BESSEMER TRUST

ACTEC 2015 Fall Meeting Musings

November 2015

The American College of Trust and Estate Counsel is a national organization of approximately 2,600 lawyers elected to membership. One of its central purposes is to study and improve trust, estate and tax laws, procedures and professional responsibility. Learn more about ACTEC and access the roster of ACTEC Fellows at **www.actec.org**.

This summary reflects the individual observations of Steve Akers from the seminars at the 2015 Fall Meeting and does not purport to represent the views of ACTEC as to any particular issues.

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Important Information Regarding This Summary
This summary is for your general information. The discussion of any estate planning alternatives and other observations herein are not intended as legal or tax advice and do not take into account the particular estate planning objectives, financial situation or needs of individual clients. This summary is based upon information obtained from various sources that Bessemer believes to be reliable, but Bessemer makes no representation or warranty with respect to the accuracy or completeness of such information. Views expressed herein are current only as of the date indicated, and are subject to change without notice. Forecasts may not be realized due to a variety of factors, including changes in law, regulation, interest rates, and inflation.

Introduction

Some of my observations from the 2015 ACTEC Fall Meeting Seminars in Monterey, California on October 16-17, 2015 are summarized below. (At the request of ACTEC, the summary does not include any discussions at Committee meetings.) This summary does not contain all of the excellent information from the seminars, but merely selected issues. The summary is based on the presentations at the seminars, but the specific speakers making particular comments typically are not identified.

Items 1-34 address projects of the Uniform Law Commission and various uniform acts impacting trust and estate law issues (Revised Uniform Fiduciary Access to Digital Assets Act, Uniform Trust Decanting Act, Uniform Power of Attorney Act, and Uniform Trust Code). Items 35-51address planning with unusual assets (guns, cannabis, aircraft, and alcohol related assets), Items 52-55 discuss planning for licensed professionals, and Items 56-60 highlight some special planning issues with art.

Items 1-4 are observations from comments by Benjamin Orzeske (Legislative Counsel, Uniform Law Commission), Turney Berry, and David English about the Uniform Law Commission and projects affecting trust and estate practices

1. Uniform Law Commission

The Uniform Law Commission, formerly known as the National Conference of Commissioners on Uniform State Laws, was founded in 1892. It drafts model state laws on topics where uniformity is desirable. It provides states with non-partisan well drafted model legislation that brings clarity and stability to critical areas of state statutory law.

Uniform Law Commissioners are volunteer lawyers (practitioners, judges, legislators, legislative staff, and law professors) appointed by the states to research, draft, and promote enactment of uniform state laws.

2. Joint Editorial Board

The Joint Editorial Board is comprised of representatives from ACTEC (Bruce Stone, Susan House, and Kevin Millard), the Uniform Law Commission (David English, Turney Berry, and Marti Starkey), and the ABA Section of Real Property, Trust & Estate Law (Malcolm Moore [chair], Carlyn McCaffrey, and Pam Schneider). The Executive Director is Professor Thomas Gallanis. The Joint Editorial Board makes recommendations and reviews, in particular, projects affecting trust and estate law matters.

3. Ongoing Projects

There are four current projects dealing with trust and estate matters:

- Uniform Divided Trusteeship Act (Professor Robert H. Sitkoff, Chair; Turney Berry, Vice-Chair; John Morley, Reporter)

- Revision of Uniform Principal and Income Act (Turney Berry, Chair; David Clark Vice-Chair; Ronald Aucutt, Reporter)
- Revision of Uniform Guardianship and Protective Proceedings Act (Professor David English, Chair; Nina Kohn, Reporter)
- Tribal Probate Code (Timothy Berg, Chair; Professor David M. English and Kathleen Guzman, Co-Reporters) (This Committee will collaborate with representatives from Tribal governments and others from Indian Country to draft a Model Tribal Probate Code that will supplement the American Indian Probate Reform Act to better fulfill its purposes and the Indian Land Consolidation Act. In particular, it will deal with land fractionalization issues.)

4. Legislative Counsel for Trust and Estate Projects-Benjamin Orzeske

Benjamin is the legislative counsel to the Uniform Law Commission that serves as legislative counsel to the Committee dealing with trust and estate issues (including all of the ongoing projects described above).

Items 5-10 are observations from a session by Victoria Blachly, and Anne Coventry (moderated by Benjamin Orzeske)—War and PEAC: Battling the Tech Industry Back to the Negotiating Table over Fiduciary Access to Digital Property

5. Background of Development of UFADAA

a. **Significance**. Americans routinely use the Internet and have many forms of digital assets. Google and Facebook are the only major digital companies that have "online tools" allowing designation of persons to manage accounts posthumously. (In addition, Facebook's website provides that "Facebook ***may*** provide access to this type of information in response to a valid will or other legal consent document expressing clear consent." [emphasis added]. Few states have enacted laws specifically granting some type of fiduciary access to digital assets. Federal privacy and computer fraud and abuse laws create confusion regarding fiduciary access, but do not specifically address fiduciaries.

Being able to access digital information after an individual's death or disability is very important, not only to obtain the information in that account, but because the information may lead to valuable information about other accounts or assets.

b. **Promulgation Process**. The Uniform Fiduciary Access to Digital Assets Act (UFADAA) drafting committee was approved in 2012 and the UFADAA was approved in the summer of 2014. The tech industry was "in the room" in all of the drafting discussions about UFADAA, There was a feeling that the terms of UFADAA had been negotiated with a consensus view, but the internet service providers (ISPs) vigorously opposed UFADAA when it was introduced in state legislatures. Throughout the discussion, the ISPs continually wanted "one more change," and always pushed for the "terms of service" provisions having priority.

c. **UFADAA Approach and Major Provisions**. After contentious negotiations with service providers over provisions of the Act, the general approach is to (i) define digital assets, (ii) provide default rules for fiduciary access with specific provisions for personal representatives, conservators/guardians, agents and trustees, (iii) defer to the account holder's intent and privacy desires, (iv) encourage custodian compliance, and (v) protect fiduciaries, custodians and content providers.

Fiduciary Authority. Section 8 of UFADAA is a key provision of the Act. It addresses the nature, extent and limitation of a fiduciary's authority over digital assets. Subsection (a) establishes that the fiduciary is authorized to exercise control over digital assets (subject to the account holder's ability to opt out as provided in subsection (b)) subject to the Terms of Service Agreement (TOS) and other applicable laws (such as copyright [service providers are very concerned about protection of their copyrights]). It provides that the fiduciary has the account holder's lawful consent under applicable electronic privacy laws and is an authorized user under any applicable criminal act (such as the Criminal Fraud and Abuse Act [CFAA], discussed below). Subsection (b) permits the account holder to opt out of fiduciary access. It renders a boilerplate provision in a TOS that limits fiduciary access as void against public policy. The TOS can allow an account holder to prevent access (or to opt for a "digital death"), but it must be in a separate affirmative election. It also provides that the fiduciary's access, by itself, will not violate a TOS provision prohibiting third party access and will not be deemed to be a transfer.

Thus, the key approach of UFADAA is that the default position is one of fiduciary access, requiring account owners to opt out of disclosure if desired.

Subsection (c) provides that any choice of law governing a TOS that prevents fiduciary access is unenforceable.

Subsection (d) clarifies that the fiduciary is authorized to access digital assets stored on devices, such as computers or smartphones, avoiding violations of state or federal laws on unauthorized computer access. The goal is that this would prevent future prosecutions based solely on the fiduciary's access, which is otherwise authorized but technically violates the TOS and thus, the CFAA.

For a more detailed summary of the provisions of UFADAA, see Item 22.d of the Current Developments Summary (2015) found **here** and available at **www.Bessemer.com/Advisor**.

6. Overview of Arguments by Service Providers Challenging UFADAA

Concerns of internet service providers (ISPs) have included: (1) Account owner privacy concerns, (2) ISP liability concerns, (3) TOS priority, (4) Federal law violations, and (5) Cost of implementation. Of major importance, federal privacy laws (Stored Communications Act), federal criminal laws (Computer Fraud and Abuse Act), state criminal laws, and "terms of service" agreements all create possible roadblocks.

a. **Privacy Concerns**. ISP lobbyists have proclaimed that their users do not want fiduciaries to have access to their accounts. "Do you want your mom reading your email after you are dead?" "They want to make your email public." "Should the

estate attorney decide whether your email should be made public?" The NetChoice website contains this statement from its executive director: "For nearly 30 years, federal law has prioritized the privacy of email and other electronic communications. Estate attorneys want to dismantle these privacy protections so they can more easily access and distribute your digital legacy." The ISPs have made it appear they are representing their account holders.

b. **Liability Concerns**. ISPs want to be indemnified for any liability. They are concerned that someone will later argue that they should not have disclosed emails (or other digital content). They wanted a court order in every instance, to know they could release information. (The pressure on the judiciary would have been tremendous with that requirement.)

c. **Cost**. Related to the liability concern issue is the cost element. (This element was not loudly voiced in the lobbying efforts of the ISPs.) Retaining staff to respond to fiduciaries' requests for information and reviewing the provisions of documents to determine if the account holder had opted in or out of disclosure is more expensive than just relying on court orders.

d. **Terms of Service Agreements**. The Terms of Service Agreement (TOS) is the long agreement that must be "checked" before opening a digital account. Users frequently just quickly scroll to the bottom of the screen to click the "I Agree" box—or else the account will not be opened. Estimates are that a person would have to spend 75 days a year to actually read the TOS agreements that are checked off every year. As a practical matter there is no way to negotiate the agreements.

The typical TOS is silent regarding fiduciary access or postmortem options, or it simply prohibits transfers altogether (postmortem or otherwise) and prohibits third parties from accessing the account. Some provide that the account will be deleted entirely at the account holder's death. For example, the Yahoo policy specifies:

> We know that dealing with the loss of a relative is very difficult. To protect the privacy of your loved one, it is our policy to honor the initial agreement that they made with us, even in the event of their passing. At the time of registration, all account holders agree to the Yahoo TOS. Pursuant to the TOS, neither the Yahoo account nor any of the contents therein are transferrable, even when the account owner is deceased. As a result, Yahoo cannot provide passwords or access to deceased users' accounts, including account content such as email. Yahoo does have a process in place to request that your loved one's account be closed, billing and premium services suspended, and any contents permanently deleted for privacy.

ISPs felt that they should be able to put any provisions they want in their TOS, and they believe that laws providing access to accounts contrary to the TOS is tantamount to letting someone else boss them.

ISPs have also been leery of setting a precedent. If legislatures could overturn some of the terms of their contracts, what else could the legislatures overturn in the contracts? They also historically have fought subpoenas effectively; unless there is a criminal warrant, the ISP typically will provide no access to accounts by third persons. They do not acknowledge that civil courts have any power to order them to provide access to information in account holders' accounts.

The difficulty of the argument that legislatures should recognize the TOS as paramount is that legislatures do not believe that account holders really read the agreements.

e. **Federal Law Issues**.

Federal Privacy Laws—Stored Communications Act. The Fourth Amendment offers citizens an expectation of privacy in their homes, but a computer network is not physically located in homes so is not protected by the Fourth Amendment. To fill the gap, Congress enacted the Stored Communications Act (SCA) in 1986 as part of the Electronic Communications Privacy Act. 18 U.S.C. §2701-2711. It limits certain providers of public communications services from disclosing the *contents* of "electronic communications" (a subset of digital assets that does not include, for example, public blogs, webpages, online purchasing accounts, bitcoin and domain names, but does include email messages and tax messages) to a government or nongovernmental entity (there are different rules that apply to each) without what amounts to a warrant. If the provider only supplies services to a limited group of people and not the general public, the SCA does not apply (so should not be an excuse to refuse disclosure to fiduciaries).

Under §2702(b)(3) of the SCA, the originator or an addressee or intended recipient may provide lawful consent for disclosures, but it does not mention fiduciaries or agents (despite some Congressional history suggesting an intent that agents could authorize disclosure). To provide assurance that a fiduciary can give "lawful consent," underlying state law or a court order should expressly provide that the fiduciary requesting the contents of SCA protected material has the user's lawful consent. Providers are allowed to divulge *non*-content "catalogue" information such as the user's name, address, account information, connection records, IP address, etc. Some providers try to argue that is all a fiduciary needs, but that information by itself is not overly helpful; the fiduciary needs access to the content.

Federal Criminal Laws—Computer Fraud and Abuse Acts. Each state and Congress has enacted a Computer Fraud and Abuse Act (CFAA) that criminalizes (or at least creates civil liability) for the "unauthorized access" of computer hardware and data stored therein including computer systems.18 U.S.C §1030. If the account holder expressly authorized a fiduciary to access her computers, such access would seemingly not violate CFAA (because that access would be authorized by the user). However, even with user authorization, a fiduciary may still be breaking the law because the fiduciary would have to access the provider's computers, which requires the *service provider's* further authorization. There is no specific exemption or authorization in the CFAA for fiduciaries attempting access a decedent's electronic communications.

