Heckerling 2017 - Report No. 13 (Thursday 1/12/17)

Included in this report are Expert Witnesses, Fiduciary Issues Related to Impact Investing, Protection From Malpractice Claims and Ethical Issues, and Planning for Corporate Executives.

The report on Expert Witnesses is a great read – very practical. The materials include engagement letters and other practical help.

The panel on Impact investing included the lawyer who, when at Treasury, promulgated the rules most relevant to the topic, and the professor who was the Reporter for the law governing charitable investments. Over the years, investment experts have figured out how to invest well while investing for good, so this topic is not just a far out idea. Read the report.

How to Structure Your Client Relationship to Protect Yourself from Malpractice Claims and Ethical Issues involves checking clients' backgrounds and drafting engagement letters. Checking clients' backgrounds is part of the anti-money laundering best practices described at an earlier session; see Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing. ACTEC is revising its sample engagement letters, which should be rolled out sometime in 2017. See http://www.actec.org/publications for ACTEC's commentaries on the ethics rules, as well as its sample engagement letters (2007 version is what is posted now).

The report on "The Art of Planning for the Corporate Executive" mentioned the topics that were covered but did not say much about what the panel said about the topics, except for the recommendation to have a durable power of attorney that provides flexible IRA decision-making (including Roth conversions).

Steve

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From: Joseph G. Hodges Jr.
Sent: Monday, January 16, 2017 5:00 PM
Subject: Heckerling 2017 - Report No. 13 (Thursday 1/12/17)

As we have done in January for the last twenty years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 51st Annual Philip E. Heckerling Institute on Estate Planning that is being held on January 9-13, 2017 at the Orlando World Center Marriott Resort and Convention Center in Florida. A complete listing of the proceedings and the Institute's 2017 brochure are available at www.law.miami.edu/heckerling and the listing of the proceedings was also published as part of **Introduction Part 2** that was distributed on 1/4/17.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Heckerling Reports Website, as we have since the 2000 Institute. Those Reports from 2000 to 2016 can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL http://mail.americanbar.org/archives/aba-ptl.html.

Editor's Comments: This Report #13 ends our coverage of the 3rd series of the Special Sessions that were held on Thursday afternoon, as the text of the report on SS 3-E about Expert Witnesses somehow either did not make it into or was accidentally deleted from Report #12 before it went out, so we are including it here below in full text. In addition, Report #12 ended with the report for Special Session 4-B, so included here are the reports for SS 4-C on Fiduciary Issues Related to Impact Investing, SS 4-D on Protection From Malpractice Claims and Ethical Issues, and SS 4-E on Planning for Corporate Executives.

The next Report #14 will cover the three concluding Friday morning Main Sessions of Heckerling 2017.

Now for the news of the day: In Report #9 we covered Prof. Susan Gary's Main Session about Impact Investing for Settlors and Beneficiaries, and in this Report #13 we cover Special Session 4-C on Fiduciary Issues Related to Impact Investing staring a panel consisting of Prof. Susan Gary, Benetta Jenson, Ruth Madrigal and John Tyler. While not directly related to this topic, many of us, especially as we approach our senior years in the practice of law, are beginning to consider doing probate and/or estate planning mediation work, either exclusively or as part of our hopefully reduced every day work loads. If so, there is a new ABA RPTE Section book that is a must read in this regard that was edited by Prof Gary entitled ***"Mediation for Estate Planners - Managing Family Conflict"*** (ABA 2016). Included in this book are 16 Chapters on various aspects of this subject, each one written by a different person, including such things as the Essential Elements, Practical Perspectives, Specific Applications, Family Business Succession Planning, Arbitration and Resources. RPTE Section Members are still entitled to get this book at discount price even though Heckerling 2017 closed last Friday.

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Thursday, January 12th, SPECIAL SESSIONS III - 2:00 to 3:30 pm

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Special Session 3-E
Arriving by Plane with a Briefcase — Lawyers Serving as Expert Witnesses [LIT]
Presenters: Louis A. Mezzullo, Robert W. Goldman, Margaret G. Lodise and Howard M. Zaritsky
Reporter: Patrick Duffey

The panel discussed an attorney serving as an expert witness in family disputes, attorney malpractice cases, trustee issues, and tax controversies.

