PRIVACY PRESERVATION PLANNING IN THE DIGITAL AGE

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I. INTRODUCTION

Privacy has been an important value in American culture from the country's inception. Indeed, many of the amendments found in the Bill of Rights are undergirded in some manner, whether directly or obliquely, by a desire to protect individual privacy.[1] For most of our country's history, a person could reasonably assume a certain minimum level of privacy for most activities engaged in at home, work, and even unassuming public settings. However, technological progress has outpaced society's ability to respond, and the very notion of privacy is in the process of being largely eviscerated.

This article will begin by discussing obstacles to privacy faced by Americans today.[2] For example, in the post-9/11 world, we have been forced to sacrifice bits of our privacy in the name of homeland security.[3] In addition, the increased use of electronic data storage, along with our own First Amendment, have also made what once were reasonably private records, such as probate documents, very public.[4] There are many dangers concomitant with the ebb of personal privacy and the rise in technology. Identity theft is a visible and potentially costly consequence of privacy vitiation, but technology is not only utilized by criminals. Municipalities and employers represent a growing group of entities that are taking advantage of the increasing skillfulness and decreasing price of surveillance systems. Furthermore, individuals may be unintentionally compromising their own privacy through the data they store on social networking sites. Information on such sites is centralized and vulnerable to a host of harmful uses.

The second and third sections of this article discuss the traditional and advanced planning tools that can be used to safeguard privacy.[5] For example, any discussion of privacy and security concerns should also address asset protection and wealth preservation issues.[6] With the rapid enhancements in technology, malpractice actions are certainly possible, if not likely, against estate planning attorneys who fail to advise clients about asset protection alternatives.[7] Indeed, "estate planning" in the 21st century is a misnomer.

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1. *See* Katz v. United States, 389 U.S. 347, 351-52 (1967) (stressing that concerns for privacy underlie the First, Third, Fourth, and Fifth Amendments).
2. *See* discussion *infra* Part I.A-F.
3. *See infra* Part I.A.
4. *See* discussion *infra* Parts I.C-E, II.A.
5. *See* discussion *infra* Part II.
6. *See* discussion *infra* Part II.A-C.
7. *See* discussion *infra* Part III.A-D.

Practitioners in this area must be comprehensive wealth preservation planners addressing a wide range of clients' needs both before and after death and extending far beyond the probate system and estate tax.

A. 9/11 Issues

Government surveillance is nothing new, but the attacks on September 11th resulted in greatly expanded surveillance programs. If government surveillance seems like a more frightening idea now than it did forty years ago when even fewer safeguards existed, then it may be because technology has advanced to a point where the government can surreptitiously collect and efficiently manage information on a vast number of Americans.[8]

In addition, in the wake of the terrorist attacks of September 11, 2001, the Patriot Act has made it easier and faster for authorities to obtain telephone wiretaps as well as access to internet communications.[9] Prohibitions on wiretapping and the interception of e-mail and web-surfing transactions have been considerably weakened, and Americans are more vulnerable to government scrutiny than ever before.[10]

B. Probate Issues

In the United States, the public has a reasonable right to access court records.[11] This right is granted by two distinct sources. Primarily, the First Amendment recognizes a general right to inspect and copy public records.[12] Secondarily, this right is buttressed by a strong common law presumption in favor of allowing public access to judicial records.[13] While this precept is important in furthering the goal of judicial transparency, it is also a cause for concern in an era of an unprecedented level of electronic access to such records.

This problem is particularly worrisome in the realm of probate records. Probate courts now routinely post records on their official web sites.[14] Hence, it has become an elementary task for anyone with an internet connection to view a multitude of probate filings, from a personal will to a probate inventory listing all of a deceased person's assets.[15]

Take Travis County, Texas, as an example. A Google search for "Travis County probate records" yields the Travis County Clerk homepage as the

8. *See* Davis v. City of Chesapeake, Civ. No. CL07-2462, 2007 WL 5971433 (Va. Cir. Ct. 2007).
9. *See* USA Patriot Act, 8 U.S.C. § 1226A(a)(2001).
10. *See* ACLU v. U.S. Dept. of Justice, 321 F. Supp. 2d 24, 29 (D.D.C. 2004).
11. *See* U.S. CONST. amend. I.
12. *Id*.
13. *See* U.S. v. Lexin, 434 F. Supp. 2d. 836, 846 (S.D. Cal. 2006).
14. Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 562 (2008).
15. *See id*. at 563.

second result.[16] This very page contains a "Civil and Probate Division" header with a direct link to "Online Probate indexes"—the interface begs no sophistication on the part of the user.[17] Following this link allows a selection between probate and civil records. Once probate is selected, a search screen is brought up to facilitate the location of records.[18]

Thus, within minutes (one Google search and two mouse clicks), a user has full access to the probate records of Travis County. One can search the records by party name, date of filing, or cause number.[19] Once a record is located, the totality of the files within is available. These files include the deceased's personal will and probate inventory (along with subsequent annual reports updating the inventory) which contains detailed financial information such as the estate's real estate property, miscellaneous property, bank account records, checking records, and investment holdings.

Open access to this information is troubling for a couple of reasons. The first is the general loss of privacy at a time—end of life and estate planning—when many would consider such privacy to be essential. Moreover, this information can make identity theft easier because of the nature of records.[20] It can also allow opportunistic individuals to identify valuable estates as potentially fruitful targets of fraudulent endeavors.[21]

C. Identity Theft

Identity theft is the act of obtaining another person's personal information for the purpose of engaging in wrongful practices including fraud or deception.[22] Between 2006 and 2007, approximately fifteen million Americans, or five percent of the country's population, suffered from some form of identity theft.[23] The explicit costs imposed upon the marketplace by identity theft are estimated at approximately $50 billion annually.[24] Additionally, identity theft undermines market confidence and has deleterious

16. Search conducted on January 15, 2010. Note that the third result yields a website with the identical relevant link.

17. Travis County Clerk, Texas, http://www.co.travis.tx.us/county_clerk/default.asp (last visited Jan. 15, 2010).

18. Travis County—County Clerk Public Access, http://tccweb.co.travis.tx.us/index.php?_module_=esd&_action_=probatekeysearch#results (last visited Jan. 15, 2010).

19. *Id*.

20. *See* Foster, *supra* note 14, at 563.

21. *See* Travis County, *supra* note 18 (the records contain detailed financial information).

22. Kamaal Zaidi, *Identity Theft and Consumer Protection: Finding Sensible Approaches to Safeguard Personal Data in the United States and Canada*, 19 LOY. CONSUMER L. REV. 99, 100 (2007).

23. Kristan T. Cheng, *Identity Theft and the Case for a National Credit Report Freeze Law*, 12 N. C. BANKING INST. 239, 239 (2008).

24. *See Identity Theft: Innovative Solutions for an Evolving Problem: Hearing Before the Subcomm. on Terrorism, Tech., & Homeland Sec. of the S. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Sen. Kyl).

effects on the reputations of individual victims.[25] Finally, victims face incalculable costs of time, fear, and violation of personal privacy.[26]

Lack of detection greatly exacerbates these problems. In a Federal Trade Commission (FTC) survey, only eleven percent of respondents knew that their personal information was appropriated before realizing that they were victims of identity theft.[27] However, costs of identity theft incidents are significantly smaller if timely discovered.[28]

Increased public awareness of the extent and seriousness of identity theft has led to growing concerns about the extent of and confidence in individual privacy.[29] This article will next examine three recent phenomena that muddle privacy issues: public surveillance, media scrutiny, and social networking.[30]

D. Security Cameras

> *"There's no place in an urban environment that you can go to right now that you're not being looked at with a video camera . . . ."*
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> — Los Angeles County Sheriff's Department Commander Charles Heal.[31]

Local governments have been using cameras in public surveillance since the late 1960s.[32] Technology in the field has advanced rapidly. Cameras atop utility poles have been replaced by extensive digital networks with infrared vision and motion detection capabilities.[33] More importantly, there has been a revolution in data-storage technology that allows for permanent preservation of recordings.[34] Modern surveillance "sees everything, forgets nothing, and never gets tired or distracted."[35] The ubiquity of the monitoring has reached such a level that this system of governance has been described by one academic as the "National Surveillance State."[36]

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25. *See* Zaidi, *supra* note 22, at 100-01.

