

# Trusts & Estates

The Journal of Wealth Management for Estate-Planning Professionals—Since 1904



**Summer Bright**—Andy Warhol's uniquely American "Bald Eagle" recently sold at an auction in Japan for US \$31,793.

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*By Barry A. Nelson*

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By Barry A. Nelson

## You **Already** May Be An Asset Protection Lawyer

Take the quiz and find out. I dare you

**T**he mere words “asset protection” make some lawyers wince.<sup>1</sup> They think asset protection is dirty and those engaged in it are the ambulance chasers of the estate-planning bar.

Of course, we all should turn our noses up at lawyers who tightrope walk on the limits of the law. And attorneys who violate the law, or assist their clients in doing so, should be dealt with severely.

But it's not only ethical to insulate clients' assets within the limits of the law from potential liability, it's also every lawyer's obligation.

Truth is, many lawyers already are engaging in asset protection without even knowing it.

Don't believe me?

Take this quiz yourself, give it to your estate-planning lawyer friends, and see.

For each of the following questions, answer:

- **Never/Almost Never** (and give yourself one point);
- **Frequently** (and award yourself two points); or
- **Always/Almost Always** (for three points).

- 1) When a client calls to inform you that he's making a real estate investment or starting a new business, do you suggest that the client take title other than in his individual name, that is to say via a corporation, a limited liability corporation, or a limited partnership?
- 2) If a client tells you he's selling his Florida homestead and intends to purchase another residence in the near future, do you advise him to keep the sales proceeds segregated to maintain homestead protection of the

proceeds until they are reinvested in the new residence?

- 3) If a client tells you his son is a surgeon and is having difficulty maintaining malpractice insurance or is involved in a messy divorce, do you suggest creating a trust for the child in the parents' estate-planning documents rather than providing for an outright gift to the surgeon/son?
- 4) If a client calls to ask the best way to take title to a car that will be driven primarily by his 21-year old daughter who is a law student, do you consider the benefits of having the car titled in the child's name rather than in the parent's name?
- 5) When your client purchases a large life insurance policy, do you consider adding dynasty trust provisions in his life insurance trust to provide both tax and spendthrift protection benefits for the children and more remote descendants?
- 6) If your client is involved in existing litigation that could result in a large judgment against him, do you ask whether there is any possibility that he'll be inheriting from his parents or spouse and, if so, do you suggest revising the estate plan to provide for gifts in trust rather than outright gifts?
- 7) Do you suggest clients consider foreign trusts to hold title to foreign security investments that have been recommended by their investment advisor to diversify asset allocation?
- 8) If a client calls after a terrible auto accident resulting in his being ticketed for driving while intoxicated, do you suggest that he take the bulk of his assets and create a foreign asset protection trust knowing that the client is insolvent at that time?



Barry A. Nelson is a shareholder in North Miami Beach, Fla.'s Nelson & Nelson, P.A.

YOUR TOTAL POINTS ARE : \_\_\_\_\_

## WHAT IT MEANS

Scoring:

- **12 points or less** = You do not address even the most basic asset protection planning concepts on a regular basis. You may want to review your responses with your malpractice carrier to see whether you should be disclosing in engagement letters that you provide no advice on asset protection issues, and that clients may want to review your planning with an asset protection attorney.

- **13 to 19 points** = You are about average in addressing asset protection issues. While you may not consider yourself an asset protection attorney, you actually address many of the issues an asset protection attorney would address with clients.

- **20 to 22 points** = You have an asset protection emphasis, but most likely would not cross the line into potential personal litigation—assuming your answer to question eight was Never/Almost Never.

- **23 to 24 points** = You are a very aggressive asset protection attorney and most likely fit the stereotype that many attorneys are concerned about when reference is made to asset protection planning.

Does your score surprise you?  
Are you actually an asset protection lawyer?


**Don't fret.** Anyone who scored 22 points or less is taking a conservative approach to asset protection planning. There's nothing wrong, indeed, it's often advisable to select a limited liability entity to take title to a new real estate investment; place homestead sales proceeds in a segregated account until the next homestead is purchased; suggest a car purchased for the client's son be titled in the son's name rather than in the name of one parent or jointly with the child; include dynasty trust provisions in a client's life insurance trust; and advise a client to discuss with

his parents the need to revise their estate plan to provide gifts in trust rather than outright as a result of a client's pending litigation.

Even creating a foreign asset protection trust for foreign investments should be respected for asset protection purposes—assuming that the transfer does not make the client insolvent and the client is not motivated by an actual intent to hinder, delay or defraud his creditors.

Assisting in the creation of the foreign trust described in question eight, however, could subject you to civil and ethical actions, as a lawyer may not assist a client in protecting assets if the client's intent is to transfer assets to defraud existing and identifiable creditors.<sup>2</sup> In certain situations there also might be criminal prosecution.

Obviously, we don't want to drive too fast. But it can be just as dangerous to drive too slowly on a highway. Lawyers who don't consider some of the issues raised by my questions may be serving their clients ill—unless they refer them to another attorney with a greater emphasis in asset preservation planning. So, if you can't bring yourself to offer these basic services, find someone who will.

Hey, I'm in the phone book. 

### Endnotes

1. This article is adapted from a piece that appeared in the *Florida Bar Journal* in November of 2005.

2. See, for example, *United States v. Eversoff*, 2008 U.S. App. Lexis 5952, 2008-1 U.S. Tax Cas. (CCH) (2d Cir. March 21, 2008), *vacating and remanding United States v. Eversoff*, 2006 U.S. Dist. Lexis 69575 (E.D.N.Y. 2006). In determining whether a transfer to a domestic trust should be respected for asset protection purposes where the federal government was attempting to foreclose on a tax lien, the Court of Appeals in *Eversoff* stated: "The district court should examine both whether Eversoff intended to defraud the government and also whether he intended to hinder or delay, as either motive is sufficient under [NY fraudulent conveyance law]....In addition, because the issue is intent, the more relevant inquiry is not whether the debtor was actually insolvent at the time of the transfer, but rather whether the debtor believed that the transfer would make him insolvent presently or in the future."