Louis Mezzullo is a consulting partner with Withers Bergman in the firm's Rancho Sante Fe office. He has served as an expert in more than 25 cases, been deposed 16 times, and testified in trial 9 times.

Howard Zaritsky is an independent attorney, national commentator, and frequent tax and trust and estate witness. He commented that testifying as an expert is the most fun he has ever had in practicing law, which "perhaps gives you an idea of the rest of my practice."

Margaret Lodise is a partner in Sacks, Glazer, Franklin & Lodise. She currently chairs the ACTEC fiduciary litigation committee. In the past 15 years, she has been retained about 30 times as an expert and testified about 12 times. Her testimony typically deals with standard of care in attorney malpractice cases, but also fiduciary standard of duty for trustees.

Robert Goldman is a partner at Goldman, Felcoski & Stone, P.A.. He is the former chair of the ACTEC fiduciary litigation committee and of the Real Property Probate and Trust Law section of the Florida bar. He has more than 30 years experience as a trust and estates litigator. While he has occasionally served as an expert, most of his experience with expert testimony is in hiring experts.

Preliminary Issues

What Type of Matters to Accept? The most common matter for expert testimony will be legal malpractice. This is a significant firm-wide decision—is your firm willing to be involved in these matters in any capacity? To testify on behalf of plaintiffs (i.e. against practitioners)? If the answer is "yes," there will be many limitations on those who you may testify against. The panel cautioned that this group would include friends, colleagues who are in the same professional groups (such as bar groups or ACTEC), and business contacts for the firm. Louis Mezzullo, Howard Zaritsky, and Margaret Lodise are all very reluctant to testify on behalf of plaintiffs.

The size and nature of your firm will dictate many decisions. Robert Goldman begins his analysis of whether to take an expert testimony job with a question: "am I competent to handle this matter?" Goldman also considers that he will likely be testifying in front of a judge that he will later practice in front of. It is very important to make clear what you can and cannot testify to.

Breach of fiduciary duties are very common. Often, plaintiffs will turn to out-of-state experts out of necessity (i.e. business realities).

Some other important questions to consider:

- Who is hiring you (i.e. the underlying client)?
- Do you respect the attorneys hiring you?

- Will those attorneys allow you to do the job that you need to do?
- Have the attorneys really thought through the testimony they need from you or will they later ask you to testify to something new?

What should lawyers look for in an expert? Being an out-of-state expert can help address business considerations. When hiring an expert, try to match skill-set as closely as possible to circumstances. Sometimes you don't want a person who has significant expert witness experience because they can look like a "hired gun." Consider the past testimony and writings of the expert, especially as they relate to the topic of testimony.

Conflicts. Ethical conflicts will always exist. More often the conflicts are not strictly ethical, but rather arising from friendships and business relationships. Zaritsky thinks it's a good idea to include in the fee agreement a requirement that the attorney include a list of all involved parties, not just the litigants. For example, after taking on the engagement you may find that the matter indirectly involves a corporate fiduciary with whom you often work; that can create an awkward situation.

How to get paid? The panel all charges hourly. Generally, they all take a significant retainer to look into the background of the case. The panel mostly took a non-refundable deposit that is "deemed earned" when paid. This avoids issues with parties retaining an expert simply so that the other side cannot use them (a la Tony Soprano). Sometimes you will lose clients by making it non-refundable, but the panel unanimously felt that those are probably "bad clients."

Mezzullo charges a significantly higher hourly rate as an expert witness. Other panel members cautioned to keep in mind that a significantly higher rate might make it appear that you are a "hired gun." For that reason, Lodise charges her regular rate. Zaritsky does charge a higher hourly rate, but only for "combat pay"—i.e. deposition and trial testimony.