26. *See id*.

27. FEDERAL TRADE COMMISSION, IDENTITY THEFT SURVEY REPORT 22 (2003).

28. *Id*. at 8.

29. Lara M. Jennings, Comment, *Paying the Price for Privacy: Using the Privacy Facts Tort to Control Social Security Number Dissemination and the Risk of Identity Theft [Bodah v. Lakeville Motor Express Inc., 663 N.W. 2d 550 (Minn. 2003)]*, 43 WASHBURN L.J. 725, 748 (2004).

30. *See* discussion *infra* Part I.D-F.

31. Peter Bowes, *High Hopes for Drone in LA Skies*, BBC NEWS, June 6, 2006, *available at* http://news.bbc.co.uk/2/hi/americas/5051142.stm.

32. Jeremy Brown, *Pan, Tilt, Zoom: Regulating the Use of Video Surveillance of Public Places*, 23 BERKELEY TECH. L.J. 755, 756 (2008).

33. *Id*. at 756-58.

34. Science Daily, *New Memory Material May Hold Date for One Billion Years*, SCIENCE NEWS, May 26, 2009, *available at* http://www.sciencedaily.com/releases/2009/05/090525105418.htm.

35. Carla Scherr, *Government Surveillance in Context, for Emails, Location, and Video: You Better Watch Out, You Better Not Frown, New Video Surveillance Techniques are Already in Town (and Other Public Spaces)*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 499, 505 (2008).

36. *See* Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 1 (2008).

Some view Britain—with over 4 million cameras, or one for every fourteen residents—as indicating further explosive growth in the surveillance industry in the United States.[37] Indeed, New York City recently announced a monitoring system based on the London model.[38] The plan's proposed breadth is stunning—New York plans to install three thousand cameras with a centralized command center.[39] The cameras will be endowed with license plate readers and the police force is contemplating the use of face-recognition software.[40]

Few municipalities regulate video surveillance.[41] While the federal government mandates that its agencies assess implications of newly implemented technologies on privacy rights, there is no parallel requirement for actions undertaken by states.[42] In the absence of a coordinated regulatory regime, it is incumbent upon the judiciary to develop a system of surveillance governance.

A right to privacy is not explicitly granted in the Constitution; however, the Fourth Amendment supplies procedural precepts that must be respected in "searches and seizures" of the people:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[43]

Interpretation of this amendment has served as the foundation of much privacy jurisprudence. In *Katz v. United States*, the Supreme Court stated that although "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy,'" it does protect "individual privacy against certain kinds of intrusion," and moreover, "its protections go further."[44] As a result, the Court held that Fourth Amendment protections arise if two conditions are met: "first, that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."[45]

Application of this two-pronged test has proved nettlesome to the Court. The Court has held that the taking of aerial photographs of an industrial

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37. Brown, *supra* note 32, at 758.

38. *See* Cara Buckley, *Police Plan Web of Surveillance for Downtown*, N.Y. TIMES, July 9, 2007, at A1.

39. *Id*.

40. *Id*.

41. Brown, *supra* note 32, at 760.

42. *Id*. at 774.

43. U.S. CONST. amend. IV.

44. Katz v. United States, 389 U.S. 347, 350 (1967).

45. *Id*. at 361 (Harlan, J., concurring).

complex from navigable airspace is not a prohibited search, but that the use of warrantless thermal imaging on a private residence is.[46] Because case law is slow to develop, it is impossible to know when the Court will be confronted with the question of the constitutional limits of mass surveillance. The *Katz* factors, though, are still good law and can provide guidance.[47] For example, it would seemingly be difficult to argue for the existence of an expectation of privacy in a public setting where surveillance systems are in use.

Finally, it is worth noting that surveillance has proceeded beyond municipality use and is now heavily utilized in the work environment.[48] Costs of such systems have fallen dramatically as technology has improved, and an increasing percentage of employers regularly monitor the conduct of their employees.[49] While there are legitimate reasons for workplace monitoring, a lack of regulation in the arena is leading to "invasive forms of surveillance, such as direct surveillance, even outside the workplace."[50]

E. Modern Media Scrutiny

The fuel for modern media's remarkably intrusive actions is the general public's insatiable appetite for information regarding their heroes, celebrities, sports stars, the wealthy, socialites, and seemingly any other random person who has been blessed (or cursed) with fifteen minutes of fame.[51]

The media's ability to disseminate information rapidly seemingly knows no bounds. In addition to traditional print and electronic media, such as newspapers, magazines, and television, the internet has provided an amazingly effective means for the public to immediately access information in real time.[52]

One need only look at the recent Tiger Woods saga to understand the reach and depth of modern media's ability to collect and disseminate information.[53]

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46. *See* Dow Chemical Co. v. United States, 476 U.S. 227, 239 (1986); *see also* Kyllo v. United States, 533 U.S. 27, 40 (2001).

47. *See Katz*, 389 U.S. at 350.

48. *See* Alexandra Fiore & Matthew Weinick, Note, *Undignified in Defeat: An Analysis of the Stagnation and Demise of Proposed Legislation Limiting Video Surveillance in the Workplace and Suggestions for Change*, 25 HOFSTRA LAB. AND EMP. L.J. 525, 525 (2007) (reviewing a survey of employer monitoring usage and describing technological advances).

49. *Id*.

50. *Id.* at 527.

51. *See generally* Yahoo! Home Page, http://yahoo.com (regularly reporting celebrity news and gossip).

52. *Id*.

53. *See, e.g.*, Mike Celizic, *Tiger Hitting Every Green in Apology Tour: Now He Must Start Winning Tournaments, or This Will Never End*, Mar. 21, 2010, http://nbcsports.msnbc.com/id/35977059/ns/sports-golf/.

F. Social Networking

Privacy issues take on yet another twist when they are examined within the framework of the "cloud": behemoth data centers and storage systems that power data delivery over the internet.[54] Social networking sites are illustrative of cloud services because they utilize this online mainframe to store data.[55] Contrast this with the old model of data storage under which a user stored information on his or her personal hard drive and the privacy concerns become manifest.

Social networking has become pervasive. For example, the Facebook community recently surpassed 350 million members, and users spent an average of 213 minutes logged in during October of 2009.[56] Individuals who are unfamiliar with the dynamics of cloud services may be prone to overestimate the level of privacy that social networking sites afford. Activities undertaken on such sites should be thought of as "actions taken in a public park with a group of friends."[57]

The potentially dangerous implications of sharing private information on social networking sites cannot be overstated. Police forces are currently making regular use of these sites to monitor criminal activity and to help solve crimes.[58] Attorneys are using social networking sites in a plethora of ways, such as to investigate witnesses, vet prospective jurors, and engage in formal and informal discovery.[59] One Orwellian attorney reportedly reviewed a juror's social network profile and referenced the juror's favorite book in his closing arguments.[60]

II. TRADITIONAL PRIVACY PLANNING

A. Electronic Privacy Services

In 2003, in response to concerns about identity theft, Congress amended the Fair Credit Reporting Act by passing the Fair and Accurate Credit Transactions Act (FACTA) to allow apprehensive consumers to place fraud alerts on their credit reports.[61] Under FACTA, users of consumer reports (typically lenders) may not extend credit to a consumer with a fraud alert "unless the user utilizes reasonable policies and procedures to form a

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54. *Clash of the Clouds*, ECONOMIST, Oct. 15, 2009.

