limiting a paramour's disclosure of sensitive information with the threat of monetary penalties and injunctive relief. Other celebrities have used NDAs in attempts to preserve confidentiality at parties and weddings, often asking each guest and staff member to sign an NDA and turn off their cell phones before attending the event.[222] A copy of the NDA that Justin Bieber reportedly required his guests to sign before attending one of his parties, which is attached as Exhibit D, imposed a $3 million penalty for disclosing confidential information.

3. Common Provisions of Non-Disclosure Agreements

The substance and scope of an NDA depends on the unique facts and circumstances driving the client's desire for privacy. There are several provisions, however, that are included in most NDAs that are discussed below.

a. Definition of "Confidential Information"

The NDA should specifically define what constitutes "confidential information."[223] Generally, this term should be drafted broadly to include any and all sensitive information that might be disclosed, either verbally, in writing, or through other media, and should include all information concerning the client's personal and business activities, with a non-exhaustive list of specific items included in the definition.[224] While the definition of confidential information may attempt to include information disclosed prior to the NDA, this provision may not be effective.[225]

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221 *See, e.g.*, Jessica Dafoe, *Scott Disick Is Expecting Women To Sign Non-Disclosure Agreements Before They Party with Him, Rivaling Kanye for Crazy*, INQUISITR, Mar. 6, 2016, *available at* http://www.inquisitr.com/2861257/scott-disick-is-expecting-women-to-sign-non-disclosure-agreements-before-they-party-with-him-rivaling-kanye-for-crazy/.

222 *See Gabrielle Union & D-Wade: Welcome To Our Wedding, Now Forget You Saw Anything!!*, TMZ, Aug. 28, 2014, available at http://www.tmz.com/2014/08/28/gabrielle-union-dwyane-wade-wedding-non-disclosure-confidentiality-cell-phones/. Many celebrity wedding planners advise their clients to require NDAs from guests and staff. Some have even made sample wedding NDAs available on their website. *See* WEDDINGS BY JESTER, *Wedding Confidentiality and Non-Disclosure Agreement*, available at http://www.weddingsbyjester.com/celebrityweddings.htm.

223 In certain cases, NDAs seek to broaden protections that may already be available under state law for "trade secrets." *See e.g.*, 765 ILL. COMP. STAT. § 1065/2(d).

224 See sample NDA at Exhibit B. Practitioners should confirm that the definition of confidential information does not violate state and federal laws that prohibit undue trade restraints. *See, e.g.*, Hispanics United of Buffalo, Inc., NLRB ALJ, No. 03-CA-027872 (Sept. 2, 2011) (interpreting an employee's comments about her job performance on Facebook to be "concerted activities" protected under Section 7 of the National Labor Relations Act).

225 *See generally* Tobin E. Olson, Anatomy of a Confidentiality Agreement, State Bar of Texas, 31st Annual Advanced Oil, Gas and Energy Resources Law Course, Oct. 3-4, 2013.

It may be important for the NDA to define what does not constitute confidential information. While parties who are subject to the non-disclosure requirement may seek carve-outs from the definition of confidential information, these carve-outs should be narrowly tailored. For example, a common (and sometimes the only) carve-out is information that is publicly available.[226]

b. Term of Confidentiality

NDAs should define the term of the non-disclosure requirement. While the term can be any length of time, a longer term should better protect a client's privacy. In fact, many NDAs are structured with an indefinite term.[227]

c. Exceptions to Non-Disclosure

While an NDA is designed to limit the disclosure of confidential information, NDAs often provide for certain exceptions. For example, an exception may apply to a client's agents, employees, and advisors who may be required to disclose confidential information to perform their jobs. Similarly, a doctor, caretaker, or other person may be permitted to disclose confidential medical information if necessary to protect the client in an emergency medical situation. Another common exception is the right to disclose confidential information in the event of a government investigation or court order.[228] Even if the NDA includes specific exceptions, it should prohibit a third party, without the client's written consent, from receiving any compensation in exchange for the disclosure of confidential information. This provision, backed by the disgorgement of any compensation, should deter third parties from selling salacious or embarrassing photos, or otherwise disclosing information in an interview or as part of a "tell-all" book.[229]

d. Non-Disparagement Clause

Many NDAs include a "non-disparagement" clause that prohibits a person from making disparaging or defamatory statements regarding the client.[230] A non-disparagement clause can be structured to last indefinitely.[231] Non-disparagement clauses are often included in

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226 *See id.*

227 *See* Coady v. Harpo, 719 N.E.2d 244 (Ill. App. Ct. 1999) (upholding confidentiality covenant executed by a senior associate producer of The Oprah Winfrey Show, although it contained no temporal or geographic limits).

228 *See, e.g.*, Martin Marietta Materials, Inc. v. Vulcan Materials Co., 2012 WL 1605146 (Del. Ch. May 4, 2012), aff'd Martin Marietta Materials, Inc. v. Vulcan Materials Co., 2012 WL 2783101 (Del. July 10, 2012) (holding that a "legally required" exception in an NDA only applied to disclosures in response to demands from third parties and not to self-imposed legal requirements).

229 In August 2015, Kim Kardashian and Kanye West settled a lawsuit for $440,000 against YouTube co-founder Chad Hurley for breaching a confidentiality agreement after Hurley leaked a video of the couple's engagement. *See* Corinne Heller, *Kim Kardashian & Kanye West Win $440,000 Settlement After Filing Lawsuit Over Leaked Proposal Video*, E! NEWS, Aug. 27, 2015, available at http://www.eonline.com/news/690562/kim-kardashian-kanye-west-win-440-000-settlement-after-filing-lawsuit-over-leaked-proposal-video.

230 *See* FreeLife Int'l, Inc. v. Am. Educ. Music Publications Inc., 2009 WL 3241795 (D. Ariz. 2009).

231 *See* Tobin E. Olson, Anatomy of a Confidentiality Agreement, State Bar of Texas, 31st Annual Advanced Oil, Gas and Energy Resources Law Course, Oct. 3-4, 2013.

employment and agency agreements, as well as divorce settlement agreements.[232] A sample non-disparagement clause is attached as Exhibit E.

e. Digital Privacy Clause

Many celebrities and other high profile individuals include "digital privacy clauses" as part of their NDAs.[233] A digital privacy clause is designed to limit the disclosure of confidential information through digital devices and social media platforms, including Facebook, Twitter, Instagram, and Snapchat. Digital privacy clauses are also becoming more common in premarital agreements. Many couples, in fact, are entering into "social media prenups," in which the couple defines what is permissible to share online regarding each other and their relationship.[234] Similarly, in the divorce context, digital privacy clauses can prohibit a spouse or former spouse from publicizing information obtained through a cell phone or computer, such as emails, text messages, and phone conversations.[235]

f. Alternative Dispute Resolution and Sealed Court Records

Because most court records are open to the public, litigation can pose serious risks to client privacy. An NDA may require non-litigation dispute mechanisms, such as mediation or arbitration, if the parties disagree regarding the application, scope, or interpretation of the NDA. If going to court is unavoidable, however, it may be advisable to include a provision that requires the parties to request that the court seal its records to avoid publicity. These privacy provisions are extremely common in employment and marital agreements.

g. Remedies for Breach

To ensure that the NDA has some teeth, it should expressly provide remedies in the event a party improperly discloses confidential information. At a minimum, the NDA should provide equitable remedies, such as injunctive relief, to prevent further disclosure. Many NDAs provide for liquidated damages upon a breach because proving actual damages can be difficult. The liquidated damages amount should be large enough to serve as a deterrent for third parties who

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232 See the discussion in Part IX.A.2.e, *supra*, regarding Donald Trump's post-nuptial agreement.

233 *See 'Til Text Do Us Part: Does Your Marriage Need a Digital Privacy Clause?*, THE DAILY BEAST, Apr. 17, 2014, available at http://www.thedailybeast.com/articles/2014/04/17/does-your-marriage-need-a-digital-privacy-clause.html (discussing the breakup of figure skater Johnny Weir and his husband, Victor Voronov).

234 *See* Lauren Effron, *I Love You, You're Perfect, but Watch What You Facebook: Social Media Prenups*, ABC NEWS, June 3, 2014, available at https://abcnews.go.com/Lifestyle/love-perfect-watch-facebook-social-media-prenups/story?id=23977608.

235 There have been several interesting cases recently regarding the legality of spouses accessing each other's email and other communications without permission. *See, e.g.*, Dave Phillips, *All Charges Dropped against Rochester Hills Man Accused of Reading Wife's Email without Permission*, OAKLAND PRESS NEWS, July 19, 2012, available at http://www.theoaklandpress.com/article/OP/20120719/NEWS/307199939 (discussing the case against Leon Walker, who was charged with felony hacking for checking his wife's email without her permission); Dan Horn, *Couple's Case Raises Questions about Surveillance, Privacy*, CINCINNATI ENQUIRER, Sept. 12, 2012, available at http://usatoday30.usatoday.com/news/nation/story/2012/09/12/couples-case-raises-questions-about-privacy-surveillance/57753902/1 (discussing Catherine Zang's lawsuit against her ex-husband for secretly monitoring her actions, via video surveillance equipment, at their shared home).

may be presented with lucrative offers for information from the media and paparazzi.[236] It is also common to require a breaching party to disgorge any profits earned as a result of an improper disclosure.

Unfortunately, NDAs cannot prevent a third party from disclosing confidential information. Rather, they may merely serve as a deterrent and provide a possible remedy if confidential information is disclosed. Once confidential information has been disclosed, the damage has been done and a client's attempts to hide, remove, or censor the information may have the unintended consequence of further publicizing and legitimizing the information.[237] A client's best method to protect privacy is to associate with trustworthy (and well-vetted) friends, family members, employees, and advisors. Because it is impossible to predict when a former friend or spouse will become a foe, however, NDAs can be an important tool in protecting a client's privacy.

B. Litigation Alternatives

Litigation is a dirty word for many clients. Litigation can be extremely expensive, time-consuming, and stressful. Moreover, because most court records are open to the public, litigation can also bring unwanted publicity to a client and the client's family. Consider, for example, the very public divorce of budding Chicago politician Jack Ryan and his wife, Hollywood actress Jeri Lynn Ryan. Although the divorce court had initially agreed to seal their divorce proceedings, the Chicago Tribune successfully petitioned the court to gain access to these records (allegedly in an effort to "scrub" all political candidates).[238] The Tribune divulged sordid details included in the court filings[239] and, amidst pressure from the public and fellow Republicans, Jack Ryan dropped out of the 2004 Senate race. His opponent, a relatively unknown politician named Barack Obama, cruised to victory.[240]

Litigation can also publicize a client's assets to various creditors, including the IRS. In 2006, media mogul Sumner Redstone was involved in a very public lawsuit regarding the effectiveness of a family settlement agreement reached in 1972. The lawsuit focused on whether shares of National Amusements, Inc., the holding company of CBS Corporation and Viacom, should have been transferred to trusts for Mr. Redstone's children. While the children's trusts were unsuccessful, the lawsuit made the IRS aware of potentially taxable transfers in 1972.

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236 *See* Part IX.A.2.f discussing Justin Bieber's $3 million remedy for disclosing the details of one of his parties.

237 This phenomenon has been called the "Streisand Effect" after a lawsuit was filed by Barbara Streisand against a photographer who had photographed her Malibu home. Ms. Streisand's lawsuit generated further publicity and sharing of the images, instead of suppressing them as Ms. Streisand had sought. *See* Andy Greenberg, *The Streisand Effect*, FORBES, May 11, 2007, available at http://www.forbes.com/2007/05/10/streisand-digg-web-tech-cx_ag_0511streisand.html.

238 *See* Jamie Schuman, *White Paper: Access to Divorce Court Proceedings*, REPORTERS COMM. FOR FREEDOM OF THE PRESS: THE NEWS MEDIA AND THE LAW, Spring 2015, available at https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2015/white-paper-access-divorce-.

239 These details included forced visits to various "sex clubs" all over the globe. *See id.*

240 *See id.* Interestingly enough, Barack Obama's opponent in the 2004 Democratic primary for the U.S. Senate was Blair Hull, who was also brought down by the Chicago Tribune's ability to access sealed divorce records, which indicated that Hull's ex-wife had sought a protective order against him. *See id.*

Armed with this information, the IRS successfully collected, 34 years later, $737,625 from Mr. Redstone in unpaid gift taxes and interest.[241]

As illustrated by the Redstone lawsuit, clients who value privacy should seek to avoid public litigation if possible. Many practitioners advise their clients to pursue alternative dispute resolution, or "ADR," which offers more confidentiality for clients to resolve their disputes with third parties.[242] For these reasons, employment agreements, marital agreements, and closely held business agreements often require ADR in the event of a dispute. The two leading ADR methods, mediation and arbitration, are discussed in the paragraphs below.

1. Mediation in General

Mediation is a non-binding process in which a mediator attempts to assist disputing parties reach a mutually agreeable solution.[243] Proponents of mediation assert that it can be less expensive, time-consuming, and public than a formal judicial proceeding.[244] While disputing parties may achieve privacy through mediation, this must be agreed upon by the parties.[245] Mediation can occur before or after a lawsuit is filed. If mediation is successful, the parties may enter into a settlement agreement that resolves the dispute, releases each party from liability, and imposes a requirement to dismiss any pending legal proceedings with prejudice.[246]

2. Arbitration in General

Arbitration is a process in which an arbitrator resolves a dispute and imposes a binding judgment on the parties.[247] Arbitration, similar to mediation, may offer more privacy than litigation, although such privacy is not self-imposing.[248] The parties can agree to hold arbitration proceedings confidentially. The popularity of arbitration is evident from the high percentage of

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241 *See* Sumner Redstone v. Commissioner, T.C. Memo. 2015-237 (2015).

242 Note, however, that some commentators question these benefits, arguing that ADR can prove to be just as expensive, lengthy, and contentious as a traditional lawsuit. *See* W. Cameron McCulloch, Jr., Practical Considerations for Drafting Arbitration Clauses, State Bar of Texas, 26th Annual Estate Planning & Probate Drafting Course, Oct. 8-9, 2015. To improve the likelihood of attaining the benefits that ADR is designed to achieve, ADR provisions should carefully outline which ADR rules should apply, how many mediators or arbitrators will be used, what qualifications the mediators or arbitrators should have, and whether the results of the ADR will be binding on the parties. *See id.*

243 *See* Jay E. Grenig, ALTERNATIVE DISPUTE RESOLUTION § 2:16.

244 *See id*.