CFAA: Crime If Access Not Authorized Under TOS. If the provider's TOS prohibits third parties from accessing the account, when the fiduciary does so (***even with user consent***) he violates the TOS, which in turn results in a violation of the CFAA. Stated differently, a person is guilty of a federal and state crime if the person accesses someone else's electronic communication account even if the other person gave consent (by sharing the username and password), because the TOS invariably prohibits a user from sharing the account and violating the TOS results in a criminal

act under the CFAA. Federal prosecutors have prosecuted defendants under CFAA based solely on violations of a website's TOS, but the U.S. Department of Justice has stated that while violating a term of service on Facebook or Match.com is a federal crime, it is not the Department's intention to prosecute "minor" violations. There have been several well publicized cases over the last several years involving fiduciaries trying to access online accounts, despite contrary provisions in TOS agreements.

7. The War, PEAC Act, Stalemate and Revised UFADAA

a. **Broad Introduction of UFADAA in State Legislatures**. The UFADAA was introduced in 26 states. That is a blockbuster for a Uniform Act (there are usually 5-6 introductions in the first year). None of those 26 bills were enacted. (Delaware enacted a version in 2014 before the UFADAA was final and before the opposition was readied for battle.)

b. **Intense Lobbying**. Lobbyists for many larger providers of electronic communications to the public (Yahoo!, Facebook, AOL, and Google were the most commonly seen, often with a representative of their trade association, NetChoice) vehemently opposed UFADAA in nearly every state in which it was introduced. These efforts were well funded; there are some estimates that the groups were spending about $250,000 in every state in which the legislation was introduced.

c. **PEAC Act**. The service providers' major complaints are that UFADAA is too broad, it raises serious privacy concerns, it potentially conflicts with federal and state law, and it implicitly overrides TOS Agreements. To address these concerns, NetChoice drafted a model act offered as an alternative to UFADAA—the Privacy Expectation Afterlife Choices Act (PEAC Act), pronounced as the "peace act." It was proposed as a legislative alternative in roughly half the states where UFADAA was introduced. The NetChoice website summarizes how the PEAC Act would work:

> ACCESSING RECORDS OF ELECTRONIC COMMUNICATIONS. The probate court can order copies of the records of the communications for the fiduciary. These records (like the To and From lines of an email) help fiduciaries identify important interactions, like those with a bank or online broker, and then contact those institutions as part of closing the account.
>
> ACCESSING THE CONTENTS OF ELECTRONIC COMMUNICATIONS. Fiduciaries can see the contents of communications only when the deceased expressly allowed it in their will or through a setting within the product or service. If the deceased bequeathed these communications, service providers will comply subject to verification and indemnification processes.
>
> RESPECTING USER CHOICES. The deceased user chooses if and how their contents are accessed via user level controls and the terms of service they agreed to in life.

This summary, other information about the PEAC Act, and the statutory language of the PEAC Act are available at **http://** **http://netchoice.org/library/privacy-expectation-afterlife-choices-act-peac/**.

. The major positions of the PEAC Act are as follows.

- It addresses executor and administrators only—not trustees, conservators or agents acting under a power of attorney.

- It takes a default privacy approach instead of the default access approach taken by UFADAA.
- It distinguishes between "catalogues" of electronic information (such as the "to" and "from" lines in an email) and the content of electronic records.
- A court order is required to access electronic records (both the catalogue and the contents) stipulating various things, and the required elements of the court order differ for accessing the contents vs. the catalogue of the account. The *content* of electronic communications can be accessed by the personal representative only with (i) a court order (which must include findings that the will of the decedent or an account setting expressly consented to disclosure, that the estate will indemnify the service provider, and that disclosure will not be a violation of the SCA or CFAA), *and* (ii) express consent by the account holder (i.e., "opting in"). [Observe that the actual provisions of the PEAC Act are not consistent with the summary of the Act on the Net Choice website, quoted above, which says nothing about requiring a court order in order to access the contents of electronic communications.]
- Even if a court order is obtained, the service provider may still refuse to disclose or may quash the order under certain circumstances, including that the disclosure would cause an undue burden or violate other applicable law.
- A broad indemnification and release is provided for the ISP. A provider will not be held liable in any civil or criminal action for good faith compliance with a court order issued under the PEAC Act and will be indemnified by the requestor for any damages the provider suffers in connection with disclosure.

See generally Prangley, *War and PEACE in Digital Assets: The Providers' PEAC Act Wages War with UFADAA*, 29 PROB. & PROP. 4 (July/August 2015). A version of the PEAC Act was enacted in Virginia.

d. **Stalemate**. The ISPs were not successful in getting legislatures to pass the PEAC Act, and they eventually realized there was a stalemate, as summarized by Turney Berry (ULC Commissioner):

> "[w]e were facing people who don't normally lose: privacy advocates; the ACLU; the Center for Democracy and Technology. We were also facing a consortium of internet providers who [have] very effective lobbyists and are accustomed to getting their way. We fought them to a draw, which was, I think, shocking to them." Transcript to Third Sessions, Revised Uniform Fiduciary Access to Digital Assets Act, Friday Morning, July 11, 2015, ULC's 124th Annual Conference, Williamsburg, Virginia.

In May 2015, ISP representatives asked to "re-group" with representatives from the Uniform Law Commission. In Mid-May, a small group of representatives from the Uniform Law Commission and counsel from some of the large providers—lobbyists were deliberately excluded—met and decided to tweak the UFADAA to reach a compromise solution. After about a dozen drafts, a consensus emerged, and was introduced as the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) at the July 2015 meeting of the Uniform Law Commission.

e. **RUFADAA**. The Uniform Law Commission approved RUFADAA on July 15, 2015. One of the major changes is that the *default* rule for personal representatives is for *privacy* of an account rather than for access; access is not permitted unless the decedent consented to disclosure (but restrictions on access in an online tool setting of an account will override consent to disclosure in an estate planning document). The revised UFADAA continues to apply beyond just executors and administrators, and addresses access to electronic information by trustees, conservators, and agents acting under a power of attorney. For a detailed summary of other provisions in the revised UFADAA, see Sharon Klein, *Fiduciary Access to Digital Assets: Breaking Developments After Provider Giants Flex Their Muscles*, LEIMBERG EST. PL. NEWSLETTER #2332 (August 12, 2015).

RUFADAA is organized differently from and is a complete rewrite of UFADAA. Major provisions of RUFADAA include the following:

- RUFADAA includes an entirely new section of fiduciary duties, §15. (References to a "§" in these summaries about uniform acts refer to a section of the uniform act being discussed.) It restates basic fiduciary duties to clarify to ISPs that stringent legal duties apply to fiduciaries and that fiduciaries cannot behave recklessly when managing the digital assets of a deceased or disabled person.
- RUFADAA grants a fiduciary full access to digital assets ***other than content*** of electronic communications unless the user opts out or the court directs otherwise. More specifically, the fiduciary has access, except that (i) the custodian of the digital asset may require specific identification of the account and evidence linking the account to the principal (via documentation or court order); and (ii) any TOS restricting fiduciary access will be upheld, absent a conflicting provision in the user's estate planning documents or an online tool/setting, §§4(c) & 5(c). *E.g.*, §8 (personal representative's access to content for a deceased user).
- For a fiduciary to access the ***content*** of electronic communications, the governing document must expressly authorize fiduciary access, or the account holder must otherwise consent to fiduciary access via an online tool. *E.g.,* §7 (personal representative's access to content for a deceased user).
- If there is a conflict between the online tool/account setting and the estate planning documents, the online tool/account setting prevails. §4(a). [This was a very important and significant concession by the ULC representatives; see Item 8 below.]
- Comments to §4 explain the relationship and priority of (i) online tools, (ii) estate planning documents, and (iii) TOS agreements:

> This section addresses the relationship of online tools, other records documenting the user's intent, and terms-of-service agreements. In some instances, there may be a conflict between the directions provided by a user in an online tool that limits access by other parties to the user's digital assets, and the user's estate planning or other personal documents that purport to authorize access for specified persons in identified situations. The act attempts to balance these interests by establishing a three-tier priority system for determining the user's intent with respect to any digital asset.

> Subsection (a) gives top priority to a user's wishes as expressed using an online tool. If a custodian of digital assets allows the user to provide directions for handling those digital assets in case of the user's death or incapacity, and the user does so, that provides the clearest possible indication of the user's intent and is specifically limited to those particular digital assets.
>
> If the user does not give direction using an online tool, but makes provisions in an estate plan for the disposition of digital assets, subsection (b) gives legal effect to the user's directions. The fiduciary charged with managing the user's digital assets must provide a copy of the relevant document to the custodian when requesting access. See Sections 7 through 14.
>
> If the user provides no other direction, the terms-of-service governing the account will apply. If the terms-of-service do not address fiduciary access to digital assets, the default rules provided in this act will apply. RUFADAA §4 cmt.

8. Importance of Online Tools Under RUFADAA

a. **Description**. RUFADAA defines an "online tool" as an electronic service provided by a custodian of a digital asset, distinct and separate from the TOS required to open the account (*i.e.*, not a "click through"). Google's Inactive Account Manager and Facebook's Legacy Contact features are two examples of such online tools. Google's Inactive Account Manager allows a user to designate up to 10 individuals to receive the contents of the user's account if it is inactive for a period of time designated by the user, or the user could choose to have the account terminated after the designated period of inactivity.

b. **Compromise**. Giving priority to online tools over provisions in estate planning documents was necessary or else ISPs would have no incentive to provide those tools. The online tools may provide a way for ISPs to handle access issues automatically rather than hiring attorneys to interpret wills or other estate planning documents. The concession to the priority of online tools over estate planning documents was granted in order to obtain the concession by ISPs that the estate planning documents (and online tools) would have priority over the "click through" TOS. That was a strongly negotiated issue that the ISPs conceded very reluctantly.

c. **Significance Going Forward**. Whether more providers will develop online tools regarding account access is unknown. If these tools become more prevalent, estate planning attorneys will have to caution clients that decisions that they made, perhaps unwittingly, years ago about their account settings will override provisions in their estate planning documents granting fiduciary access to digital assets (analogous to life insurance or retirement plan beneficiary designations overriding provisions in wills and trust documents).

9. Legislative Prospects Looking Forward

There are now 29 (perhaps soon 30) states considering RUFADAA. Facebook and Google have endorsed the Act; the expectation is that ISPs will not oppose RUFADAA like they did UFADAA. Proponents are aware, however, that the agreement of Facebook and Google

may mean little to lobbyists who have been pushing the PEAC Act. (The RUFUDAA proponents are still working with the ACLU to satisfy them.)

California is a very important legislative battleground, because most ISPs use California as their choice of law for dispute resolution. There is a pending bill in California, generally based on the PEAC Act, that deals just with decedents (not living account owners). Negotiations are under way to modify the bill to more closely match the RUFADAA provisions. If RUFADAA passes in some other states, that may help in slanting the California bill toward the RUFADAA approach.

10. VAIL; Sample Document Providing Fiduciaries With Access to Digital Assets

a. **VAIL**. A planning approach that may appeal to tech savvy clients willing to invest time in planning for their digital assets is the "Virtual Asset Instruction Letter" (VAIL). This is a process whereby a client develops a list of all of his online accounts and assets, provides web addresses, usernames and passwords to give the client's designated representatives the ability to identify and access these accounts. A 7-step process is used:

(1) Identify each digital account and determine how the company handles the account when the user dies;

(2) Determine which accounts should allow fiduciary access and prepare a written and electronic file list with passwords;

(3) Determine which accounts should be deleted and provide instructions to do so;

(4) Consider saving account and access information on a CD or "thumb drive" and store it, updating it as passwords change;

(5) Make a backup of pictures or other memorabilia that are stored on the internet;

(6) Upgrade the power of attorney, trust and will to include fiduciary access provisions as desired; and

(7) If someone other than the personal representative is to have access to digital assets, name those individuals in the user's will or other estate planning documents.

b. **Sample Document Providing Fiduciary Access to Digital Assets**.

The following form clause provided by Jim Lamm (ACTEC Fellow practicing with the Gray Plant Mooty law firm in Minneapolis, Minnesota) is designed as a stand-alone document that a person could sign to authorize disclosure of the content of electronic communications (and other digital assets) to all of the person's fiduciaries. Jim has graciously given me permission to include the document in this summary.

