

Planning for Privacy in a Public World

Orange County Estate Planning Council

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Overview of Discussion

- Common Issues
- Cybersecurity
- Personal Security
- Privacy Planning Strategies
- 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
- Best practices can be a business generator

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

- Litigation is extremely public
- 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

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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