245 Although in some states, like Texas, the mediator is bound to confidentiality and cannot disclose any matter pertaining to the mediation, there are several exceptions and nuances to this duty. In addition, there may not be any protection against a party's disclosure of information from the mediation without a contractual obligation prohibiting such disclosure. *See* Randall B. White, "Winning" at Mediation, State Bar of Texas, 41st Annual Advanced Family Law Course, Aug. 3-6, 2015.

246 *See id.*

247 *See* Jay E. Grenig, ALTERNATIVE DISPUTE RESOLUTION § 1:1; *see also* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "arbitration").

248 *See* AM. JUR., ALTERNATIVE DISPUTE RESOLUTION § 44.

employment agreements that mandate arbitration in the event of a dispute. A sample arbitration provision for an employment agreement is attached as Exhibit F.

3. Enforcement of Mediation Agreements and Arbitration Awards

Because mediation agreements and arbitration awards are not self-executing, the prevailing party may be required to obtain a court order to enforce them. The prevailing party's attempts to enforce the mediation agreement or arbitration award may compromise the privacy protections offered by ADR in the first place.[249] To preserve privacy, the parties can agree that any enforcement proceeding will include a request to seal the court record.[250]

Whether a court will grant a request to seal the records of an ADR enforcement proceeding depends on the facts and circumstances of each case, along with applicable law.[251] For example, a federal district court in New York declined to seal an arbitration award submitted for enforcement because the plaintiff had not demonstrated sufficient harm to justify limiting public access to judicial materials.[252] The court noted, however, that the mere filing of an award for enforcement did not require disclosure of any underlying documentation, which could remain confidential.[253] Compare New York with Texas, where a federal district court ordered the award confirmation proceedings to be sealed.[254] The court noted that the parties' contract contained a confidentiality clause and the award contained extensive findings of fact and conclusions of law.[255] The court weighed the need to protect the parties' business and strategic information against the minimal value of the information to the general public.[256]

A non-prevailing party may seek to set aside or vacate an arbitration award. Courts typically give great deference to arbitration awards, and will only set aside the award if the arbitrator demonstrated a manifest disregard of the law.[257] A suit to set aside or vacate an arbitration award can also risk a client's privacy. This is because a review of an arbitration award on a claim of manifest disregard permits the court to consider all information.[258] To better protect their privacy, the parties can agree that any suit to set aside or vacate an arbitration award include a request to seal the court record.

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249 *See* AM. JUR., ALTERNATIVE DISPUTE RESOLUTION § 195; *see also* CAL. CIV. PRO. CODE § 1285 (granting any party to arbitration the right to petition the court to confirm, correct, or vacate an award), 1285.4 (providing that the petition shall set forth a copy of the arbitration agreement, the names of arbitrators, and a copy of the award and written option).

250 *See, e.g.*, Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12-13 (1986).

251 *See* AM. JUR., ALTERNATIVE DISPUTE RESOLUTION §§ 195—205.

252 Global Reinsurance Corp.-U.S. Branch v. Argonaut, 2008 WL 1805459 (S.D.N.Y. 2008).

253 *See id.*

254 Decapolis Group, LLC v. Mangesh Energy, Ltd., No. 3:13-cv-1547-M (N.D. Tex. Feb. 24, 2014).

255 *See id.*

256 *See id.*

257 *See* AM. JUR., ALTERNATIVE DISPUTE RESOLUTION § 206; *see also* Rauh v. Rockford Products Corp., 574 N.E.2d 636 (1991).

258 *See* Sarofim v. Trust Company of The West, 440 F.3d 213 (5th Cir. 2006).

4. Mandatory ADR Provisions in Estate Planning Documents

Clients who are especially concerned with their privacy may inquire whether mandatory ADR provisions may be included in their estate planning documents. Some states may refuse to enforce mandatory ADR provisions against beneficiaries who did not sign the Will or trust agreement.[259] Other states may have due process or public policy concerns with mandatory ADR provisions.[260] Similar issues exist with mandatory ADR provisions included in ancillary estate planning documents.[261] A client who desires to include a mandatory ADR clause in any event may consider entering into a standalone agreement with the client's family members.[262]

Some states have enacted statutes expressly authorizing the enforcement of mandatory ADR provisions in Wills and trust agreements.[263] At least one state court has upheld a mandatory arbitration provision in a trust agreement. In 2013, in *Rachal v. Reitz*, the Supreme Court of Texas enforced a mandatory arbitration clause in a trust agreement against the beneficiaries.[264] The court considered the settlor's intent that arbitration be the sole and exclusive remedy for any dispute.[265] The court concluded that under the doctrine of "direct benefits estoppel," a beneficiary manifests assent to a trust's arbitration clause by attempting to enforce rights that would not exist but for the trust.[266] A sample mandatory arbitration provision for a trust agreement, modeled after the provision in *Rachal v. Reitz*, is attached as Exhibit G.

X. Dealing with Public Courts

Sometimes clients are required to deal with public courts. For example, when a client divorces, the divorce will not be legally effective until a court issues a divorce decree.[267] A client may also be sued by a third party who insists on having the matter resolved by a court. If a

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259 *See, e.g.*, Diaz v. Bukey, 125 Cal. Rptr. 3d 610 (Cal. Ct. App. 2011). In 2006, the American College of Trust and Estate Counsel (ACTEC) issued a report discussing the use and constitutionality of mandatory arbitration clauses in Wills and trust agreements. *See* ACTEC, Arbitration Task Force Report, Sept. 18, 2006, available at http://www.mnbar.org/docs/default-source/sections/actec-arbitration-task-force-report.pdf?sfvrsn=0.

260 *See, e.g.*, In re Will of Jacobovitz, 295 N.Y.S.2d 527 (Sur. Ct. Nassau County 1968); *see also* In re Berger, 437 N.Y.S.2d 690 (N.Y. App. Div. 1981).

261 Ancillary estate planning documents that are similar to contracts, however, with traditional elements of offer, acceptance, and consideration, may provide a foundation for validating a mandatory arbitration clause. *See* Nancy E. Delaney, Jonathan Byer, & Michael S. Schwartz, *Rachal v. Reitz and the Evolution of the Enforceability of Arbitration Clauses in Estate Planning Documents*, 27 A.B.A. REAL PROPERTY, TRUST & ESTATE LAW, PROBATE & PROPERTY MAGAZINE 6 (2013).

262 *See id.*

263 *See, e.g.*, ARIZ. REV. STAT. § 14-10205; MICH. COMP. LAWS § 600.847.

264 Rachal v. Reitz, 403 S.W.3d 840 (Tex. 2013).

265 *Id.*

266 *See id.* The California Supreme Court applied similar reasoning in 2012 when it held that third parties were bound to a mandatory arbitration provision in an agreement even if such third parties were not signatories to the agreement. *See* Pinnacle Museum Tower Ass'n v. Pinnacle Market Dev. (U.S.), LLC, 282 P.3d 1217 (Cal. 2012).

267 *See, e.g.*, TEX. FAM. CODE § 6.202 (providing that marriage is void if entered into when either party has an existing marriage not dissolved by legal action or terminated by death).

client is charged with a crime, the client will be forced to deal with the criminal courts. Because documents filed with a court generally become a matter of public record,[268] a client's privacy is threatened when involved in court proceedings. The paragraphs below discuss methods to protect the privacy of a client who is forced to deal with a public court.

A. Private Trials

Sometimes parties desire to litigate their disputes in a private setting to avoid scrutiny from the media and the public, and to limit visibility to the IRS or other government agencies. Many states permit "private trials," in which the parties to a civil or family law matter may request that the acting judge refer their case to a private judge.[269] If the motion is granted, the private judge will oversee the trial and render a verdict that, once submitted to the court, will stand as a verdict of the court.[270] Certain states provide that a private trial shall not be held in a public courtroom.[271] Accordingly, a private trial can resolve disputes among parties who wish to maintain their privacy, but are unable to avoid court involvement.[272]

B. Sealing Civil Court Records

A client may also request that the court seal its records from public view. Each jurisdiction has its own rules and procedures for sealing court records, but some commonalities exist. A court's decision to seal its records usually hinges on a finding that there is a substantial interest in favor of sealing that outweighs the public's presumptive right to access and any adverse effect that sealing would have.[273] Most courts require notice and a hearing with respect to a request to seal court records.[274] In high profile cases where media attention is anticipated from the outset, it may be possible to obtain a temporary seal prior to a hearing for a permanent seal.[275]

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[268] *See* Pichler v. UNITE, 585 F.3d 741, 746 n. 5 (3d Cir. 2009); *see also* TEX. RUL. CIV. PRO. § 76a (providing that court records are presumed to be open to the general public unless cause is shown to seal record).

[269] *See, e.g.*, FLA. STAT. § 44.104; TEX. CIV. PRAC. & REM. CODE § 151.001.

[270] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 151.011.

[271] TEX. CIV. PRAC. & REM. CODE § 151.010.

[272] Note, however, that such privacy may be lost if a party appeals the verdict rendered in a private trial, as the trial record, or certain portions thereof, may be made public on appeal. *See* TEX. CIV. PRAC. & REM. CODE § 151.013.

[273] *See, e.g.*, TEX. RUL. CIV. PRO. § 76a(1) ("No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following: (a) a specific, serious and substantial interest which clearly outweighs: (1) this presumption of openness; (2) any probable adverse effect that sealing will have upon the general public health or safety; (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.").

[274] *See, e.g., id.* at § 76a(3).

[275] *See, e.g., id.* at § 76a(5). In California, records are automatically conditionally under seal pending the determination of the motion. CAL. RUL. CT. § 2.551(b)(4).

Wills are rarely sealed because they are drafted with an expectation that they will become public.[276] By contrast, trust agreements are usually drafted with an expectation that they will remain private. Therefore, courts may be more willing to seal a trust agreement or related proceedings if there is a heightened need for privacy, such as to protect the identity of trust beneficiaries for security reasons. States often have separate rules for determining when court records will be sealed in divorce or child custody proceedings.[277] In New York, for example, divorce proceedings are automatically sealed for 100 years.[278]

Pursuant to Code § 7461(a), all reports of the United States Tax Court, including transcripts of court hearings and all evidence received by the court and its divisions, are matters of public record. Code § 7461(b) provides limited exceptions for trade secrets or other confidential information.[279] Compare Code § 7461(a) with Code § 6103, which generally prohibits an IRS employee from releasing a taxpayer's return information unless one of several exceptions applies (*e.g.*, disclosure to certain state agencies, law enforcement agencies, and other third parties in certain circumstances).[280]

C. Document Filing Strategies

Another strategy to privatize court filings is to only file certain documents with the court, or to take other measures to protect the parties' identities. For instance, California permits divorcing spouses to execute two property settlement agreements—one that is filed with the court (the "filed PSA") and one that is not filed with the court (the "unfiled PSA").[281] The unfiled PSA typically divides the spouses' property and includes other provisions that the

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[276] Of course, there will always be exceptions. *See* Nolan Clay, *Oklahoma County Judge Seals Slain Labor Commissioner's Will From Public*, THE OKLAHOMAN, Sept. 19, 2015, available at: http://newsok.com/oklahoma-county-judge-seals-slain-labor-commissioners-will-from-public/article/5447990/?page=1.

[277] *See, e.g.*, TEX. FAM. CODE §§ 161.210, 161.021 (allowing for the sealing of records in a proceeding terminating the parent-child relationship or a suit requesting adoption).

[278] *See* NYCOURTS.GOV, *County Clerk Records – New York State Court Officers, General Information*, http://www.nycourts.gov/courts/1jd/supctmanh/county_clerk_records.shtml.

[279] The breadth of Code § 7461 and its exceptions was tested during the administration of Michael Jackson's estate. After the IRS asserted that additional estate tax was owed, the estate filed a petition in the Tax Court. The estate sought to seal testimony by its expert, attorney and agent Mark Roesler of CMG Worldwide, regarding the historical earnings of dead celebrities who were CMG clients, the commissions charged by CMG, the details of Michael Jackson's contracts and CMG's process of valuing those contracts, and the details of film contracts brokered by CMG. The estate argued that this information was confidential and constituted CMG's trade secrets. The Tax Court agreed that the amount of CMG's commissions should be protected, but refused to seal other information included in Mr. Roesler's testimony. In certain instances, such as with the earnings of Marilyn Monroe and Princess Diana after their deaths, information that was once confidential had gone stale. The bottom line remains that it is very difficult to override the general presumption that evidence received by the Tax Court is open to the public. *See* Estate of Michael Jackson v. Commissioner, No. 171512-13, Order (Apr. 28, 2017); *see also* Bruce Steiner, *Michael Jackson and Sealing Court Proceedings*, LISI ESTATE PLANNING NEWSLETTER #2555 (May 25, 2017).

[280] For a good summary of IRS disclosure rules, see *Disclosure Laws*, available at https://www.irs.gov/government-entities/federal-state-local-governments/disclosure-laws.

[281] *See* Ronald S. Granberg, *Protecting Client Privacy in Divorce*, 30 FAMILY LAW NEWS 4 (2008), available at http://www.granberglaw.com/wp-content/uploads/2012/07/protecting_client_privacy_divorce.pdf.

spouses may wish to keep confidential. When submitting the filed PSA to the court, the spouses can attach a copy of the unfiled PSA, which the court will incorporate by reference and, by merging its provisions with the court's judgment, order the parties to comply with the terms of the unfiled PSA.[282] The court then returns the unfiled PSA to the spouses without keeping a copy in its file.

A client entering into a premarital agreement may wish to obtain a declaratory judgment from the court prior to the marriage confirming that the agreement is binding and enforceable.[283] It may be possible to structure this declaratory judgment action to protect the parties' privacy. For example, only the parties' initials and not their full names could be included in the pleadings. In addition, although the judge may view the parties' financial information, it should not be disclosed in the pleadings or otherwise made available to the public.

D. Making Criminal Records Confidential

A client's criminal history is easily accessible online in most jurisdictions. Many clients wish to protect their reputations and livelihoods by limiting third party access to their criminal records. The paragraphs below discuss, in broad terms, how to expunge criminal records or otherwise seal such records from the public. The rules governing this process vary among jurisdictions, and it is important for a lawyer to be familiar with applicable rules when advising a client.

1. Expunction/Expungement

Most jurisdictions have two options for limiting access to criminal history databases and court records. The first option is expunction, also referred to as expungement. Expunction involves permanently removing all evidence of a client's criminal record as if it never occurred.[284] While this would best protect the client's privacy, it may not be available in all situations. For instance, some jurisdictions only allow expunction if there was no final conviction.[285] Others only allow expunction for certain misdemeanor convictions, such as public intoxication or minor in possession.[286] Requirements for expunction often include completing

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[282] *See* Court Form FL-180, Paragraph 4.o., available at http://www.courts.ca.gov/documents/fl180.pdf.