Goldman's principles for expert witness retainer agreements:
The trier of fact and other side will see the retainer agreement;
Try to define standard of care/expectations (i.e. the expert will answer questions, not ask them; the expert will get all appropriate material from the hiring attorneys);
Clarify that the expert will be giving his or her honest opinion, regardless of whether or not favorable to client;
Include language to attempt to prevent being conflicted out against client or attorney in other matters (due to information learned during testimony)

Zaritsky added that he likes to read all depositions, including fact witnesses, even if client does not want them to spend that money. This, he believes, helps him prepare for the case and strengthens him as an expert.

Mezzullo added that it is critical to make sure not to state what your opinion will be in your engagement together. He likes to start out as a consultant, then later become an expert if that's what they want. Why? As soon as you get designated an expert, everything you do becomes discoverable. Federal rules are relatively lenient, but some states are less lenient with respect to work product privilege.

On the other hand, Goldman points out that being a "consultant" makes you a member of the team, not an independent expert. In the past, he has used that to his advantage in cross-examining experts.

Robert Goldman insists on writing the engagement letter when he is hiring the expert.

Practical Considerations Once You Are Engaged

The panel discussed opining on the law, which is supposed to be the realm of the judge. As a practical matter, many judges are allowing the testimony. Mezzullo points out that it is more commonly allowed in bench trials than in jury trials. Goldman says that the law can be part of "reliable principles and methods" prong of Daubert.

Malpractice Insurance Considerations. Are you even practicing law? Mezzullo says he is practicing law as a consultant, but perhaps not as an expert. Zaritsky includes a requirement in his retainer agreement that the hiring attorney have at least as much malpractice insurance as he does so that he does not become the "deep pocket."

When do you hire an expert? It can take a significant amount of time to do your background research. Also consider time to prepare the witness.

Zaritsky noted that if you are hired by an insurance company, always increase your retainer as they often take a very long time to pay.

Personal Experiences of Panel as an Expert

Goldman shared a story about an expert that testified exactly contrary to what he had written years earlier in two separate law review articles. He asked him to read passages from those articles, but not to reconcile those positions.

Zaritsky points out that it is important to go back and reread all of your writings that are in any way related to the subject matter.

Lodise warns the hiring attorneys to be cautious about what they tell her about, for example, settlement positions and weaknesses of the case. This is due to her concern about the extent of privilege.

Goldman uses notes when reviewing case materials, but ends every single note in a question mark (?). If he's ever questioned on the notes, this allows him to point out that he was unsure of the position at that time.

Reports and notes can be an issue, especially draft reports. Zaritsky keeps a single ongoing draft, without printing off copies. He believes that technique would prevent the other side from getting prior drafts because, simply, there would be no prior drafts.

Goldman advised that, when serving as an expert, you need to get into mindset that you are going to take the time necessary. Don't give in to badgering and agree with the other side. Don't be a "smartass" in depositions.

Zaritsky agreed that it can be easy to get tired after a long day of testifying. His policy is that if the deposition begins in the morning, it ends at 3:30 no matter what.
Lodise advised to be sure, when testifying as an expert, that you don't go beyond what you've

been asked to opine on—you may not know other pieces of the case.

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Thursday, January 12th, SPECIAL SESSIONS IV - 3:50 to 5:20 pm

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Special Session 4-C
It's Hard to Be Good: The Fiduciary Issues, Strategies, and Drafting Considerations Related to Impact Investing [CHR][FIN]
Presenters: Benetta Park Jenson, Susan N. Gary, M. Ruth M. Madrigal and John Tyler
Reporter: Michelle Mieras

Impact investing is a hot topic in the investment world. More and more clients are interested in investing in a way to make the world a better place. This panel took a deeper dive into the Thursday Morning Main Session by Susan Gary about the fiduciary issues that arise when settlors, beneficiaries, endowments and foundations want to invest for social good. The panel also discussed strategies and drafting to accomplish the settlor's goals and beneficiaries' wishes, including alternatives to traditional trust structures, such as the highly publicized Chan Zuckerberg Initiative LLC. Here are some of the more significant highlights from this session.

