Asset Protection Estate Planning: Trusts and Estates Attorneys are
More Than Just Trust and Estate Drafters
by Michael Sneeringer

Trusts and Estates attorneys ("T&E attorneys") need to be mindful of the fact that
their planning will come under scrutiny if their client becomes entangled in a legal
quagmire. The legal quicksand surrounding clients can come in the forms of divorces,
bankruptcies, personal injury lawsuits and vicarious liabilities, among others. T&E
attorney’s work product may be tested, not with respect to challenges by the IRS or a
disgruntled beneficiary, but rather by a creditor. All T&E attorneys, at some point in time,
aid their clients in protection of their assets. What exactly constitutes as “asset
protection”? Is forming an LLC in another state different from the client’s domicile
considered asset protection? Is creating a trust for client’s son in a jurisdiction such as
Nevada or South Dakota considered asset protection? Can T&E attorneys legally
protect clients from creditors? Can T&E attorneys legally protect themselves from their
own clients when the client gets “Buyer’s Remorse”? This article explains that when
undertaking asset protection planning for clients, T&E attorneys, like cats, must PPUR:
Prepare for the client, Protect the client from himself or herself, Understand that today’s
planning by T&E attorney could later on be attacked by a foreseeable or unforeseeable
creditor and Recognize that not all clients will be satisfied.

I. Asset Protection

Asset protection is a term that generally describes the techniques used to guard
one’s wealth from claims of creditors. The initial question T&E attorneys should be
asking themselves is whether clients should be told in writing and or verbally by their T&E attorney that the attorney is creating an “asset protection” plan as opposed to merely engaging in “trust and estate” planning. Asset protection, by itself, may not be the best stated reason to undertake any course of planning, but it is a legitimate rationale that, coupled with other reasons, cannot be overlooked and should be communicated to the client.

For example, if grandparent’s immediate goal in 2013 is to create a trust for grandchild and protect grandchild’s trust corpus from a judgment against grandchild for alimony, wrongful death or child support, grandparent’s immediate goal is probably “asset protection” of funds set to be inherited by grandchild. Grandparent’s planning objectives can be spun off into multiple facets such as use of grandparent’s unified credit amount or spend down of grandparent’s assets; both legitimate objectives that, in addition to asset protection, are well founded and within the bounds of appropriate estate planning.

What grandparent has to consider is the potential reach of grandchild’s creditors. If grandchild is already subject to a judgment, can grandparent provide a protected trust to grandchild?

**A. Worst Case Scenario: Asset Protection Gone Bad**

T&E attorneys need to always warn clients of potential adverse scenarios. One such example is the unpublished opinion of Kilker v. Stillman, No. G045813, 2012 WL 5902348 (Cal. App. 4th Dist. Nov. 26, 2012). In Kilker, Debtor ran a soil and engineering business that in 2000, performed soil testing in connection with a pool’s construction. In 2004, Debtor formed three trusts and transferred virtually all of his assets into one of the
trusts. Debtor would later admit that because soil engineers are frequently sued, his primary objective in creating the trusts was “[a]sset protection… so that his ‘creditors could not go after any equity that [debtor’s] trust, his personal trust, owned in [said] property.’” Kilker, at *2.

In 2008, Debtor was sued for negligence as a result of the 2000 soil testing. Debtor settled, but failed to pay the settlement amount by the agreed-upon date. After the plaintiffs obtained a judgment against Debtor, they attempted to levy on trust assets. Subsequently, a court case arose surrounding Debtor’s transfer of property into the trusts in 2004 as the plaintiffs contended that Debtor’s transfers constituted a fraudulent conveyance under California’s fraudulent transfer statute. The court used Debtor’s testimony to rule under California’s fraudulent transfer statute that Debtor had the requisite actual intent at the time he transferred property into trust to “hinder, delay, or defraud” his creditors, even creditors that were unforeseen at the time of the transfer.

Debtor attempted to use the often cited differential between the “three” classes of creditors: present creditors, future creditors and future potential creditors. Debtor stated that the plaintiffs were not present creditors in 2004 and that the question should have turned on whether the plaintiffs were truly considered actual future creditors.