[283] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 37.003 (providing for declaratory judgments under Texas law). There is some lively debate as to the legitimacy of a declaratory judgment affirming the validity of a premarital agreement. Opponents focus on the fact that a declaratory judgment generally requires some form of justiciable controversy, such that the court will refrain from issuing mere advisory opinions. *See* Kathryn J. Murphy, *Premarital and Postmarital Agreements*, 39-42 (Feb. 2009), available at https://www.gbfamilylaw.com/wp-content/uploads/2014/01/premarital-and-postmarital-agreements.pdf.

[284] *See, e.g.*, TEX. CODE CRIM. PROC. § 55.03 (providing that the effect of expunction is to prohibit the release, maintenance, dissemination, or use of the expunged records and files for any purpose and to allow the person to deny the occurrence of the arrest).

[285] *See, e.g.*, TEX. CODE CRIM. PROC. § 55.01(a).

[286] *Id.*

probation or deferred adjudication, paying all fines, and/or maintaining a clean record for a specified period of time.[287] Each jurisdiction will have a variation on these requirements.[288]

2. Sealed Record

When expunction is not available, a client may still be able to have the client's criminal record sealed. Some jurisdictions refer to this as obtaining an order of non-disclosure.[289] In a few jurisdictions, including New York, expunction is not available and seeking to seal a criminal record is the only option.[290] Unlike expunction, a sealed criminal record does not erase its existence, but it may limit the public's ability to access the criminal record. For example, if a client is applying for a loan or a new job, a sealed record may not appear in a routine background check.[291] There are exceptions, however, which typically allow law enforcement agencies to access sealed criminal records and may grant access to a few select agencies, including schools, when there is an overriding public interest in favor of full disclosure.[292]

3. Juveniles

It may be easier to expunge or seal juvenile criminal records than adult criminal records, provided the juvenile did not commit any further crimes upon becoming an adult.[293] Some jurisdictions are also more lenient on minor drug-possession charges than others. For example, in California, a juvenile's conviction for possession of marijuana for personal use is erased from the juvenile's criminal record after two years.[294]

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[287] *See, e.g., How Do I Get an Expungement?*, LAW OFFICE OF THE LOS ANGELES COUNTY PUBLIC DEFENDER, http://pd.co.la.ca.us/faqs_Expungement.html.

[288] *See, e.g.*, TEX. CODE CRIM. PROC. § 55.01 (requiring that the individual did not "intentionally or knowingly flee after being released on bail"); FLA. STAT. § 943.0585 (providing that a client may only seek expunction once).

[289] *See, e.g.*, TEX. GOV'T CODE § 411.074.

[290] *See How To Expunge a Criminal Record in New York*, THOMSON REUTERS, Jan. 13, 2014, http://statelaws.findlaw.com/new-york-law/how-to-expunge-a-criminal-record-in-new-york.html ("For better or worse, the fact is that in the state of New York, you cannot expunge your criminal record . . . [h]owever, you can 'seal' your criminal record.").

[291] *See e.g., Expunctions in Texas*, TEXAS YOUNG LAWYERS ASSOCIATION, 2010, http://www.tyla.org/tasks/sites/default/assets/File/37653ExpunctionBookletLoRes.pdf; Ward Davidson & Hillary Hennessee, *I'm Innocent! Now What?*, TEX. B.J., Mar. 2013, available at https://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal&Template=/CM/ContentDisplay.cfm&ContentID=21669.

[292] *See, e.g.*, TEX. GOV'T CODE § 411.076.

[293] *See, e.g.*, TEX. CODE CRIM. PROC. § 55.01 (requiring that an adult did not "intentionally or knowingly flee after being released on bail"); Fla. Stat. § 943.0585 (providing that an adult may only seek expunction once).

[294] *See* CAL. HEALTH & SAFETY CODE § 11361.5. Because each state has its own set of rules, it is critical to consult and understand state law. For state-specific information, FindLaw maintains the following website with links to each state's rules on expunction of criminal records: http://criminal.findlaw.com/expungement/expungement-and-criminal-records-state-specific-information.html.

XI. Securing a Client's Privacy at Death

Clients who are concerned with privacy during their lifetimes should also plan to protect their privacy upon death. This can be especially important for celebrities, public figures, or individuals with sizeable or complex estates. The paragraphs below discuss how death can pose serious risks to a client's privacy and how to mitigate those risks.

As part of this discussion, note that strategies discussed elsewhere in this paper may be beneficial in maintaining a client's privacy upon death. For instance, a revocable trust can privatize a client's estate plan, as discussed in Part II.B.1. In addition, the creative use of non-disclosure agreements and litigation alternatives can preserve a client's confidential information, as discussed in Part IX. Because these strategies are fully addressed elsewhere, they are only briefly mentioned below.

A. The Public Nature of Death

Federal, state, and local laws establish minimum reporting requirements that apply at a decedent's death.[295] Most states require that a decedent's death be reported to state and local authorities through the filing of a death certificate, which is typically handled by the funeral home.[296] Obituaries and death notices are normally the responsibility of the decedent's surviving family members, who are often assisted by the funeral home or newspaper.[297] Obituaries for famous or high profile individuals may be independently published by the decedent's friends, media outlets, or even strangers.[298]

There may be many reasons to delay, protect, and manage information about an individual's death, including mitigating shock to family members,[299] verifying the facts surrounding the decedent's death,[300] protecting the decedent's privacy,[301] and complying with

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295 A decedent's death does not generally need to be reported to the federal government, as vital records are a matter of state and local law. If the decedent was receiving Social Security benefits, however, there may be a duty to report the death to the Social Security Administration. *See* 42 U.S.C. § 408(a)(4). In addition, the IRS has certain requirements for indicating a taxpayer's death in the final income tax return. *See* IRS Publication 559, Survivors, Executors, and Administrators, 4 (2015), available at https://www.irs.gov/pub/irs-pdf/p559.pdf; *see also* 26 U.S.C. § 6012(b)(1); Treas. Regs. § 1.6012(b)(1).

296 *See, e.g.*, HAW. REV. STAT. § 338-8; FLA. STAT. § 382.008; DEL. CODE ANN. tit. 16, § 3123; CAL. HEALTH & SAFETY CODE § 102775; D.C. CODE § 7-211; TEX. HEALTH & SAFETY CODE § 193.002.

297 Many funeral homes will write the obituary as part of their services. *See* LEGACY.COM, *Guide to Writing an Obituary*, http://www.legacy.com/news/advice-and-support/article/guide-to-writing-an-obituary.

298 Interestingly, in 2003, it was discovered that one of CNN's websites accidentally provided access to obituary mock-ups for Ronald Reagan, Bob Hope, Fidel Castro, Pope John Paul II, Nelson Mandela, Gerald Ford, and Dick Cheney, even though none of these persons had died at that time. *See* Sue Chan, *CNN Chagrined Over Premature Obits*, CBS NEWS, Apr. 17, 2003, available at http://www.cbsnews.com/news/cnn-chagrined-over-premature-obits/.

299 Many police departments do not release the name of a person who has died to the media without first notifying the person's relatives or next of kin to minimize shock. *See, e.g.*, Chicago Police Department Employee Resource E06-04, *Notification of Death or Hospitalization – Member/Families*, Aug. 3, 2004, available at http://directives.chicagopolice.org/lt2015/data/a7a56e3d-12887ea9-ce512-887e-c5620c4ef3ea883f.html.

300 Publication of false information may harm the reputation of a news source, but is generally not actionable. *See* Herrick v. Evening Express Publ'g Co., 113 A. 16 (Me. 1921) (holding that a newspaper was not liable for a

applicable laws.[302] Details about a decedent's death can emerge rapidly and it may be important to protect and manage that information as it develops. It is common for the death of a high profile decedent to be reported almost immediately. The media and others may seek to learn as much as possible regarding the decedent's death.[303] It may be important to appoint a spokesperson to communicate on behalf of the decedent's surviving family members.

B. Funeral Arrangements and Disposition of Remains

Clients may desire to keep their funeral arrangements private. In most states, there is a statutory obligation to follow a decedent's written personal preferences with respect to the decedent's funeral.[304] Additionally, many states permit a decedent to designate an agent to control the disposition of the decedent's remains.[305] If no such designation is made, state law generally determines the priority of persons eligible to control the decedent's remains.[306] Note, however, that if the decedent was involved in a crime or died under suspicious circumstances, the decedent's body may be subject to an inquest by local officials to investigate the cause of death, before the body is released to the decedent's agent.[307]

The requirements for designating funeral arrangements and the disposition of remains vary from state to state. A client can grant an agent broad discretion or can include specific directions detailing the client's desires, including whether the client will be buried or cremated,

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mother's emotional distress after the newspaper mistakenly published a photograph of the mother's son with the report of another person with the same name).

301 The right to privacy is generally regarded as lapsing at one's death. *See* Cordell v. Detective Publications, Inc., 419 F.2d 989, 990—91 (6th Cir. 1969). In limited cases, however, the survivors of a person may have a right of privacy. *See* National Archives & Records Administration v. Favish, 541 U.S. 157 (2004) (recognizing a statutory right of privacy held by the family members of Vincent Foster, Jr., President Clinton's deputy counsel, which allowed Foster's family to object to the disclosure of death scene photographs requested under the Freedom of Information Act). Most states, though, continue to reject a common law survivor right of privacy. *See* Cordell v. Detective Publications, Inc., 419 F.2d 989 (6th Cir. 1969) (holding that under Tennessee law a parent could not maintain an invasion of privacy claim based on her emotional distress caused by reading a pulp magazine article that contained an unauthorized and sensational account of her daughter's murder); *see also* Smith v. City of Artesia, 772 P.2d 373 (N.M. Ct. App. 1989) (holding that the parents of a murder victim had no right to privacy over photographs of their daughter's dead body).

302 Some states criminalize the disclosure of certain identifying information of a decedent who was the victim of a sexual offense. *See, e.g.*, FLA. STAT. §§ 794.024, 794.026, 794.03.

303 When Prince died, Page Six reported less than 24 hours later that the painkiller, Percocet, may have played a role in the singer's death. The sources of the information were not identified in the report, suggesting information was leaked by persons around Prince prior to or at the time of his death. *See* Carlos Greer, Yaron Steinbuch, & Danika Fears, *Prince Treated for Percocet Overdose Days Before He Died*, PAGE SIX, Apr. 22, 2016, available at http://pagesix.com/2016/04/22/prince-911-call-released/.

304 The Funeral Consumers Alliance provides a list of each state's laws governing body disposition and the ability to designate an agent to carry out one's wishes. *See* https://www.funerals.org/?consumers=legal-right-make-decisions-funeral.

305 *See, e.g.*, TEX. HEALTH & SAFETY CODE § 711.002.

306 *See, e.g., id.* at § 711.002(a).

307 In Texas, for example, Chapter 49 of the Texas Code of Criminal Procedure requires an inquest of certain deaths and grants the justice of the peace or medical examiner authority over the body to conduct the inquest.

the nature and specifics of any ceremony to be held, any religious, spiritual, or symbolic elements desired, and the place for interment of remains. In many states, a deceased client's agent is responsible for reasonable expenses incurred, but may be reimbursed by the client's estate.[308]

Some states permit a client to designate an agent and express funeral directions in a Will,[309] and may not require the Will to be probated to give effect to the client's wishes.[310] If the Will is probated, however, the client's wishes will become a public record.

It may be difficult to fulfill a client's desire to have a private ceremony. Many funeral ceremonies are held in places of worship that do not restrict persons from attending the service. In addition, burial services may be held in a public cemetery, which would allow uninvited guests to attend. Because many people may wish to attend the funeral of a high profile individual, it may be appropriate to hold a private ceremony for close friends and family, and a separate memorial service for the public.

It may be appropriate to exclude certain individuals, including estranged family members, reporters, or protestors, from attending a client's funeral. Doing so, however, may implicate property laws and First Amendment rights.[311] Many states have attempted to balance the rights of funeral protestors with the privacy rights of others by providing buffer zones and time restrictions.[312] If the funeral is held on private property, such as a funeral home or private cemetery, the client's agent and property owner may be able to restrict certain persons from attending the funeral. If there is any threat of a physical confrontation, it may be appropriate to hire security guards or arrange for law enforcement to be present.

C. Obituaries

Each client's life is a story, composed of a beginning, middle, and end. It is often a challenge to tell a client's life story in a few short paragraphs of an obituary. Clients who wish to define their legacy should consider writing their own obituary or providing family members with a draft that can be updated upon the client's death.[313] This approach may enable clients to provide their own perspective, control information that is shared with the public, and, perhaps,

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308 *See, e.g.*, Glover v. Elliston, 529 S.W.2d 119 (Tex. Civ. App.–Eastland, 1975) (finding that the person making funeral arrangements is liable to the funeral home).

309 *See, e.g.*, N.J. REV. STAT. § 45:27-22 (requiring a designation to be made in the decedent's Will).

310 *See, e.g.*, TEX. HEALTH & SAFETY CODE § 711.002(h) (permitting designation of an agent in a Will, but not requiring that the Will to be probated before the decedent's directions are carried out).

311 *See* David L. Hudson, Jr., *Funeral Protests*, FIRST AMENDMENT CENTER, Jan. 10, 2006, available at http://www.firstamendmentcenter.org/funeral-protests.

312 Almost all states and the federal government have enacted laws restricting picketing and protests at funerals. *See, e.g.*, TEX. PENAL CODE § 42.055 (making funeral picketing a Class B misdemeanor if done within 3 hours before or 3 hours after the service); *see also* The Respect for America's Fallen Heroes Act, Public Law No. 109-228, codified at 38 U.S.C. § 2413 (prohibiting protests within 300 feet of the entrance of any cemetery under the control of the United States Department of Veterans Affairs if done within 1 hour before or 1 hour after the service).

313 "Homeland" actor James Rebhorn, who died March 21, 2014, authored his own obituary. *See* Justin Rocket Silverman, *In the Facebook Age, More People Are Writing Their Own Obituaries*, N.Y. DAILY NEWS, Mar. 31, 2014, available at http://www.nydailynews.com/life-style/write-obituary-article-1.1740877.

set the record straight. After all, who knows what others may say about clients after their deaths?[314]

Given the keen interest in chronicling the lives of the rich and famous,[315] high profile clients may have multiple obituaries published upon their deaths. Sometimes dueling obituaries may seek to outdo one another in eloquence, prose, factual details, and anecdotes regarding the deceased client.[316] Because there is generally no oversight regarding the contents of an obituary, which may be based on rumor or speculation,[317] clients should consider protecting their privacy during lifetime by obtaining non-disclosure agreements from family members, friends, employees, physicians, and other service providers. These measures are discussed in Part IX.A.