55. *Id.*

56. Scott Morrison, *LinkedIn Wants Users to Connect More*, WALL ST. J., Dec. 30, 2009, at B6.

57. Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 53 (2009).

58. *Id.*

59. *See* Shannon Awsumb, *Social Networking: The Next E-Discovery Frontier*, 66 BENCH & B. MINN. 22, 23 (2009).

60. *Id.*

61. 15 U.S.C.A. § 1681c (West 2009).

reasonable belief that the user knows the identity of the person making the request."[62] Fraud alerts, however, lapse after ninety days.[63]

Since that time, electronic privacy protection providers have appeared in the marketplace to file these fraud alerts and subsequently renew them in perpetuity.[64] LifeLock is perhaps the best-known of these companies.[65] In addition to fraud alert renewal, LifeLock opts its customers out of pre-approved credit card offers, alerts its customers of address changes in the national address database, peruses illegal websites for its customers' financial information, and guarantees losses resulting from identity theft up to one million dollars.[66] Note that this guarantee is not comprehensive insurance—it covers only limited losses that result directly from a failure or defect in the company's service.[67] LifeLock offers two levels of service—one for $120 per year and a more comprehensive option at $180 per year.[68] Because of the limited utility of the guarantee and the fact that LifeLock performs precautionary functions that individuals can undertake on their own, the value of its services should be viewed primarily as convenience-based.

B. Contractual/Non-Probate Transfers

In order to avoid the multitude of privacy issues relating to the probate process, many individuals choose to use contractual or other non-probate transfer techniques to pass assets upon their death.[69] Although very effective in avoiding the probate process, these types of transfers, other than trusts, can be very problematic because the property passes directly to the individual named, therefore bypassing the individual's estate planning documents.[70]

Non-probate assets generally fall into three categories: those which are transferred by title, by contract, or by trust.[71]

Assets transferred by title include property held in joint tenancy with right of survivorship, such as a house, car, or bank account (or other financial

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62. *Id*. § 1681c-1 (h)(I)(B)(i).

63. *Id*. § 1681c-1 (h)(2).

64. *Contra* Patrick O'Grady, *LifeLock Barred From Placing Fraud Alerts in Experian Settlement*, PHOENIX BUS. J., Oct. 22, 2009, *available at* http://phoenixbizhournals.com/pheonix/stories/2009/10/19/daily66.html.

65. *See* LifeLock, http://www.lifelock.com (last visited Apr. 3, 2010).

66. LifeLock, How LifeLock Works, http://www.lifelock.com/lifelock-for-people (last visited Jan. 2, 2010) [hereinafter How LifeLock Works].

67. LifeLock, Our $1 Million Service Guarantee, http://www.lifelock.com/our-guarantee (last visited Jan. 2, 2010). For example, the guarantee does not cover direct costs of the theft, lost wages, lost opportunities, or loss of business. *Id.*

68. *See* How LifeLock Works, *supra* note 66.

69. *See* The Caton Law Firm, PLLC, *Will vs. Living Trust: Understanding the Options*, http://www.kcclaw.com/CM/Articles/articles3.asp (last visited Mar. 29, 2010).

70. *See Transferring Assets Outside of Probate*, http://docstoc.com/docs/29621978/TRANSFERRING-ASSETS-OUTSIDE-OF-PROBATE (last visited Mar. 28, 2010) [hereinafter Transferring Assets].

71. *Id*.

account).[72] Note that property jointly owned as a tenant-in-common has no rights of survivorship and is probate property.[73]

Assets transferred by contract include life insurance policies, pension and retirement plans, and any other asset on which the owner names the beneficiary to receive it upon the owner's death such as "pay on death" accounts.[74]

If an individual has created and funded a trust, the trust will generally contain provisions regarding transfer of the property at the time of death.[75] While many people have jointly titled assets and contractual assets with beneficiary designations, revocable living trusts are also a useful tool and are discussed further below.[76]

C. Traditional Entity Planning

Traditional entity planning that encompasses the use of various legal vehicles, generally structured pursuant to certain state laws, have been in use for generations to protect the privacy of entity owners, shareholders, partners, and members.[77] The common element in each of the following legal structures is that the owner of the contributed asset (cash, securities, business interests, etc.) no longer holds title to the contributed asset; he or she now holds an interest in the legal entity.[78]

1. Corporations

Corporations are formed pursuant to state law; they allow individuals or other entities to own an interest (shares of stock) in the corporation in exchange for their contributed asset.[79] Corporations provide the owner (shareholder) with privacy related to the assets of the corporation because the shareholder no longer owns an interest in the contributed asset—she owns a part of the corporation.[80] Unfortunately, corporations are probably the least effective of business entities in this regard to wealth preservation and asset protection planning.[81] If a creditor seizes shares of a corporation, the creditor may

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72. *Id*.

73. *See Title(s)-Best Way to Hold Real Estate*, http://arctic.org/~dean/sircam/Title(s)%20-%20best%20way%20to%20hold%20real%20estate.html (last visited Mar. 28, 2010).

74. *See Transferring Assets*, *supra* note 70, at 1.

75. *See* 76 AM. JUR. 2D *Trusts* § 4 (2010).

76. *See id.* § 7.

77. *See* BRIAN P. KEMP, GEORGIA SECRETARY OF STATE, WHICH LEGAL ENTITY IS RIGHT FOR YOUR BUSINESS: SOLE PROPRIETORSHIP, GENERAL PARTNERSHIP, LIMITED PARTNERSHIP, CORPORATION OR LIMITED LIABILITY COMPANY?, http://www.sos.ga.gov/corporations/legal_entity.pdf.

78. *See id*.

79. *See id*.

80. *See id*.

81. *See Why Corporations Should Not Shelter Personal Assets*, http://www.assetprotectionattorney.com/blog/?p=44 (last visited Mar. 20, 2010).

exercise all of the rights of a shareholder.[82] If the shareholder holds a small interest in the corporation, the creditor's newly acquired rights may be insignificant.[83] A shareholder agreement between multiple shareholders may provide shareholders with protection from creditor seizures of shares.[84]

2. Limited Liability Companies

Limited liability companies (LLCs) are a new player in the entity planning toolbox. Members—similar to shareholders—contribute assets to an LLC in exchange for ownership interest in the LLC.[85] A membership interest, which is personal to the individual member, can provide the member with significant asset protection features.[86] Since only specific members or designated managers are authorized to manage the LLC, creditors generally have no rights to the owner's membership interest.[87] However, a charging order obtained through a court petition may grant the creditor the ability to seize certain entity information as well as any distributions made to the members.[88] Additionally, if the creditor seizes an interest in an LLC, income tax liability attachable to the membership interest may burden the creditor, even if the creditor does not receive any of the income distributions.[89]

3. Limited Partnerships

Two classes of partners make up the formation of limited partnerships: limited and general.[90] Generally, the general partner has a small interest in the entity, typically one percent or less.[91] Some jurisdictions allow the general partner to make no contribution to the partnership.[92] The remaining interests are held by the limited partners.[93] The interest in the limited partnership provides some of the same asset protection features as an LLC.[94] The structure of the limited partnership limits the rights of the limited partners to participate in the management of the partnership.[95] The general partner, in most situations, manages and controls the management of the limited partnership.[96]

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82. *See id*.
83. Duncan E. Osborne & Jack E. Owen Jr., *Asset Protection: Trust Planning* (A.L.I. 2009).
84. *See id*. at 147.
85. *Id*.
86. *Id*.
87. *Id*.
88. *Id*.
89. *Id*.
90. *Id*.
91. *Id*.
92. *Id*.
93. *Id*.
94. *Id*.
95. *Id*.
96. *Id*.

