

# Planning for Privacy in a Public World

Houston Business and Estate Planning Council

Houston, Texas

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# Overview of Discussion

- Common Issues
- Cybersecurity
- Personal Security
- Privacy Planning Strategies
- Ethical Duties
- Best Practices

# Common Issues

- Basic right to privacy
- Privacy planning will only increase
- Absolute privacy difficult to achieve
- Proactive planning is best
- Consider practical impact
- Cross-disciplinary approach
- Comply with state and local laws
- Elevate ethical duties into best practices

# Cyber-Attacks

- Cyber-attacks increasing
- High profile attacks
  - Businesses – Anthem, Yahoo, Equifax, Facebook
  - Global attacks – NY Fed Reserve Bank, “WannaCry” ransomware
  - Service Providers – DLA Piper
- Rescator
- Dark Web

# Cybersecurity Tips

- Basic tips
  - Password protection
  - Email security
  - Social media
  - Smart technology
  - Disposal of electronic devices
  - Removing information from the internet
- Retain a cybersecurity specialist

# Personal Security

- Big risk for high profile clients
- Basic tips
  - Keep a low profile
  - Background investigations vs. background checks
- Retain a personal security specialist
  - Home security systems
  - Bodyguard services

# Revocable Trusts

- Standalone Will becomes public record at death
- Pour-Over Will and Revocable Trust can preserve privacy during lifetime and upon death
  - Keeps estate plan private
  - Avoid public inventory of assets upon death
  - Exhibit can privatize portion of estate plan
- Other Privacy Benefits
  - Management tool for lifetime incapacity
  - Avoid ancillary probate
  - Facilitate anonymous ownership of assets

# Limiting Disclosure to Beneficiaries

- Silent Trusts
  - Beneficiaries have no knowledge of trust
  - Available in certain states (Delaware, Alaska, etc.)
  - Potential disadvantages
- Basis Consistency Rules
  - Risk over-disclosure to certain beneficiaries
  - Potential solutions:
    - Fund bequests with non-probate assets
    - Fund bequests with cash
    - Fund multiple revocable trusts
    - Liquidate assets or borrow cash to satisfy bequests
    - Set aside assets to fund bequests



# Titling Assets for Privacy

- Clients desire privacy for specific assets
  - Real estate
  - Major collections
  - Cars, boats, planes, etc.
  - Controversial assets
- Utilize revocable trust or business entity
  - Inconspicuous name
  - Third party trustee or manager
  - Practical considerations

# Charitable Planning

- Motivations for anonymous giving
- Methods to achieve privacy
  - Gifts through an agent
  - Gifts through a revocable trust or LLC
  - Gifts to a donor advised fund
  - Private foundation gifts to donor advised fund

# Political Contributions

- Motivations for anonymous contributions
- Contributions publicized by Federal Election Commission
- Consider a 501(c)(4) organization
  - Social welfare organization
  - Privacy of donor information
  - Tax consequences

# Financial Privacy Planning

- Motivations for financial privacy
- Tension with financial markets
  - Bank Secrecy Act
  - Know your customer rules
  - Financial Action Task Force
- General Recommendations
  - Use revocable trust or business entity
  - Confirm third party security measures
- Special situations
  - Insiders with public companies
  - Lottery winners

# Medical Privacy Planning

- Motivations for medical privacy
- HIPAA offers some protection
  - Limit disclosure to incapacity
  - Prohibit re-disclosure
- Non-disclosure agreements

# Non-Disclosure Agreements

- Common Uses
  - Employees
  - Professional advisors
  - Business partners
  - Medical care providers
  - Spouses
  - Social events

# Non-Disclosure Agreements

- Common NDA provisions
  - Definition of “confidential information”
  - Term of confidentiality
  - Exceptions to non-disclosure
  - Non-disparagement clause
- Enforcement
  - Remedies for breach
  - Alternative dispute resolution
  - Beware of “Streisand Effect”

# Public Litigation

- Dangers of public litigation
- Methods to avoid litigation altogether
  - Mediation
  - Arbitration
  - Alternative dispute resolution in estate planning documents
- Dealing with public courts
  - Private trials
  - Sealing civil court records
  - Document filing strategies
  - Criminal records



# Securing Privacy at Death

- Public nature of death
- Family spokesperson
- Funeral arrangements
- Obituaries
- Fiduciary access to digital information

# Ethical Duties

- Ethical duties associated with privacy planning
  - Confidentiality
  - Representing clients with diminished capacity
  - Competence
  - Communication
  - Conflicts of interest
- Be sure to avoid:
  - Assisting with a client's criminal activity
  - Unauthorized practice of law

# Best Practices

- General Recommendations
  - Do not discuss work in public
  - Be careful with social media and lectures
  - Educate personnel
  - Restrict access to estate planning files
- Tech-Based Recommendations
  - Implement cybersecurity policies
  - Data encryption
  - Two-factor authentication for remote access
  - Enterprise Security Program (ESP)

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