The session kicked off with the panelists commenting that they have more and more clients asking about impact investing. Ms. Jenson stated that the analysis should always begin by assessing the character of the investor (i.e., individual, charity, trust) as that will affect the options.

Ms. Gary reviewed the terms often used in this area. She noted that inconsistency in the use of the terminology creates challenges. For purposes of this discussion, the panelists have agreed on some general terms.

"Socially Responsible Investing" (SRI) includes a number of strategies. Historically, it developed as negative screening, i.e., avoid investing in companies who participate in or fund negative activity. This commonly manifests in clients wanting to avoid tobacco and weapons. The interest eventually turned to identifying areas that we want to invest in, aka positive screens (e.g., solar energy). Another type of SRI that has developed is shareholder advocacy (proxy voting).

"ESG Investing" means integrating environmental, social, and governance factors into the robust financial analysis (not to be confused with the Atlanta rapper, Extra Street Gangsta). Ms. Gary stated that while some refer to these as non-financial factors, she disagrees; each has a financial impact. The premise of ESG is to use additional factors in investment decision-making to improve financial performance, while investing responsibly.

"Impact investing" has two distinct meanings. On one hand, it is becoming a generic term for this type of investing. Ms. Gary sees it as replacing SRI as the generic term. On the other hand, it can be used to describe investing in reference to a particular goal or the desire to have an impact on a certain cause.

The creation of new terms for the same underlying investment philosophy is due in part to marketing. Financial advisors create their own terms in order to brand what they do, adding to the confusion. Ms.Jenson stated that the disparate meanings attributed to these terms require us to

be cautious; take a step back to understand what the client's underlying goal is when they express interest in impact investing.

Ms. Gary discussed fiduciary duties in the context of impact investing. The duty of loyalty requires a fiduciary to act in the best interests of the beneficiary, or, in the case of a charity, in the best interests of the charitable mission. If the investment carries out the mission or purpose of the charity or trust, it is generally suitable, as long as the fiduciary is not sacrificing return by choosing that investment. In a private trust, unless there is a provision in the language of the trust, we must evaluate the investment under the Prudent Investor Rule.

The presenters used several case studies to examine the fiduciary issues related to impact investing. The first case study involved a private foundation dedicated to reversing the effects of discrimination and combating community deterioration" in a particular urban location. A for-profit company asked the foundation to extend a no-interest loan to it to develop a low income, high crime block of the city. The company has been unsuccessful locating commercial financing. The foundation's management feels the project will significantly further the foundation's charitable purposes.

Ms. Gary began the analysis by noting that when dealing with a charity, look at whether the entity is organized as a trust (subject to the Prudent Investor Act) or a charitable entity (governed by UPMIFA). In either case, the charity can look at its own purposes when making investment decisions. In the case study, the proposed loan is closely aligned with the purpose of the charity.

Ms. Madrigal examined the options: could this be a Program Related Investment (PRI)? PRIs must significantly further the charitable purpose of the foundation. PRIs also require that financial profit not be a significant purpose of the investment. The third requirement of a PRI is that no portion be used for lobbying or political activity. Today's discussion focused on the first two prongs. PRI status leads to tax benefits. For example, the PRI will not be considered a jeopardizing investment, and can be counted as equivalent to grants for purposes of meeting the 5% distribution requirements. However, the self-dealing rules will still apply to the foundation, even in the context of a PRI.

Ms. Madrigal noted that it is harder in reality to determine whether something significantly furthers the charitable purpose of an organization. The analysis is akin to a 501(c)(3) determination, and the uncertainty that exists there is also present with a PRI. In order to try to help people understand the PRI requirements, final regulations with nine new examples were issued in April 2016 which attempt to cover a wider scope of exempt purposes, e.g., scientific research, environmental deterioration, arts and education.

It is similarly difficult to determine whether there making money is a significant purpose. This is a facts and circumstances determination made (and documented!) at the time the investment is made. Note that the investment's subsequent success does not affect the initial purpose. The more similar the loan is to a commercial loan, the more likely the IRS will think it is set up to serve a financial interest.