D. Last Medical Records

As discussed in Part VIII.A, HIPAA generally prevents covered entities from disclosing a client's medical records to unauthorized parties during lifetime.[318] Nevertheless, upon death, HIPAA permits the client's personal representative to access medical records.[319] If no personal representative has been appointed, it may be necessary to initiate a temporary estate administration to gain access to critical medical records.[320] It may be advisable for a high profile client to obtain non-disclosure agreements from individuals who are not subject to HIPAA restrictions, including family members, friends, and non-medical service providers.

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[314] Attorney Jonathan Turley wrote an interesting article discussing defamation of the dead. He noted that defamation after a person dies is not actionable, no matter how malicious, untrue or vile. Jonathan Turley, *Defaming the Dead*, Sept. 17, 2006, available at https://jonathanturley.org/2007/08/18/defaming-the-dead/.

[315] There is even a Wikipedia page devoted entirely to listing the numerous biographies and artistic depictions of Steve Jobs. *See* WIKIPEDIA, *List of Artistic Depictions of Steve Jobs*, https://en.wikipedia.org/w/index.php?title=List_of_artistic_depictions_of_Steve_Jobs&oldid=711814421. Not surprisingly, Apple has also taken an interest in the posthumous image of Steve Jobs. *See* Brian X. Chen and Alexandra Alter, *Apple Opens Up to Praise New Book on Steve Jobs*, N.Y. TIMES, Mar. 22, 2015, available at http://www.nytimes.com/2015/03/23/business/media/apple-opens-up-to-praise-new-book-on-steve-jobs-and-criticize-an-old-one.html.

[316] In a somewhat awkward case, the wife and girlfriend of a deceased man wrote competing obituaries that appeared side by side in a local newspaper. One obituary stated that the decedent "[was] survived by his loving wife." The other obituary, placed directly below the first, made no mention of the wife, but noted that the decedent was survived by "his long-time girlfriend." Hilary Hanson, *Deceased Man's Wife and Girlfriend Write Competing Obituaries*, HUFFINGTON POST, Aug. 6, 2016, available at http://www.huffingtonpost.com/entry/wife-girlfriend-write-obituaries-newspaper_us_57a5f548e4b021fd9878c5e3.

[317] Somewhat famously, a slanderous obituary of Edgar Allan Poe appeared in the New-York Daily Tribune after Poe's death in 1849. The obituary, written by an unknown author "Ludwig," lauded Poe at times and attacked his character at others. Apparently, the obituary so badly marred Poe's reputation that his legend is still intertwined with the obituary's claims. *See* Poe Museum, *Who is Edgar Allan Poe?*, http://www.poemuseum.org/life.php; *see also* Ludwig, Letter to the Editor, *Death of Edgar A. Poe*, N.Y. DAILY TRIBUNE, Oct. 9, 1849, available at http://www.eapoe.org/papers/misc1827/nyt49100.htm.

[318] *See* 45 U.S.C. § 164.502.

[319] *See id.*

[320] *See id.*

E. Autopsy Reports, Visual Evidence, and Vital Records

Autopsy reports, accident and crime scene photos, and death certificates may contain information that a deceased client's family desires to keep private.[321] Access to these documents is governed by state law, which varies widely. According to a 50-state survey conducted by the Office of Legislative Research of the Connecticut General Assembly in 2013:

- 9 states have laws governing the disclosure of crime scene photos;
- 26 states have laws governing the disclosure of autopsy reports; and
- 16 states have laws governing the disclosure of 911 transcripts.[322]

The survey indicates that state laws generally restrict access to such records to next of kin, although some states grant public access to autopsy reports and 911 transcripts.[323] Some states permit certain agencies to release records to parties other than those specified in the statute.[324]

The disclosure of vital records, including birth and death certificates, is often limited to immediate family members. Some states, however, including Ohio, will issue vital records to anyone who pays the required fee.[325] In other states, vital records become public after a certain number of years. In Texas, for example, birth certificates become public after 75 years and death certificates become public after 25 years.[326]

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321 Scotty Crane, son of actor Bob Crane (known for playing Colonel Robert Hogan in Hogan's Heroes), launched a website in June 2001 that included his father's autopsy report, crime scene photos from his father's gruesome murder, and outtakes from his father's sex films. *See* Roger Ebert, *Sons Take Sides in Biopic Dispute*, THE HOUR, Oct. 25, 2002.

322 Office of Legislative Research of the Connecticut General Assembly, *States' Laws on Disclosing Crime Scene Photographs, Autopsy Reports, and 911 Tapes and Transcripts*, Sept. 18, 2013, available at https://www.cga.ct.gov/2013/rpt/2013-R-0364.htm.

323 *See id.*

324 For example, after Prince died on April 15, 2016, the Carver County Sheriff, Jim Olson, spoke to the press regarding the lack of evidence indicating that the death was a suicide. Additionally, Olson stated, "This is certainly a big event internationally and nationally, and I can tell you that we are going to leave no stone unturned on this and make sure the public knows what happened." *See* Carlos Greer, Yaron Steinbuch, & Danika Fears, *Prince Treated for Percocet Overdose Days Before He Died*, PAGE SIX, Apr. 22, 2016, available at http://pagesix.com/2016/04/22/prince-911-call-released/.

325 Ohio offers vital records for purchase on its official government website. *See* OHIO.GOV, *Welcome to Ohio's Online Certificates Application*, https://odhgateway.odh.ohio.gov/OrderBirthCertificates/.

326 *See* TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *Ordering Death Certificates Online*, http://www.dshs.texas.gov/vs/reqproc/Ordering-Death-Certificates-Online/. In 2011, the Hawaii Health Department took the unusual step of making an exception to its policy to not release photocopies of actual records and released a photocopy of President Barack Obama's Certificate of Live Birth in order to "end the numerous inquiries related to his birth in Hawaii." *See* Big Island Video News, *Hawaii Health Dept. Details Obama Birth Certificate Request*, Apr. 27, 2011, available at http://www.bigislandvideonews.com/2011/04/27/hawaii-health-dept-details-obama-birth-certificate-request/.

F. Family Statements and Spokespersons

Surviving family members of a high profile decedent may issue a public statement, which is often accompanied by a request for privacy.[327] If questions from the media or general public persist, it may be appropriate for the decedent's surviving family members to appoint a spokesperson to represent the family. The spokesperson can offer statements and answer questions in a calm and eloquent manner, which may not be possible for grieving family members.

G. Fiduciary Access to Digital Information

One issue that may arise in the administration of a deceased client's estate is the need to access, manage, distribute, copy, or delete digital assets and accounts. Accessing and securing this data may be important in protecting the deceased client's privacy. Access to digital information is generally determined by the provider's terms of service and state law. The paragraphs below discuss the Revised Uniform Fiduciary Access to Digital Assets Act (the "UFADAA") and provide practical tips to facilitate a fiduciary's access to digital information upon death.

1. Revised Uniform Fiduciary Access to Digital Assets Act

The UFADAA is a model statute prepared by the National Conference of Commissioners on Uniform State Laws. [328] It is designed to grant fiduciaries the ability to access, manage, distribute, copy, or delete digital assets and accounts. Prior to the introduction of the UFADAA, only 8 states (Connecticut, Indiana, Rhode Island, Oklahoma, Idaho, Virginia, Nevada, and Louisiana) had enacted laws addressing fiduciary access to digital assets.[329] Effective January 1, 2015, Delaware became the first state to enact the UFADAA.[330] Since then, 37 additional states have enacted some version of the UFADAA, and in 2017, 8 states introduced UFADAA for legislative consideration.[331]

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[327] For example, when singer Celine Dion's husband, René Angélil, passed away, their family issued the following public statement: "René Angélil, 73, passed away this morning at his home in Las Vegas after a long and courageous battle against cancer. The family requests that their privacy be respected at the moment; more details will be provided at a later time." *See* Kayleigh Dray, *Heartbroken Celine Dion Requests Privacy Following Death of Husband René Angélil*, CLOSER, Jan. 15, 2016, available at http://lifestyle.one/closer/celebrity/news/celine-dion-ren-anglil-family-tribute-death-cancer/.

[328] A copy of the UFADAA can be accessed at:http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf.

[329] *See* CONN. GEN. STAT. § 45a-334a; IND. CODE § 29-1-13-1.1; R.I. GEN. LAWS § 33-27; OKLA. STAT. tit. 58, § 269; IDAHO STAT. § 15-3-715(28); VA. CODE ANN. § 64.2-110; NEV. REV. STAT. § 143.188; LA. CODE CIV. PROC. ANN. art. 3191.

[330] Delaware enacted an earlier version of the UFADAA. *See* DEL. CODE ANN. tit. 12, ch. 50.

[331] *See* Uniform Law Commission, *Legislative Fact Sheet – Fiduciary Access to Digital Assets Act*, available at http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Fiduciary%20Access%20to%20Digital%20Assets%20Act,%20Revised%20(2015). One state that has not adopted UFADAA is Massachusetts. In 2017, the Massachusetts Supreme Judicial Court ruled that, pursuant to the federal Stored Communications Act, Yahoo could

The UFADAA generally provides that the fiduciary managing a deceased client's tangible property may also access digital assets provided the client did not limit such access by Will, trust, or other instrument.[332] To access digital assets, the fiduciary must send a request to the account operator and a certified copy of the instrument providing the fiduciary's authority.[333] An account operator that receives a valid request should be protected from liability for good faith compliance with such request.[334]

The UFADAA allows a fiduciary to access, but not control, the deceased client's digital assets to the extent necessary to discharge fiduciary duties.[335] The fiduciary, however, must still abide by other applicable laws, including federal intellectual property laws and privacy laws.[336] For example, an executor may access a deceased client's e-mail account to aid in the inventory of assets, but may not publish, duplicate, or distribute private communications or copyrighted material.[337]

2. Digital Asset and Account Planning Suggestions

Clients seeking to protect their privacy should consider granting fiduciaries access to their digital assets upon death, rather than relying on the provider's terms of service or default state law. Below are practical recommendations to help clients achieve their privacy objectives:

- Avoid storing confidential, embarrassing, or potentially damaging information or images in a digital format.

- Provide for specific disposition of digital assets according to the provider's terms of service (*e.g.*, follow an email service provider's policy and instructions with regard to access after death).

- Back up digital assets to a secured external hard drive, dvd, or flash drive and provide for access upon death.

- Maintain a comprehensive inventory of all digital assets, passwords, and other digital information. The inventory can be password-protected and entrusted with a third party or stored in a safe deposit box. Alternatively, clients can use an "online afterlife company" that stores usernames and passwords and sends them to a designated person upon death.

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disclose the contents of a decedent's email account to a personal representative, based solely on the personal representative's consent. *See* Ajemian v. Yahoo!, 2017 WL 458270 (Mass. 2017).

332 *See* UFADAA § 15.

333 *See id.* at §§ 6—14.

334 *See id.* at § 16.

335 *See generally id.* at § 15.

336 *See id.* at § 7.

337 For a discussion of privacy rights after death, see Natasha Chu, *Protecting Privacy after Death*, 13 NW. U. L. REV. 255 (2015).

- Do not include user names, passwords, or other confidential information in a Will that may become public record upon death.

XII. Cybersecurity

Electronic data is under constant attack. Our law firm, for example, experiences over 100,000 cyber-attacks each week, with that number steadily increasing. Our clients experience these same issues and are seeking solutions to protect their data, both during lifetime and upon death. Although professional advisors may not be equipped to provide comprehensive solutions, they can assist in identifying and coordinating with cybersecurity experts. Cybersecurity awareness may be the best defense against a cyber-attack. Clients should be vigilant and if a client suspects a hack, the client should immediately implement measures to secure digital data.

A. Cyber-Attacks on the Rise[338]

Individuals, businesses, and nations are experiencing ever-increasing threats of cyber-crimes. In 2015, over 500 million people had their personal records stolen or lost, while cyber-criminals forged over 1 million cyber-attacks against individuals each day. For example, the highly publicized cyber-attacks on Anthem Healthcare and the Office of Personnel Management exposed a total of more than 100 million personal records.[339] In September 2016, Yahoo announced that it was subject to the largest data breach in history, exposing more than 500 million user accounts. Yahoo blamed the data breach on "state-sponsored" hackers.[340] In July 2017, credit-reporting company Equifax experienced a cybersecurity breach that exposed the personal information of as many as 143 million Americans, representing almost half the country.[341] Cybersecurity issues are not limited to large corporations, as small businesses are often subject to cyber-attacks. In 2015, 43% of corporate cyber-attacks were directed at businesses with fewer than 250 employees.

In addition to individuals and businesses, nations are now entangled in bouts of "cyberwarfare." In February 2016, for example, the Federal Reserve Bank of New York, through a global payment system known as Swift, was convinced to transfer $81 million from a Bangladesh bank to accounts in the Philippines.[342] It is highly suspected that North Korea

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338 The statistics discussed and techniques discussed in this Part XII are derived primarily from Symantec's Internet Security Threat Report. *See* Symantec, *Internet Security Threat Report*, Vol. 21 (2015), available at https://www.symantec.com/security-center/threat-report.

339 ANTHEM, *How To Access and Sign Up for Identity Theft Repair and Credit Monitoring Services*, http://www.anthemfacts.com; *see also* Michael Adams, *Why the OPM Hack is Far Worse Than You Imagine*, LAWFARE, Mar. 11, 2016, available at http://www.lawfareblog.com/why-opm-hack-far-worse-you-imagine.

340 *See* REUTERS, *Some Yahoo Users Close Accounts Amid Anger, Security Fears*, Sept. 26, 2016, available at http://www.nbcnews.com/tech/tech-news/some-yahoo-users-close-accounts-amid-anger-security-fears-n654236.

341 *See* Sara Ashley O'Brien, *Giant Equifax Data Breach: 143 Million People Could Be Affected*, CNN, Sept. 8, 2017, available at http://money.cnn.com/2017/09/07/technology/business/equifax-data-breach/index.html.