Generally, the ability to transfer limited partnership interests is significantly restricted in most limited partnership agreements.[97] Fortunately, a creditor of a limited partner has fewer rights than the limited partner himself.[98] A partner's judgment creditor can petition a court for a charging order regarding the limited partner's interest in the partnership.[99] Any distributions that would otherwise be made to the debtor/partner can now be received by the creditor thanks to the charging order.[100] In many jurisdictions, the creditor's sole remedy against the debtor/partner is the charging order.[101] As the general partner is jointly and severally liable for the debts of the partnership, the charging order's role is critical.[102] Therefore, the general partner's role is typically held by another entity such as an LLC or a corporation.[103]

4. Choice of Entity

When determining the choice of entity, one must analyze the complexity of the administration of each business structure along with the individual's planning goals with respect to the property and the exposure of the activity and entity to tax liability.[104]

For example, in most states, licensed professionals cannot evade liability with an LLC, corporation, or limited partnership.[105] Thus, to protect the non-exempt assets of the family, a different plan is needed.[106] If limiting personal exposure to claims is prohibited by law, clients may protect the assets themselves through a Family Limited Partnership (FLP), an LLC, or a trust.[107] In doing so, the particular licensed professional removes any incentive for a plaintiff to sue him or her.[108]

Additionally, if forming an LLC is not possible, a professional practice should be incorporated.[109] Even though the corporation will not protect against malpractice claims, it may prevent many other business risks.[110] If using a corporation, a person must give a personal guarantee, or else he or she will not

97. *Id*.
98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*.
102. *Id*.
103. *Id*.
104. *Id*. at 146.
105. The Asset Protection Law Center, http://www.rjmintz.com/right-business-entity.html (last visited Apr. 20, 2010).
106. *Id*.
107. *Id*.
108. *Id*.
109. *Id*.
110. *Id*.

be responsible for corporate obligations.[111] Also, the individual will be protected from most claims from employees, suppliers, and landlords.[112]

If there are multiple partners in a professional practice, an individual can separately incorporate her practice, thereby limiting her liability for claims arising from their negligence.[113] An individual who separately incorporates her practice will not be liable for claims against other partners, all the while remaining partner with each of the other corporations.[114] One thing the individual must be aware of is preventing a potential double tax on corporate earnings.[115] Zeroing out corporate income or using an "S" corporation will help prevent this double taxation.[116]

As a general principle, the ownership of those assets with a high risk of producing liability should always be separated from safe assets, such as cash or securities.[117] These safe assets should not be jeopardized by a liability associated with an individual's business or other high-risk assets.[118]

For example, a client, who owns a restaurant and has substantial retirement savings in the bank, could lose his or her retirement savings if sued because of a liability in connection with the restaurant. However, by putting the restaurant in an LLC, the client removes the at-risk asset from his legal ownership. Any lawsuit against the LLC, which owns the business, would not place the client's other assets at risk.

5. Jurisdictional Issues

Many jurisdictions provide favorable state law and tax incentives to entity formation.[119] Particularly, Delaware and Nevada have actively courted the legal entity business for many years.[120] Delaware, because of its favorable corporate, LLC, and limited partnership laws, has been the home to many of the nation's largest companies.[121] Nevada, a newer player in this field, has aggressively marketed its legal structures.[122]

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111. *Id*.
112. *Id*.
113. *Id*.
114. *Id*.
115. *Id*.
116. *Id*; *see also* NOLO.com, S Corporation Facts, http://www.nolo.com/legal-encyclopedia/article-30002.html (last visited Apr. 20, 2010).
117. *See* Alfred J. Olsen & Susan K. Smith, *Family Business and Professional Corporate Tax Strategies*, C472 ALI-ABA 207, 249 (1990).
118. *See id*.
119. *See* Nevada Corporate Planners, The Four Most Common and Best Options, www.nvinc.com/whichstatetoincorporate.htm (last visited Mar. 29, 2010).
120. *See id*.
121. *See id*.
122. *See id.*

D. Trust Planning

1. Revocable Management Trusts

Discussion of estate planning has long focused on the implementation of a "revocable management trust" or "living trust."[123] The concept of a fully-funded revocable living trust begins with a person (the settlor) creating a revocable trust agreement.[124] The settlor then re-titles every asset he or she owns into the name of the new trust.[125] Typically, the settlor will serve as the trustee of the trust during his or her lifetime.[126]

The traditional advantages of a fully funded revocable living trust include:

1. Management Vehicle in Case of Settlor's Incapacity: During a settlor's lifetime, one of the primary uses of the revocable living trust is to act as a management vehicle for a settlor in case of such settlor's incapacity.[127]
2. Current Management of Assets: A settlor may fully fund his or her revocable trust and appoint another individual or institution as trustee. The appointed trustee can then manage the assets for the benefit of the settlor during his or her life. (For example, extended periods of travel abroad, or management of assets for an elderly individual.)[128]
3. Probate Avoidance: The most highly touted purpose of a fully-funded revocable living trust is removing trust assets from the probate process and its attendant costs. Recall, the purpose of probate is to re-title assets which are held by the decedent at death. However, if the assets are already titled in the name of the trust at the decedent's death, there is nothing to re-title. Therefore, no formal probate of the estate is necessary.[129]
4. Avoidance of Ancillary Probate: If an individual dies owning property in more than one state, separate probate proceedings are necessary in each state in order to re-title the property located in that state. This can be significantly burdensome and expensive. Accordingly, if out-of-state property has been re-titled into the name of a revocable living trust, all ancillary probate in the other state(s) is thereby avoided as well.[130]
5. Depository Vehicle for Disposition of Settlor's Estate: Upon the death of a settlor, the trust provides the terms for the disposition of the assets owned by the trust. The provisions of the trust are not filed in any public

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123. *See* RESTATEMENT (THIRD) OF TRUSTS § 25 (2003).
124. *See id*. general cmt.
125. *See id*.
126. *See id*.
127. *See* LENA BARNETT & BRETT CAMPBELL, AMERICAN BAR ASSOCIATION GUIDE TO WILLS AND ESTATES 90 (2d ed. 1999), http://www.abanet.org/publiced/practical/books/wills/chapter_5.pdf.
128. *Id*.
129. *Id*. at 87.
130. *See* GERRY W. BEYER, TEXAS TRUST LAW: CASES AND MATERIALS 5 (2007).

records, and therefore the disposition of one's assets remains private to the settlor and his or her family (or other beneficiaries).[131]

There are disadvantages to fully funded revocable living trusts: all assets currently titled in the name of the settlor (e.g., deeds, deeds of trust, assignments, bills of sale, etc.) must be re-titled into the name of the trust; and because a trust is a separate legal entity, accurate books and records will need to be kept for the assets of the trust.[132] In addition, the trustee is required to maintain separate financial accounts for the trust.[133] There may also be ongoing accounting and trustee fees depending upon who is handling the trust's matters.[134] Because of the disadvantages associated with a fully-funded revocable living trust, many practitioners have utilized a standby revocable living trust to achieve the client's estate planning objectives.[135] Because Texas law provides for independent administration, probating a decedent's assets in Texas can typically be done at minimal cost.[136]

2. Irrevocable Trusts

Although not traditionally known as a privacy tool, the traditional irrevocable trust, either created by the settlor during his or her life or at the death of the settlor, can provide a number of benefits for the beneficiary.[137] In addition to the benefits described in the section above relating to revocable management trusts, the irrevocable trust, if properly structured as a spendthrift trust, will provide the beneficiary with asset protection features against his or her creditors that are only surpassed by a foreign trust as described later herein.[138]

The continuation of such irrevocable trusts for the lifetime of children beneficiaries rather than outright distributions provides a significant degree of privacy and asset protection for future generations as well.[139] Particularly, if each child is designated as the trustee (or co-trustee) of his or her own separate trust when he or she attains an appropriate age (e.g., upon attaining the age of 30 years), then each child will have control over and continued access to the assets of his or her own trust.[140]

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131. BARNETT & CAMPBELL, *supra* note 127, at 89.
132. *See id*. at 97.
133. *See* BEYER, *supra* note 130, at 106-07.
134. *Id*. at 135-39.
135. *See* 3 TEX. PRAC. GUIDE WILLS, TRUSTS, AND EST. PLAN § 9:46 (2009).
136. *See* 29 TEX. JUR. 3D *Decedents' Estates* § 955 (2010).
137. JAY D. ADKISSON & CHRISTOPHER M. RISER, ASSET PROTECTION: CONCEPTS AND STRATEGIES FOR PROTECTING YOUR WEALTH 129-30 (2004).
138. *See* BEYER, *supra* note 130, at 78.
139. *See* ADKISSON & RISER, *supra* note 137, at 129-30.
140. *See id*.