Since Debtor admitted in testimony that his primary objective in creating the trusts was asset protection so that his creditors could not go after any equity that he owned in his property, Debtor’s actual future creditor argument was flawed because under California law; the statute in question did not distinguish future creditors or future potential creditors; “a current creditor can challenge a transfer as fraudulent, regardless
whether that creditor had a claim at the time of the transfer, if that creditor can prove, inter alia, the transfer was made to hinder, delay, or defraud any creditor.” Kilker, at *4.

Though Kilker cannot be cited as precedent and involved a do-it-yourself debtor (with some help from the debtor’s accounting firm), its premise is that “asset protection” should not be the only answer of why a client engages in a certain transaction recommended by a T&E attorney. Could the unsophisticated debtor in Kilker have saved himself, from himself, by hiring an experienced T&E attorney at the outset of his employment, instead of engaging in “planning” with an “accounting firm”? Hopefully when a client comes through T&E attorney’s door, at the point in client’s employment where no claims are on the horizon such as the debtor described in Kilker (i.e., Debtor in Kilker was engaged in a line of work, soil testing, where many of his contemporaries were sued, and as such, Debtor wanted to protect against future creditors), T&E attorney will be ready to align the appropriate factors to correctly engage in planning that will prove beneficial to the client.

II. Factors Trusts and Estates Attorney Must Keep in Mind (the P is for Prepare)

Even before client walks in the door, T&E attorney needs to be prepared. T&E attorneys strive to be brought up to speed by clients using “client information sheets” at the outset of the initial client conference. Unfortunately, valuable information tends to be embellished or left out by the potential client for various reasons: privacy, age of client, capacity of client, presence of client’s children/spouse during initial client conference, issues of honesty and trust, etc. Most of the time, these “oversights” are in the form of approximate value of total assets, employment history and various extraneous issues
that for whatever reason, the client leaves out: Is the client embarrassed about his or her child out of wedlock? Does the client not trust his or her spouse regarding certain financial information? Has the client provided for family, friends or perhaps a mistress that he or she would not like the spouse to find out about? Has client not presented his or her history of litigiousness? The prudent T&E attorney will look into the client's background using services such as LexusNexus or Westlaw. Perhaps a web search with a detailed client questionnaire is a perfect form of “due diligence,” but is that enough?

Sometimes prior to planning, T&E attorneys will direct their clients to fill out an affidavit of solvency or other similar document that describes, among other things, the client as “solvent” at the time T&E attorney commences the representation and planning, the client is not trying to hinder, defraud or delay creditors, the client is not absconding, the client has not broken any laws by commencing planning, etc. Solvency is defined as the client having sufficient assets to meet his or her obligations as they mature in the ordinary courts of business; i.e., the individual is able to pay his or her debts, not a mere “hope” or “wish” to pay. While T&E attorney must be mindful of potential creditors, generally the affidavit of solvency serves to absolve the attorney of consequences that could behold T&E attorney from liability from potential creditors of the client in the future. T&E attorney has sufficiently forced the client to state, preferably in the form of a notarized writing, that his or her assets are greater than liabilities.

Once an affidavit of solvency or other such document is signed, many newly minted or casual T&E attorneys feel their job is finished; the affidavit of solvency is the holy grail of attorney liability protection. Unfortunately, the skilled and seasoned T&E
attorney is aware that this is not enough. If T&E attorneys are truly going to practice asset protection, there is more work to be done.

A. Case on Point: Asset Protection in the Attorney’s Practice

*Goldberg v. Rosen*, 493 Fed. Appx. 11 (11th Cir. Fla. 2012) identifies a potential consequence of asset protection planning by attorneys. Debtor in *Goldberg* hired a nationally recognized Asset Protection Attorney (“APA”) to prepare legal documents including an offshore asset protection trust. Debtor paid $45,000 in costs and fees for the documents. About a year after engaging APA, a $2,930,899.97 judgment was entered against Debtor. On February 6, 2009, Debtor filed a Chapter 7 Bankruptcy Petition. Later, Debtor repatriated the offshore asset protection trust funds for fear of being held in contempt. In turn, Bankruptcy Trustee brought an adversary proceeding against APA, seeking to recover the attorneys’ fees and costs paid by Debtor to APA.