Authorization and Consent for Release of Electronically Stored Information

I hereby authorize any individual or entity that possesses, custodies, or controls any electronically stored information of mine or that provides to me an electronic communication service or remote computing service, whether public or private, to divulge to my then-acting fiduciaries at any time: (1) any electronically stored information of mine; (2) the contents of any

communication that is in electronic storage by that service or that is carried or maintained on that service; and (3) any record or other information pertaining to me with respect to that service. The terms used in this authorization are to be construed as broadly as possible, and the term "fiduciaries" includes an attorney-in-fact acting under a power of attorney document signed by me, a guardian or conservator appointed for me, a trustee of my revocable trust, and a personal representative (executor) of my estate.

This authorization is to be construed to be my lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law. This authorization is effective immediately. Unless this authorization is revoked by me in writing while I am competent, this authorization continues to be effective during any period that I am incapacitated and continues to be effective after my death.

Unless an individual or entity has received actual notice that this authorization has been validly revoked by me, that individual or entity receiving this authorization may act on the presumption that it is valid and unrevoked. An individual or entity may accept a copy or facsimile of this original authorization as though it were an original document.

Date: ____________________________ ______________________________________
Signature

____
Printed Name

STATE OF ____________________

COUNTY OF __________________

This instrument was acknowledged before me on ____________________ (date) by ____________________ (name of person).

____
Notary Public

Items 11-17 are observations from a session by Susan T. Bart and Amy E. Heller (moderated by Benjamin Orzeske)—Uncorking the Uniform Trust Decanting Act: What Decanting States, Prohibition States, and Teetotalers Can Learn

11. Decanting Authority May Provide Needed Flexibility

Judicial modification can be expensive and invasive of privacy. Nonjudicial modification by settlement agreement is permitted by statute in at least 33 states, but (i) the statutes may not allow dispositive changes, (ii) using the statutes may result in adverse tax consequences, (iii) necessary consent may not be possible on behalf of minor, unborn, or incapacitated beneficiaries, and (iv) some of the required beneficiaries may be unwilling to consent.

Twenty-three states have decanting statutes, permitting a trustee to exercise its discretionary distribution authority to make a distribution from the "first trust" to a

"second trust" for trust beneficiaries without court approval or beneficiary consent (many statutes allow differing dispositive provisions in the second trust, depending on the circumstances, but sometimes only administrative provisions can be changed). The state statutes vary dramatically, and some are so permissive that the mere existence of the statute may conceivably cause tax issues.

12. Should Decanting Provisions be Drafted into Trust Agreements?

If a client does not want to allow decanting, the trust agreement should specifically prohibit distributions in further trust (at least to trusts that are not substantially identical) because the applicable state statute may otherwise allow decanting or the trust administration may move to a state that allows decanting.

If a client wishes to allow decanting flexibility, including a decanting provision in the trust allows decanting if the relevant state does not have a decanting statute, or in case the trust moves to a state without a decanting statute. In addition, the clause could draft around permissive provisions in some state statutes that could cause adverse tax consequences. (The new Uniform Decanting Act can be a drafting guide because it includes various provisions designed to guard against adverse tax issues.)

13. Overview of Uniform Trust Decanting Act

The Uniform Law Commission formed a Trust Decanting Committee in early 2013. The Committee was chaired by Stanley Kent, Susan Bart served as the Reporter, and Amy Heller was the American Bar Association Advisor to the Committee. The Act was approved by the Commissioners in July 2015.

a. **Extent of Decanting Authority Depends on Extent of Discretion Over Distributions**. If the trustee has limited distributive discretion (for example, an ascertainable standard), generally only administrative provisions can be changed in the new trust. If the trustee has expanded distributional discretion (for example, "best interests," "welfare" or no standard), the second trust may have different dispositive provisions, with limits that protect "vested rights" and that protect qualification for various tax advantages.

b. **Approval and Notice Requirements**. The decanting power can generally be exercised with court approval or beneficiary consent (except for a few specific modifications that may benefit the trustee personally). However, beneficiaries and certain other interested persons are entitled to notice and may seek court relief if they believe the trustee breached its fiduciary duty because of the manner in which the decanting authority was exercised.

c. **Need to Distribute Not Required**. There is no requirement that the trustee of the first trust could have been compelled or would have actually made a distribution from the first trust in order to exercise a decanting power. §21.

d. **Innovations in the Uniform Act**.

   (1) **Restatements Permitted**. The second trust may be a restatement of the first trust, eliminating the need for having an entirely new trust, assigning assets, and

terminating the old trust. §2(10). (This provision may impact the income tax treatment--if the first trust is decanted to a new second trust, DNI of the first trust may be carried out to the second trust; but if the first trust is merely restated, there may be no DNI carryout and the trust may be able to continue with its same tax ID number.)

(2) **Reasonable Reliance**. A trustee may reasonably rely on a prior decanting, even if the decanting under the law of another state does not comply with all the requirements of the state's decanting statute. §6. Even though a trustee may reasonably rely on a prior decanting, a beneficiary may still challenge the decanting as invalid. (A trustee of a decanted trust may wish to use a decanting power or nonjudicial settlement agreement to confirm the validity of a prior attempted decanting and the current terms of the trust.)

(3) **Saving Provisions**. The Act addresses an imperfect attempted decanting by reading out of the second trust any impermissible provision and reading into the second trust any required provision. §22(a). The trustee should then take appropriate corrective actions, §22(b), such as informing the beneficiaries of the impact of the savings provision and taking remedial action for distributions made or not made in error.

(4) **Protecting Charitable Interests**. Wholly charitable trusts may not be decanted. §3(b). Trusts with charitable interests may not be decanted in a manner that diminishes the charitable interest or changes the charitable purpose. §14(c). The Attorney General must receive notice of any decanting of a trust with a charitable interest. §14(b). The governing law of the trust cannot be changed without court approval if the Attorney General objects (to alleviate a concern that the trustee may decant merely to move the trust to a state that is not as strict in enforcing charitable interests or to avoid the Attorney's objection to a particular trustee action). §14(e).

(5) **Special Needs Trusts.** The second trust may modify the interest of a beneficiary with a disability (generally making distributions discretionary with the trustee) even if the trustee does not have expanded distributive discretion, in order to facilitate qualification for governmental benefits. §13.

(6) **Tax Restrictions.** The Act has extensive provisions to prevent the decanting authority from causing adverse tax consequences for issues such as qualification for the marital or charitable deduction, qualifying for the "GST annual exclusion," subchapter S qualifications (if the first trust is a qualified S shareholder and holds S corporation stock, the second trust must be a qualified shareholder; if the first trust is a QSST and hold S stock, the second trust must also be a QSST), and qualified retirement benefits.

(7) **Grantor Trusts**.

Turning Off. The trustee can decant in a manner that "turns off" grantor trust status (but would still have to consider its fiduciary duties in doing so, which may preclude decanting to turn off grantor trust status in some situations). §19(b)(9)(A). If the trust is a grantor trust because it is a foreign trust under

§672(f)(2)(A), however, the second trust must also qualify under that same section. §19(b)(7).

Turning On. The trustee may decant the assets of a non-grantor trust to a second trust that is a grantor trust, §19(b)(9), except that the trustee must give notice to the settlor and the settlor has the right to block the decanting if the second trust does not give the settlor the power to turn off the grantor trust status or eliminates the right of a third party to cause the first trust to be a grantor trust, §19(b)(10).

Grantor Trust to Grantor Trust. The trustee may decant a grantor trust to another grantor trust unless the second trust removes the settlor's power to turn off grantor trust status that was in the first trust. §19(b)(10(A).

(7) **Self-Interested Decanting Restrictions**. Modifications that are in the self-interest of the fiduciary are restricted or prohibited:

- *Compensation*–The second trust cannot increase the trustee's compensation unless all qualified beneficiaries consent or the increase is approved by the court, §16(a);
- *Trustee Liability*–The second trust may not expand exculpation of the trustee; the second trust may indemnify the trustee of the first trust for any liability that would have been payable from the first trust; the second trust may not reduce fiduciary liability in the aggregate, §17(a)-(c);
- *Divided Trustee Powers*–The second trust may divided and reallocate trustee powers and may relieve a fiduciary from liability for an action or failure to act of another fiduciary as permitted by a directed trust statute, §17(d); and
- *Removal or Replacement of Trustee*–The second trust cannot eliminate the power of a person to remove or replace a fiduciary unless one of several consent exceptions is satisfied or a court approves the modification, §18. For example, the trustee could decant to appoint a trust director to give directions to the trustee regarding distribution decisions, but someone must still have fiduciary responsibility for the decisions.

(8) **Settlor**. The settlor of the second trust is clarified for different purposes. The settlor of the first trust is generally also deemed to be the settlor of the second trust; if the assets were decanted to a separate trust with a different settlor, the trust may be deemed to have two settlors as to the different portions of the trust. In any event, in determining settlor intent as to the second trust, the intent of a settlor of the first trust, a settlor of the second trust (if different), and the authorized fiduciary may be considered. §25(b).

(9) **Court Role**. Court approval is not required, but a fiduciary may seek court guidance to confirm that a decanting is not an abuse of discretion. A court may appoint a special fiduciary to exercise the decanting power in appropriate cases. §9.

(10) **Animal Trusts**. Animal trusts (having an animal as a beneficiary) may generally be decanted as long as the second trust "must provide that the trust property

may be applied only to its intended purpose for the period the first trust benefitted the animal." §23(d).

(11) **Later-Discovered Property**. If the trustee intended to decant all of the trust, any later-discovered property will be part of the second trust; otherwise, later-discovered property will be part of the first trust. The exercise of a decanting power may clarify how the exercise applies to later-discovered property. §26.

14. Decanting Power if Trustee Has Expanded Distributive Discretion

a. **Decanting Power**. An "authorized fiduciary" that has "expanded distributive discretion" over the trust corpus for the benefit of one or more current beneficiaries may exercise a decanting power over the principal including (subject to restrictions as described below) the power to include only some of the beneficiaries of the first trust as beneficiaries of the second trust and including the power to grant certain powers of appointment. §11(b). If the trustee has expanded distributive discretion over only part of the trust principal, the broad decanting power under §11 may be exercised only over that part of the trust. §11(f).

b. **Expanded Distributive Discretion**. "Expanded distributive discretion" means a discretionary distribution power that is not limited to an ascertainable standard (as defined in Code §2041(b)(1)(A) or §2514(c)(1)) or a reasonably definite standard (as defined in Code §674(b)(5)(A)). §2(11).

c. **Authorized Fiduciary**. An "authorized fiduciary" is a fiduciary (including a distribution director) other than a settlor that has discretion to make or direct current distributions of trust principal. §2(3).

d. **Restrictions**.

(1) **No Acceleration of Remainder Interests**. The second trust cannot have as a current beneficiary anyone who is not a current beneficiary of the first trust. §11(c)(1)).

(2) **No New Beneficiaries**. The second trust may not include any new current beneficiaries or any new successor or remainder beneficiary. §11(c).

(3) **Vested Interests**. The second trust may not reduce or eliminate a vested interest. §11(c)(3). A vested interest includes a noncontingent mandatory distribution right (such as the right of a beneficiary to withdraw at age 30 if the beneficiary has not yet reached age 30), a current noncontingent right to receive distributions (such as a right to receive income that is in "pay status"), a presently exercisable general power of appointment, or a vested remainder interest. §11(a)(3).

(4) **Powers of Appointment**. The second trust may:

- Retain a power of appointment in the first trust;
- Omit a power of appointment in the first trust other than a presently exercisable general power of appointment;

- Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust; or
- Create or modify a power of appointment if the powerholder is the successor or presumptive remainder beneficiary of the first trust as long as the exercise of the power is delayed until the powerholder becomes (or would become if living) a current beneficiary. §11(d).

The power of appointment in the second trust may be general or nongeneral. The class of potential appointees under the power of appointment may include persons who are *not* beneficiaries of the first trust. §11(e).

15. Decanting Power if Trustee Has Limited Distributive Discretion

An "authorized fiduciary" that has "limited distributive discretion" (i.e., a discretionary distribution power limited to an ascertainable standard or reasonably definite standard) over trust principal may decant the principal to a second trust as long as the beneficial interest of each beneficiary of the second trust is substantially similar to that person's beneficial interest in the first trust. §12(b), (c).

16. Fiduciary Duty; No Implied Duty to Exercise or Inform Beneficiaries of Decanting Power

The fiduciary must act accordance with its fiduciary duties in exercising a decanting power. §4(a). The Act "does not create or imply a duty to exercise the decanting power or to inform beneficiaries about the applicability of" the Act. §4(b).

17. Duration; Perpetuities

The second trust may have a different duration than the first trust, but the second trust must be subject to perpetuity provisions applicable to the first trust to the extent of property in the second trust that came from the first trust. §20.