Ms. Madrigal offered an example of a PRI's impact. A community needs child care, and the existing child care needs a new building. A grant could be given to construct a new child care center. Alternatively, a no-interest loan could be made to have a building constructed. The child care center could then obtain a commercial loan using the building as collateral, and pay the

money back to the PRI, which could lend it out again. Over time, that same money could have much greater impact than one grant.

Variations on the case study were used to emphasize the effect of certain changed facts. Additional case studies were examined where the investor was first an individual, and then a trustee. Ms. Park Jenson noted the opportunity to draft purpose into trusts to permit impact investing, but to be careful about painting the trustee into a corner. Investments have evolved greatly, and will continue to do so. Also remember that the terms don't mean the same thing to everyone. These considerations are particularly important with dynasty trusts.
After working through the case studies, the speakers provided their session takeaways:

Ms. Gary stated that it is not necessary to give up financial return to take environmental, social and governance factors into investments, but that you do need to choose the fund and the advisor carefully in order to fulfill fiduciary duties.

Ms. Madrigal's takeaway was that impact investing encompasses a very broad spectrum of opportunities, from investing to get more return to program-related investments that are grant alternatives and therefore receive the same tax treatment under the Code as grants. Each tool may be used to accomplish a different purpose, whether it's effective investment or effective impact on the world.

Mr. Tyler commented that we need to understand the purposes of the investor, the priority of the purposes, and to consider accountability as it relates to the enterprise. These are important considerations that also need to be known for the other investors, so that the discrepancies are known and can be addressed. He said that impact investing does not need to be complicated, but it does need to be intentional.

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Special Session 4-D
Protecting Yourself When Planning in Unsettled Waters: A Case Study on How to Structure Your Client Relationship to Protect Yourself from Malpractice Claims and Ethical Issues [LIT]
Presenters: Shawn C. Snyder, Dominic J. Campisi and Jessica A. Uzcategui
Reporter: Patrick Duffey

This session explored the steps that practitioners can take to protect themselves from malpractice suits when planning in unsettled areas. It illustrates practical and ethical issues surrounding the initial client engagement, settlement negotiations with third parties, and practical defenses to common malpractice claims.

Panel Background

Shawn Snyder is a partner at Snyder & Snyder, P.A., located in Davie, Florida. He is board certified by the Florida Bar in Wills, Trusts and Estates, is an adjunct professor in the University of Miami Law School Graduate Program in Estate Planning, and is chairman of the Florida Bar Wills, Trusts, and Estates committee.

Jessica A. Uzcategui is a partner at Sacks, Glazier, Franklin & Lodise, located in Los Angeles,

California. She serves as the co-chair of the Ethics and Malpractice Committee of the Real Property, Trust and Estate Law section of the ABA, and was recently selected to participate in the inaugural Collaborative Bar Leadership Academy.

Dominic J. Campisi is a partner at Evans, Lantham & Campisi, in San Francisco, California. He is a fellow of the American College of Trust and Estate Counsel, an attorney member of the National College of Probate Judges, and Academician, International Academy of Estate and Trust Law.

This presentation was inspired by the recent Davidson case, which involved a self-cancelling installment note (SCIN) and a subsequent malpractice action (which was recently dismissed).

Pre-Engagement

Ms. Snyder shared a quote from his mentor, that a lawyer should be judged not by the quality of the clients he has, but by the quality of the clients he turned away.

There needs to be a screening process and due diligence to take in new clients. By way of analogy, bankers have significant legal requirements to take on new clients. Thus, for attorneys, it is more of a best practice.

What does due diligence involve?

Google the client;
Look at the client's professional record (e.g. bar complaints);
look in public record (is the client a litigious person?). Snyder once ran a client through Interpol and it turned out that he had an international warrant for his arrest;
Get a credit or background report (after getting client permission).

Context will often determine the amount and extent of due diligence that is appropriate.

Best Practices. Firms should have a written policy on types and amount of due diligence they do on their clients. Get client permission, generally written permission, to do client due diligence. A policy on the information kept in the fire and how to dispose of irrelevant information.

