

The Accountant/Attorney Liability Reporter

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Inside this issue:

Page 2

Engagement Letter And Good Record Keeping Lead To Accountant Defense Verdict

By Nicholas A. Ogden, Esq. and Nancy M. Reimer, Esq.

Page 4

Closing Attorney Not Liable To Seller As Escrow Agent In Absence Of Contract With Seller Of Property

By Douglas M. Marrano, Esq.

Page 7

Massachusetts Probate And Family Court Addresses Lawyer's Simultaneous Representa- tion Of Family Members

By Alberto Rossi, Esq. and Nancy M. Reimer, Esq.

Page 9

Domestic Asset Protection Trusts (DAPT)

By Donna M. White, Esq.

Engagement Letter And Good Record Keeping Lead To Accountant Defense Verdict

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I**N JUNE OF THIS YEAR DONOVAN HATEM LLP** successfully defended an accountant in a four-day jury trial.

The plaintiff was an attorney who claimed that the accountant committed malpractice in the preparation of his 1992 tax returns. The plaintiff claimed the accountant should have performed a cash reconciliation of his books and Form 1099s received when the attorney received settlements. The plaintiff asserted that the failure to perform this work created red flags that caused the Internal Revenue Service to audit the plaintiff's 1992 tax returns. Eventually, the plaintiff was assessed an additional tax liability of approximately \$7,500, based on underreported income. The plaintiff sought recovery of substantial attorney's and accountant's fees incurred in connection with the audit, as well as emotional distress damages stemming from the IRS audit.

The trial turned on a determination of what information the plaintiff provided to the accountant to prepare the plaintiff's tax returns and what the accountant should have done with such information. The accountant's engagement letter; and detailed tax organizer of information provided by the client with notes of clarifications were significant in determining the information the plaintiff provided to the accountant, and what review/inquiry the accountant was required to make concerning the information.

The engagement letter stated as follows:

Your returns will be prepared from the information you furnish us. We will make no audit or other verification of the data you submit, although we may need to ask you for clarification of some of the information.

The judge properly instructed the jury that the engagement letter acts like a contract and defines the scope of the accountant's services.

In order to prepare the plaintiff's 1992 tax return, the accountant requested and received the plaintiff's 1990 and 1991 tax returns. Additionally, the accountant sent the plaintiff a tax organizer in which the plaintiff entered his financial information for the year, and attached numerous sheets outlining his accounts, income, expenses and property. The tax organizer and additional sheets filled out by the plaintiff, however, failed to include information concerning all of the plaintiff's bank accounts and a real estate transaction. The accountant, during preparation of the plaintiff's 1992 tax return, reviewed the tax organizer, and contacted the plaintiff seeking clarification of several questions. The accountant kept notes

of these discussions in the margins of the tax organizer and on separate worksheets used in the preparation of the plaintiff's tax return, demonstrating that the accountant sought and received clarification from the plaintiff of information provided in the tax organizer.

Our defense theme for the trial came from the AICPA Statement on Responsibilities in Tax Practice, Certain Procedural Aspects of Preparing Returns, § .02 ("Section .02"), which states:

In preparing or signing a return, the CPA may in good faith rely without verification upon information furnished by the client or third parties. However, the CPA should not ignore the implications of information furnished and should make reasonable inquiries if the information furnished appears to be incorrect, incomplete, or inconsistent on its face or on the basis of other facts known to the CPA. In this connection, the CPA should refer to the client's returns for prior years whenever feasible.

The combined effect of the engagement letter and tax organizer established that the accountant provided the services he represented he would to the plaintiff, and that the accountant complied with Section .02. The accountant obtained information from the plaintiff, and sought clarification when necessary. Further, because the plaintiff completely failed to provide certain information to the accountant, and because the information he did provide to the accountant was consistent with the plaintiff's previous tax years, there was no information to lead the accountant to believe that the plaintiff had not been completely forthcoming when filling out the tax organizer.

In short, a detailed engagement letter, and contemporaneous detailed notes during the tax preparation, established that the accountant performed the agreed-upon services in accordance with the applicable standard of care. ■

Closing Attorney Not Liable To Seller As Escrow Agent In Absence Of Contract With Seller Of Property

By Douglas M. Marrano, Esq.

A **MASSACHUSETTS SUPERIOR COURT JUDGE** recently awarded summary judgment to a defendant law firm (the "Firm"), which conducted the closing on a sale of commercial property between business entities. Despite allegations that the Firm received sales proceeds and did not distribute them as agreed, the court awarded summary judgment on several breach of contract and consumer protection act theories because no contract existed between the Firm and the seller imposing duties that the attorney act as an escrow agent.