1. Lessons Learned

So what did the attorney do wrong in *Goldberg*? Well… nothing. The attorney, before commencing the planning involved, obtained an affidavit of solvency. With regards to the affidavit of solvency, the court stated:

> [T]he Court thinks it's abundantly clear that there's been no establishment of insolvency.

In fact, the record is abundant with records of solvency. The witness signed a solvency affidavit, which she said she did not read, but the Court notes—noted that the witness could remember some things in the way of financial numbers of a rather complicated structure down to the penny, and other things, she couldn't remember at all… In reviewing the bankruptcy court's judgment, the district court concluded that the evidence in support of the Trustee's claims was "woefully lacking." The district court noted that there was no evidence of legal malpractice or unjust enrichment, and that the credible evidence supported a finding that the Debtor was solvent, not insolvent, at the time she made the transfer…
Nor do we find support for the Trustee’s assertion of clear error in the bankruptcy court’s finding that the Debtor was solvent at the time of the transfers.


_a. Excited Client and Solvent Client_

At first client is excited that his or her life will be put back together by T&E attorney. The client finds out that he or she has a few exempt assets and agrees to plan with them. In many cases, T&E attorney will proceed with planning armed with the knowledge gleaned from the initial conference, facts as restated in the engagement letter (that hopefully the client signs off on) and initial client questionnaire.

In some cases, the client, who T&E attorney sees as having a greater certainty of litigation, next is faced with a choice: fill out the affidavit of solvency and start planning, or play it conservative and not plan… if client was just in the excitement phase, client is rather eager to sign the affidavit. This “solvency” phase is better handled by T&E attorney if T&E attorney educates client on the consequences of lying on the affidavit of solvency or recognizes when client is embellishing the truth. In educating the client, T&E attorney should make client aware of some of the more egregious instances of asset protection, such as the cases of Jamie Solow (_SEC v. Solow_, 682 F. Supp. 2d 1312 (S.D. Fla. 2010)) and Peter Rogan (_Dexia Crédit Local v. Rogan_, 629 F.3d 612 (7th Cir. Ill. 2010); _U.S. v. Rogan_, 2012 U.S. Dist. LEXIS 56109 (N.D. Ill. Mar. 29, 2012)).
b. Former Client

Client becomes former client once the scope of the initial estate planning/asset protection engagement has ended. T&E attorney may have drafted wills and trusts for the client. T&E attorney should be wary to just let client go on his or her way: was there an inactive or termination letter (i.e., something that clarifies the status of the attorney-client relationship)? What is required by T&E attorney’s malpractice insurer in order to terminate a client representation?

c. Worried and Remorseful

The crucial phase from T&E attorney’s perspective is when client becomes worried: client’s business is insolvent, client gets divorced, client stopped paying child support, etc. As client’s peace of mind disappears, he or she begins to ponder the scope of the legal problem with regards to the breadth of his or her assets: the family home is in foreclosure; the exotic car lease has 24 months left; the real estate will not sell; the boat has broken down; the gold is fake, etc. Client is then remorseful; client has been chastised by his or her bankruptcy or family law attorney for entering into the estate plan with T&E attorney; why were assets put into a domestic asset protection trust? A foreign asset protection trust? A family limited partnership?

d. Vengeful Client

When creditors become angry as soon as discovery commences and it is unearthed that client put 1/5 of his or her assets into a foreign asset protection trust and another 3/5 into a trust for grandchild or child, client inevitably will reappear in T&E attorney’s life. T&E attorney must either be ready to explain how planning protects client or how the planning can be undone. Often times this is where the initially “excited” client
turns into the Goldberg client… a client ready to repatriate funds, dissolve entities and terminate trusts with the hopes of paying back his or her creditors. Can T&E attorney avoid this scenario in the first place? Should T&E attorney really be worried about client’s creditor especially if this is now former client?

III. What should the Trusts and Estates Attorney do (hint the second P is for Protect)?

Each client brings unique issues to the table such as owning a business, multiple marriages or ownership of foreign assets, among others, and in some cases, T&E attorney may be familiar with the different categories of the law to solve such issues. However, clients come to T&E attorneys expecting an “expert.” T&E attorneys must offer clients the reasons why an additional professional (the attorney specializing in bankruptcy, family law or litigation; the financial planner; the insurance broker) should be consulted with. An experienced T&E attorney differentiates himself or herself by recommending to the client the necessity of consulting with said professional to thoroughly review client’s situation in the presence of T&E attorney and recommend a course of planning that sufficiently covers all of the client’s areas of need.