III. ADVANCED PLANNING

A. Non-Disclosure Agreements/Confidentiality Agreements

1. Introduction

The growing ease with which information is gathered and disseminated today has given rise to a more pressing need to protect information that may be valuable to a private individual or a small or large business owned by the individual.[141] Numerous instances exist in which it is either necessary or desirable to share confidential information with another party.[142] However, the key to doing so is to make sure that the other party will be bound to respect the confidential information provided to him or her, and not use that information to the client's detriment.[143] The common way to protect the secrecy of confidential information given to another party is through the use of a non-disclosure agreement (NDA), which is sometimes referred to as a confidentiality agreement.[144]

2. Typical Uses

When does it make sense to require another party to sign an NDA? While there are many instances in which such an agreement would be appropriate, "the principal situations . . . are when you wish to convey something valuable about [your personal affairs or] your business or idea, but you want to ensure that the other side doesn't steal the information or use it without your approval."[145]

Here are some typical situations where a confidentiality agreement is often used:

> [1] An invention or business idea will be presented to a potential partner, investor, or distributor. [2] Financial, marketing, and other information will be shared with a prospective buyer of your business. [3] A new product or technology will be shown to a prospective buyer or licensee. [4] A company or individual will be providing you with services and will have access to some sensitive information in providing those services. [5] Employees will

141. *See* Richard D. Harroch, *Business Plans: How to Make Sure No One Steals Your Ideas*, ALLBUSINESS.COM, 2010, http://www.allbusiness.com/business-planning-structures/business-plans/2385-1.html.

142. *See id*.

143. *See id*.

144. *See id*.

145. *Id*.

> have access to confidential and proprietary information about your business in the course of their job.[146]

NDAs come in two basic formats—a mutual agreement and a one-sided agreement or unilateral agreement.[147] The one-sided agreement is used when only one side will be sharing confidential information with the other side.[148] When each side shares confidential information the parties need a mutual agreement.[149]

3. Professional Advisors (Attorney/Accountant/Financial Advisors)

> [NDAs] protect valuable trade secrets from reaching your competitors and help defend your company and your clients' private information against fraud and theft.[150]
>
> . . . .
>
> If you disclose key information at a meeting without an NDA, it is considered public disclosure. So NDAs are appropriate for anyone who might learn of your company's confidential information [such as]: 1. Independent consultants or contractors; 2. Potential business partners or customers who might learn information while making a business decision; 3. Potential investors; 4 Company employees.[151]
>
> [An] [NDA] is particularly common in the competitive computer industry. Employees that work in cutting edge software or hardware may be asked to sign [an] [NDA] in order to protect the company's investment . . . . Banks and investment firms might also require employees to sign [NDAs] to protect the personal financial information of its members, or information regarding the institution's own finances.[152]

Although certain professional advisors may be bound by professional ethical confidentiality requirements, NDAs can both buttress those requirements and expand upon them.[153] In addition, such agreements can

146. *Id*.

147. *See* Brian Luskey, *Guide to Non-Disclosure Agreements*, BUSINESS.COM, 2009, http://www.business.com/guides/non-disclosure-agreements-43919/.

148. *Id*.

149. *Id*.

150. *Id*.

151. *Id*.

152. R. Kayne, *What is a Non-Disclosure Agreement?*, WISEGEEK, 2010, http://www.wisegeek.com/what-is-a-non-disclosure-agreement.htm.

153. *See* Barbara C. Bentrup, *Friend or Foe: Reasonable Noncompete Restrictions Can Benefit Corporate In-House Counsel and Protect Corporate Employers*, 52 ST. LOUIS U. L.J. 1037, 1060 (Spring 2008).

provide additional protection when dealing with professions not encumbered with ethical requirements.[154]

4. Non-Compete

NDAs are typically combined with employment agreements or covenants not to compete.[155] The covenant not to compete is another common tool used to protect valuable business information.[156] Very simply, a covenant not to compete is an agreement that prohibits an individual from competing with a former employer.[157] The agreement typically will state that the individual, after leaving his or her employment, may not be employed in the same or a similar line of work, for a specified time, in a certain geographic area.[158]

The reality, however, is that covenants not to compete are substantially less powerful than many employers and attorneys believe.[159] This is especially true in Texas.[160] The most common misconception is that any covenant not to compete will be enforceable so long as it is reasonably limited in time, geography, and scope, but their actual enforceability is substantially more limited, for a variety of reasons.[161] First, even at common law, covenants not to compete were only enforceable to serve a legitimate business interest of an employer.[162] Accordingly, a covenant would be enforceable to protect an employer's confidential information, but it would not be upheld simply to discourage employees in whom employers had made some investment from departing to establish competing businesses.[163] Second, the enforceability of covenants not to compete is now a creature of statute in Texas.[164] Although the legislature intended to broaden the enforceability of covenants not to compete in employment relationships, as a result of poorly chosen statutory language, and an extremely limiting interpretation by the Texas Supreme Court, the enforceability of covenants not to compete is more limited than ever.[165]

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154. *See id*.; *see also* Emily Cunningham, *Protecting Cuisine Under the Rubric of Intellectual Property Law: Should the Law Play a Bigger Role in the Kitchen?*, 9 HIGH TECH. L.J. 21 (2009) (using NDAs to protect trade secrets of chefs, a profession without formal ethical requirements).

155. *See, e.g.*, Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements,* 86 NEB. L. REV. 672, 675 (2008).

156. *See, e.g.*, *id*. at 676.

157. *See, e.g.*, *id*. at 675.

158. *See, e.g.*, *id*. at 671-81.

159. *See* Jeffrey W. Tayton, *Covenants Not to Compete in Texas: Shifting Sands from Hill to Light*, 3 TEX. INTELL. PROP. L.J. 143, 185 (Spring 1995) (explaining Texas rules and court interpretations of covenants not to compete based on court rulings over time).

160. *See id*.

161. *See id*.

162. *See id*. at 186.

163. *See id*.

164. TEX. BUS. & COM. CODE ANN. §15.50 (Vernon 2009).

165. *See generally* Jeffrey W. Tayson, *Covenant Not to Compete in Texas: Shifting Sands from Hill to Light*, 3 TEX. INTELL. PROP. L.J. 143 (1995) (discussing recent Texas case law that created a new, limited application of legally enforceable covenants not to compete).

5. Hired Staff

NDAs may also be applied to household employees such as nannies, cooks, and housekeepers.[166] At one time confidentiality agreements for non-professional staff, or domestic workers, were limited to celebrity households; however, the use of such documents has now become widespread. Courts have found that everyone, including high-end business owners and those who choose not to disclose how they make their income have as great a right to privacy as celebrities.[167] Therefore, such private individuals may have a bigger interest in these kinds of agreements. However, such NDAs can give a false sense of security. In order to recover, it must be shown that damages were caused by a breach of confidentiality.[168] In addition, many domestic workers may not have enough money to pay the judgment in the event that damages are proven.