Items 18-28 are observations from a session by Margaret Van Houten and Professor Linda S. Whitton—Life With and Without the Uniform Power of Attorney Act: Drafting and Administering Financial Powers of Attorney

18. Background and Major Themes of Uniform Power of Attorney Act

The Uniform Power of Attorney Act ("UPOAA") was approved in 2006, replacing the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney Act, and Article 5, Part 5 of the Uniform Probate Code. It has been enacted Alabama, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Iowa, Maine, Montana, Nebraska, Nevada, New Mexico, Ohio, Pennsylvania, Virginia, West Virginia, and Wisconsin (and states containing many of the provisions of the Uniform Act have been passed in Florida and Maryland). Major purposes of the Uniform Act are (i) to enhance the effectiveness of powers of attorney, and (ii) to prevent, identify and redress power of attorney abuse. The Act strives to strike a balance between preserving "the durable power of attorney as a

flexible, low cost, and private form of surrogate decision making" and "deterring use of the power of attorney as a tool for financial abuse of incapacitated individuals." Uniform Law Commission, *Power of Attorney Summary* (2004).

19. Increasing Sensitivity to Agent Duties and Protecting Honorable Agents

The original Uniform Durable Power of Attorney Act was only four paragraphs long and said nothing about agent duties. Some state statutes began to address unavoidable tensions with agents, such as conflicts of interests. Under the common law, which applies to the extent not revised in the power of attorney, the agent must act in the sole interest of the principal. *See* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?,* 114 YALE L.J. 929 (2005). Under common law principles, conflicts of interest may arise even if the agent is acting in the best interest of the principal, resulting in potential agent liability absent consent or ratification by the principal. *See* Deborah A. Demott, *Disloyal Agents*, 58 ALA. L. REV. 1049-1067 (2007). "In other words, under the common law, an agent with a conflict of interest, or who receives a benefit without the principal's consent, faces liability for breach of the duty of loyalty, even if the agent's benefit did not injure the principal." Linda S. Whitton, *Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent,* 117 PENN STATE L. REV. 1037, 1056 (2013). The UPOAA changes this approach, as discussed below.

Planners should be careful in counseling clients to determine the principal's expectations. There may be a variety of situations in which the principal may want to authorize actions by the agent even if the actions do not benefit the principal directly (for example, carrying out the principal's intent to continue the principal's actions while competent, such as making provisions for his or her spouse and children).

20. Agent Duties Under Uniform Power of Attorney Act

a. **Agent Duties Under UPOAA**. There are mandatory and default agent duties under the UPOAA. *Mandatory duties* require that the agent must:

   (1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

   (2) act in good faith; and

   (3) act within the scope of authority granted in the power of attorney. §114(a)

   These mandatory duties offer substantial flexibility for the principal to make clear expectations as to how the power of attorney should be used, and whether there are times it can be used even aside from actions in the principal's "best interest."

   Default duties of the agent under the UPOAA (that can be overridden in a particular power of attorney) include the duties of (i) acting loyally, (ii) acting with care, competence, and diligence, (iii) avoiding conflicts of interest, (iv) keeping records and accounting for transactions, (v) cooperating with the principal's health-care agent, and (vi) preserving the principal's estate plan if consistent with the principal's best interest. §114(b).

b. **Shift From Common Law: Actions Benefiting Agent Do Not Result in Liability If Agent Fulfilling Duty of Care to Principal**. The UPOAA states explicitly that an agent that acts with care, competence, and diligence is not liable solely because the agent also benefits from some action by the agent:

> An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal. §114(d).

Professor Whitton justifies this departure from the common law position:

> The departure of the UPOAA from the common law is justified on two grounds. First, as previously noted, many family member agents have inherent conflicts of interest. Second, a durable power of attorney, unlike a common law agency relationship, continues notwithstanding the principal's incapacity. Thus, an incapacitated principal cannot give prior consent nor ratify a transaction in which the agent has a conflict of interest or might receive a benefit. Linda S. Whitton, *Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent,* 117 PENN STATE L. REV. 1037, 1056-57 (2013) (citations omitted).

c. **Examples of Application of Agent Duties Under UPOAA**.

Assume the client wants to hedge against the necessity of a guardianship in the event of the client's incapacity. The client has a good relationship with his wife and adult children. He wants his wife to have "hot powers" in a power of attorney (such as the power to make gifts, change beneficiary designations, etc.) because he regularly does this to help support his adult children. He does not want one child to know of assistance given to another child. He wants his oldest son to be the successor agent, but he will not have the same scope of authority as the client's wife. The client and the son co-own real estate.

(1) **Make Expectations Clear**. The attorney should assist the client in making his expectations clear. The first mandatory duty of agents under the UPOAA is to "act in accordance with the principal's reasonable expectations." This will involve some custom drafting in the power of attorney or in other documentation.

(2) **Spouse With Broad Authority**. The power of attorney can authorize the spouse, as agent, to make gifts to the client's children to assist their support, make clear that the gifts need not be equal, and direct that gifts to children be kept secret from the other children. Those actions can be authorized even though they do not meet the "best interest of the principal" standard.

(3) **Son With Conflict of Interest**. Assume the son learns of a lucrative opportunity to sell the real estate, and in the exercise of his due diligence he thinks a sale would be in his father's best interest. The sale will also benefit the son individually. Under the UPOAA, there is no agent liability merely because an action benefits the agent personally as long as the agent is acting with care, competence, and diligence for the best interest of the principal.

On the other hand, if the son is deeply in debt and chooses to sell the property for less than its reasonable value to get a badly needed quick infusion of cash, the son would likely have liability (absent specific authorization for such actions in the power of attorney). The action is not in the principal's best interest.

However, if the son sells the property for less than its reasonable value in order to raise money pay for the father's care, there would be no agent liability if the action was in the father's best interest.

(4) **"Convenience" Title**. Assume the client's name is on the real estate merely to help the son get a better mortgage and insurance rates, but the son is the intended sole owner of the real estate. If the son sells the real estate for less than its reasonable value, arguably the son is liable unless the power of attorney authorizes that type of transaction and describes it in a way that it would meet the best interest test as to the client. This scenario highlights the customized planning and drafting that may be needed to protect the "honest agent."

21. Customized Counseling Is Required

a. **Beyond "Part of the Package" Planning**. Powers of attorney have typically been viewed as documents that just "come with the package" in the estate planning representation. Attorneys must be more aware of both the potential for agent abuse and the potential that the power of attorney is not flexible enough to protect the honest agent. For example, the attorney should counsel the client regarding the alternatives with respect to the scope of the power of the agent to make gifts and regarding the effect of conflicts of interest with the agent.

b. **Checklist**. Margaret van Houten has prepared a client interview checklist regarding issues for powers of attorney. Using such a checklist helps focus attention to issues dealing with the power of attorney rather than focusing on general estate and trust planning issues. Topics on the questionnaire include:

- the initial and successor agents,
- whether the agent has the option to appoint a co-agent or successor agent,
- whether different agents will have different authorities,
- how co-agents take action,
- agent compensation,
- whether there are existing powers of attorney and whether they will be revoked,
- the effective date of the power of attorney,
- whether there are co-ownership or business relationships with an agent and the principal's views regarding any such business dealings,
- whether any of the discretionary agent duties (listed in §114(b)) should be waived,
- whether the agent should be exonerated for a breach of trust (see §115),
- whether a particular person should be named who is entitled to petition the court for judicial relief (see §116),
- which of the general agent powers should be granted,
- whether the agent should have the power to make gifts and limitations on the potential donees, amounts or purposes of such gifts,

- whether the agent will have various "hot powers" (such as the power to revoke an inter vivos trust, change rights of survivorship, the right to delegate fiduciary powers, and the right to disclaim property including a power of appointment), and
- any needed directions regarding preservation of the client's estate plan.

c. **Planning Approach**. Professor Whitton suggests the following approach in designing customized powers of attorney:

> First, the drafting attorney should determine from the client interview whether the principal intends the agent to act in a manner that diverges from an objective view of the principal's "best interest." Examples include making gifts or providing other types of support to the agent from the principal's property. Second, if the answer to this determination is yes, the client must choose between (1) explicitly stating the expectations in the power of attorney, thus canceling by implication the default duties of loyalty and (2) modifying the duties of loyalty in the power of attorney without explicitly stating the expectations, thus allowing those expectations to remain flexible. Although the drafting attorney may be reluctant to recommend modification of the default duties of loyalty, which reduces certain protections for the principal, the internal tension between these duties and the principal's expectations cannot be ignored. Linda S. Whitton, *Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent,* 117 PENN STATE L. REV. 1037, 1059 (2013) (citation omitted).

22. Form Options

Power of attorney statutes (including the UPOAA) include a statutory power of attorney form. Form options now include:

(i) The *statutory form* (deviations may be listed in the "special language" section of the statutory form; advantages of using the statutory form include that third parties will be more comfortable with and more likely to recognize the power of attorney, and under some statutes a third party may have liability for refusing to recognize a statutory form power of attorney);

(ii) A *modified statutory form* that is a more personalized form that generally looks like the statutory form with additional or special clauses within the terms of the document rather than including all deviations in the "special language" section of the form (advantages include that the form can be more flexible in dealing with customized situations); and

(iii) An *individually drafted form*, which typically would include a full listing of powers of the agent (the primary disadvantage being that third parties may be unwilling to accept the power of attorney, and if recording the power of attorney should become necessary, a long form may be more expensive to record).

23. Approaches of Documenting General Power Provisions

Historically, powers of attorney have included all of the agent powers in the form itself. Power of attorney statutes (including the UPOAA) include a statutory power of attorney form with a list of powers that are described in more detail in the accompanying statute.

A typical statutory form calls for the principal to initial any of the specific powers that the agent should have in the list of powers (or to initial the "All preceding subjects" line). One speaker alters her form to merely include the powers desired by the client rather than including the full list of powers with blanks for initialing the desired powers, for fear that a dishonorable agent could easily forge an initial into an otherwise blank space. Fellows attending the seminar were about evenly split as to whether they use blanks that the client must initial.

An issue also arises as to how to communicate the scope of the powers to the client (and to the agent). Alternatives are to give a list of the detailed descriptions of each of the powers to the client or to attach the detailed description to the power of attorney as an exhibit (which obviously increases the length of the power of attorney).

24. "Personal and Family Maintenance" Power

One of the statutory powers is the "personal and family maintenance power," described in §213. This includes very broad authorization to pay living expenses and other expenses of family members, which is *not* desired by some clients. The personal and family maintenance power authorizes the agent to maintain the customary standard of living of the principal, the principal's spouse, the principal's children, and individuals who the principal is supporting or is legally obligated to support. The types of expenses authorized for those persons are rather broad including:

- providing living quarters and the operating costs of living quarters,
- providing "normal domestic help, usual vacations and travel expenses, and funds for shelter, clothing, food, appropriate education, including postsecondary and vocational education, and other current living costs,"
- paying health care and custodial care expenses,
- continuing any provision for automobiles or other means of transportation, and
- maintaining credit and debit accounts.

The authority to make these payments, which could conceivably be quite substantial, is not dependent on, nor limited by, authority that the agent may or may not have to make gifts.

Some clients will not want to provide for these extensive payments under a power of attorney (including things such as domestic help and vacations) for their children.

25. Gifting Authority

Section 217 addresses the gifting power. Gifts are limited to amounts that qualify for the gift tax annual exclusion (or if the spouse agrees to gift splitting, to twice the annual exclusion amount). The agent must consider various specific factors in determining whether a gift is consistent with the principal's objectives and is in the principal's best interest, including the extent of the principal's property, the principal's foreseeable obligations and need for maintenance, the minimization of taxes, eligibility for governmental assistance programs, and the principal's personal history of making or joining in making gifts.

The client may want to customize the gifting authority with respect to various issues including gifts to the agent, gifts to someone who not an ancestor or descendant of the principal, gifts in excess of the annual exclusion, gift splitting, indirect gifts, gifting when the client has a revocable trust (in which event the best approach is generally to include gifting authority in the revocable trust rather than in the power of attorney), and whether gifts among a class of donees must be equalized.

26. Coordination With Will or Revocable Trust

If an individual holds most of his or her assets in a revocable trust, most transactions will occur in the revocable trust and the power of attorney may only be necessary for very specific matters. Section 211(b)(7) authorizes the agent to transfer the principal's assets to a revocable trust created by the principal as settlor.

The agent generally should not be different than the person named as executor in the principal's will.

27. Acceptance by Financial Institutions

The Act contains a carrot and a stick regarding third parties' recognition of powers of attorney.

The carrot is that third parties are protected from liability if they accept an "acknowledged" power of attorney without actual knowledge that it is forged, void, invalid, or terminated, or that the agent is exceeding or improperly exercising his or her authority. An "acknowledged" power of attorney is one that has been "purportedly verified before a notary public …." A third party is not required to verify independently the validity of a power of attorney or an agent's exercise of authority. The third party may request the agent's certification under oath as to any factual matter and an opinion of counsel as to any matter regarding the power if the person making the request furnishes the reason for the request in writing (for example, if the third party has reason to believe the agent is stealing from the principal). §119. In addition, §120 protects third parties from liability by enunciating certain safe harbors for refusal to recognize a power of attorney.

