Heckerling Institute Report
Report #7 - Ethics and MDP / Entities

The following is Report #7 from our on-site reporters regarding some of the highlights from the events and presentations that are taking place at the 34th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 10-14, 1999 at the Fontainebleau Hilton in Miami Beach, Florida.

This Report covers **Bruce Ross**' **"Ethics and MDP"** presentation and **Lou Mezzullo**'s **"Entities"** presentation, both of which were given on Tuesday, January 11th.

This report was filed by on-site reporter, Alan F.Rothschild, Jr. Alan is the current Chairman of the K-2 Technology and Economics Committee of the Probate Division of the ABA Real Property, Probate and Trust Law Section.

Law & Ethics -- Bruce Ross

Bruce, a Los Angeles practitioner and well-known expert on the rules of professional conduct in the area of trust and estates, provided a national update on legal malpractice in estate planning and administration since his 1994 Heckerling (28th Institute) presentation.

Bruce began by noting the inherit conflicts and confidentiality concerns regularly faced by practitioners. He noted that the rules of professional conduct are not well designed for this area of practice, nonetheless, the rules are being used increasingly in civil litigation to impose liability on attorneys.

In most jurisdictions, Ross pointed out that the elements of a malpractice claim are: Attorney is under an obligation to use the skill, prudence and diligence as other members of the profession; the attorney has breached this duty; there is proximate cause between the attorney's negligence and an injury; and there is damage to the "client". Other theories of recovery include breach of fiduciary duty, negligent misrepresentation and fraud.

Bruce spent a significant amount of his program discussing recent cases on the issue of standing or privity. He noted that in the estate planning area, a majority of the jurisdictions hold that the beneficiaries of a defectively drafted instrument should be considered as "indirect" clients for purposes of establishing standing. In the estate administration area, however, most states still apply the privity rule to bar malpractice actions by a disgruntled trust or estate beneficiary against the attorney for the fiduciary.

Choice of Family Business Entity for Estate Planning Purposes -- Lou Mezzullo

Lou provided a fast-paced update on selecting the best family business vehicle based on a number of income tax, estate tax and family planning factors. The backbone of his paper can also be found in BNA's Family Limited Partnerships and Limited Liability Companies portfolio (#812) and RPPT's An Estate Planner's Guide to Family Business Entities, both of which Lou authored.

Selection of Entity arises in three situations -- 1. establishment of a new venture, 2. Outside developments (changes in law or nature of business), and 3. Changes in owner's personal circumstances. Tax issues which can impact entity selection include treatment of earnings and losses, the value of an interest in the entity for transfer tax purposes, and the entity's ability to combine with other entities or to break up without taxable gain.

Mezzullo also emphasized the importance of state law in selecting the appropriate entity. He noted there were lots of choices available to the practitioner today -- good news because of the choices available, but bad news for the challenges to the planner who tries to stay current on each one.

The factors Lou reviewed included: (Nontax) Limited Liability, Retention of Control, Continuity of Life, Restrictions on Transferability, One Business Entity, Restrictions on Voting and Management Rights, Protecting Assets from Liability Exposure, Protecting Assets from Creditors, Simple and Inexpensive Formation, Dealing with Recalcitrant Family Members, and (Tax) Partnership Tax Treatment, No Restrictions on Ownership, No Restrictions on Capital Structure, Tax-Free Formation, Tax-Free Contributions, Tax-Free Withdrawals, Adjustment to Basis, Discounts and Premiums and Self-Employment Income Tax.

After analyzing these tax and non-tax factors, Lou clearly indicated his preference for LLC's as the easiest, most flexible family business vehicle in most circumstances. A FLP with a limited liability general partner was a close second.

That's it for Report #7.