In *Labels, Inc. et al. v. Dion, et al.*, the plaintiffs, two business entities and a realty trust (collectively, the "Sellers") sued, among others, the Firm and the bank that financed the real estate transaction. In 2000, the Sellers began looking for commercial property on which to consolidate manufacturing operations. The Sellers found such a property in Hampton, New Hampshire (the "Hampton property"). In order to purchase the Hampton property, the Sellers needed to sell property it owned in Amesbury, Massachusetts (the "Amesbury property") and obtain a bank loan.

The decision in *Labels* is important because it supports the legal proposition that an attorney does not generally owe a duty to parties to a transaction other than the attorney's client.

The Sellers found a purchaser for the Amesbury property, Alkim, LLC (the "Purchaser"). The Sellers introduced the Purchaser to its bank (the "Bank") so the Purchaser could obtain financing to purchase the Amesbury property. At the same time, the Sellers discussed with the Bank a loan for itself in order to purchase the Hampton property.

Based on recommendations from the Bank and one of the Seller principals, the Purchaser engaged the Firm to represent it in both the financing and the purchase. The Firm was on the Bank's list of approved counsel and had previously represented the Sellers in unrelated loan transactions with the Bank.

The Bank would not finance entirely Seller's the purchase of the Hampton property, and instead suggested the Sellers obtain part of the loan through the U.S. Small Business Administration (the "SBA"). The Sellers sought SBA assistance and discovered SBA rules required anyone owning more than 20 percent of a company to personally guarantee the loan. The other principal of the Seller (the "Divesting Principal") was unwilling to personally guarantee any further loans due to his advanced age and deteriorating health. The Sellers' other co-owner (the "Remaining Principal") agreed to conduct a buy-out. The two principals eventually reached an agreement (the "Agreement") in October 2000 in which the Divesting Principal would receive a lump sum payment of \$100,000, among other things, and weekly interest payments for five years. After five years, the Divesting Principal could call the principal on the note or opt for another five years' worth of interest payments.

The Sellers and the Purchaser negotiated the purchase and sale agreement for the Amesbury property. The Purchaser informed the Firm of the terms of the deal. The Firm drafted a purchase and sale agreement, but had no role in the negotiations between the Sellers and the Purchaser.

A dispute arose between the Divesting Principal and the Remaining Principal whereby the Divesting Principal could not tender his shares of stocks and would not sign a substitute stock certificate. The Sellers discontinued weekly interest payments to the Divesting Principal and the Remaining Principal declared the Agreement rescinded.

The Divesting Principal brought the Agreement and notice of rescission to the Firm and said he was willing to proceed with either the Agreement or rescission, as directed by the Sellers. The Firm, anticipating that it would merely draft the requisite documents, contacted the Remaining Principal, who became agitated and suggested the Firm had a conflict of interest. The Firm then recommended the Divesting Principal seek help from another attorney.

The Bank, also learning of the disagreement within Sellers, hired an attorney to investigate the Bank's rights with respect to previous loans to the Sellers. The Bank directed the Remaining Principal to attend a meeting. The Remaining Principal obtained a loan sufficient to purchase the Hampton property from another lender. At the meeting with the Bank, the Remaining Principal became angry and stated his intention to withdraw all his business from the Bank.

The Sellers and the Purchaser set the date for the closing on the Amesbury property for early January 2001. The Sellers then set the closing for the purchase of the Hampton property for a few days later. The Bank hired an attorney to represent it on the financing of the Amesbury property, but she was not able to conduct the closing. Instead, the Firm conducted the closing and drafted, among other things, a Settlement Statement, listing relevant financial components of the transaction. The Firm, representing the Purchaser only, along with the Purchaser's managing partner, a Bank vice president, the Remaining Principal and his

attorney, and the Divesting Principal's attorney, with a signed power of attorney, attended the closing.

At the closing, the Remaining Principal announced that there would be net proceeds payable to the Sellers from the transaction. The Firm's expectation was that all funds would be turned over to the Bank in satisfaction of the Sellers' previous loans. The Firm attempted to contact the appropriate Bank employee, who was unavailable. The parties agreed to proceed with the closing and when the Firm obtained confirmation of the payout amount, it would amend the Settlement Statement and disburse the funds as appropriate.

The next day, counsel for the Divesting Principal faxed a letter stating the Firm was not to pay out any sales proceeds to the Sellers. The following day, the Firm sent sale and mortgage documents for recording at the Registry of Deeds. The Sellers' attorney then faxed a letter demanding the Firm to issue a check to the Sellers for the sales proceeds.