The stick is that a refusal of a power of attorney by a third party that does not fall within one of the listed safe harbors subjects the third party to liability for attorney's fees and costs if the agent is required to obtain court-ordered acceptance of the power. §120. Alternative B for §120, which has been adopted in some states, applies the third party liability provision only if the power of attorney in question is the statutory form power of attorney.

28. Digital Assets

The Act does not address digital assets. Specific authority with respect to digital assets should generally be added to power of attorney forms. A separate stand-alone document (prepared by Jim Lamm) providing all fiduciaries access to digital assets is in Item 10.b above. If the planner prefers to include the provision directly in a client's power of attorney, the language could be adjusted for inclusion in a power of attorney.

Items 29-34 are observations from a session by Turney P. Berry and Professor David M. English—Taking the UTC Down the Pacific Coast Highway: Twists, Turns, Beautiful Views and Perilous Cliffs

29. Uniform Trust Code—Background and Relationship to Other Pending Uniform Laws

The Uniform Trust Code was originally completed in 2000, and has been amended in 2001, 2003, 2004, and 2005. It has been adopted by 31 states (including the District of Columbia). It comprehensively addresses major issues regarding express trusts, but there are various topics that are (or will be) dealt with separately in other uniform codes (such as the Uniform Principal and Income Act, the Uniform Prudent Investor Act, and the Uniform Custodial Investor Act).

There are now two drafting committees of the Uniform Law Commission addressing other trust issues.

a. **Uniform Divided Trusteeship Committee**. There is a committee dealing with delegation and advisors. The Divided Trusteeship Committee is addressing in detail directed trusts and having co-trustees with divided duties. This uniform act will be completed in the summer of 2017.

b. **Principal and Income Committee**. The principal and income act was originally enacted in 1931, and revised in 1962 and 1997. Changes were made in 2008 to §409 (dealing with deferred compensation in response to Rev. Rul. 2006-26) and §505 (dealing with flow-through income from entities), and a new §606 was added to facilitate the technical implementation of the amendments; but there was no plenary review of the Act in 2008. Some of the issues that the committee will address, in particular, are (i) making adjustments between income and principal to make a unitrust election, (ii) the treatment of money that a trust receives in partial liquidation of an entity in which the trust owns an interest, and (iii) the allocation of capital gains to income for income tax purposes. The chair of the committee is Turney P. Berry and the Reporter is Ronald D. Aucutt.

30. Suggestions for Changes

Various suggestions have been made for revisions to the Uniform Trust Code. Some of the issues include the following:

- §103–various issues regarding the definition of a "qualified beneficiary," including whether every living descendant of a perpetual spray trust for the settlor's descendants is a "qualified beneficiary;"
- §108–principal place of business, specifically addressing a trust's situs for state income tax purposes;
- §109–methods and waiver of notice, addressing electronic delivery of trustee reports;
- §302–whether the holder of a nongeneral power of appointment should be able to represent permissible appointees (but not takers in default);

- §303–virtual representation, whether an ancestor should be able to represent minor and unborn descendants in all generations, if there are no living parents of the represented descendant;
- New section on "designated representative" new concept allowing a designated representative nominated in the trust agreement or by someone authorized in the trust agreement (based on Fla. Stat. §736.0306);
- §401–creation of trust, whether to permit expressly the creation of trusts by agents under powers of attorney;
- §413–cy pres, addition of comments addressing standing to enforce charitable gifts that are not deemed to be trusts that are governed by the UTC;
- §703–cotrustees, specifically addressing co-trustees' duty to communicate with each other;
- Article 8–whether to address specifically the breadth of fiduciary duty beyond the trust being administered;
- §802–duty of loyalty, address limitation on seeking a contract partial to the fiduciary prior to formally becoming a fiduciary;
- §813–duty to inform and report, whether to require an accountant certification to reports, modifying notice requirements "to insure notice to all present and potential beneficiaries," expressly allowing the delivery of the trustee report electronically, and addressing the fiduciary exception to the attorney-client privilege that the existing Act leaves open for further consideration by courts;
- §817–whether to include a clear statement of the exact process required to present a receipt and release to a beneficiary;
- §1001–inclusion of an appropriate punishment for a fiduciary who only discloses material when deposed;
- §1005–currently shortens the limitations period for actions against the trustee if a report is delivered that discloses the existence of a potential claim and informs the beneficiary of the time allowed for commencing a proceeding, and whether that limitations period should be lengthened;
- General–representation regarding rights of beneficiaries; and
- Oregon and New York changes, considering changes to the Uniform Trust Code being considered in Oregon and New York.

The Uniform Law Commission has been very active over the years regarding trust and estate matters. At least ten Commissioners have expertise in trust and estate law issues. There are now four active projects regarding trust and estate matters (divided trusteeship, Indian Probate Code, principal and income, and guardianship), and that is as many trust and estate projects as the Commission can address at any one time. Until that queue clears, there are not sufficient resources to tackle a revision of the Uniform Trust Code. Some of the major Uniform Acts have been revised about every 20 years, so a comprehensive review of the Code is timely.

31. Proposed Revision to Section 802-Duty of Loyalty

The American Bankers Association has proposed amendments to §802 dealing with the duty of loyalty. It proposes revising §802(f) to create a self-dealing exception not only for proprietary mutual funds but for other types of affiliated products and services for "alternative investments." Any such investments would have to comply with the Uniform Prudent Investor Act and would require certain disclosures to beneficiaries. Any delegation to or retention of an affiliated agent would have to be fair to the beneficiaries, as well as be annually disclosed to beneficiaries. The proposal is based on Missouri Trust Code §802.

The Joint Editorial Board has responded that the Uniform Trust Code needs to be revised with respect to this issue, but further discussion is needed as to what type of expansion is appropriate. For example, while the expansion has in mind the investment affiliates that have been created by many corporate trustees, the provision would also apply to individuals and should address what limits will apply to individual trustees investing trust funds in a company in which the individual has an interest. Substantial attention will be devoted to the definition of an "affiliate" (which is not now defined in the Uniform Trust Code).

32. Choice of Law and Governing Law

Section 107 of the Uniform Trust Code applies the language of the Restatement (Second) of Trusts, basing the governing law on the place of most significant relationships to the matter at tissue. This is not always clear.

Hudson v. UMB Bank, N.A. 447 S.W.3d 714 (Mo. Ct. App. 2014) addresses the appropriate governing law for a trust that had connections with Kansas, Colorado and Missouri. Beneficiaries brought an action to remove the trustee, but Kansas law requires "a substantial change of circumstances" to remove a trustee, which the beneficiaries admitted they could not establish. They maintained that Missouri law applied instead. The court concluded that Kansas law applied based on expressions in the trust agreement. By naming the trustee with reference to its location in Kansas, and by referencing the Kansas Trustee Powers Act (even though then repealed), the settlor unambiguously expressed his intent that the trusts be administered under Kansas law. The settlor's designation of controlling laws must be respected where all or any part of the administration occurred in Kansas.

In light of the Uniform Trust Codes' reference to the principal place of administration, the best drafting approach is to designate the intended principal place of administration in the trust instrument.

33. Standing to Enforce Charitable Trusts and Other Charitable Gifts

Section 405 of the Uniform Trust Code gives the settlor standing to enforce the terms of a charitable trust. There are no similar statutory provisions giving a donor standing to enforce charitable gifts that do not involve trusts. There have been three cases concluding that the donor to a charitable not-for-profit corporation (but not in trust) does not by default have the ability to enforce the terms of the donation; the standing provision would have to

be in the donation document. *E.g., Courtenay C. and Lucy Patten Davis Foundation v. Colorado State University Research Foundation*, 320 P.3d 1115 (Wyo. 2014).

A possible planning approach is for a donor to fund an LLC, which in turn would fund a charitable trust. The LLC would have a perpetual existence, and as settlor, would have standing to enforce the trust. Under "uniform law land," a "person" includes individuals AND entities.

34. Duty of Trustee of Revocable Trust

The general rule is that the duty of the trustee of a revocable trust is solely to the settlor. §603. *See Puhl v. U.S. Bank, N.A*. 34 N.E.3d 530 (Ohio Ct. App. 2015) ("'During the lifetime of the settlor of a revocable trust … the duties of the trustee … are owed exclusively to the settlor.' [quoting statute]. Indeed, the trustee of a revocable trust may follow an instruction of the settlor even if that instruction is contrary to the terms of the trust…Therefore, during her lifetime, Rose had the authority to instruct the Trustee to retain the 1989 stocks (as she did on several occasions), and the Trustee had the duty under [the statute] to follow Rose's instructions, regardless of the risk presented by the high percentage of the Trust's portfolio invested in the 1989 stocks.")

The settlor can revoke the trust, in effect having a general power of appointment, and can virtually represent the other trust beneficiaries. If the settlor is incapacitated, however, the trustee may have accountability to the other beneficiaries of the trust.

There have been several outlier cases. A California case held that the beneficiaries could not complain about trustee actions while the settlor was living, but could argue after the settlor's death that what the trustee's actions were inappropriate. Another California case (*Drake*), concluded that if beneficiaries think the settlor is incapacitated, they can attempt to establish in court that the settlor is incapacitated so the trust is functionally no longer revocable. (The beneficiaries must understand that is a high risk strategy—if the court concludes that the settlor is not incapacitated, the beneficiaries will "be in a world of hurt.")

Items 35-41 are observations from a session by Wendy Goffe—What to Do When You Find Out Grandma Had a Gun Collection or an Interest in a Cannabis Outlet

35. Significance; Ask Clients About Gun Collection

There are strict federal and state laws governing the registration, ownership, and transfer of guns that impact the ability of a fiduciary to possess and sell or transfer guns. Clients, however, do not even think about guns presenting any particular estate planning issues.

36. Federal and State Laws and Registration Requirements

a. **Gun Control Act of 1968**. The Gun Control Act of 1968, 18 U.S.C. ch. 44, categorizes weapons as either Title I firearms or Title II firearms. It regulates the *interstate* disposition of rifles, shotguns, and handguns, the vast majority of guns privately owned in the United States.

b. **National Firearms Act of 1934**. The National Firearms Act of 1934 (NFA), 26 U.DS.C. ch. 53, regulates Title II firearms (also known as NFA weapons), which include automatic firearms (machine guns), silencers, short or short-barreled (that is, sawed-off) shotguns, short or short-barreled rifles, destructive devices (such as missile bearing rockets, grenades and bombs), and "any other weapon."

c. **State and Local Laws**. State law generally regulates the *intrastate* transfer of Title I firearms. Local rules regarding the right to possess or transfer firearms are generally narrower than the federal rules; if someone qualifies under the federal rule, they probably also qualify under the local rule. There are differences, however, and something that is legal in one state may be illegal in another state. Be careful with transferring firearms across state lines, to make sure they are allowed and licensed in the new state.

d. **Registry.** The NFA Branch of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) administers the National Firearms, Registration and Transfer Record (NFA Registry). The transfer or possession of an *unregistered* Title II weapon is a criminal act covered by I.R.C. §5861(e).

37. Restrictions on Transfer of NFA Weapons

Transferring an NFA weapon without complying with several NFA transfer rules or possessing such a weapon is also illegal. Title II has a broad definition of transfer, including "selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of" an NFA weapon. When an individual transfers or purchases an NFA weapon, the Chief Law Enforcement Officer of the city or county where the individual resides must sign a document called a Form 4, Application for Transfer and Registration of Firearm. The transferor must submit and attach to the Form 4 a photo of the transferee, as well as the transferee's fingerprints in duplicate. A Form 4 is also required for the transfer of an NFA weapon to a trust, but the fingerprints or a photo of the trustee is not required. The transfer by a fiduciary requires filing Form 5, Application for Tax Exempt Transfer and Registration of a Firearm.

Any transfer of an NFA weapon is subject to a transfer tax generally, but the transfer in satisfaction of a bequest is exempt from the transfer tax.

38. Persons Prohibited From Owning Firearms

Under the Gun Control Act, certain persons cannot possess *any* firearms (Title I or Title II). Excluded individuals include persons under 18 years of age (with a few exceptions), convicted felons (and persons under indictment of a crime punishable by imprisonment for over one year), fugitives from justice, persons either adjudicated a "mental defective" or committed to a mental institution, persons convicted of misdemeanor domestic violence offenses, and illegal aliens or persons admitted to the United States under a nonimmigrant visa. There are other categories of prohibited persons that may not be so self-evident, including persons who are unlawful users of or addicted to a controlled substance, dishonorably discharged veterans, and persons who have renounced their U.S. citizenship.