342 *See* Daniel Bentley, *The New York Fed Came This Close to Stopping the $81 Million Cyber Bank Heist*, FORTUNE, June 6, 2016, available at http://fortune.com/2016/06/06/new-york-fed-theft/.

played a role in this cyber-attack.[343] More recently, in May 2017, the world saw its most massive cyber-attack to date. Governments, businesses, and hospitals in over 150 countries were victimized by the WannaCry ransomware attack, which froze computer users from accessing their files until hackers were paid a ransom in "cryptocurrency," such as Bitcoin.[344]

Cyber-criminals are attacking more than just email accounts and passwords. Smart phones, cars, smart home devices, televisions, and medical devices are going online faster than security specialists can protect them. After researchers determined that hackers could remotely control a smart vehicle during a proof-of-concept attack, Fiat Chrysler recalled 1.4 million vehicles.[345] Other proof-of-concept testing revealed that a hacker could open a smart home lock remotely without a pin code, steal user login data on smart televisions, and control an insulin delivery pump. Experts believe that cyber-crimes will continue to rise every year.[346]

B. Cyber-Criminals and the Dark Web

Many cyber-criminals perpetrate their attacks through the "dark web." The dark web, which was originally developed by the U.S. Navy, is a part of the internet that permits its users to remain anonymous, or "dark," and is only accessible through special software.[347] To further understand the dark web, it is best to view the internet in different layers. The first layer is the "surface web," which is what most internet users will recognize. The surface web is comprised of websites that search engines like Yahoo or Google are able to search and index.[348] Amazingly, even by conservative estimates, the surface web contains less than 5% of the information that exists on the internet.[349] The next layer of the internet is the "deep web," which

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343 *See* Michael Corkery & Matthew Goldstein, *North Korea Said to Be Target of Inquiry Over $81 Million Cyberheist*, N.Y. TIMES, Mar. 22, 2017, available at https://www.nytimes.com/2017/03/22/business/dealbook/north-korea-said-to-be-target-of-inquiry-over-81-million-cyberheist.html.

344 *See* Mark Thompson & Jethro Mullen, *World's Biggest Cyberattack Sends Countries into 'Disaster Recovery Mode'*, CNN, May 14, 2017, available at http://money.cnn.com/2017/05/14/technology/ransomware-attack-threat-escalating/index.html. Interestingly, while Bitcoin is the cryptocurrency that has garnered the most mainstream attention, likely due to its meteoric rise in value, many cyber-criminals prefer to deal in more obscure cryptocurrencies, such as Monero. *See* Ivana Kottasova, CNN, Jan. 3, 2018, available at http://money.cnn.com/2018/01/03/technology/bitcoin-popularity-criminals-monero/index.html?iid=ob_lockedrail_bottomlist (noting that Bitcoin only accounts for approximately 36% of the cryptocurrency market, down from 90% in 2016).

345 Reem Nasr, *Fiat Chrysler Recalling 1.4M Vehicles Amid Hacking Defense*, CNBC, Jul. 14, 2015, available at http://www.cnbc.com/2015/07/24/fiat-chrysler-recalling-14m-vehicles-amid-hacking-defense.html.

346 FEDERAL BUREAU OF INVESTIGATION, *Incidents of Ransomware on the Rise: Protect Yourself and Your Organization*, Apr. 29, 2016, available at http://www.fbi.gov/news/stories/incidents-of-ransomware-on-the-rise.

347 *See* Damon Beres, *What You Should Know About the "Dark Web," An Anonymous Haven for Hackers*, HUFFINGTON POST, Aug. 20, 2015, available at http://www.huffingtonpost.com/entry/what-is-the-dark-web_us_55d48c50e4b0ab468d9f17d7.

348 *See id.*

349 *See* Marc Goodman, *The Dark Web Revealed*, POPULAR SCIENCE, Apr. 1, 2015, available at http://www.popsci.com/dark-web-revealed.

simply consists of online information that is not discoverable through search engines.[350] Despite its name, most internet users access the deep web on a fairly regular basis, as it includes government databases and libraries, as well as any other information that a user must search for within a website itself.[351] The final layer is the dark web, which relies on anonymity software in an attempt to protect the user's identity and location.[352]

Dark web users can purchase drugs, firearms, forged passports, or stolen credit cards, solicit hitmen or prostitutes, and view illegal pornography, among other illicit activities.[353] This widespread illicit activity has not gone unnoticed by national governments, however, and law enforcement officials across the globe have increased their efforts to detect, detain, and punish cyber-criminals on the dark web. In July 2017, two of the largest dark web marketplaces, Hansa and Alphabay, were infiltrated and shut down by Dutch authorities, Europol, and the U.S. Department of Justice.[354]

One of the most infamous cyber-criminals in the world is "Rescator," who hails from Russia.[355] Rescator maintains a dark website that sells stolen credit card numbers from all over the world (except Russia). Rescator is responsible for some of the most high-profile breaches in the U.S. retail industry, including Target and Home Depot,[356] and the U.S. Department of Justice estimates that the Rescator website accounts for over 85% of stolen credit card numbers that are sold on the dark web.[357] Because all of the information a cyber-criminal needs to steal a credit card is contained in the card's magnetic strip, most credit card companies are transitioning to chip card technology in an effort to reduce fraud.[358]

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350 *See* Damon Beres, *What You Should Know About the "Dark Web," An Anonymous Haven for Hackers*, HUFFINGTON POST, Aug. 20, 2015, available at http://www.huffingtonpost.com/entry/what-is-the-dark-web_us_55d48c50e4b0ab468d9f17d7.

351 *See id.*

352 *See id.*

353 *See* Marc Goodman, *The Dark Web Revealed*, POPULAR SCIENCE, Apr. 1, 2015, available at http://www.popsci.com/dark-web-revealed.

354 *See* Andy Greenberg, *Global Police Spring a Trap on Thousands of Dark Web Users*, WIRED, July 20, 2017, available at https://www.wired.com/story/alphabay-hansa-takedown-dark-web-trap/?mbid=nl_72017_p2&CNDID.

355 *See* Dune Lawrence, *The Amazon.com of Stolen Credit Cards Makes It All So Easy*, BLOOMBERG BUSINESS INSIDER, Sept. 14, 2014, available at https://www.bloomberg.com/news/articles/2014-09-04/the-amazon-dot-com-of-stolen-credit-cards-makes-it-all-so-easy.

356 *See id.*

357 *See* Steve Akers, *Heckerling Musings 2017 and Estate Planning Current Developments*, BESSEMER TRUST, Mar. 2017, available at http://www.bessemertrust.com/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/Advisor/Presentation/Print%20PDFs/Heckerling%20Musings%202017_website.pdf (referencing comments by Mark Lanterman on January 11, 2017, at the 51st Annual Heckerling Institute on Estate Planning sponsored by the University of Miami School of Law).

358 *See* Maggie Overfelt, *Hackers Rush To Cash in on $14 Billion in Fraud Before Chip Cards Take Over*, CNBC, May 6, 2016, available at http://www.cnbc.com/2016/05/06/those-new-chip-cards-will-cause-14-billion-in-fraud-by-2020.html.

Although cyber-criminals continue to access the dark web at an alarming rate, clients can implement relatively simple protective measures to mitigate exposure to cyber-attacks. While some of these measures are discussed generally below, it is advisable to consult a cybersecurity specialist.

C. Password Protection

Passwords are not immune from hackers and, generally, a password that is longer and more complex will offer better protection. Suppose a client's password is "Spartacus" in reference to his dog—a hacker can instantly crack this password. If the client adds some numbers to the password, so the password is "Spartacus12," a hacker can crack this password in roughly 14 minutes. If the client adds numbers and a special character, so the password is "@Sparta12cus," a hacker will need approximately 275 days to crack it. Even better, if the password is "Sp@rtacusWENT2T0wn," a hacker will need approximately 377 billion years to crack it. A client can further minimize risk by utilizing a different password for each account.

D. Email Security

Common sense is the first line of defense for email security. If an email looks phishy, it probably is. In 2015, almost 50% of all inbound emails were flagged as spam. While spam filters generally intercept most phishy emails, spammers are getting more creative.[359] Cyber-experts recommend clients have multiple email accounts, including one for business, one for family and friends, and one for websites that require an email as a user ID. By having multiple email accounts with distinct purposes, clients may reduce the risk of cyber-attacks.

Clients may further protect themselves by following a monthly or more frequent security regimen. This regimen may include changing passwords, checking email account settings, accessing emails from only trusted networks, and being aware of current email threats. Email hackers may also prey upon clients' emotional vulnerabilities. In 2015, hackers released the personal data of 32 million users who registered on AshleyMadison.com, a dating service for individuals who are married or in committed relationships.[360] In the days that followed, various other hackers bombarded inboxes with the subject line "Find Out if Your Husband Has Cheated on Ashley Madison," or "Were You Exposed by Ashley Madison?" Many curious recipients followed links contained in such emails and found nothing regarding their spouse, but were exposed to malware.

E. Social Media

Social media presents another avenue for hackers to access personal data. A sophisticated cyber-criminal can be disguised to appear as an online friend. There are five popular social media hacks: (1) user sharing, (2) fake offers, (3) fake applications,

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[359] Jordan Robertson, *E-Mail Spam Goes Artisanal*, BLOOMBERG, Jan. 19, 2016, available at http://www.bloomberg.com/news/articles/2016-01-19/e-mail-spam-goes-artisanal.

[360] Robert Hackett, *What to Know About the Ashley Madison Hack*, FORTUNE, Aug. 26, 2015, available at http://fortune.com/2015/08/26/ashley-madison-hack/.

(4) "likejacking," and (5) fake video plugins.[361] User sharing—where a user does the work of a hacker by sharing a scam—was the most prevalent social media cyber-crime in 2015. Fake offers convince a user to divulge private information in exchange for a free gift or prize, while fake applications look like they are linked to a legitimate social media website, but instead direct the user to harmful computer viruses. Similarly, "likejacking" and fake video plugins trick users into clicking "like" or a plugin link leading to malware.

F. Smart Technology

Self-monitoring analysis and reporting technology, or "smart" technology, continues to expand, and now appears in cars, homes, televisions, watches, and phones, among other products and places.[362] While smart technology may make life more convenient, it may do so at the expense of privacy. Smart devices are designed to gather the user's personal information, including the user's name, address, phone number, email address, contacts, fingerprints, voice, location, habits, login credentials, credit card numbers, health information, and more. This information has become a powerful commodity for businesses, government, and identity thieves.[363] Smart technology is also increasingly being used to solve crimes, with criminal investigators accessing data from devices such as a Fitbit and an Amazon Echo.[364]

In 2012, approximately 96% of new cars sold in the United States were equipped with an event data recorder, also known as a "black box."[365] Black boxes capture only basic information in the event of a crash, such as vehicle speed, steering, breaking, seatbelt usage, and airbag

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361 Lucie Hys, *How To Prevent a Social Media Hack*, SECURITY INTELLIGENCE BY IBM, May 25, 2016, available at https://securityintelligence.com/how-to-prevent-a-social-media-hack/.

362 *See, e.g.*, Elizabeth Dwoskin, *Coming to a Doctor's Office Near You*, WASH. POST, Sept. 27, 2016, available at https://www.washingtonpost.com/business/economy/medical-scribes-track-doctors-examinations-from-thousands-of-miles-away/2016/09/27/2c269f54-7c23-11e6-ac8e-cf8e0dd91dc7_story.html; *Best Golf Swing & Game Analyzers*, GOLF DIGEST, Apr. 19, 2016, available at http://www.golfdigest.com/story/best-golf-swing-and-game-analyzers.

363 *See, e.g.*, Elizabeth Dwoskin, *Coming to a Doctor's Office Near You*, WASH. POST, Sept. 27, 2016, available at https://www.washingtonpost.com/business/economy/medical-scribes-track-doctors-examinations-from-thousands-of-miles-away/2016/09/27/2c269f54-7c23-11e6-ac8e-cf8e0dd91dc7_story.html; *Best Golf Swing & Game Analyzers*, GOLF DIGEST, Apr. 19, 2016, available at http://www.golfdigest.com/story/best-golf-swing-and-game-analyzers.

364 *See, e.g.*, Amanda Watts, *Cops Use Murdered Woman's Fitbit To Charge Her Husband*, CNN, Apr. 26, 2017, available at http://www.cnn.com/2017/04/25/us/fitbit-womans-death-investigation-trnd/index.html; Eliott C. McLaughlin, *Suspect OKs Amazon To Hand over Echo Recordings in Murder Case*, CNN, Apr. 27, 2016, available at http://www.cnn.com/2017/03/07/tech/amazon-echo-alexa-bentonville-arkansas-murder-case/index.html; *see also* Eliott C. McLaughlin, *Alexa, What Other Devices Are Listening to Me?*, CNN, Jan. 12, 2017, available at http://www.cnn.com/2017/01/12/tech/voice-technology-internet-of-things-privacy/index.html.

365 Consumers have identified identity theft as one of their primary fears. *See* Mary Bowerman, *Survey Reveals What Americans Fear the Most*, USA TODAY NETWORK, Oct. 12, 2016, available at http://www.usatoday.com/story/news/nation-now/2016/10/12/survey-top-10-things-americans-fear-most/91934874/. According to the Bureau of Justice Statistics, 17.6 million U.S. residents experienced identity theft in 2014. *See* Bureau of Justice Statistics, *Press Release*, Sept. 27, 2015, available at http://www.bjs.gov/content/pub/press/vit14pr.cfm.

deployment.[366] Federal law provides that this information is owned by the driver and may not be accessed without the driver's consent.[367] There are no laws, however, addressing data collected by automakers through vehicle internet connections.[368] While it is estimated that fewer than 20% of new cars sold globally can be linked to the internet, this number is expected to reach 75% by 2020.[369]

With no laws expressly governing the dissemination of data collected by a vehicle, there is a general risk that automakers may sell this information to third parties, including insurance companies, car rental companies, advertisement agencies, and other businesses.[370] An automaker's ability to sell such information is generally determined by the owner's manual, although under voluntary guidelines established by the Alliance of Automobile Manufacturers in 2014, most automakers have agreed to obtain permission from the driver before sharing information about the driver's location, health, or behavior.[371]

In spite of its privacy risks, many clients are unwilling to forego the conveniences offered by smart technology devices. These clients can still take measures, however, to protect their privacy and personal security. First, before purchasing smart devices or vehicles, the client should read privacy notices, warnings, product manuals, and other disclosures made by the manufacturer. The client can gather important information regarding the product's operation and functions, which may help the client assess whether the potential privacy intrusions are acceptable. Second, some products contain their own security features, such as password protection. The client should utilize these protections and set effective passwords, as discussed above. Third, the client should carefully select which personal details will be shared with the

366 National Highway Traffic Safety Administration, *EDR Q&As*, Aug. 2006, available at http://www.nhtsa.gov/DOT/NHTSA/Rulemaking/Rules/Associated%20Files/EDR_QAs_11Aug2006.pdf.

367 *See* National Conference of State Legislatures, *Privacy of Data from Event Data Recorders: State Statutes*, http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-of-data-from-event-data-recorders.aspx.

368 *See* Tom Krisher & Dee-Ann Durbin, *Your Car Can Tell More About You Than You Think*, THE ASSOCIATED PRESS, published in THE DALLAS MORNING NEWS, Sept. 30, 2016, available at http://www.dallasnews.com/business/autos/2016/09/30/car-knows-thatll-become-big-business.