Prior to the Bank's disbursements of the loan proceeds, the Divesting Principal and the Sellers' attorney both faxed letters with conflicting instructions for the Seller and the Divesting Principal as to what to do with the sales proceeds. The attorney for the Divesting Principal also notified the Firm that there was a court hearing the following week at his client's request for temporary restraining order against the Sellers for the sales proceeds. Following this correspondence, the Bank disbursed loan proceeds to complete the purchase of the Amesbury property.

The Firm deposited the loan proceeds in the Firm's IOLTA account and waited for the court to act. The following week, a Massachusetts Superior Court judge issued a writ requiring the Firm to hold the funds until directed otherwise. Four months later, the Divesting Principal and the Sellers reached an agreement as to release of the funds. The Firm issued the Sellers a check for the sales proceeds plus interest.

The Sellers sued the Firm, the Bank, and the Divesting Principal. The Sellers claimed the Firm was in breach of the escrow agree-

The Court ruled "[a]n enforceable agreement requires consideration, and there was none here; there was simply a statement of future intent."

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ment, breached the implied covenant of good faith and fair dealing, and violated the Massachusetts Consumer Protection Act.

The Superior Court ruled the Firm was entitled to summary judgment. Even in the light most favorable to the Sellers, there was no escrow agreement. The Court found there was merely the Firm's statement at the end of the closing to obtain the correct payout figure and distribute the net sale proceeds. The Court ruled "[a]n enforceable agreement requires consideration, and there was none here; there was simply a statement of future intent."

The Court also found the Firm had no duty to release the sales proceeds. The Firm did not obtain any funds from the Bank until the documents were on record with the Registry of Deeds. By that time, the Firm had received conflicting directions and had been notified of the pending court hearing. The Court ruled the Firm had no duty to distribute funds until after the court hearing.

The Court also concluded the Firm had no duty to the Sellers or the Remaining Principal. The Firm's only client was the Purchaser. The Court ruled an attorney may only have a duty to a nonclient when the attorney should foresee that the nonclient will rely on the services rendered by the attorney, but that a duty may not be

imposed if that independent duty would conflict with an attorney's existing duty to his or her client. The Court held that, in this case, imposing a duty to the Sellers would conflict with the Firm's existing duty to represent the Purchaser. The Court ruled because the Firm had no duty to the Sellers, that the Sellers could not prevail on its claim of breach of the escrow agreement against the Firm. For the same reasons, the Court concluded the Sellers would be unable to prevail on its claims of breach of the covenant of good faith and fair dealing or violations of the Consumer Protection Act.

The decision in *Labels* is important because it supports the legal proposition that an attorney does not generally owe a duty to parties to a transaction other than the attorney's client. It also establishes the mere presence of an attorney at a closing and the attorney's receipt of sales proceeds does not create an escrow agreement or designate a closing attorney as escrow agent. An escrow agreement continues to require consideration paid to or received by the attorneys in order to rise to the level of an enforceable contract. ■

Massachusetts Probate And Family Court Addresses Lawyer's Simultaneous Representation Of Family Members

By Alberto Rossi, Esq. and Nancy M. Reimer, Esq.

A **RECENT DECISION OF THE PROBATE AND FAMILY COURT** reinforces the fundamental principles set forth in the Massachusetts Professional Rules of Conduct that an attorney may simultaneously represent clients related to one another so long as their interests are not directly adverse to each other. In this matter, the plaintiff filed a complaint against an attorney alleging breach of fiduciary duty as a result of the attorney's preparation of two wills for the plaintiff's Aunts disinheriting the plaintiff while at the same time providing legal assistance to the plaintiff on other matters. The plaintiff alleged that this was a breach of fiduciary duty because his attorney represented his Aunts in preparing a document that was adverse to him. The Probate and Family Court granted summary judgment for the attorney finding no violation of any Professional Rules of Conduct. Donovan Hatem LLP represented the attorney in this matter.

Factual Background

The factual circumstances surrounding this lawsuit begin in 1993 when two sisters decided to have an attorney prepare their estate plans, which included the drafting of two wills wherein each sister named several charities as well as their nieces and nephews as beneficiaries. Sometime thereafter, one sister had a "falling out" with the plaintiff, her nephew, and as a result thereof, both sisters decided to amend their wills to disinherit the plaintiff, while making Linda, one of the sisters' nieces, and her husband, David, the primary beneficiaries.

Even if the attorney had violated the Professional Rules of Conduct, that fact alone would not necessarily rise to the level of a breach of fiduciary duty.