While a convicted felon is prohibited from possessing a firearm, the Supreme Court has held (unanimously) that nothing strips the individual of his property interest in the firearm,

and thus, he retains the right to sell or otherwise dispose of it, as long as the recipient will not give the felon control over the firearm. *Henderson v. U.S.,* 575 U.S. __ (2015). Therefore, the felon will not need to turn over his firearms to law enforcement, but can dispose of them by giving or selling them to a friend or family member.

The interstate transfer of firearms to a person who is prohibited from owning firearms is a crime (punishable up to five years imprisonment). 18 U.S.C. §924. Furthermore, any firearm involved in a violation of the Gun Control Act is subject to seizure and forfeiture. 18 U.S.C. §924(d).

39. Fiduciary Concerns

a. **Safeguarding and Preserving**. The fiduciary has the responsibility of safeguarding and preserving firearms under the fiduciary's control. Firearms generally must be stored in a humidity controlled environment to avoid rusting. An appraiser or gun dealer may be able to take control of firearms and store them. The fiduciary may consider using companies that will resell the firearms, if that is desired. They will pick up the guns, store them and sell them. (For example, Cabellas will do that.)

b. **Compliance with Registration and Ownership Qualification Rules**.

Fiduciaries need to determine the registration status of firearms coming into their possession. Retroactive registration may not be an option, putting the fiduciary in the position of having to turn over an unregistered weapon to law enforcement or an ATF office. (*Mere possession* of an *unregistered NFA weapon* can be punished by up to 10 years in prison and fines of up to $250,000.) If the fiduciary cannot locate the decedent's registration paperwork, the government will provide information to a duly appointed personal representative (the records are treated as confidential tax information). Allen L. Venet, From the Bazaar to the Bizarre: *Planning for and Administering Unusual Assets in Estates and Trusts,* 47th ANNUAL HECKERLING INST. ON EST. PL. ¶1704.1[A][1] (2014) (hereafter "Venet, Bazaar to the Bizarre") .

In addition, transferring possession of firearms to a person who is prohibited from possessing or owning firearms (as discussed above) is illegal under the Gun Control Act, and can subject the executor, the heir, or both, to criminal penalties. 18 U.S.C. §922(d). There is an exception from the federal law that prohibits the interstate transport of firearms to an unlicensed person for bequests; a person may transport into the state in which he resides any firearms if he lawfully acquires such firearm by bequest or intestate succession in a state other than his state of residence. 18 U.S.C. §922(a)(3). That provision allows the *beneficiary* to transport the gun, but it does not specifically allow the *fiduciary* to transport the gun. If the beneficiary cannot come to decedent's state to pick up the gun, the fiduciary should use a licensed dealer as an intermediary to deliver the gun to the out-of-state beneficiary. *See* Venet, Bazaar to the Bizarre, at ¶1704.1[C]. Unlawfully transferring an NFA weapon to an out-of-state recipient is subject to further penalties under the National Firearms Act. 18 U.S.C. §5861(b), (e).

Registration requires the new owner to obtain the signature of the chief law enforcement officer of his or her home jurisdiction. Some police chiefs refuse to sign these forms. (The sometimes onerous registration requirements have led to the

popularization of gun trusts, as described in Item 40 below, so that the use of guns owned by the trust could continue for long periods of time without re-registration.) Venet, Bazaar to the Bizarre, at ¶1704.1[A][1].

The fiduciary might consider obtaining a release with special language from beneficiaries receiving firearms:

> I certify that: I possess a valid, current [State] Weapons Carry License; I am legally entitled to receive, own, possess and use the Gun[s], under all applicable federal, state and local laws and regulations; I have no knowledge of, and I have never been informed of, any restrictions or prohibition on my right to receive, own, possess or use the Gun[s] or other such firearms; and I will fully comply with all federal, state and local laws and regulations regarding my ownership, possession and use of the Gun[s]. Venet, Bazaar to the Bizarre, at ¶1706.

c. **Appraisals**. Obtaining appraisals by the fiduciary can be tricky. Appraisers are usually licensed gun dealers. Before returning a weapon, an appraiser may ask the executor to confirm that the executor is lawfully able to possess a firearm; otherwise the appraiser may not return the weapon. Furthermore, one cannot transfer possession of an NFA gun, even temporarily, to an unregistered owner and leaving the weapon overnight in the custody of an appraiser might subject both the fiduciary and appraiser to criminal prosecution. Venet, Bazaar to the Bizarre, at ¶1704.1[A][1].

40. Gun Trusts

a. **Description**. Individuals may purchase NFA weapons in an entity (such as a trust) to avoid rules that otherwise regulate subsequent transfers that would be made if the firearm had been owned by the individual directly. Trusts are often used rather than corporations or LLCs to avoid annual filing fees, public disclosure, or separate tax returns. A revocable trust designed specifically for the ownership, transfer, and possession of an NFA weapon may be known as a gun trust or NFA Trust. (Apparently, the first gun trust was drafted by David Goldman, an attorney in Jacksonville, Florida. *See* Margaret Littman, *In Goldman Guns Trust*, 97 A.B.A. J. 12, 13 (Feb. 2011).)

b. **Drafting Issues**.

- The NFA registration requirements (including payment of transfer fees) must be satisfied for the transfer of firearms into the gun trust. (While the transfer of an NFA weapon in satisfaction of a bequest is exempt from the transfer tax, a transfer of an NFA weapon to a gun trust is not exempt.)
- The trust must account for the different types of firearms it may hold.
- The trust can name numerous trustees, but each must be lawfully able to own the weapon.
- Any beneficiary may use a firearm in the trust (including a trustee but only if the trustee is named as a beneficiary).
- The trust agreement should provide who, and under what circumstances, trustees and beneficiaries can have access to firearms and ammunition and what happens if a trustee, successor trustee, or beneficiary becomes a "disqualified person."

- The trust can name minor children as its beneficiaries until they are old enough to possess the weapon outright, when the gun could be distributed to the beneficiary.
- The settlor can be a life beneficiary (but cannot be the sole beneficiary or the merger doctrine may cause the trust to be disregarded).
- The trustee's power to change the name of the trust should be limited, because a change of name would require re-registration and payment of a transfer tax.

c. **Transfers From Gun Trust**. The trust may not transfer a firearm to a person who may not lawfully buy or own firearms. The trustee is responsible for determining the capacity of the beneficiary and the federal, state, and local laws that apply to the individual before allowing a beneficiary to use a weapon or distributing an NFA weapon to a beneficiary.

Although a revocable trust can be revoked under trust law principles at any time, the BATFE must approve termination of the gun trust and the distribution of its assets to its beneficiaries, as it would any other transfer.

Neither the trustee nor any beneficiary may transport any of the assets across state lines where registered without prior BATFE approval.

41. Cannabis Issues

a. **Growing and Valuable Industry**. There has been some movement of states (currently, in Washington, Colorado, and Oregon as discussed below) to legalize, tax, and regulate marijuana for medical or recreational purposes. Researchers estimate that $3.5 billion worth of legal marijuana will be sold in 2015. Uncle Ike's, a profitable retail outline in Seattle, is estimated by Wall Street to have a value of $415 million.

b. **Federal Law**. The federal Controlled Substances Act (CSA) prohibits the cultivation, distribution, and possession of marijuana for any reason other than to engage in federally approved research. Plants, drugs and chemicals are organized into five categories; Schedule I substances are deemed to have no currently accepted medical use, unlike Schedules II-V substances, which may be manufactured, distributed and used in accordance with the CSA. Marijuana has always been categorized as a Schedule I drug and subject to severe restrictions under the CSA. 21 U.S.C. §812(c). The unauthorized cultivation, distribution, or possession of marijuana is subject to federal civil and criminal penalties.

c. **State Legalization Initiatives**. Washington and Colorado allow individuals over the age of 21 to possess certain quantities of marijuana for private use. The have a three-tier production, processing, and retail licensing system, with separate licensing and other requirements for each of the three arms of the marijuana industry. Strict requirements apply regarding who can own the entities involved in any of these three categories. Oregon has approved possessing and growing marijuana; the sale of marijuana will not become legal until 2016.

d. **Cole Memorandum**. U.S. Department of Justice Deputy Attorney General James Cole issued a memorandum in August 2013 (the "Cole Memo") stating that the U.S. Department of Justice enforcement activity would prioritize activities that violate state

law and focus on eight activities that the federal government most wants to prevent including the distribution of marijuana to children, sharing marijuana revenue with criminal enterprises or gangs, diverting marijuana to states that have not legalized it, providing fronts for trafficking in other illegal drugs, using firearms in the cultivation and distribution of marijuana, exacerbating public safety consequences such as driving under the influence of marijuana, growing marijuana on public lands, and possessing or using marijuana on federal property.

A concern with relying on the Cole memo is that a change of the Presidency may result in a change of the administrative policy of the Justice Department.

e. **Treasury Department Guidance**. The Financial Crimes Enforcement Network ("FinCEN"), a division of the Treasury Department, has guidelines to clarify Bank Secrecy Act expectations for financial institutions seeking to provide services to marijuana-related businesses. A variety of factors must be considered. Any financial institution that decides to provide financial services to marijuana-related businesses would be required to file suspicious activity reports if the institution knows, suspects, or has reason to suspect that a transaction involves funds derived from a marijuana-related business.

   These restrictions have given new life to credit unions in these states; state chartered banks are willing to accept money derived from marijuana. (There is a 10% charge for paying taxes in cash, so cannabis companies have to deposit money with some institution so it can pay taxes to the IRS.)

f. **Federal Income and Transfer Tax Considerations**. Because marijuana is illegal under federal law, no business deductions are allowed and the gross revenue is taxable.

   Even illegal property has a value for federal transfer tax purposes.

g. **Leasing Issues**. Real estate owners leasing property to a marijuana-related business will want the lessee to post a bond, because business-interruption insurance is not available to cover the risk that land involved in a marijuana business may be seized as evidence in a federal proceeding.

h. **Estate Planning Considerations**. The planner must determine whether a named fiduciary will be willing to serve if the estate includes a producer, processor, or retail marijuana license, given marijuana's illegal status for federal law purposes. Corporate fiduciaries are unlikely to serve. A fiduciary that does serve will have to determine whether the estate or trust can own licenses under state law as that is not clear. Owners of marijuana-related businesses must carefully consider succession planning strategies to avoid transfers to individuals who are not qualified to become owners.

i. **Ethical Concerns**. Despite the legalization efforts in several states, an attorney must consider whether he or she may ethically advise and assist a client seeking the lawyer's help to engage in conduct that the lawyer knows is criminal. The Arizona and Colorado Supreme Courts have adopted rules providing that attorneys can advise clients about matters that are legal under the local marijuana laws as long as the lawyer advises the client of potential federal law implications. In other states, ethical concerns remain.

Items 42-48 are observations from a session by Stacey D. Spivey and Cynda Ottaway—Up, Up and Away: How to Navigate Through an Airplane Transfer.

42. Aircraft Registration

a. **Registration Required For All Aircraft**. All aircraft, whether commercial or non-commercial, must be registered through the FAA aircraft registration branch in Oklahoma City, Oklahoma. Aircraft are highly regulated assets.

The term "aircraft" is defined very broadly; a recent pronouncement includes drones as aircraft that must be registered.

The aircraft must be registered in the name of the "owner," which is generally the person or entity holding legal title.

b. **Significance**. Operating the aircraft without proper registration or in violation of "flight department company" rules may result in FAA fines and penalties, and other significant economic risks, some of which may include a lien on the aircraft, loss of insurance coverage, liability disputes, breach of lease or financing covenants, unintended tax treatment, etc.

c. **General Premise of Registration System**. Only qualified persons may be owners, and the general premise is transparency. The FAA will "drill down" through entity owners to determine the actual owners to confirm that the owners are qualified.

d. **Don't Dabble**. The FAA registration process is quite complex. Estate planning practitioners should retain counsel to assist with the FAA registration and compliance process. (Some attorneys specialize in FAA registration matters and other attorneys specialize in structuring transactions involving aircraft sales and acquisitions.)