369 *See* id.

370 *See* id. Some insurance companies install devices in vehicles that enable the company to identify safe drivers and reward them with lower premiums. See Zurich, *Smart Cars and Connected Vehicles: Privacy, Security, and Safety Considerations*, 2014, available at file://wsm/dfs/users2/jchadwick/Downloads/smart_cars_and_connected_vehicles.pdf.

371 *See* Tom Krisher & Dee-Ann Durbin, *Your Car Can Tell More About You Than You Think*, THE ASSOCIATED PRESS, published in THE DALLAS MORNING NEWS, Sept. 30, 2016, available at http://www.dallasnews.com/business/autos/2016/09/30/car-knows-thatll-become-big-business.

smart device.[372] Finally, to the extent possible, the client should cover cameras when they are not in use.[373]

G. Disposal of Electronic Devices

Most clients have multiple electronic devices, including computers, laptops, tablets, phones, and storage devices. Technology continues to advance at a rapid pace, causing clients to replace these devices with new and more powerful models. Before disposing of electronic devices, the client should ensure that all confidential information has been removed. If sensitive information is not properly removed, it may be recoverable by cyber-criminals. To illustrate the risks associated with the disposal of electronic devices, as a test, a security software company purchased 20 phones on eBay. The prior owners had performed a factory reset, believing that pictures and personal information had been permanently deleted. The security company, however, was able to recover approximately 40,000 photographs, 750 emails, 250 contacts with names and addresses, and other files containing highly personal information.[374] The Federal Trade Commission has a useful website that provides information regarding the disposal of electronic devices and securing online accounts.[375]

H. Removing Information from the Internet

In today's world, it is nearly impossible to live off the grid. This is particularly true for high profile celebrities and public figures, whose every move is seemingly tracked by prying eyes. Once information appears on the internet, it is difficult (if not impossible) to remove, and may forever remain available to the general public through archival systems.[376] While a client may initiate litigation to remove defamatory online statements or other embarrassing, damaging, or negative information,[377] a client's own efforts to keep a low online profile may be the best way to preserve privacy. Clients seeking to remove themselves from the internet should consider taking the following steps:[378]

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372 *See* U.S. NEWS, *Smart Cars, TVs Show Privacy Risks*, Feb. 9, 2015, available at http://www.usnews.com/news/articles/2015/02/09/smart-cars-tvs-show-privacy-risks (discussing Samsung's Smart TV privacy policy, which reminds users that sensitive information may be captured by the TV's voice recognition device).

373 *See* Julian Hattem, *FBI Director: Cover Up Your Webcam*, THE HILL, Sept. 14, 2016, available at http://thehill.com/policy/national-security/295933-fbi-director-cover-up-your-webcam.

374 *See* Pete Pachal, *Hard Proof That Wiping Your Phone Doesn't Actually Delete Everything*, MASHABLE, July 9, 2014, available at http://mashable.com/2014/07/09/data-wipe-recovery-smartphones/#vB5w91vJh5qp.

375 *See* FEDERAL TRADE COMMISSION, CONSUMER INFORMATION: ONLINE SECURITY, https://www.consumer.ftc.gov/topics/online-security.

376 Not only does information remain publicly available on the internet until it is replaced, but even deleted information may be accessible through internet archives that are becoming increasingly more common. *See, e.g.*, INTERNET ARCHIVE WAYBACK MACHINE, available at https://archive.org/web/.

377 *See, e.g.*, Aaron Minc, *The Dark Side of the Internet: How To Remove Defamatory Online Content*, DEFAMATION REMOVAL LAW, NOV. 30, 2013, available at http://www.defamationremovallaw.com/dark-side-internet-remove-defamatory-online-content/.

378 *See* Eric Franklin, *6 Ways To Delete Yourself from the Internet*, CNET, Oct. 20, 2016, available at https://www.cnet.com/how-to/remove-delete-yourself-from-the-internet/; Dave Jenkins, *How To Completely Delete*

- Delete all social networking accounts, including Facebook, Twitter, Instagram, Snapchat, and Pinterest.
- Delete all shopping accounts, including Amazon, Ebay, Paypal, and others.
- Delete all online profiles, including YouTube, Skype, online message boards, job sites, and dating websites.
- Request to be removed from data collection sites, including Spokeo, PeopleFinder, and others.
- Confirm with phone companies and electronic service providers that phone numbers are not listed online.
- Search the internet thoroughly for all images, mentions, search results, or other details, and request removals directly from the website.
- Pay for a service to help with the above removal process and monitor the client's online anonymity.[379]

I. Law Firm Data Breaches

The ethical duties of competence and confidentiality require lawyers to take reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to a client's representation.[380] As law firms move their files to electronic storage, complying with these duties becomes more challenging as cyber-attacks increase in number and sophistication. Although most jurisdictions have not yet addressed how these ethical duties apply to electronic file security, those that have concluded that a lawyer must take reasonable measures to protect electronic files containing specific categories of personal client information.[381] Such personal information may include a client's social security number, bank accounts, and health care information.[382] If client information is inadvertently disclosed through

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Yourself from the Internet, HIGHSNOBIETY, May 12, 2016, available at http://www.highsnobiety.com/2016/05/12/how-to-delete-yourself-from-the-internet/.

[379] A popular internet removal service is DeleteMe at abine.com. For $129 per year, a DeleteMe adviser will remove a client's public listings from the internet and provide the client with a privacy report every three months. *See* ABINE, *DeleteMe: Delete Your Personal Information from the Internet*, https://www.abine.com/deleteme/landing.php.

[380] MODEL RULES OF PROF'L CONDUCT R. 1.1; 1.6(c). The comments to the Model Rules provide that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8.

[381] *See e.g.*, MASS. GEN. LAWS. ch. 93H; State Bar of Arizona, *Opinion 09-04*, Dec. 2009, available at http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=704; Nevada Standing Committee on Ethics and Professional Responsibility, *Formal Opinion No. 33*, Feb. 9, 2006, available at http://ftp.documation.com/references/ABA10a/PDfs/3_12.pdf. ; Virginia State Bar's Standing Committee on Legal Ethics, *Legal Ethics Opinion 1818*, Sept. 17, 2005, available at http://www.vsb.org/profguides/leos/leo_1818.html.

[382] MASS. GEN. LAWS. ch. 93H.

a data breach, the ethical duty of communication may require the lawyer to disclose the breach to the client.[383]

XIII. Personal Security

In addition to minimizing cybersecurity risks, clients should be aware of risks to their personal security. High profile clients and their families may be especially exposed to potential physical attacks and kidnapping. While attorneys, accountants, and financial advisors may not be equipped to adequately advise clients regarding these issues, they can assist in identifying and coordinating with personal protection professionals. The paragraphs below discuss general considerations regarding a client's personal security.

A. Maintaining a Low Profile

Clients can minimize personal security risks by maintaining a low profile. The client's travel plans should be kept confidential and personal information regarding the client's family should not be made public. This can be difficult at times, as children (and many adults) often use social media to share their day-to-day activities and vacation plans.[384] It may be appropriate for clients to have frank discussions with family members regarding the potential security risks of posting personal information on social media.[385] High profile clients may take additional measures to protect themselves and their families, including travelling under a fictitious name and flying privately instead of commercially.

B. Home Security

Security professionals can provide clients with recommendations regarding how to secure their personal residences. Security systems can range from simple and inexpensive to complex and costly.[386] Some homes include "safe rooms" with bullet and bomb-proof walls, doors, and windows. Clients can stock safe rooms with food, water, and supplies to maintain the client's

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383 *See* MODEL RULES OF PROF'L CONDUCT R. 1.4; *see also* Jody R. Westby, *Cybersecurity & Law Firms: A Business Risk*, 39 LAW PRACTICE 4 (2013), available at http://www.americanbar.org/publications/law_practice_magazine/2013/july-august/cybersecurity-law-firms.html.

384 In October 2016, Kim Kardashian was robbed at gunpoint. The thieves made off with more than $10 million in jewelry and investigators later suspected that the robbery was an inside job. *See* Lori Hinnant & Sylvie Corbet, *Investigators: "Inside Job" Suspected in Kardashian Robbery*, ASSOCIATED PRESS, Jan. 10, 2017, available at http://bigstory.ap.org/article/72cb4fdd4c71432bb87e665f54de943e/police-inside-job-heart-kardashian-robbery-probe. Some have speculated that the robbery may have been facilitated by Mrs. Kardashian's own actions, including her frequent posts on social media revealing her whereabouts and flaunting her expensive jewelry. *See* Mark Seal, *The Inside Story of the Kim Kardashian Paris Hotel Heist*, VANITY FAIR, Holiday 2016, available at http://www.vanityfair.com/style/2016/10/solving-kim-kardashian-west-paris-robbery.

385 *See* Michael Massa, *Cyber Security Concerns and the High Net-Worth Family Office*, CREDIT SUISSE PERSPECTIVES, July 2012, available at http://www.weinstocklaw.com/docs/perspectives_july_2012_-_credit_suisse_wpg.pdf.

386 *See* Morgan Brennan, *Billionaire Bunkers: Beyond the Panic Room, Home Security Goes Sci-Fi*, FORBES, Dec. 16, 2013, available at http://www.forbes.com/sites/morganbrennan/2013/11/27/billionaire-bunkers-beyond-the-panic-room-home-security-goes-sci-fi/#7e7b10d154d7.

family in the safe room for several days or more.[387] Even yachts have been outfitted with safe rooms.[388]

C. Background Checks

Clients may have employees who help them in their businesses and homes. Clients should obtain background checks on potential and existing employees.[389] Clients who are especially concerned with personal security may desire to obtain background checks on friends and social acquaintances. While background checks cannot guarantee a client's personal security, they should minimize risks.

D. Protective Services/Bodyguards

High profile and ultra-wealthy clients may be exposed to greater personal security risks that necessitate additional protection. These clients often hire security details, including bodyguards and professional drivers.[390] The presence of security personnel may deter would-be attackers and protect the client and the client's family in the event of an attack.

XIV. Ethics and Law Firm Best Practices

Privacy planning implicates many ethical duties. This paper has highlighted the ethical considerations associated with planning for a client's privacy and personal security. These considerations include the duty of confidentiality, the duty of competence, the duty of communication, conflicts of interest, the unauthorized practice of law, and representing a client with diminished capacity. Because the ethical duty most often associated with privacy planning is the duty of confidentiality, the balance of this paper focuses on a lawyer's duty to keep client information confidential. While a lawyer's ethical duties set minimum requirements, lawyers should strive to exceed these requirements by implementing best practices, as discussed below.

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387 The details of specific safe rooms are generally not disclosed as an added safety measure, but it appears Kenny Rogers' mansion included such a safe room, among other security measures. *See* Cheryl P., *Inside Kenny Rogers' $46 Mil Mansion: Panic Room is Intriguing Feature Inside Massive Bel-Air Estate*, INQUISITR, Mar. 29, 2015, available at http://www.inquisitr.com/1964020/inside-kenny-rogers-46-mil-mansion-panic-room-is-intriguing-feature-inside-massive-bel-air-estate/.

388 The super-yacht "Harbour Island" includes a master suite, which doubles as the ship's panic room. The room includes ballistic glass to protect against bullets, two to three days' worth of food, a communications system to alert authorities, and command operations to maintain control of the yacht. *See* CNBC.COM, *Dangerously Rich Billionaire Super Security*, http://www.cnbc.com/2012/06/06/Billionaire-Security:-Ultimate-Protection-Measures.html?slide=10.

389 *See* Mark Battat, *Household Employment Best Practices*, WEALTHY & WISE (Aug. 2009).

390 *See, e.g.*, Ian Mohr, *Mark Zuckerberg Hired 16 Bodyguards To Protect Him at Home*, PAGESIX, Feb. 14, 2016, available at http://pagesix.com/2016/02/14/mark-zuckerberg-has-16-bodyguards-at-his-home/; Clayton Sandell & Dan Lieberman, *Hollywood's Bodyguard's: Inside the World of Celebrity Security Detail*, ABC NEWS, Feb. 22, 2013, available at http://abcnews.go.com/Entertainment/hollywoods-bodyguards-inside-world-celebrity-security-detail/story?id=18567443.

A. Ethical Duty of Confidentiality

Lawyers are required to keep client information confidential, not only because of the attorney-client privilege but also as a result of the ethical duty of confidentiality.[391] When planning for a client's privacy and personal security, it is important to distinguish between these two rules. The attorney-client privilege was born in the laws of evidence and is found in state statutes and common law. By contrast, the ethical duty of confidentiality is set forth in each jurisdiction's professional rules of conduct. While both rules relate to privacy and protecting confidential communications with a lawyer, there are critical differences between how they are applied and what they cover. As a general rule, all communications with clients are confidential, but only a subset of those communications may be covered by the attorney-client privilege.

1. Attorney-Client Privilege

Generally, the attorney-client privilege prevents a lawyer from disclosing a confidential communication (including documents or other records that contain a communication) made by a client in confidence for the purpose of obtaining legal advice from a legal professional unless the client consents.[392] The scope of the attorney-client privilege is narrow and does not extend to all communications. Communications with third parties may still be privileged, but only if such communication facilitates the rendering of legal advice.[393]

2. Ethical Duty of Confidentiality

The ethical duty to maintain client confidentiality is much broader than the attorney-client privilege. The ethical duty protects all communications and information passing between client and lawyer, as well as other communications, documents, or information related to the representation, regardless of whether a third party or the client provided such information. Section 1.6 of the Model Rules provides that a lawyer may not disclose information regarding a client's representation unless:

- the client gives informed consent;
- disclosure is impliedly authorized in order to carry out the representation; or
- disclosure is necessary:
    - to prevent reasonably certain death or substantial bodily harm;
    - to prevent a crime or substantial injury, to secure legal advice in compliance with the Model Rules, to establish a defense or claim, or to comply with a court order or state law;

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391 MODEL RULES OF PROF'L CONDUCT R. 1.6.

392 8 WIGMORE ON EVIDENCE § 2292 (2003).

393 If a client has died, practitioners should use extra caution when discussing privileged matters with third parties. At least one jurisdiction has held that communications with third parties after a client's death are not covered by the attorney-client privilege. *See* Adler v. Greenfield, 990 N.E.2d 1219 (Ill. App. 1st 2013).