To prepare their amended wills, the sisters sought the aid of another attorney, the defendant in this lawsuit. The attorney also happened to be the brother-in-law of Linda, the sisters' niece. Since joining the sisters' extended family, the attorney had performed various legal services for the sisters as well as the plaintiff. For example, the attorney drafted a deed for the plaintiff that transferred property to the plaintiff and his wife and reviewed a purchase and sale agreement for the plaintiff as well as several leases. Prior to the preparation of the sisters' amended will to disinherit

the plaintiff, the attorney's legal assistance to the sisters included collecting on a personal loan made to one of the sisters as well as handling a landlord/tenant dispute.

Legal Analysis

In examining the plaintiff's complaint, the Probate Court pointed out the first deficiency therein: the claim that a violation of the Professional Rules of Conduct is conclusory evidence of an attorney's breach of a fiduciary duty owed to the plaintiff. In dismissing this contention, the Probate Court stated the following:

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“A violation of a canon of ethics or a disciplinary rule . . . is not itself an actionable breach of a duty to a client.’ *Fischman v. Brooks*, 396 Mass. 643, 649 (1986). The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. The fact that a Rule is just a basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, *does not necessarily mean that an antagonist in a collateral proceeding or transaction may rely on a violation of a Rule.* ‘As with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary rule was intended to protect one in his position, a violation of that rule may be some evidence of an attorney’s negligence.’ *Id.* at 649.” (emphasis added).

Accordingly, the Probate Court held that even if the attorney had violated the Professional Rules of Conduct, that fact alone would not necessarily rise to the level of a breach of fiduciary duty.

The Court next analyzed Rule 1.8(c) of the Professional Rules of Conduct which provides that “a lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, *except where the client is related to the donee*” (emphasis added). Although the attorney in this matter did prepare an instrument conveying a substantial gift to his brother, David, and sister-in-law, Linda, he did not violate Rule 1.8(c) because his clients, the sisters, were related to the donee, David and Linda.

Likewise, the Court held that the attorney did not violate Rule 1.7 of the Professional Rules of Conduct with respect to his dual representation of the sisters and the plaintiff, their nephew. Specifically, Rule 1.7 provides the following:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s re-

sponsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implication of the common representation and the advantages and risks involved.

The plaintiff alleged the attorney’s preparation of the estate planning documents for the sisters was “directly adverse” to the plaintiff’s interests. The Court disagreed:

“Direct adversity requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests.” ABA Formal Op. 05-434. Plaintiff’s legal rights would be “adverse” to Emma and Theresa’s if they had a legal duty to make the bequest that is to be revoked or altered. *Id.* Absent a legal obligation to make the bequest, “there is no conflict of legal rights and duties between the testator and the beneficiary and there is no direct adversity.” *Id.*

Accordingly, because there was no legal obligation on the part of the sisters to bequest any gift to the plaintiff, and the legal services provided to the plaintiff, as even admitted by him, were unrelated to the legal services provided to the sisters, the attorney did not violate either Rules 1.7(a) or 1.7(b) of the Professional Rules of Conduct.

Conclusion

This Probate and Family Court decision reaffirms the principles set forth in the Rules of Professional Conduct: a conflict of interest does not merely arise from the dual representation of multiple family members so long as their interests are not directly adverse to each other. ■

Domestic Asset Protection Trusts (DAPT)

By Donna M. White, Esq.

Any person has a right to arrange his or her affairs "to provide against future misfortune when he is abundantly able to do so."

- Carr v. Breese, 81 N.Y. 584, cited with approval in Schreyer v. Scott 134 U.S. 405 (1890)

Overview: What is a DAPT?

A Domestic Asset Protection Trust or DAPT, is an irrevocable trust established in one of the nine states (Alaska, Colorado, Delaware, Missouri, Nevada, Oklahoma, Rhode Island, South Dakota, and Utah) whose laws allow a person (a "Donor") to transfer assets to a trust for his or her own benefit and prevent the Donor's creditors from reaching those assets.

History: From Offshore to Onshore

Prior to 1997, and originating in the common law as far back as 1570, the law in every state of the United States allowed creditors (past, present and future) to reach the Donor's interest in such a trust. In response to the loss of investment capital to offshore asset protection jurisdictions and in an effort to attract capital investment of their own, the DAPT states listed above changed their legislation to abolish the long standing common law rules, creating for the first time the possibility of creating an asset protection trust without the expense and uncertainty associated with offshore planning.

Which Jurisdiction?

Alaska and Delaware were the first two states to pass legislation that provides for asset protection trusts and they continue to be the lead jurisdictions on the domestic asset protection front. While the laws of both jurisdictions are similar, Alaska is preferable because (i) it allows more flexibility in the way distributions from the trust are structured; and (ii) if a judgment creditor were to challenge such a trust, forcing the creditor to go to Alaska to litigate the claim would be more onerous than forcing a creditor to litigate a claim in Delaware.