43. Documentation Required for Registration

a. **Originally Signed Documents**. Most documents that are filed with the FAA must be originally signed by the appropriate person (typically an officer, director or manager). That often comes as a surprise; multiple originally signed documents may be used, knowing that one will have to be filed with the FAA. (When a trust must be filed, the FAA will accept a certification from the attorney that a trust copy is the same as the original document.)

b. **Bill of Sale**. The bill of sale is the title transfer document, documenting that the owner holds legal title to the aircraft. The bill of sale must obtain certain required detailed information. The documentation must reflect a complete chain of title from the last registered owner. The bill of sale must be originally executed by the seller and must have present conveyance language.

c. **Aircraft Registration Application**. The AC Form 8050-1 Aircraft Registration Application requires detailed information about the aircraft and the owner. The white copy is filed with the FAA and the pink copy must be kept on board the aircraft. The FAA website has extensive information about the application with examples.

d. **Proof of Citizenship**. The general rule is that the owner must be a citizen of the United States. The Application describes the legal status of the owner (individual,

partnership, limited liability company, corporation, or trust). Detailed rules for each specify how to satisfy the U.S. citizen requirement. For example, a partnership must be comprised of individual U.S. citizens and cannot have a corporation or other entity as a partner. For an LLC, all members and managers must be U.S. citizens. The FAA Registry will drill down through underlying LLC subsidiaries to determine the ultimate owners. For trusts, all trustees and beneficiaries must be U.S. citizens (unless a "non-U.S. citizen trust" is used in which the beneficiary is not a U.S. citizen but the trustee-owner is).

44. Avoid Commercial Use Categorization

FAA regulations categorize aircraft into various categories, generally commercial and non-commercial, and grant airworthiness certificates under one of those categories. The personal use regulations impose significantly less stringent operational and maintenance standards than those for commercial aircraft.

The FAA classifies aircraft leases as either "dry" leases or "wet" leases. Under a dry lease, the aircraft owner provides only the aircraft and no crew. The aircraft is typically leased under this type of arrangement to an operating entity that provides the crew. So long as the personal use limitations are followed, this arrangement will not cause the aircraft to fall in a commercial category. A wet lease is one in which the owner provides even just one crew member, and results in the aircraft falling into the commercial category.

45. Registration Renewals

Be sure to provide the correct address of the aircraft owner with the registration so that the owner will receive renewal notices. Failure to renew on time will require a formal renewal process that takes several weeks, during which time the aircraft cannot be validly operated.

46. Financing

Special financing forms, available from the FAA, must be used for aircraft financings. Foreign financings will have to go through the International Registry located in Ireland.

47. Sales and Use Taxes

If a sales tax applies where the aircraft is sold, use tax may be imposed by the state where the aircraft is based on the difference between the state's sales or use tax and the tax paid to the state where the sale occurred. Some states (such as Washington) consider the aircraft owned by a non-resident to be based in-state if it has spent more than 90 days in the state during any 12-month period, subjecting the aircraft to use tax in that state. An owner may have to pay the annual excise tax in one state and the use tax in another state because at least three months is spent in the other state.

48. Gift Issue With Private Aircraft

The IRS took the position in a recent audit that all of the flights of grandchildren on the grandparent-owner's aircraft were gifts by the grandparent (there was no indication whether the grandparent was also present and the grandchildren merely joined him on the flights). Gift tax returns had to be prepared with respect to flights over the ten-year period. The flights were deemed to have a value of $2,500 per hour, and the total gift tax was $8.5 million. Remind clients that family members using the plane may have to pay fair value for the private air flights in order to avoid gift taxes on the aircraft owner—which can be much more expensive than first class commercial air tickets.

Items 49-51 are observations from a session by Dom Campisi—The Other Decanting (Dealing With Alcohol Related Assets in Trusts and Estates)

49. Application

The summary addresses dealing with alcohol-related assets in trusts and estates. These types of assets can include vineyards, wineries, breweries, restaurants, brewpubs, distillers, distributors, retailers, collections of wines and whiskeys. The summary also addresses the perils and pitfalls of owning a vineyard and/or winery.

50. Interesting Historical Background and Facts Regarding Alcohol

Wine was produced in China 9,000 years ago. The domestication of rice led to the discovery of fermentation in closed containers, which were needed to protect the harvested rice from insects and rodents but were not waterproof. Ready access to alcohol resulted in genetic changes over thousands of years that caused Han Chinese and other Asians to develop intolerances to alcohol. A labor force of intolerant workers evolved over long periods of time; workers who have a medical problem drinking alcohol will not drink up the crop.

Forty-five percent of the world adult population does not drink alcohol for genetic, religious or personal reasons. The 44% of the American adult population who drink regularly offers a large consumer audience for alcoholic beverages.

Taxation. Alexander Hamilton in 1791 started taxing "spirituous liquors and the stills that produced them" to repay war debts. Farmers who had no way to sell bulk grains turned to whiskey and other alcohol that could be more efficiently transported. Federal tax collectors appeared in the local collection districts, resulting in large bodies of armed farmers confronting federal officials. The militias of several states were federalized, and the Whiskey Rebellion was suppressed, resulting in damages to fences and livestock of homeowners from the foraging militiamen. The collateral damage to innocent voters hardened concerns about militias, leading to support for the Second Amendment. Jefferson repealed the excise taxes in 1802, and alcohol was not taxed again until the Civil War. Now a host of taxes and attendant restrictions make ownership of alcoholic production and distribution entities difficult and expensive.

Interesting Health Facts. Various studies have indicated the health benefits of moderate consumption of wine, including "a lower risk for coronary heart disease in some

individuals." Animal research suggests possible benefits from certain antioxidants in red wine called polyphenols (and in particular, resveratrol), such as helping to prevent damage to blood vessels, reducing LDL cholesterol (the "bad" cholesterol), preventing blood clots, reducing the risk of heart disease, stroke, diabetes, mellitus, metabolic syndrome and early death, but more than moderate amounts (two glasses of wine a day for men) results in increased health risks. Red wine may also help defend against Alzheimer's. (*See* R. Thomas, A Randomized, Double-Blind, Placebo-Controlled Trial of Resveratrol for Alzheimer Disease, NEUROLOGY (Sept. 2015).) The various animal studies have involved huge dosages of resveratrol—"to get the same dose of resveratrol used in the mice studies, a person would have to drink more than 1,000 liters of red wine every day." Mayo Clinic, *Red Wine and Resveratrol: Good for Your Heart?* (at http://www.mayoclinic.org/diseases-conditions/heart-disease/in-depth/red-wine/art-20048281). Mr. Campisi observes that "before starting to drink red wine, note that one milligram of resveratrol in pill form is the equivalent of the resveratrol in 1,000 bottles of red wine."

51. Difficulties in Owning Producer, Distributor, or Retailer Businesses

The alcohol industry has a three-tier system comprised of producers, distributors, and retailers. Operating any of these businesses is difficult and expensive. Some of the difficulties include the following.

- Numerous restrictions are imposed on the production of alcohol by the federal Bureau of Alcohol, Tobacco and Firearms (BATF) and local control agencies (such as the California ABC).
- Restaurants, brewpubs, bars, resorts, hotels and other entities serving alcoholic beverages are subject to multiple restrictions with the risk of penalties or termination of expensive licenses (e.g., violations of age restrictions or liability for sales to intoxicated persons). These are dangerous assets to hold in estates or trusts and require substantial oversight of employees and agents.
- Theft by employees is a significant risk; managing alcoholic beverage sales require specialized tracking to prevent losses.
- Distributorship risks depend upon terms of the distributorship agreement, including termination risks or the death of the licensed manager. The Maris litigation, *Maris Distributing v. Anheuser-Bush*, led to changes in wholesaler agreements including the ability to terminate the wholesaler without cause and restricted compensation for lucrative brands.
- Family disputes have broken up some alcohol-industry businesses; notable examples include the Mondavi and Gallo families.
- Vineyard example problems include grape grower arbitrations, producer's liens, and misappropriation by storage facilities. There as an overabundance of wineries, with 8,990 American wineries at the end of 2014, growing at 7% per year. There are now only a few national distributors, which leads to a problem of smaller wineries locating a distributor – what distributor will invest in a small winery that runs out of supply mid-year, so that restaurants have to drop the wine from their wine lists? (This has led to a

greatly increased significance of online sales for wineries.) There are various natural risks as well for wineries including, various plant diseases, earthquakes (one winery lost a year of production from the crushing of wine barrels in an earthquake), and weather. One bad Wine Spectator review can destroy a vintage. Winemaking is a very difficult art-a third of the vintage may taste rotten in some years. The testing of vineyards at night and picking at night may ruin the enjoyment of owning a vineyard home. "Friends don't let friends by wineries."

- Financial crashes may crush demand from consumers; cheap foreign wines subsidized by export hungry governments can be difficult competitors.

Items 52-55 are observations from a session by Kurt Sommer—Planning for and Managing Estates of Licensed Professionals

52. Focus on Planning for Disability and Death

a. **Sudden Disability or Death**. A plan should be in place for the sudden disability or death of the licensed professional.

b. **Major Causes of Death**. The major causes of death in the United States are (1) heart disease (611,105), (2) cancer (584,881), (3) chronic lower respiratory diseases (149,205), (4) accidents (130,557), (5) stroke (128,978), (6) Alzheimer's disease (84,767), (6) diabetes (75,578), and (7) influenza and pneumonia (56,979). Many of these can occur suddenly and at younger ages (about one-third of people hospitalized for stroke are younger than 65 years of age).

53. Ethical Obligations of Attorney

a. **Competency**. Under Rule 1.1 of the ABA Model Rules of Professional Conduct, competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. This rule requires that attorneys investigate the particular nuances of licensed professional clients' obligations in drafting documents for those clients.

b. **Client With Diminished Capacity**. Rule 1.14 provides that a lawyer can intervene for a client with diminished capacity:

> When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

b. **Terminating Representation**. If the attorney-client relationship is terminated (for example due to a sudden cause), Rule 1.16(d) requires the lawyer to take steps to protect the client's interest:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and

> refunding any advanced payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

c. **Case Study-Disabled Attorney**.

- If the disabled attorney's partner does not practice in the same area, the law firm should withdraw from representation (to assure competent representation).
- The disabled attorney's partner should comply with Rule 1.16(d) including notifying the client as soon as possible to avoid prejudice to the client's case, surrendering the client's papers and refunding any advanced payments that have not been earned.
- Copies of all files that are conveyed should be retained to defend against a potential liability claim.
- A sole practitioner attorney is under an ethical obligation to implement a succession plan to be able to prevent the neglect of client matters in the event of the sole practitioner's death or disability, including designating another lawyer to review client files and notify clients of the lawyer's death or disability and determine whether there is a need for immediate protective action. Comment 5 to Rule 1.3 provides:

  > To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of the deceased or disabled lawyer).

- The buy-sell agreements of smaller firms often do not deal with disability. Review operating agreements, bylaws, and shareholder agreements and revise them as necessary to cover disability as well as the death of a lawyer in the firm.
- Will there be mandatory tail coverage to provide liability insurance for the disabled professional?
- Who will cover the cost of transitioning clients? Make sure there is adequate funding to cover someone taking over files and securing and transitioning representation to other attorneys.
- A sole practitioner attorney should consider nominating in a power of attorney some other attorney who is qualified with the expertise and time to transition the clients to another lawyer.
- Review that designation periodically; the person designated may have decided that at some point he or she is no longer willing to assume that responsibility.

- In the event of a temporary (hopefully) disability, consider conflicts of interest in naming a successor to transition clients. Will the transitioning attorney "steal" the client after the attorney regains capacity?
- In the event of a disability, how long can the practice be run by the staff? Who will pay the staff and ongoing expenses?
- Consider disability insurance to cover the costs of transitioning and maintaining the practice in the event of disability.
- If the practice is terminated (due to permanent disability or death) who will close the office? For example, who will sell office equipment? Can the office lease be terminated in the event of a medical emergency? Who will pay bills? Who will be responsible for maintaining the confidentiality of client records?

54. Other Licensed Professionals

Other licensed professionals will have similar ethical and professional obligations in the event of the professional's disability or death. Similar pre-planning steps are necessary.

As an example, most licensed professions will require that, in the event of the disability or death of the professional, another licensed professional must secure the patient/client files, inform the patients/clients immediately, not allow anyone other than a licensed person to access the files, store the files, etc. Some situations may require *immediate* notification and transitioning (for example, the troubled patient of a psychotherapist).

55. Best Practices

- Investigate whether the client has any specific legal or ethical obligations to patients or clients.
- Address any such obligations in the power of attorney in the event of disability or in the will or Revocable Trust in the event of death.
- Consider dividing duties between two or more successor trustees or personal representatives, or grant fiduciaries the specific authority to hire a qualified person to address the specific needs of the particular profession.
- Make plans for emergencies (either disability or sudden death). For medical professionals in particular, plan for transitioning patients (immediately in some cases).
- Assist the client in developing a written succession plan to deal with potential disability–including transitioning of clients/patients, providing sufficient funding for transitioning; notifying patients/clients; and addressing specific obligations of that profession.
- Consider the effect of an emergency on professional liability coverage and whether tail coverage is possible for a permanently disabled licensed professional.
- Investigate how the client operates, where files are stored, and whether the storage of files complies with laws for the profession.

- Once a licensed professional dies, are there steps that can be taken in the probate process to reduce the period for asserting claims against the estate?.
- Don't wait for the crises!