T&E attorney needs to think outside the box and realize that the second marriage, irresponsible child-in-law, multiple ownership stakes in real estate or ownership of complicated assets may require a second opinion or second expert in the room for if not the initial client conference, at least the second client meeting. T&E attorney is not only protecting his or herself from liability to the client, but more importantly is also protecting the client from the inevitable what ifs: what if divorce
number two occurs; what if irresponsible child-in-law borrows the second home or family car; what if a capital call or call on a line of credit on one of the properties occurs?

IV. The Future with Client Client (Understand Today’s Planning is Tomorrow’s Panacea; Recognize Client’s will not Always be Satisfied)

Once client’s creditor issue surfaces, T&E attorney needs to step back from the situation and look at his or her initial engagement with client. What did T&E attorney set out to initially do? Some T&E attorneys are cognizant that they can plan for tomorrow but cannot plan for an act of God. If T&E attorney took all the necessary precautions in creating the structure or drafting the documents, there is nothing to be worried about.

If client or former client is in the remorse or vengeance stage, he or she may come back for a meeting to understand the structure once again or be briefed on how he or she is protected. This is ultimately a good thing: former client comes back into the office and is a paying customer once again while current client is reminded of why he or she is still a client; either way, T&E attorney is able to update the client or former client with the current law in order to possibly be engaged for additional planning.

If client does not return, he or she may be exhibiting buyer’s remorse, What T&E attorney has not dealt with a client with buyer’s remorse? Buyer’s remorse is not limited to attorneys: surgery gone bad, a car that is a lemon, an investment that went south, or a home improvement that has left much to the imagination, etc. If T&E attorney documented and structured everything properly, there is nothing to worry about.

The instance a “feeling” of concern washes over T&E attorney, action must be taken. T&E attorney should first reach out to other trusted professionals in the field to see if the situation has been encountered by someone else. If that does not work, T&E
attorney may have to turn over the issue to his or her malpractice insurer. Although a bold step, such disclosure could prove beneficial in the long term. From there, T&E attorney should be ready to disclose to client what could or should have been done. T&E attorney might look to his or her notes or correspondences with client to verify that all the necessary steps were taken. T&E attorney should also verify whether client took the necessary steps to implement the planning. Sometimes post planning memorandums become a T&E attorney’s saving grace. If T&E attorney has outlined all the necessary steps to client, specifically provided which professional client should contact to properly administer certain planning and provided an acknowledgment for client to sign showing that client read and understood said procedures, T&E attorney has mitigated much of the culpability in any “issue” that has arisen from the planning.

Requesting client to sign off on an acknowledgment is one thing, actually getting the letter back signed is another. T&E attorney must often rely on his or her support staff to provide the necessary follow-ups with client to get the signed acknowledgment. This step is crucial and can save T&E attorney much headache. T&E attorney might also have an intern, paralegal or associate sit in on the meetings with client and take notes. Later on when problems arise, T&E attorney will have the notes of another individual available to verify what was discussed and what T&E attorney told client to do to fully implement the planning.

V. Conclusion

Generally speaking, T&E attorneys need not check their common sense at the door. Cases like Kilker and Goldberg exemplify the premise that the best asset protection attorney practices in certainty, not guess work. Unfortunately, T&E attorneys
cannot “Monday Morning Quarterback” each and every decision made for a client. If the goal is sleeping at night, T&E attorneys should **PPUR**: Prepare before initiating planning, for a client, by educating his or herself on the client’s background and assets; **P**rotect the client from his or herself by educating and explaining to the client the necessity of accuracy and candor on/during such “estate planning staples” as the initial client conference and estate planning questionnaire; **U**nderstand that today’s planning may be subject to later scrutiny; and **R**ecognize that clients, no matter what type of planning, technique or solution is being touted, may not be satisfied.

---

1 Michael Sneeringer was admitted to the Florida Bar in 2012. He practices in the areas of estate planning, probate administration and asset protection planning at Nelson & Nelson in Miami Beach, FL. He can be reached at michael@estatetaxlawyers.com.