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Structure of the Trust

A typical Alaska asset protection trust would be structured so that distributions could be made to the Donor, the Donor's spouse and the Donor's issue. In addition, to prevent the transfer to the trust from being a completed gift for gift tax purposes, the Donor would retain both a power to veto distributions to anyone but himself or herself, as well as a testamentary power to appoint the trust assets at his or her death.

The trustee of the trust must be an Alaska resident or an Alaska trust company or bank with trust powers. It is preferable to choose a trust company or bank that does not have branches in other states. There is some concern that a non-Alaska court may be able to obtain jurisdiction over the Alaska Trustee through a branch located in the state of the court's jurisdiction. The Alaska Trustee must materially participate in the administration of the trust (accounting, tax reporting, etc), would hold some or all of the assets and would make actual distributions. However, while the Alaska Trustee could make all of the distribution decisions, the trust would typically be structured so that a "Trust Protector" would also have the power to direct distributions. The Trust Protector need not be a resident of Alaska and would typically be a trusted advisor of the Donor. The Trust Protector would also have the power to amend the trust document, remove and replace the Alaska Trustee for any reason, and remove the trust to another jurisdiction, including an offshore jurisdiction. The Donor would retain the power to remove and replace the Trust Protector for cause and to name successors to serve in that role.

Custody and Investment of Trust Assets

While transferring all of the trust assets to an account held by the Alaska bank or trust company would afford the most asset protection, many clients are uncomfortable moving assets to an unfamiliar institution in another state. To alleviate client concerns, the trust assets may be transferred to an account at the

client's Massachusetts bank or investment company in the name of a newly created Limited Liability Company. All of the interests in the LLC would be owned by the Alaska asset protection trust. In essence, the investment assets are converted into LLC interests and those "interests" would be the trust assets held by the Alaska bank or trust company. Even if the LLC is not used and the assets are transferred to the Alaska bank or trust company, the client can continue to use his or her current investment advisor to direct the investment of the account.

Will an Alaska DAPT Work?

The Alaska statute, like the statutes of all of the domestic asset protection jurisdictions, is untested. No one can guarantee that such a trust will, in the end, prevent a creditor from gaining access to the assets transferred to the trust. Obviously, if the client transfers assets to such a trust and it is later determined that the transfer was a "fraudulent conveyance" (made with the actual intent to hinder, delay or defraud a creditor of the client), the trust will not provide any asset protection to the client. In general, under Alaska law, a creditor has a four year statute of limitations within which to assert that the client's transfer to the trust was fraudulent; and must show actual, rather than mere constructive fraud. The recent enactment of the

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") called into question whether DAPTs were an effective asset protection tool. If the Donor of such a trust files for bankruptcy, the bankruptcy trustee can include in the bankruptcy estate the assets of any DAPT created in the ten (10) year period prior to the filing of the bankruptcy, if it is shown that the transfer was made with the actual intent to hinder, delay or defraud any entity to which the Donor was or became indebted to on or after the date of the transfer. Note the bankruptcy trustee must prove actual fraud not constructive fraud. Although clients need to understand the uncertainty of DAPTs in a bankruptcy setting, in general, these trusts are set up to protect a portion of the client's assets (the so-called "nest egg") and to provide the client with a stronger negotiating position in the event of a lawsuit. Most

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clients interested in this type of planning are not contemplating filing for bankruptcy. While creditors can force a client into an involuntary bankruptcy, this type of bankruptcy is very rare and may even be prevented by the new mandatory credit counseling requirement that must be met by all debtors within 180 days of a bankruptcy filing. Despite the uncertainty, there is one guarantee. If the client does nothing, the assets will certainly be exposed to creditors. Except for the cost of setting up and administering the trust; and the added complexity of having assets owned by a trust, there is really no disadvantage to creating such an arrangement.

Legal and Administrative Costs

The legal fees for setting up such a trust range from \$4000 to \$7000. The yearly administration fees charged by the Alaska trustee would be approximately \$2500 - \$4000 per year. If a limited liability company is used in addition to the trust additional legal fees, filing fees and other disbursements of approximately \$4000 would be incurred. ■

This article represents a simplified discussion of a complex estate planning tool. There are many ways to structure a DAPT to deal with specific situations. If you have any questions about this or any other estate planning technique, please contact Donna M. White, Partner, Estate Planning Group, 617-406-4526.

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The Accountant/Attorney Liability Reporter

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