Items 56-60 are observations from a session by Jane Levine (Sotheby's, New York) and Professor Ann-Marie Rhodes—Art Endures, Laws Change – Now What?

56. Legal Determinants of Value

The major legal determinants of value for art are *authenticity* and *good marketable title*. (Each of those fit into the concept of "art exceptionalism." Professor Anne-Marie Rhodes, who has written extensively about art issues, says there is no such thing as "art law." Legal issues regarding art combine all aspects of law, but legal rules do not always apply in the normal ways to art issues.)

a. **Art Authenticity**. Art authenticity is not static. There will be a consensus opinion about the authenticity of a particular piece, but it can shift over time. For example, a research project by Dutch historians began in 1968 regarding the authenticity of Rembrandt paintings. Various earlier surveys had been reducing the number of authentic Rembrandts from 711 in 1921 to 420 in 1968. The number of paintings that the panelists could agree upon as authentic Rembrandts was considerably lower-about 300.

There are three major factors leading to authenticity problems: (i) Forgery; (2) Mistake and misattribution; and (3) "Not authentic enough."

Forgery. Intentional deception and forgery obviously present authenticity problems.

Mistake and Misattribution. An example of "mistake" is the experience of the famed Getty art museum. After becoming the director, Nicholas Turner believed various drawings in the collection were forgeries, and he was involved in messy litigation; the museum refused to make his speculation public. A particular well-known incident involves a seven-foot-tall Greek statue of a boy that the museum purchased in 1985 for $7 million. The museum eventually sponsored an international colloquium on the authenticity of the statue, and it now is accompanied by a wall panel that reads, "Circa 530 B.C. or modern forgery."

Various cases have addressed whether statements by a seller were mere *opinions* or whether they constituted *warranties* that the work was authentic. In *Dawson v. G. Malina, Inc.*, (SDNY 1978), the court, in applying an art specific New York statute concerning warranties, concluded that the determination of liability should be made on an item-by-item basis. If the dealer could show that it had a reasonable basis to say a particular piece was authentic, there was no liability because authenticity is fluid and consensus opinion can change over time. What appears to be a warranty might not be. Many auction houses give a 5-year warranty of authenticity, but reserve the right to rescind the sale if authenticity is later questioned.

Not Authentic Enough. As an example, an Agam sculpture in Chicago deteriorated over time and the owner restored it. When Agam saw it, he disavowed it as the new

colors were not what he intended. The Visual Artists Rights Act can raise concerns; it gives artists the right to prevent the use of one's name on any work that has been distorted, mutilated, or modified in a way that would be prejudicial to the artist's honor or reputation.

Tools Used by Art Industry to Determine Authenticity. Three approaches typically used to determine authenticity are:

- *Provenance*–a written compilation of the chain of possession, generally including exhibition history and bibliography (John Myatt is a notorious art forger who also faked provenance documents);
- *Scientific analysis*–including things such as dendrochronology (determining age and felling date of tree of the wood used in the painter's panel), textile research, paint sample analysis, X-ray images and other radiographic research, and forensic analysis of handwriting; forensic analysis is generally unsatisfying in proving authenticity-it is better at proving inauthenticity;
- *Connoisseurship*–the visual inspection of the work by the "trained eye" is the most preferred method in the art world, and this is highly subjective.

If an authenticity problem is later discovered, the owner may have little recourse. The statutes of limitations applicable to a breach of a warranty of authenticity are strictly applied; there is no discovery rule, which often leaves the current owner without a remedy against the seller unless there is fraud or concealment sufficient to give the court grounds to toll the statute of limitations.

Authentication bodies are increasingly refusing to authenticate works for fear of liability. Courts typically will not authenticate a piece of art.

b. **Good Title**. If there is a theft, the law will not favor the thief. The legal issue arises between innocent owners vs. bona fide purchasers for value. The U.S. legal system prefers legal owners, but the civil law system prefers the bona fide purchaser for value. A key is the owner's due diligence, to alert authorities if something is stolen, and to notify the Art Loss Registry ("ALR"). Due diligence of the owner whose art has been stolen may be the tipping point on the ability of the owner to prevail in an action against a bona fide purchaser for value.

(1) **Warranty of Title**. Sellers must warrant good title and that they can transfer title to property free of all encumbrances and liens. Even if a seller does not expressly warrant title, UCC §2-312 creates a warranty of title from seller to buyer as a matter of law. The UCC allows modification or waiver of this warranty, but auction houses in New York City are required by local law to make a nonwaivable warranty of title to buyers at auction. Rules of the City of New York §2-124. The seller is not allowed to sell "as is."

(2) **Scenarios for Compromised Title by Theft**. There are three dominant factual contexts for compromised title by theft in the U.S.:

(a) Classic theft (works valued at over $500 million stolen from the Isabella Stewart Gardner Museum in 1990 have never been recovered);

(b) War-looted art, especially Nazi-era transfers (the recent movie "Woman in Gold" tells the story of the recovery of Gustav Klimt's *Portrait of Adele Bloch-Bauer I* [*see Republic of Austria v. Altmann,* 541 U.S. 677 (2004)]), as well as Russian revolution and Cuban revolution looting; and

(c) Antiquities looting (1970 is a key date); the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Exports and Transfer of Ownership of Cultural Property, ratified in the U.S. by the Convention on Cultural Property Implementation Act of 1983 (CPIA) allows for stolen objects to be seized if there is documentation of the objects in a museum or institution of a state party (see Items 59-60 below).

(3) **Statute of Limitations on Warranty of Good Title and On Recovering Stolen Art**. The UCC has a four-year statute of limitations on the implied warranty of title that applies to every sale of goods. But there can be a much longer period of time in which "original owners" can bring actions to recover stolen property–time periods to bring replevin claims typically run longer than the time periods to sue under the warranty of title, which can leave a good-faith buyer at risk.

Replevin claims (seeking the recovery of specific property rather than money damages) typically arise long after the theft in art matters. New York applies a "demand and refusal" rule. Under the New York rule, the three-year statute of limitations for conversion and replevin only starts to run when the owner makes a demand which is refused, unless a demand would have been futile. *See Guggenheim v. Lubell*, 77 N.Y.2d 311 (1991). Most other jurisdictions that have considered the statute of limitations for stolen art have adopted a discovery rule. Under the discovery rule, a cause of action does not accrue until the claimant discovers or under a reasonable exercise of diligence should have discovered the facts that gave rise to the cause of action. This rule puts the burden on the original owner to be diligent in searching for the art. *O'Keefe v. Snyder*, 416 A.2d 862 (Sup. Ct. N.J.1980) addressed whether New Jersey would apply the New York demand and refusal rule or the more commonly used discovery rule. Georgia O'Keeffe in 1946 discovered that three of her paintings were missing. She did not do anything about it because she believed that publicizing the theft would drive the works further underground. In 1972 she notified some art dealers of the theft. In 1975-1976 she received word that one of those paintings was on sale at a gallery. She contacted the gallery and demanded its return. The normal statute of limitations for replevin had long passed from the 1946 date that she first discovered the theft. New Jersey applied a modified discovery rule requiring the original owner to exercise due diligence. The case was ultimately settled.

California applies an actual discovery rule regarding fine art that applies to works stolen within 100 years prior to the date of enactment in 2010. Calif. Code Civil Proc. §338(c). An action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft of a work of fine art, must be commenced within six years of both of the following: (i) the actual discovery by the claimant of the identity and whereabouts

of the work, and (ii) facts sufficient to indicate that the claimant has a claim for a possessory interest in the art.

There are two databases for stolen art. (One is ALR.) Art houses run a check through those databases on every lot they sell. **If clients have art that is stolen or missing, listing the art on one of those databases is very important.** That will be the needed diligence to be able to use the longer statute of limitations for artworks.

Laches and Equitable Estopel Defenses. Even if claims are timely, laches and equitable estoppel doctrines apply. The laches defense requires (i) unreasonable delay by the claimant and (ii) prejudice to the defendant resulting from that delay. For example, prejudice could result from a time delay if documentary evidence is lost, if witnesses are no longer available, if the person holding the art had invested additional sums in caring for the art (not knowing that he or she did not have good title), or possibly if a beneficiary complains that she would not have agreed to accept the Monet as her part of the estate had she known the estate did not have good title. *See In Re Flamenbaum* (Assyrian tablet was stolen from a German Museum in World War II; a Holocaust survivor bartered with cigarettes to get the tablet from a Russian soldier and it passed from his estate to a museum; the lower court dismissed the claimant's claim based on laches; reversed on appeal because the Museum's due diligence would not have located the tablet's owner so the lack of diligence was not relevant).

Entrustment. An exception to the general rule that a thief cannot convey good title is the entrustment doctrine. UCC §2-403(2). If art is entrusted to a merchant who deals in goods of that kind and authorizes the merchant to transfer the art to a buyer in the ordinary course of business, a purchaser from the merchant may acquire good title even if the merchant acts contrary to the owner's directions. (The good faith buyer has no way of knowing that the merchant who sells the art did not have the authority to sell it.)

(4) **Restricted Materials**. Another factor impacting marketable title is whether the art contains endangered species materials in the work (such as ivory, tortoiseshell, rosewood or migratory bird feathers.) The Endangered Species Act imposes various detailed restrictions. There have been recent developments regarding restrictions on African elephant ivory, narrowing an "antique exception" (for items more than 100 years old) and tightening other restrictions.

An example of the restricted materials problem is that a decedent's estate owned a Rauschenberg work, *Canyon*, that included a taxidermied eagle jutting out from the painting. The art could not be sold because selling or trading an eagle (dead or alive) is illegal. The estate reportedly valued it a $0 and the IRS valued it at $64 million. The tax dispute was resolved by an agreement that the estate tax would be zero if the work would be left to a public institution; it is now in the Museum of Modern Art in New York. (There have been several other cases in which the IRS also contended that art works had to be valued within the illegal market.)

Liens and Encumbrances. Liens and encumbrances obviously will impact a warranty of good title.

57. Art Market Factors That Affect Value

Major factors in the art world that affect the value of a piece are rarity, condition, and provenance.

Rarity. Rarity can be a double-edged sword. For example, a relatively rare Warhol work from an early style was not well received in sales because it was not indicative of the Warhol style.

Condition. The importance of condition varies in different sub-markets. In the Chinese art market, condition matters dramatically; a hair line crack on the back of dish resulted in the piece being worth about 20% of the value of a comparable piece.

Provenance. Appraisers look at the intrinsic value of an item, not its provenance *(i.e.,* the record of its ownership). Provenance, however, can greatly impact the value when the work is sold. As an example, items of jewelry from the Elizabeth Taylor or Lauren Bacall collections sold for significantly over their estimated value.

Authenticity. If the authenticity of a piece is merely questioned, value can be impacted significantly. In *Doherty v. Commissioner* (9th Cir. 1994), the value of a painting, *Attacking Stagecoach,* purportedly by Charles Russell, was discounted in value because of disputes over its authenticity.

Other Factors. Oil paintings are generally more valuable than water colors or drawings. Certain periods of an artist's work may be more valuable than others. Bigger is not always better (for example, rugs-not everyone can accommodate a big rug).

58. Three Reasons People Sell Art–The "Three D's"

"There are three reasons people sell art: death, debt, and divorce."

59. Classical and Egyptian Antiquities

Archaeological objects are scrutinized carefully, and are increasingly subject to claims by countries from which the objects were taken. Many U.S. museums have received these types of claims. The general concept is to protect objects that were in the ground of the country (even if the modern country did not exist in antiquity or even if the object was moved from where it was created).

Important Factors.

- What is the country of origin (where was it excavated in modern times)?
- When and how did the object leave that country?
- Of particular importance is whether the object left the country before it enacted clear, unambiguous laws that establish ownership entitlement to such object.
- In defending a claim, provenance is critical. What documents can the estate provide to demonstrate history of ownership? Invoices? Family photographs? Insurance, storage documents? Independent, unrelated third parties cooperating possession?

60. Import and Export Considerations

The Cultural Property Implementation Act of 1983 ("CPIA"), 19 U.S.C.A. §§2601-2613 provides import/export restrictions with respect to works of art or antiquities as cultural property. There are two primary import restrictions under the CPIA. (1) There is a prohibition on the U.S. import of any "article of cultural property, and documented as appertaining to the inventory of a museum or religious or secular public monument or similar institution in any State Party which is stolen from such institution after the effective date." (2) There are more complex import restrictions covering archaeological or ethnological materials that are only activated by another country's request to the U.S. for such import restrictions; the Cultural Property Advisory Committee reviews the request and makes a recommendation to the President whether to enter into an agreement with the country; under such an agreement, items subject to the provision may not be imported into the U.S. unless accompanied by a "certification or other documentation… that such exportation was not in violation of the laws of the State Party."