6. Common Terms

There are certain issues that every well-written nondisclosure agreement should address. Although, as with any contract, the terms need to be tailored to fit the particular circumstances, the following are some issues that should always be considered in this type of agreement:

1. The definition of "proprietary information" or "confidential information" to be protected. If this definition is too broad or vague, the agreement will be unenforceable. The description must define the confidential information well enough to be enforceable without disclosing the confidential information itself.[169]
2. A description of what the information may be used for (e.g., for the purpose of reviewing a potential purchase of the business).[170]
3. An agreement that the confidential information will be protected from disclosure to third parties.[171]
4. An agreement that the confidential information will be protected from any use other than the use authorized under the agreement.[172]
5. Agreement that no copies will be made of the confidential information except as authorized under the agreement.[173]

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166. Victoria D. Blachly, *Confidentiality Agreements: How Confident Are You?*, SK004 ALI-ABA 327, 329 (2004).

167. *See* J. Onassis v. Christian Dior-New York, Inc., 472 N.Y.S.2d 254, 260 (1984).

168. Brown v. Perrette, 25 DEL. J. CORP. L. 356, 357-359 (2000).

169. Deborah J Ludwig, *A Pragmatic View of Term Sheets and Ancillary Agreements*, 1780 PLI/CORP 61, 72 (2010).

170. *Id.* at 75.

171. Blachly, *supra* note 166, at 333.

172. *Id.*

173. *Id.*

6. A stated period of time that the agreement not to disclose will continue.[174]
7. A statement that the provision to maintain confidentiality will survive termination of the agreement. This is most important when the nondisclosure agreement is part of a separate agreement with its own termination date. Your client's need to have the information protected from disclosure will last longer than many of the contracts with their customers, subcontractors, suppliers, and employees.[175]
8. A statement that public domain information cannot be treated as that of the business and is not includable in the proprietary information covered by the agreement.[176]
9. If someone else independently comes up with the same information, without use of your information, you cannot prevent the use of that independently obtained information. This is typically mentioned in a nondisclosure agreement.[177]
10. You may protect the fact that you are using public domain information or information that is well known in your industry. The basic information is not your confidential information, but the fact that you are using it is your confidential information. If this is something you wish to do, make sure you are supported by the protective steps taken and the definitions of "confidential information."[178]
11. Consider adding a provision to the agreement covering remedies. What if there is a breach of agreement and information is used or disclosed? You may wish to indicate that money alone will not compensate for the loss of confidentiality, and that, consequently, the business should be entitled, in addition to financial remedies, to get an injunction to prevent the recipient of the information from disclosing the information. Such a provision sets the stage for the business owner to get an injunction against the individual who breaches the agreement to prevent further disclosure or use. It can be difficult to get an injunction without such an agreement.[179]
12. Consider whether it is appropriate to have the party receiving information agree to have all their employees who will have access to the information also sign a nondisclosure agreement. You may wish to make sure those employees and their employer sign an agreement containing the same terms and definitions of confidential information.[180]

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174. Ludwig, *supra* note 169, at 74.

175. *Id*. at 76.

176. Jodi L. Short, KILLING THE MESSENGER: THE USE OF NONDISCLOSURE AGREEMENTS TO SILENCE WHISTLEBLOWERS, 60 U. PITT. L. REV. 1207, 1226 (1999).

177. *See id*.

178. *See* CRC-Evans Pipeline Int'l, Inc. v. Myers, 927 S.W. 2d 259, 265 (1996).

179. *See id*.

180. *See id*.

7. Enforceability Issues

A common problem in enforcing nondisclosure agreements is that the definition or description of the information to be protected is unclear.[181] Trying to cover too much information by defining the confidential information as "all business information" may backfire. It is important to identify particular information, without revealing valuable information.[182]

Another concern is that the agreement may state that the confidential information is to be marked "confidential."[183] If the agreement establishes this as the method for identifying confidential information, you need to make certain your information is marked. If your procedures for marking information are not reliable, do not use them as your method for identifying confidential information.

B. Blind Trusts

The use of blind trusts in both the public and private sectors has become increasingly popular in recent years.[184] A blind trust involves the entrustment of personal investment assets with an independent trustee who manages and otherwise disposes of those assets without the settlor's participation, influence, or knowledge.[185] This is done in order to avoid potential conflicts of interest that may present themselves to individuals in both the public and private sectors.[186] Incidentally, the use of blind trusts by individuals in the public sector may also offer some relief from state and federal financial disclosure requirements.[187] What follows is a general overview of the rules governing the creation and administration of blind trusts in both the public and private sectors.[188]

The rules governing the creation and administration of blind trusts differ depending on whether they are created for use in the public or private sector.[189] In the public sector, the federal government and many states have promulgated rules governing the creation and administration of blind trusts.[190]

At the federal level, the rules governing blind trusts are found in the Ethics in Government Act of 1978, as amended (the Ethics Act).[191] The Ethics

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181. *See id*.
182. *See id*.
183. *See id*.
184. Edmond M. Ianni, *Blind Trusts Offer Clients Customized Wealth Planning*, 30 EST. PLAN. 319, 319 (2003).
185. *Id*.
186. *Id*.
187. *See, e.g.*, TEX. GOV. CODE ANN. § 572.023 (Vernon 2008).
188. For purposes of illustration, this discussion is restricted to qualified blind trusts at the federal level.
189. *See* Ianni, *supra* note 184, at 321-23.
190. *See id.* at 320 ("At least 37 states, the District of Columbia, and the Virgin Islands have statutes or regulations recognizing blind trusts").
191. Ethics in Government Act of 1978, 5 U.S.C. app. §101 et. seq.

Act officially established the "qualified blind trust" as a mechanism whereby government officials could avoid actual or apparent conflicts of interest with official duties.[192]

A qualified blind trust under the Ethics Act is one that meets the following four requirements: (1) an independent trustee as defined in the Ethics Act—trust management decisions are given to an independent trustee who manages the assets in the trust without the settlor's knowledge; (2) freely transferable assets—any asset transferred to the trust by an interested party must be free of any restriction with respect to its transfer or sale unless such restriction is expressly approved by the supervising ethics office of the reporting individual; (3) statutory trust language—the trust instrument must contain certain trust provisions required by the Ethics Act; and (4) pre-approval—the trust instrument and trustee must be pre-approved by the government official's supervising ethics office.[193]

The use of a qualified blind trust also offers individuals some respite from extensive financial disclosure requirements found in the Ethics Act.[194] Under the Ethics Act, certain federal employees, officers, nominees, and candidates are required to file financial reports disclosing information related to an individual's assets, income, and liabilities.[195] An exception to this reporting requirement exists for an individual with a qualified blind trust.[196] With some exceptions, an individual with a qualified blind trust need "only report the value range of the individual's interest in the trust, and report the value range of income that the individual received from the trust" rather than report the holdings or the source of income from any of the holdings of the trust, as would otherwise be required under the Ethics Act.[197] The rationale underlying this exception is that because an official is unaware of the trustee's management or other disposition of the trust assets (except in limited circumstances provided for in the Ethics Act), the official may conduct government business without a conflict of interest relating to his or her blind trust holdings and activities.[198] Qualified blind trusts also provide an exception to conflict of interest laws, which impose civil and criminal liability on executive branch employees related to financial conflicts of interest.[199]

The Office of Government Ethics (OGE), the supervising ethics office for the executive branch of the federal government, supplemented the Ethics Act

192. Megan J. Ballard, *The Shortsightedness of Blind Trusts*, 56 U. KAN. L. REV. 43, 49 (2007).

193. *See* Ianni, *supra* note 184, at 321.

194. *Id*.

195. *See* 5 U.S.C. app. § 101 et. seq.