- to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

- to secure legal advice about the lawyer's compliance with the Model Rules;

- to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

- to comply with other law or a court order; or

- to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.[394]

3. Application upon a Client's Death

The general rule is that both the attorney-client privilege[395] and a lawyer's duty to maintain client confidentiality[396] continue after a client's death. There are exceptions to both rules, however, that may apply in a number of situations depending on applicable state law. For example, either the attorney-client privilege or the ethical duty of confidentiality may not apply if:

- a lawyer's disclosure is in the best interests of the client's estate or furthers the deceased client's interests;[397]

- a claim is made in connection with a will contest;[398]

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394 MODEL RULES OF PROF'L CONDUCT R. 1.6.

395 *See* Swindler & Berlin v. United States, 524 U.S. 399 (1998); *see also* 64 A.L.R. 185 and cases cited therein.

396 *See* Swindler & Berlin v. United States, 524 U.S. 399 (1998); *see also* Barry F. Spivey, *Post-Death Confidentiality of Estate Planning Communications Between Attorney and Client*, FLA. B.J. (Apr. 2003) (noting that "the answer appears to be, uniformly, yes" in response to the question, "Does the Lawyer's Ethical Duty of Confidentiality survive the client's death?"); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 111 cmt. c (stating that a "duty of confidentiality extends . . . beyond the death of the client"); MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 21; ACTEC, *Commentaries to Model Rules*, § 1.6 (3rd ed. 1998); South Carolina Bar Ethics Advisory Committee, *Ethics Advisory Opinion* 12-10, July 10, 2012; Pennsylvania State Bar, *Opinion* 2012-027 (2012).

397 *See* FLA. RUL. PROF'L CONDUCT R. 4-1.6 (permitting disclosure to serve the best interest of the client; unless the decedent expressly prohibited the disclosure prior); ACTEC, *Commentaries to Model Rules*, § 1.6 (3rd ed. 1998).

398 *See, e.g.*, TEX. R. EVID. § 503(d)(2) ("The privilege does not apply . . . [i]f the communication is relevant to an issue between parties claiming through the same deceased client."); *see also* Eixholtz. v. Grunewald, 21 N.W.2d 914, 917 (Mich. 1946).

- a personal representative of a deceased client's estate waives the attorney-client privilege and doing so is in the best interest of the estate;[399] or

- a court order mandates disclosure.[400]

B. Law Firm Best Practices

This paper has discussed various ethical duties that may apply when assisting a client who seeks to protect privacy and personal security. While these ethical duties should serve as a baseline, lawyers should adopt best practices to protect client information and data. These measures are a core business issue that impacts a law firm's ability to attract and retain clients.

Clients are becoming more concerned about the threat of cyber-attacks and many are demanding that law firms take measures to improve their cybersecurity. It is no longer just a technical issue—cybersecurity is a practical issue that requires law firms to budget and plan for the prevention of and reaction to potential data breaches.[401] Effective cybersecurity requires cooperation among the firm's technical and non-technical personnel regarding (i) information that needs to be protected, (ii) the type and extent of the risks to that information, (iii) the firm's appropriate risk level, and (iv) the amount of time, money, and resources the firm is willing and able to commit to ensure that level of risk.[402]

There are several measures a law firm can take to ensure that it is adequately protecting its clients' confidential information and data. Some are fairly easy to implement, while others require more collaboration with third party service providers. Adopting and adhering to best practices is critical to the success of any law firm.

1. Best Practices for All Law Firms

Listed below are recommended best practices that all law firms should consider implementing to protect their clients' privacy:

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399 *See, e.g.*, OHIO REV. CODE ANN. § 2317.02; TEX. R. EVID. § 503(c) ("The person who was the client's lawyer or the lawyer's representative when the communication was made may claim the privilege on the client's behalf – and is presumed to have authority to do so."); *see also* In re Estate of Colby, 723 N.Y.S.2d 631, 698 (Surr. Ct. New York County 2001) ("Since the client could have waived the privilege to protect himself or to promote his interest, it is reasonable to conclude that, after his death, his personal representative stands in his shoes for the same purpose."); *Waiver of Attorney-Client Privilege by Personal Representative or Heir of Deceased Client or by Guardian of Incompetent*, 67 A.L.R.2d 1268. *But see* McKinney v. Kalamazoo-City Bank, 221 N.W. 156 (Mich. 1928) (holding that a personal representative may only waive the privilege to protect the estate, but may "not for the dissipation or the diminution thereof").

400 *See* Paley v. Superior Ct. of Los Angeles, 137 Cal.App.2d 450, n.4 (Cal. App. 1956) (ordering the attorneys who drafted a Will to answer questions related to the substance of communications regarding the disposition of the decedent's property, the nature and extent of the decedent's property, and the capacity of the decedent, all over the petitioner's privilege objection).

401 Carly Okyle, *The Top 3 Mistakes Businesses Make After a Hack*, ENTREPRENEUR, Oct. 9, 2015, available at https://www.entrepreneur.com/article/252281.

402 Joseph M. Burton, *4 Steps to Getting Serious About Law Firm Cybersecurity*, LAW PRACTICE TODAY, Sept. 15, 2014, available at http://www.lawpracticetoday.org/article/4-steps-getting-serious-law-firm-cybersecurity/.

- *Do Not Discuss Work in Public*. To avoid sharing confidential client information, law firms should instruct personnel to refrain from talking about clients outside of the office.

- *Be Careful with Social Media and Speaking Engagements***.** While blogging, tweeting, or speaking about a lawyer's expertise and work experiences can facilitate business development, it can also constitute an improper disclosure of client information that may result in the loss of a client.

- *Educate Law Firm Personnel.* Educating personnel regarding potential data security threats is important to protect confidential client information.

- *Data Encryption.* Encryption can scramble data using a key so that the original data cannot be recovered without the key. Law firms should consider encrypting client data stored on any device that leaves the office, is stored in the cloud, or is transmitted in a way that is easy to hack. The manner and type of encryption will vary based on the perceived threat, although ideally encryption should be used for mobile devices, email, and firm communications that transfer files.[403]

- *Passwords.* Strong passwords are important to securing law firm data. As discussed in Part XII.C, law firm personnel should use passwords that contain a mix of letters, numbers, and symbols.[404] Law firm personnel should be required to change their passwords regularly and, after a set amount of inactivity, hardware, including computers and phones, should automatically log off.

- *Two-Factor Authentication.* With greater mobility, more law firm personnel are using their own devices to perform work activities. In response, law firms should take additional measures to secure confidential information. To protect client data and reduce the risk of a security breach, a law firm should consider using two-factor authentication to add a second layer of security and verification to the log-in procedure. Without two-factor authentication, a user signs into websites, applications, and programs with a username and password. If a user's password is compromised, however, the account is vulnerable to a third party. Two-factor authentication verifies a user's identity by utilizing a second factor (such as a code sent to the user's e-mail or mobile device) that prevents anyone but the user from logging into the environment, even if they have obtained the user's password.[405]

- *Minimize Use of Flash Drives and CDs.* To minimize the risk of loss or theft of confidential data, law firms should consider limiting the number of firm personnel who are permitted to copy firm data onto flash drives or CDs.

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403 *Id.*

404 Sam Glover, *Passwords: A User Guide for Lawyers and Law Firms*, LAWYERIST.COM, Sept. 24, 2015, available at https://lawyerist.com/73015/passwords-guide-lawyers/.

405 ABACUS DATA SYSTEMS, *What is Two-Factor Authentication?*, July 7, 2015, available at http://www.abacuslaw.com/resources/blog/what-two-factor-authentication.

- *Establish an Email and Internet Usage Policy.* Law firms should adopt, monitor, and enforce policies regarding the use of email and internet for personal purposes.[406]

- *Create a Device Security Policy.* Lost devices can create opportunities for hackers to access secure networks, transmit viral emails, and steal valuable client data. Law firms should implement a policy regarding the use of devices and the steps that should be followed in the event of a device is lost or stolen. The steps should include notifying the law firm immediately and wiping the device remotely to minimize the risk of a data breach.[407]

- *Implement and Review Contracts with Third Party Service Providers.* Third party service providers may threaten a law firm's cybersecurity. Law firms should review third party contracts to ensure that the firm is protected if an incident occurs on the third party's systems.[408] The law firm should also consider developing contractual security requirements for third party vendors, cloud providers, or any other entity that interacts with or connects to the law firm's network, including notification by the third party in the event of a breach.[409]

- *Establish a Formal Records Retention Policy.* Law firms should create a formal records retention policy to establish guidelines regarding what data should be retained and what data should be eliminated.[410]

- *Establish an Incident Response Plan.* Implementing an incident response plan is a critical cybersecurity measure. The plan should specify who will be alerted, within what time frame they will be notified, what type of documentation pertaining to the incident should be retained, who has authority to discuss the incident, and who will make investigatory decisions. As discussed above, a lawyer may have an ethical duty to advise a client regarding a breach of the client's data. Failure to disclose the breach may expose the law firm to additional liability if the client's data is further compromised.[411]

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406 John W. Simek & Sharon D. Nelson, *Essential Law Firm Technology Policies and Plans*, A.B.A. LAW PRACTICE MAGAZINE: A.B.A. TECHSHOW TIPS SPECIAL ISSUES, March/April 2012, available at http://www.americanbar.org/publications/law_practice_magazine/2012/march_april/hot-buttons.html.

407 Daryn Teague, *5 Cybersecurity Best Practices for Law Firms*, LEXISNEXIS BUSINESS OF LAW BLOG, Oct. 14, 2015, available at http://businessoflawblog.com/2015/10/cybersecurity-law-firms/.

408 *Id.*

409 Jody R. Westby, *Cybersecurity & Law Firms: A Business Risk*, A.B.A. LAW PRACTICE MAGAZINE: THE BIG IDEAS ISSUE, July/August 2012, available at http://www.americanbar.org/publications/law_practice_magazine/2013/july-august/cybersecurity-law-firms.html.

410 Noelle Price, *Worst Mistakes and Best Practices in Law Firm Cybersecurity Measures*, LAW CROSSING, http://www.lawcrossing.com/employers/article/900046499/Worst-Mistakes-and-Best-Practices-in-Law-Firm-Cybersecurity-Measures/.

411 Jody R. Westby, *Cybersecurity & Law Firms: A Business Risk*, A.B.A. LAW PRACTICE MAGAZINE: THE BIG IDEAS ISSUE, July/August 2012, available at http://www.americanbar.org/publications/law_practice_magazine/2013/july-august/cybersecurity-law-firms.html.

- *Cyber Liability Insurance*. Law firms should consider purchasing cyber liability insurance, which may provide coverage in the event of a breach.

2. Enterprise Security Program

Many corporate clients require law firms to complete lengthy questionnaires detailing their cybersecurity protections and perform on-site inspections.[412] With clients requiring greater cybersecurity measures, data security is now an enterprise issue, and law firms should develop and maintain a quality cybersecurity program. Many large law firms employ a chief information security officer ("CISO") and staff to establish and manage what is known as an enterprise security program ("ESP"). Creating and maintaining an ESP at a law firm requires the following:[413]

- *Form an ESP Team*. A team composed of practice group leaders, office management, finance, accounting, human resources, information technology, communications, and security personnel should regularly discuss, evaluate, and address cybersecurity issues.

- *Establish Privacy and Security Policies*. Law firms should adopt and maintain high-level policies regarding data privacy and security. Policies could address mandatory use of encryption, rules regarding remote access, and use of accounts, mobile devices, flash drives, laptops, Wi-Fi "hotspots," clouds, and social networking sites.

- *Inventory the Firm's Software and Data Systems*. Law firms should inventory its software systems and data and create categories of risk. Client data that may be more sensitive than other data may be maintained on a separate server with enhanced security protections.

- *Identify Important Points of Contact*. Law firms should identify specific employees at each office to coordinate information with law enforcement, cybersecurity experts, Internet service providers, and communications companies.

- *Third-Party Testing*. Law firms should perform third-party vulnerability, penetration, and malware scans and tests. Additionally, law firms should utilize antivirus software and other specialized services to help detect malware and sophisticated attacks.

- *Software Code Reviews*. Law firms should conduct software code reviews on Web applications and custom code to evaluate weaknesses.

- *Implement Proper Security Technologies*. Law firms should implement necessary security technologies for encryption, intrusion prevention, detection, and monitoring.

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412 Matthew Goldstein, *Law Firms are Pressed on Security for Data*, N.Y. TIMES, Mar. 26, 2014, available at http://dealbook.nytimes.com/2014/03/26/law-firms-scrutinized-as-hacking-increases/?_r=0.

413 *See id.* (summarizing Julia H. Allen & Jody R. Westby, *Governing for Enterprise Security (GES): Defining an Effective Enterprise Security Program (ESP)*, CARNEGIE MELLON, SOFTWARE ENGINEERING INSTITUTE, March 2007, available at http://resources.sei.cmu.edu/asset_files/WhitePaper/2007_019_001_54378.pdf.

- *Security Controls*. Law firms should identify and document security controls and establish security configuration settings, access controls, and login functions.

- *Develop Security Policies and Procedures*. Security policies and procedures should be established to support security plans and technologies.

- *Formalize Cybersecurity Policies*. Law firms should adopt written cybersecurity policies. These policies may address responses to a breach, use of computers and mobile devices, access to firm networks, and storage of firm data.

- *Educate and Train Law Firm Personnel*. Law firms should educate personnel regarding potential data threats.

- *Incident Response Plans*. Law firms should develop and test incident response plans to ensure business continuity.

- *Third Party Contractual Requirements*. As discussed above, law firms should establish contractual security requirements for third party vendors, cloud providers, or other entities that interact with or connect to the firm's network. Third parties should be required to notify the law firm of any breach within a specified time period.

- *Ongoing Reviews and Updates*. Law firms should regularly review the ESP and update it as necessary.

XV. Conclusion

We live in a public world, where anyone with a computer, smartphone, or tablet can access an unsettling amount of personal information in a very short amount of time. Clients have become increasingly concerned with protecting their privacy and personal security, and often look to their professional advisors for assistance. The goal of this paper is to equip advisors with practical solutions to secure their clients' privacy and personal security, while navigating the ethical duties that such solutions may implicate.

EXHIBIT A

SAMPLE ANONYMOUS DONATION AGREEMENT

_____, 20___

_____
Executive Director
_____ Charity
_____
_____

Re: Anonymous Donation

Dear _____:

It is my pleasure to inform you that an anonymous donor (the "Donor") has made a decision to make a $_____ grant to _____ Charity ("Grantee") subject to Grantee's acceptance of the terms and conditions set forth in this agreement.

The following terms and conditions apply to this grant:

1. Of this grant, $_____ shall be used for _____. The remaining portion of this grant shall be used for _____. The grant shall be used over a period of _____. Grantee agrees to limit expenditures to these purposes and timeframe.

