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Clients getting defensive with their assets, lawyers say

By Pat Milhizer - Law Bulletin staff writer

As the economy continued heading south late last year, Thomas J. Handler's phone rang more often than usual.

The callers wanted to make sure that their assets were protected should they get sued.

"A lot of business deals have gone under, and investments have blown up. Whenever that happens, people are looking for somebody to blame. They sue the investment advisor, accountants, and attorneys — whether they had anything to do with it or not. Anybody they can think of. They're trying to find somebody blame for it," said Handler, an attorney at Handler Thayer, LLP.

A few calls to Handler's office in mid-November came from attorneys who had just made partner at prominent firms. They wanted to get an idea of how exposed they would be if they were to be sued.

"I got five calls in two days about asset protection trusts, and I don't get five calls in a week. Five calls a month might be typical. To get five in two days was extraordinary," Handler said.

"We thought these people were referred by other partners of the firm. But they were out of the blue," Handler said.

Lawyers who work with business enterprises and handle estate plans and tax planning matters are busy these days.

Their clients want to protect themselves against creditors by moving money into retirement funds or college-savings plans for their children. There's also more interest in placing homes in a joint tenancy with spouses, Handler said.

"So unless somebody gets a judgment against both the husband and wife, they cannot take the house," Handler said.

In another form of asset protection that is tied to tax planning, some wealthy clients are trying to pass down to their children businesses and real estate that have recently lost value but could be worth more when the economy recovers.

The transactions are motivated by fears that the federal government will raise taxes on the transfers of assets.

Since the gift tax is based on the value of a business, now's the time to pass it along to children because the business is probably worth less in these economic conditions, attorneys say.

"People figure if they're going to pay tax, they might as well pay it when it's lower. So we've seen a lot of that," said M. Read Moore of McDermott, Will & Emery LLP. "If you don't own assets, creditors can't get them."

"Everybody thinks the party's over with low tax rates and all that. But it remains to be seen," Moore said.

In terms of estate planning, there are two ways clients are thinking about it, said Tim Lappen, an attorney at Jeffer, Mangels, Butler & Marmaro LLP in Los Angeles.

"To a certain extent, people are saying that they're not sure it's a good idea to give assets away to children or other relatives now because they're not sure how much they're going to have [themselves]," Lappen said. "Because this economy is so different from anything we've seen, more people are less willing to give away chunks of their estate during their lifetime."

"On other hand, people who have adequate resources are doing more of this.… We're seeing historically low valuations for those kinds of gifts. Because who knows what a company is worth anymore," Lappen said. "When Ford Motor Company is worth two dollars a share, what is your company worth?"

Lappen said that clients also are concerned that the federal government will eliminate discounts that gift donors receive.

Take a company that's worth $1 million, for example.

The business owner has to pay taxes on the donation, so if the owner gives somebody a 10 percent stake in that company, it would seem that the gift donor would have to pay taxes on $100,000.

But because the person who just received 10 percent of the business doesn't have control over how the company is run, the federal government allows a discount on the tax. So in this hypothetical instance, the donor may only pay taxes on $60,000, instead of $100,000, Lappen said.

The discount also could be applied to the owner of a $1 million business who has 10 children and gives each child an equal share of the business. The donor may only have to pay taxes on $600,000 instead of the full $1 million value of the company, Lappen said.

"Change would come on the federal level," Lappen said. "So if that's something you're thinking of doing anyhow, maybe you should do it now sooner rather than later."