Initial Engagement Letter

Generally, engagement letters are not absolutely required under all circumstances, though according to the ABA rules they are "preferable" (except in contingent fee cases, in which case they are required). California is the only state that has not adopted the ABA model rules and it requires a written fee agreement if fees will exceed $1,000.

Multiple clients present an important issue. Consider conflict issues among a married couple, multiple generations of family members, or business partners. ABA model rule 1.7 prohibits joint representation if there is significant potential conflict of interest, but the clients can avoid that prohibition with informed written consent. Ms. Uzcategui pointed out that secrets among clients are among the most common (and significant) potential issues with joint representation.

Subsequent engagement letters can be tricky because, unlike the initial letter, they are presumed

to be made with the attorney not as a third party but as a fiduciary. This can create unfavorable evidentiary presumptions if they are later challenged.

Conflicts of interests are problematic. Waivers are important, but equally important are the disclosures. The issue can arise if the clients are not all paying an equal amount of fees. You want a provision that says that if one party leaves, the attorney can continue to represent the remaining parties and can continue to use confidential information obtained by them.

Mr. Campisi usually has a "majority rule" provision in his multi-client engagement letters, which means that not all clients have to agree to take a particular course of action. This can prevent the need to go to court if there is an impasse.

What about expert certification (board certification). Some states held experts to significantly elevated standard of care. This elevated standard of care can create problems for attorneys accused of malpractice. The panel pointed out that some states could impose an "expert" level standard of care if the attorney holds himself or herself out as an expert (even if not using that term and not board certified).

Kovel letters are engagement letters from tax professionals (generally accountants) and are meant to avoid discovery of their work product. The Kovel decision analogized the role of accountants to translators. Subsequent decisions have added caveats and limitations. Note that attorney-client privilege does not work if fraud or crime is involved.

Hypothetical: *What issues arise with changes in the law (or proposed changes)?* For example, the proposed Section 2704 Regulations.

Ms. Uzcategui would want to document client consent to controversial techniques after the attorney advised them of the proposed tax regulations. One way to do this would be by way of a letter discussing prior disclosures, the determinations made by the clients in light of those disclosures, and the current situation in light of new facts. The content of the letter would be dictated by what actually happened. Thus, a "CYA" letter is not a panacea, Ms. Uzcategui pointed out.

What Can Go Wrong?

Mr. Campisi pointed out that attorneys and law firms can often be the deep pocket. For example, in the Hanes case, a law firm was found liable where a son lost a significant amount of mother's funds in a series of business transactions in which the firm was involved; the firm's liability stemmed from the fact that it continued to have an attorney-client relationship with the mother. The damages for the firm became significant because the son went bankrupt.

The panel also discussed that the "deep pocket" phenomenon can create situations where the accusation of malpractice is unexpected, since the firm may not have done anything to actually cause the underlying harm.

Potential Defenses

It's critical to document these potential defenses during the course of the engagement.

Uncertainty in the Law. If a point of law has not been "settled by the court of last resort" and the attorney acts in good faith, the attorney should not be liable for making an error in judgement. Ms. Uzcategui pointed out that this defense is used to protect attorneys from being judged using hindsight. Evidence of this fact can include disagreement among experts.

Knowing Acceptance of Risk. For example, a client may decline to take actions that do not maximize tax savings because of significant non-tax considerations. Uzcategui recommends documenting that the clients declined to take certain tax-advantageous actions and, perhaps, even having the clients sign a letter to that effect.

Statute of Limitations. The Davidson case turned on this issue. The tax team there had used a contract to shorten the statute of limitations to just one year. Because the client's engagement ended at his death, the statute of limitations ended just one year after that—which was probably months before the tax return was even filed (let alone audited).

Mandatory Arbitration Clauses

Consider the ability to bind a client to arbitration in the event of a dispute. A Pennsylvania court held that, the client must be informed (prior to the engagement) of the following principles, if the mandatory arbitration clause is to be binding on the client:

- the client is waiving his right to a jury trial;
- the client is waiving his right to an appeal;
- the client is waiving broad discovery;
- the client could pay substantial upfront costs;
- the client could still make a disciplinary complaint against the attorney;
- the client could speak with independent counsel before signing the agreement; and
- the client was fully informed of the types of claims that would have to be submitted to arbitration.