2. The cash comprising this grant may be merged for investment purposes with the general investment assets of Grantee, but the grant will be used only for the purposes set forth in paragraph one of this letter.

3. No publication or disclosure regarding this grant shall be made without the Donor's prior written approval. For this purpose, Grantee should communicate with the undersigned to obtain any such approval. In addition, Grantee agrees to forward to me copies of any news releases, published materials or media articles mentioning this grant which come to Grantee's attention. The Donor retains the right to release information regarding this grant as it sees fit.

4. Should the fulfillment of the purpose of this grant become inappropriate or impractical, Grantee will notify me, I will consult with the Donor, and the Donor may, at its option, re-designate the grant for another purpose.

5. Grantee shall furnish me with written reports for the period from the date of the grant through _____ and for the six-month period ending _____ outlining the specific use of funds, including an accounting of all funds expended and planned future use of funds. Such report should be sent to my attention at the following address: _____, _____ Law Firm, _____.

6. Grantee agrees to keep its financial and other records so that they adequately show that the funds were used exclusively for the grant's purposes.

7. Grantee represents and warrants as follows: (i) Grantee currently is a public charity as described in Section 501(c)(3) of the Internal Revenue Code of 1986 (not a private foundation or a private operating foundation); and (ii) receipt of this grant will not adversely affect Grantee's current status.

8. Grantee agrees to promptly furnish me with any information concerning a proposed change in Grantee's current classification as a public charity.

9. Grantee agrees to supply me with such information as the Donor may require to permit the review of the use made of these grant funds and their effect upon the public charity status of Grantee.

10. Acknowledgment of Grantee's agreement to the terms and conditions set forth in this agreement will be made by a duly authorized officer of Grantee as provided below.

11. Grantee agrees to provide contemporaneous written acknowledgement of the contribution as provided in Section 170(f)(8) of the Internal Revenue Code of 1986.

Assuming the terms and conditions of this grant are acceptable, an authorized officer of Grantee, should execute both copies of this agreement and return one copy to me.

Very truly yours,

_____

Enclosure

As _____ of _____ Charity, I certify that I am duly authorized to bind the organization to the terms of this agreement, and do hereby agree to accept the terms set forth above this ____ day of _____, 20___ on behalf of _____ Charity.

_____ CHARITY

By: _____
Name: _____
Title: _____

EXHIBIT B

SAMPLE NON-DISCLOSURE CLAUSE FOR AN EMPLOYMENT CONTRACT

CONFIDENTIAL INFORMATION

1.1 **"Confidential Information"** means any and all non-public, confidential or proprietary information that Employee encounters, learns, develops or derives in contemplation of or in the course of performing the services or otherwise in contemplation of or in connection with this Agreement. Such information includes customer and supplier lists and related information; contact information for Client and his affiliates; Client's personal information and social plans; Client's financial information; Client's medical information; business plans, projections and strategies; marketing plans, proposals, and strategies; contracts; salary, compensation, and personnel information; technical and/or financial information; and all non-public financial data of Employer. **"Confidential Information"** does not include any information that is or becomes generally available to the public without breach of this Agreement through no fault of Employee.

1.2 Employer and Employee agree that Employee will be provided access to certain Confidential Information in connection with this Agreement. Employee acknowledges that the right to continued access to Confidential Information and access to additional Confidential Information is valuable consideration to which he otherwise would not be entitled. Employee agrees to (a) hold in strict confidence all Confidential Information, (b) use the Confidential Information solely to perform or to exercise Employee's rights under this Agreement, and (c) not to transfer, display, convey or otherwise disclose or make available all or any part of such Confidential Information to any person or entity not authorized by Employer to receive such Confidential Information. Employee will not use (except as expressly provided in this Agreement) or disclose Confidential Information without the prior consent of Employers. Employee shall take appropriate action and utilize the same efforts to safeguard the Confidential Information as it utilizes to protect its own trade secrets or proprietary information.

1.3 Employee may disclose the Confidential Information in response to a valid court order, law, rule, regulation (including without limitation any securities exchange regulation), or other governmental action provided that (a) Employee is notified in writing prior to disclosure of the information, and (b) Employee assists Employer in any attempt by Employer to limit or prevent the disclosure of the Confidential Information.

1.4 Employee obtains no right, title, interest, or license in or to any of the Confidential Information except for the rights set forth in this Agreement. Upon the termination of this Agreement or upon the earlier request of Employer, Employee shall (a) at his own expense, (i) promptly return to Employer all information that is in tangible form (and all copies thereof) that is the property of Employer or that contains any Confidential Information (collectively, the **"Material Information"**), or (ii) upon written request from Employer, destroy such Material Information and provide Employer with written certification of such destruction, and (b) cease all further use of any Material Information, whether in tangible or intangible form.

1.5 Employee may in the course of his employment conceive, develop or contribute to material or information related to the business of the Employer, including, without limitation, software, technical documentation, ideas, inventions (whether or not patentable), hardware, know-how, marketing plans, designs, techniques, documentation and records, regardless of the form or media, if any, on which such is stored (referred to in this Agreement as "**Proprietary Property**"). Employer shall exclusively

own all Proprietary Property which Employee conceives, develops or contributes to in the course of his employment and all intellectual and industrial property and other rights of any kind in or relating to the Proprietary Property, including but not limited to all copyright, patent, trade secret and trade-mark rights in or relating to the Proprietary Property. For greater certainty, Employee hereby assigns to Employer any and all rights that Employee may have or obtain in or to the Proprietary Property. Material or information conceived, developed or contributed to by Employee outside work hours on the Employer's premises or through the use of the Employer's property and/or assets shall also be Proprietary Property and be governed by this Agreement if such material or information relates to the business of the Employer. The Participant shall keep full and accurate records accessible at all times to the Employer relating to all Proprietary Property and shall promptly disclose and deliver to the Employer all Proprietary Property.

1.6 Employee agrees that Employee will, if requested from time to time by the Employer, execute such further reasonable agreements as to confidentiality and proprietary rights as may be reasonably required to protect Confidential Information or Proprietary Property.

1.7 Regardless of any changes in position, salary or otherwise, including, without limitation, termination of this Agreement, unless otherwise stipulated pursuant to the terms hereof, Employee will continue to be subject to each of the terms and conditions of this Section and any other(s) executed pursuant to the preceding paragraph.

EXHIBIT C

SAMPLE NON-DISCLOSURE CLAUSE FOR PREMARITAL AGREEMENT

Confidentiality. The parties recognize and agree that it is in each party's best interests to keep and maintain this Agreement (including, without limitation, the Schedules) in strict confidence as between themselves during their marriage and thereafter, and further that irreparable harm would be caused from the disclosure of this Agreement and its provisions. The parties hereby agree that the provisions of this Agreement, and in particular, the Schedules attached hereto, shall not be disclosed to any third party or be used for any purposes by the parties or their attorneys, except in connection with the enforcement of the Agreement or for estate planning purposes, without the prior written consent of the other party, or an order to such effect by a court of competent jurisdiction, or incident to any divorce or similar proceedings.

EXHIBIT D

JUSTIN BIEBER'S PURPORTED NON-DISCLOSURE AGREEMENT FOR PARTY ATTENDANCE[414]

Justin Bieber
c/o Myman Greenspan Fineman Fox Rosenberg & Light, LLP
11601 Wilshire Blvd., Ste. 2200
Los Angeles, CA 90025
Attn: Aaron D. Rosenberg, Esq.

Dear Mr. Bieber:

I, the undersigned, acknowledge that I am attending a private event and in the course thereof have been granted or will gain access to information and other material concerning you and your friends, family, business associates, business entities, affiliates and other individuals and entities related thereto (unless noted otherwise, all such individuals and entities, including you, are hereinafter collectively referred to as the "Persons"). I acknowledge that the privacy of the Persons is highly valued and that all efforts are made to maintain confidentiality with respect to all information and other material of every kind concerning the Persons. Accordingly, for good and valuable consideration, the receipt of which I hereby acknowledge, I hereby agree as follows:

1. All information concerning the Persons and their business and personal activities, including, without limitation, the Persons' legal and financial affairs (including, without limitation, compensation paid to me by the Persons), the terms of any agreement between me and the Persons, the Persons' physical health, or the philosophical, spiritual or other views or characteristics of the Persons, along with any and all photographs, likenesses, tapes, films, videos and other recordings (including any negatives, prints or copies thereof) related thereto, regardless of how and when acquired, and whether acquired within the scope of the services to be rendered by me, shall be deemed to be confidential, private, secret and sensitive information (collectively "Confidential Information"). Notwithstanding anything to the contrary contained herein, I shall not photograph or record you (or the Persons) without your prior written consent in each instance. All Confidential Information shall remain the Persons' or the Persons' designees' sole and exclusive property, free of any claim or interest by me or any third party on my behalf.

2. Without limiting the foregoing, neither I nor any third party on my behalf shall at any time use or disclose, directly or indirectly, to anyone other than your authorized representatives any Confidential Information. Without limiting the generality of the foregoing, I shall not, without your prior written consent in each instance, publish, directly or indirectly, or cause or induce the publication to a third party of, any Confidential Information, including, without limitation, texting, "tweeting," giving any interviews, making statements to the press, or writing, preparing or assisting in the preparation of any books, articles, programs, press releases or any other oral or written communications. I shall not remove, reproduce, summarize, copy, excerpt, distribute, sell, exploit or utilize in any manner

[414] This agreement was obtained from tmz.com and is reprinted here without alteration. *See* TMZ, http://tmz.vo.llnwd.net/o28/newsdesk/tmz_documents/1117_bieber_doc2.pdf. We make no representations whatsoever regarding the legality or effectiveness of this agreement.

whatsoever any Confidential Information without your prior written consent in each instance. Furthermore, I agree that I shall not make any derogatory or negative statements with respect to the Persons, or otherwise engage in any act that may harm or disparage or cause to lower in esteem the Persons' reputation or public image.

3. Subject to the terms of any separate services agreement between you and I, you and your licensees, successors and assigns exclusively own, throughout the universe, as a so-called "work for hire," the entire right, title and interest (including the copyright and any and all renewal and extension rights) in and to the results and proceeds of my services for you. If you are deemed not to own such results and proceeds as a so-called work-for-hire, then I hereby assign all of the foregoing rights to you.

4. I hereby acknowledge that it would be extremely difficult, if not impossible, to ascertain the monetary damages that would be caused by any breach by me of the terms hereof and therefore agree that any breach of the foregoing confidentiality provisions shall be compensated by a payment of Three Million Dollars ($3,000,000) and shall be subject to injunction by any court of competent jurisdiction, without limitation of the other remedies to which you may be lawfully entitled. In the event that the foregoing "liquidated damages" provision shall be held unenforceable or in the event that I breach any other provision hereof, I understand that I shall be held liable for any and all damages suffered by the Persons.

5. I further acknowledge and agree that the terms of this agreement shall be binding on my successors, assigns, attorneys, agents, licensees, past and present officers, directors and any third parties furnished, engaged, affiliated with or otherwise under my supervision and shall cause each of them to comply with the terms and conditions hereof.

6. This agreement shall be governed by and construed under the laws of the State of California. This agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and cannot be modified except by a written instrument signed by you and I. No modification or termination of the agreement shall affect or impair any of your rights or my obligations hereunder. Any disputes between the parties hereto shall be subject exclusively to the jurisdiction of the state and federal courts sitting in the County of Los Angeles, the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the date first set forth above.

Yours truly,

Signed: _____
Print: _____
SSN: _____
Email: _____

ACKNOWLEDGED AND AGREED:

By: _____
On behalf of Justin Bieber

EXHIBIT E

SAMPLE NON-DISPARAGEMENT CLAUSE

Non-disparagement. Neither party, nor its affiliates, successors or assigns, shall, at any time, say, publish or cause to be published or do anything that casts the other party and, if applicable, its affiliates, stockholders, managers, members, officers, directors, representatives, partners, or employees in an unfavorable light, or disparages or injures the good will, personal or business reputation of the other party and, if applicable, its affiliates, stockholders, managers, members, officers, directors, representatives, partners, or employees, or disparages or injures the other party's relationship with any other party in general, or the good will or business reputation of the other party and, if applicable, its affiliates, stockholders, managers, members, officers, directors, representatives, partners, or employees.

EXHIBIT F

SAMPLE ARBITRATION CLAUSE
FOR AN EMPLOYMENT AGREEMENT

Arbitration. In the event of a claimed breach of this Agreement by any of the parties hereto, except for a dispute where the remedy sought is specific performance or another form of extraordinary equitable relief, such dispute shall be submitted to binding arbitration in [NAME OF COUNTY] County, [STATE] in accordance with the terms of this Section. The party who is alleging that a dispute exists shall send a notice of such dispute to all other parties to this Agreement, setting forth in detail the dispute, the parties involved and the position of such party with respect to the dispute. If agreement as to the matters detailed in the preceding sentence is not reached within twenty (20) business days after receipt of the notice, then, within ten (10) business days thereafter, counsel for the parties shall mutually select an arbitrator who is experienced in [commercial] arbitration. If counsel for the parties is unable to agree upon the selection of the arbitrator, the arbitrator shall be selected by the American Arbitration Association (the "AAA"). Any disputes as to the rules for conducting the arbitration shall be resolved by reference to the AAA rules for [commercial] arbitration by the arbitrator. The arbitrator shall schedule a hearing on the disputed issues within one-hundred twenty (120) days after his or her appointment, and the arbitrator shall render his or her decision after the hearing, in writing, as expeditiously as possible, and shall deliver copies of such decision to the parties. A default judgment may be entered against any party who fails to appear at the arbitration hearing. Such decision and determination shall be final and unappealable and may be filed as a judgment of record in any jurisdiction designated by the successful party. The parties to this Agreement agree that this paragraph has been included to rapidly and inexpensively resolve any disputes among them with respect to the matters described above, and that this paragraph shall be grounds for dismissal of any court action commenced by any party with respect to a dispute arising out of such matters.

EXHIBIT G

SAMPLE ARBITRATION CLAUSE FOR A TRUST AGREEMENT [BASED ON ARBITRATION CLAUSE IN *RACHAL V. REITZ*]

Arbitration. Despite anything herein to the contrary, I intend that as to any dispute of any kind involving this Trust or any of the parties or persons concerned herewith (e.g., beneficiaries, Trustees), arbitration as provided herein shall be the sole and exclusive remedy, and no legal proceedings shall be allowed or given effect except as they may relate to enforcing or implementing such arbitration in accordance herewith. Judgment on any arbitration award pursuant hereto shall be binding and enforceable on all said parties. This agreement shall extend to and be binding upon the Grantor, Trustees, and beneficiaries hereto and on their respective heirs, executors, administrators, legal representatives, and successors.