196. *See id*.; *see also* 5 C.F.R. § 2634.301 (2010) (explaining that under regulations promulgated by the Office of Government Ethics, an asset initially placed in the trust continues to pose a potential conflict of interest until it has been sold or reduced to a value of less than $1,000.00).

197. Ballard, *supra* note 192, at 51.

198. *See* Ianni, *supra* note 184, at 320.

199. Ballard, *supra* note 192.

by issuing its own set of regulations governing blind trusts.[200] The OGE requirements for a qualified blind trust are similar to those found in the Ethics Act with the addition of a few requirements.[201] For example, under the OGE regulations, only a financial institution may serve as trustee of a qualified blind trust.[202] In addition, the OGE regulations require that all communications between the trustee and the interested party be in writing and pre-approved by the director of the OGE.[203]

Like the public sector, the use of blind trusts in the private sector has grown in recent years.[204] This is due in large part to recent corporate scandals, strict insider trading laws, and creative compensation packages making it more common for executives to receive stocks and options as compensation.[205] A blind trust provides a means by which an executive can comply with fiduciary obligations and securities law while also providing greater flexibility to diversify one's portfolio.[206] This is because an independent trustee under a blind trust can sell the executive's stock at any time and more frequently over time, without the limitation of window periods.[207]

While private sector blind trusts possess many of the features of public sector blind trusts (*e.g.*, independent trustee, independent management of the trust, and similar trust provisions), they do not have statutorily delineated guidelines governing their creation and administration.[208] Instead, to be effective, private sector blind trusts must take into account regulatory considerations such as those found in the Securities Exchange Act of 1934, as amended.[209] For example, under SEC Rule 10b5-1:

> the 'manipulative and deceptive devices' prohibited by Section 10(b) . . . include . . . the purchase or sale of a security of any issuer, on the basis of 'material nonpublic information' about that security or issuer, in breach of a duty of trust or confidence that is owed . . . to the issuer . . . or shareholders of that issuer, or to any other person who is the source of the material nonpublic information.[210]

SEC Rule 10b5-1 sets forth an affirmative defense to a charge of insider trading to cover situations where a person can demonstrate that material

200. *See* 5 C.F.R. § 2634.102 (2010).
201. *See* Ianni, *supra* note 184, at 321-22.
202. *See* 5 C.F.R. § 2634.406 (2) (2010).
203. *See* 5 C.F.R. § 2534.407 (1)-(2) (2010).
204. *See* Ianni, *supra* note 184, at 322.
205. *Id*.
206. *Id*.
207. *Id*.
208. *Id*.
209. *Id*. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).
210. 17 C.F.R. § 240.10b5-1(a) (2002); *see also* Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

nonpublic information was not a factor in the trading decision, as is the case with properly structured and administered blind trusts.[211]

The use of blind trusts in both the public and private sectors, although not widespread, has become more prevalent in recent years.[212] In the public arena, the use of a qualified blind trust not only offers a solution to potential conflicts of interests that may otherwise arise, but also helps alleviate the financial disclosure requirements required of certain government officials.[213] Their private sector counterparts also serve a dual function by addressing a business insider's need to diversify his financial holdings while complying with fiduciary duties and state and federal regulations.[214]

C. Foreign Banking

The utilization of foreign banks often provides an increased level of privacy security for U.S. citizens.[215] Privacy standards in banking are of the utmost priority in many foreign jurisdictions.[216] Generally, a party may not compel the revelation of the identity of a bank account owner under the laws of the foreign jurisdiction.[217] Likewise, many foreign laws prohibit the disclosure of assets held in foreign banks.[218]

There is one important exception to this privacy standard: disclosure to the Internal Revenue Service (IRS).[219] A high amount of media attention has recently focused on foreign banks—notably UBS in Switzerland—which have custodied accounts owned or maintained for the benefit of U.S. individuals.[220] The IRS has made no secret of its mission to target and penalize foreign banks with assets that the IRS believes should have been reported by U.S. owners and beneficiaries.[221] In its quest, the media perception has often been expanded to imply that all foreign bank accounts owned or maintained by U.S. persons are

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211. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b5-1 (2002).

212. *See* Patti Richards, Guide to Blind Trusts: Use Blind Trust Information to Provide For Yourself and Your Loved Ones, Work.com, http://www.work.com/blind-trust-21590/ (last visited Apr. 18, 2010).

213. *See id*.

214. *See id*.

215. *See generally*, Financial Services, http://www.ptclub.com/whatisoffshore.html (last visited Apr. 20, 2010) (providing an overview of the advantages of using a foreign bank).

216. *See* The Asset Protection Law Center, http://www.rjmintz.com/bank-secrecy.html (last visited Mar. 28, 2010). The most notable jurisdictions are Austria, Switzerland, Liechtenstein, Luxembourg, the Channel Islands, and Gibraltar. *Id*.

217. *Id*.

218. *Id*.

219. *See Report of Foreign Bank and Financial Accounts (FBAR),* I.R.S., http://www.irs.gov/businesses/ small/article/0,,id=148849,00.html (last visited Apr. 18, 2010).

220. *See* Lynnley Browning, *I.R.S. Seeks Report of Foreign Accounts*, N.Y. TIMES, May 15, 2008, *available at* http://www.nytimes.com/2008/05/15/business/15tax.htm.

221. *See* Excerpts from IRS Commissioner Doug Shumlan's Press Remarks on UBS, I.R.S. (Aug. 19, 2009), http://www.irs.gov/newsroom/article/0,,id=212203,00.html.

"inherently evil."[222] However, there are many legitimate foreign institutions which are fully compliant with U.S. disclosure rules.[223] Likewise, there are many legitimate reasons why a U.S. person would desire to maintain a foreign bank account.[224] Privacy is just one of those reasons.

Thorough inquiries should be conducted regarding any foreign bank's reputation, integrity, and financial standards.[225] Today's worldwide banking standards require inquiries under the "know your customer" rules to prevent money laundering, potential funding of terrorism, and a variety of other criminal activities.[226] It should be considered suspect if any bank—domestic or foreign—does not mandate thorough due diligence of new customers.[227]

Use of a branch of a well-known U.S. or international bank "must be carefully and cautiously considered."[228] "The bank's presence in other jurisdictions (for example, the U.S.) could compromise the level of protection otherwise afforded the client's assets."[229] Many foreign banks have high quality money managers; "[h]owever, independent investment professionals also are available and many provide high quality investment advice."[230]

D. Foreign Trusts

The use of a foreign trust provides three primary advantages for high net worth individuals and families. First, a significant degree of privacy may be achieved for the existence of the trust itself, the identity of the trust beneficiaries, and the assets held by the trust.[231] Second, an individual may create a spendthrift trust and still remain a beneficiary—something not available in Texas or in most other states in the U.S.[232] Finally, when a foreign trust is not jurisdictionally connected to the U.S., a foreign trust is less likely to be targeted as a source for satisfying a future judgment or claim of a creditor.[233]

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222. Posting of Simon Black to Sovereign Man: Global Financial Intelligence, http://www.sovereignman. com/finance/today-i-confessed-my-sins-to-uncle-sam (June 26, 2009).

223. *See I.R.S. to Receive Unprecedented Amount of Information in UBS Agreement*, I.R.S., Aug. 19, 2009, http://irs.gov/newsroom/article/0,,id=212124,00.html.

224. *See* Mario A. Mata, *'Hot Topics' in Offshore Tax Compliance, Planning and Enforcement*, A.L.I.-A.B.A. COURSE OF STUDY at 297.

225. *See* Osborne, *supra* note 83, at 189.

226. *Id*. at 184.

227. *Id*. at 197.

228. *Id*. at 190.