The panel believed that this decision presents good guidance for attorneys looking to enforce arbitration clauses.

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Special Session 4-E
There Is Never Just One Cockroach in the Kitchen: The Art of Planning for the Corporate Executive
Presenters: Daniel H. Markstein, III, Gregory V. Gadarian and Richard J. Miller, Jr.
Reporter: Herb Braverman

This panel examined the income and transfer tax as well as ancillary securities law issues that arise in advising corporate executives. Here are the highlights.

Daniel H. Markstein III, Gregory V. Gadarian and Richard J. Miller, Jr., three accomplished attorneys from across the country, ended the last full day of the Institute with a thorough and quite complicated discussion of planning for the corporate executive, describing it as an "art" and not a science.

The program focused on deferred compensation of highly paid corporate executives who "suffer" from (1) a lack of liquidity, (2) adverse income tax consequences arising from death or asset transfers, (3) a lack of diversity among investments and/or (4) an inability of make gifts with these

deferred compensation packages. There was discussion of both nonqualified and qualified compensation, with the emphasis on the former, including both funded and unfunded approaches, focusing on certain IRC Sections, including 61, 83. 409A and 457.

There was a substantial use of media, some of which also appear in the materials, which are not voluminous; the recorded presentation may be more helpful to those interested in more information on this area.

The types of assets reviewed included cash, qualified and unqualified stocks, various kinds of options, private derivatives, SAR's, restricted stock units, phantom stock plans, carried interests and variations thereof. There was particular concern over IRD issues and how to deal with it for the corporate executive.

The planning techniques that were discussed included conversion of IRA's to Roths, as well as using charitable trusts to mitigate the tax consequences of some deferred compensation plans.

There was a detailed discussion of split dollar insurance arrangements, focusing mostly on the more common economic benefit approach and its tax consequences for the employee.

The discussion of Section 409A was also thorough, since that section of the Code was created to deal with deferred compensation issues, but is not applicable to split dollar arrangements.

With respect to IRA's, it was suggested that a provision to convert IRA's to Roth IRA's be put into one's general power of attorney so that some end of life planning could be undertaken to save income taxes and to stretch the life of one or more IRA's. On the other hand, Senator Wyden's recent proposal was discussed because it would prohibit such conversions, cap Roth IRA's and require a mandatory 5 year distribution period on certain inherited IRA's.

This was an excellent and in depth discussion that merits further study beyond the confines of this summary report using the printed and recorded materials from this presentation.

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The Reporters

Our on-site local reporters who will be present in Orlando in 2017 are **Joanne Hindel Esq**., a Vice President with Fifth Third Bank in Cleveland, Ohio; **Kimon Karas Esq**., an attorney with McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; **Craig Dreyer Esq**., an attorney with Clark Skatoff, PA in Palm Beach Gardens, Florida; **Herb Braverman Esq**., an attorney with Braverman & Associates in Orange Village, Ohio; **Kristin Dittus Esq**. a solo attorney in Denver, Colorado, **Michael Sneeringer Esq**., an attorney with Akermn, LLP in Naples, Florida, **Michelle R. Mieras**, a Fiduciary Risk Manager with Bank of the West in Denver, Colorado, **Beth Anderson Esq**, an attorney with Wyatt, Trrant & Combs, LLP in Louisville, Kentucky, **Bruce A. Tannahill Esq**, a Director of Estate and Business Planning in the Mass Mutual Financial Group in Phoenix, Arizona, and **Patrick J, Duffey Esq**, an attorney with Holland & Knight in Tampa, Florida.

The **Report Editor** again in 2017 will be **Joseph G. Hodges Jr. Esq**., a solo practitioner in Denver, Colorado. He is also the Chief Moderator of the ABA-PTL discussion list.

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