229. *Id*.; *see, e.g.*, U.S. v. Sturman et al., 951 F.2d 1466, 1483 (6th Cir. 1991) (Mr. Levine had an account at a branch of a Swiss bank in the Bahamas, and despite Bahamas bank secrecy laws, U.S. authorities gained access to information about the account by exerting pressure on the U.S. branch of the Swiss bank).

230. *See* Osborne, *supra* note 83, at 190.

231. *Id*. at 180.

232. *Id*.

233. *See* Frederick H. Tansil, *Asset Protection Trusts (APTS): Non-Tax Issues*, 2009 A.L.I.-A.B.A. COURSE OF STUDY, at 563.

Generally, a creditor will first obtain a judgment in a U.S. court against the debtor in order to reach the assets of a foreign trust.[234] The creditor may "bring suit against the trustee in either the jurisdiction where the trustee is domiciled or in a jurisdiction where the trust assets are located."[235] He may also sue in the jurisdiction of the settlor's domicile in situations where an alleged fraudulent transfer occurred or in other situations, such as in a bankruptcy context.[236] The creditor will then attempt to use these assets in order to satisfy the judgment.[237]

The creditor will typically assert one or more of the following as his argument(s):

> (1) the asset protection features of the offshore trust offend public policy in the jurisdiction where the post-judgment action is brought and, therefore, the governing law of the trust (i.e., the laws of the offshore jurisdiction) should be ignored in favor of the laws of the jurisdiction in which the action is brought; (2) the settlor's transfer to the offshore trust was a fraudulent transfer and, therefore, should be set aside; or, (3) the offshore trust . . . is the alter ego of the settlor and, because the settlor never really parted with dominion and control over the trust assets, the court should disregard the trust structure.[238]

1. Exporting the Assets vs. Importing the Law

There are two fundamental methods of achieving asset protection and privacy through foreign trusts that may at times conflict.[239]

a. Export the Assets

The first method is to sever all jurisdictional ties with state and federal judicial systems by placing the assets "in a foreign jurisdiction with a foreign structure and a foreign trustee."[240] The claimant seeking to satisfy the judgment must then travel to the foreign jurisdiction to enforce the claim.[241] This method, "exporting the assets," offers the highest degree of security and privacy for the trustee, while being costly and generally unsuccessful for the creditor.[242]

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234. *See* Osborne, *supra* note 83, at 180.
235. *Id*.
236. *Id*.
237. *Id*.
238. *Id*.
239. *Id*.
240. *Id*. at 180-81.
241. *See id*.
242. *See id*.

It is also possible to have trust assets in jurisdictions other than where the trust is located.[243] Depending on the additional jurisdictional laws, this can further advantage or disadvantage the trustee in protecting the assets from the creditors.[244] The primary advantage is the severance of the jurisdictional nexus; however, this benefit can be lost if planning is done carelessly.[245]

b. Import the Law

An individual can also select a foreign jurisdiction as a second alternative. The foreign jurisdiction should have aggressive trust and fraudulent transfer laws, meant to protect the settlor and the beneficiaries. In addition, the foreign jurisdiction should implement the asset protection plan so that the aggressive body of law is applicable to the trust entity, regardless of the fact that the trust assets remain in the U.S.[246]

> Under this method, the settlor implements the foreign trust in conjunction with a U.S. family limited partnership, limited liability company or other domestic legal entity that holds some or all of the settlor's assets. The settlor conveys all or a portion of the domestic limited partnership interests or the domestic corporation's shares to the foreign trustee. Under the arrangement the hard assets remain in the domestic partnership or corporation and, therefore, are physically situated in the U.S. Of course, being situated in the U.S., the assets are theoretically susceptible to local proceedings. The goal, however, is that the barricades of the aggressive foreign law applicable to the foreign trust will have been brought 'onshore' to the U.S. in such a way as to defeat or severely discourage the claimant. Using this method, one 'imports the foreign law.'[247]

The client controlling the assets is considered a significant concern of financial planning.[248] Many times clients tend to resist a foreign trustee when it comes to giving up control of their assets.[249] What they fail to realize is that the sacrifice must be made, however, to achieve the protection afforded under an "exporting the assets" approach. Also, "there are a number of specific methods of addressing the control issue (protectorships, letters of wishes, advisory committees, co-trusteeships, and the like), but the advising attorney must

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243. *Id.* at 182.

244. *See id.*

245. *Id.* ("[A] lawsuit filed in the trust situs jurisdiction may be ineffective if the trust assets are not located there . . . . [A] foreign trust with a custodial arrangement with a branch of a U.S. bank abroad may inadvertently expose trust assets to the jurisdiction of U.S. courts").

246. *See id.*

247. *Id.* at 181.

248. *Id.* at 183.

249. *Id.*

determine at what point the extent of retained client asset control renders the trust a sham and, therefore, indefensible in court."[250]

Giving the client some control leads to the issue that "the trustee can be attacked as a sham under U.S. law or applicable foreign law."[251] According to some:

> The greatest danger exists when the settlor is aggressive about retaining control. If the arrangement is ultimately controlled by the settlor, and if the settlor has, in effect, complete beneficial enjoyment, a court could easily deem the entire structure a sham and order turnover of the assets.[252] With regard to those clients seeking a high degree of control, avoiding a sham arrangement presents a serious challenge.[253]

Not only does the client want control, but he or she also "wants to retain, either currently or prospectively, the right to beneficial enjoyment of trust assets."[254] The concepts of expanding, shifting, and contracting are not new concepts for foreign trust planning, but fairly new for U.S. trust planning.[255]

Several reporting requirements come about through the operation and formation of a foreign trust.[256] By investing in the domestic and foreign entities, the result is that one must follow additional requirements when it comes to filing.[257] The reports are due to the IRS. [258] There is normally a fiduciary that must file the reports or returns, although "in practice foreign trust reporting rules place the true onus of compliance on the U.S. owners and beneficiaries of foreign trusts rather than the foreign trustees (who may be difficult for the IRS to access)."[259] However, this responsibility may be unfairly placed:

> This is underscored by the penalties that may be assessed against the U.S. owner for the foreign trustee's failure to furnish Form 3520-A (and supplemental statements), and the unfavorable presumptions applied to U.S. beneficiaries who do not receive essential information from the foreign trustees. It is not always possible for U.S. owners and beneficiaries of foreign trusts to ensure that the foreign trustee understands that compliance with the reporting rules is compulsory, irrespective of any bank secrecy or related laws of the jurisdiction where the trust is administered.

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250. *Id*.

251. *Id*.

252. *Id*.; *see also* Hayton, "When Is a Trust Not a Trust?", presented at the IBC Conference on Strategic Uses of International Trusts, London, Dec. 1993; *see* U.S. v. Grant, Civil Case 00-CV-8986 (S.D. Fla. 2005) ("Because the beneficiary of a Bermuda trust had full discretion to remove and replace the trustee, the magistrate concluded that the beneficiary essentially controlled the corpus of the trust and recommended that the beneficiary be ordered to repatriate trust assets so that they would be subject to U.S. law.").

253. *See* Osborne, *supra* note 83, at 183.

254. *Id*.

255. *Id.*

256. *Id.* at 224-25.

257. *Id.*

258. *Id.*

259. *Id*.

In addition, "it is unclear whether U.S. owners and beneficiaries of foreign trusts have a right of redress against foreign trustees who fail to keep the required information or to furnish it."[260]

IV. CONCLUSION

As one's ability to maintain his or her privacy continues to erode, the tools and techniques to protect and preserve such privacy must likewise evolve. The cutting edge tools and techniques provided in this article, both basic and advanced, provide individuals and families with valuable methods to achieve the privacy they so greatly desire. Tools and techniques, however, can only do so much. The most powerful of all privacy preservation planning techniques is, and always will be, the self-restraint, intentionality and caution of the individual or family desiring such privacy.

260. *Id.*