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Attorneys From Randick O'Dea & Tooliatos Pleased to Announce . . .


Nick Tooliatos will be returning to Randick O'Dea & Tooliatos and the practice of law March 21, 2011 from a year of active duty as the Deputy Commanding General of the 1st Theater Sustainment Command at Camp Arifjan, Kuwait. He was the second in command of the senior U.S. forward-deployed Sustainment Command Headquarters, which, during his command, was engaged in the transition between Operation Iraqi Freedom and Operation New Dawn.

Mr. Tooliatos is a Certified Specialist in Probate, Estate Planning and Trust Law. He has worked extensively with emerging and closely-held businesses dealing with matters ranging from choice of business form, compensation and capitalization to the intricacies of tax planning. He has extensive experience in real estate transactions, including acquisitions, exchanges and leases.

He is also an experienced litigator in the limited areas of complex tax matters and probate and trust issues.

Michael J. Kimball has become "Of Counsel" to Randick O'Dea & Tooliatos, LLP.

Mr. Kimball's practice includes the various types of early stage financing, technology and online transactions seen in Silicon Valley, with a specialty in online advertising, behavioral targeting, ePrivacy and security. His clients include large, highly visible public companies, as well as new start-up ventures, and mid-sized companies. Mr. Kimball was previously a senior member of the legal team at Yahoo!, where he specialized in the area of intellectual property licensing. Before joining Yahoo!, Mr. Kimball served as Managing Attorney at Commerce One, where he sealed key strategic alliances, managed the patent portfolio, and supported the company's sales and marketing strategy.

Prior to his legal career, Mr Kimball served as a naval officer on the nuclear attack submarine USS William H. Bates (SSN-680). This new relationship will serve to strengthen the ability of Randick O'Dea & Tooliatos to provide a full range of legal services to its high tech clients. 

Med-Cal Long Term Care By Erica Shepard

Contrary to popular belief, Medi-Cal Long Term Care Planning is not a service restricted to individuals receiving public benefits. It is a planning opportunity which pertains to families with a home and other assets needed to support the senior member of the family for the remainder of his or her life.

The upcoming modifications to California's Medi-Cal law are rapidly drawing to a close. The process has been slow moving, but it is now certain that we will be operating under new Medi-Cal law within the next few months. This leaves very little time to take advantage of the benefits of the current law outlined below.

To help you better understand some of the more important changes contained in the federal and state law, the following is a basic comparison between existing law and those that will, in all likelihood, be included in the new Medi-Cal Long Term Care regulations:

I. Principal Residence:

Current Law: Under Current law, the principal residence, all of the land on which the principal residence is located, all of the land adjacent or contiguous to the land on which the principal residence is situated and all of the structures on all

such land is considered exempt for Medi-Cal Long Term Care eligibility. This exemption exists without regard to the value of the principal residence and the adjacent properties. While the transfer of the principal residence may result in adverse tax consequences, such a transfer will currently not result in a transfer penalty and/or period of ineligibility for Medi-Cal Long Term Care purposes.

New Law: Under the changes contained in SB 483 and expected to be included in new regulations, the exemption of the principal residence, all adjacent or contiguous property and the structures located thereon will be limited to a "net equity interest" of \$750,000. For Medi-Cal purposes, "net-equity interest" is defined as the total tax assessed value of the entire exempt residence (property and structures) less any encumbrances. If the "net equity interest" of the entire exempt residence exceeds \$750,000, the Medi-Cal applicant or recipient will be deemed ineligible. Although the ability to transfer the exempt residence may continue under the new regulations, it appears that such a transfer will be limited to the maximum "net equity interest" and any transfer of an interest in excess of that limit will be subject to a transfer penalty and a period of ineligibility.

2. Look Back Period:

Current Law: As provided under existing Medi-Cal law, the State of California legally presumes that the transfer of any Medi-Cal non-exempt asset for less than fair compensation within 30 months (2 1/2 years) of an application for Long Term Care benefits is solely for the purpose of qualifying for Medi-Cal benefits.

New Law: Effective under the new law, the State will legally presume any uncompensated transfer of a Medi-Cal non-exempt asset within 60 months (5 years) of an application for Long Term Care benefits is solely for the purpose of establishing eligibility for Medi-Cal Long Term Care benefits.

3. Period of Ineligibility:

Current Law: Currently, the uncompensated transfer of a Medi-Cal non-exempt asset within the Look Back Period (30 months) results in a period of ineligibility equal to the length of time that the value of the transferred asset would have paid for the applicant's nursing facility costs. The actual period of ineligibility is calculated by dividing the uncompensated value of the transferred asset by the then in effect average private pay rate (APPR) rounded down to the nearest whole number. The current APPR is \$6,311. The calculated period of ineligibility begins on the first day of the month in which the non-exempt asset was transferred regardless of whether the applicant needs or applies for Medi-Cal Long Term Care benefits. For example, the transfer of a non-exempt asset with a value of \$100,000 on January 31, 2010 would result in an 15 month period of ineligibility ($100,000/6,311 = 15.84$ or 15). The period of ineligibility would begin to run on January 1, 2010 without regard to the applicant's condition or need for benefits during that ineligibility period.

New Law: Under the new law, the period of ineligibility will be calculated exactly as under the existing law with the significant exception that the State will not round off any fractional period of ineligibility. Another exception is that, under the new federal and state law, the period of ineligibility will begin on the first day of the month in which the applicant would otherwise be eligible for Medi-Cal Long Term except for the transfers. Since Medi-Cal Long Term Care benefits are only available when a qualified applicant enters a skilled nursing facility, the period of ineligibility under the new law will not start to run until the first day of the month in which the applicant is admitted to a long term care facility and does not have Medi-Cal non-exempt assets in excess of the allowable resource limit (\$2,000 for a single person or \$3,000 for a married couple). Without a doubt, it is this combination of the increased Look Back Period and the delay in running the period of ineligibility until skilled nursing facility placement that presents the most difficult and far reaching challenges of the new law. It is easy to imagine that an innocent gift made by a grandparent to a grandchild for education purposes results in an unexpected and catastrophic ineligibility should the grandparent require placement in a skilled nursing facility within 5 years of the transfer.

4. Multiple Gifts:

Current Law: Under current law, the period of ineligibility can be significantly reduced by making closely spaced small gifts of non-exempt assets. Each gift creates its own period of ineligibility and each period of ineligibility is run concurrently with all other periods. For example, if, instead of making one transfer of \$100,000, a prospective applicant makes two separate transfers of \$50,000, each transfer will result in two separate 7 month periods of ineligibility. Since each of the two 7 month periods will run concurrently and use the same 7 months, the total period of ineligibility for the two gifts will be 7 months instead of 15 months for one gift of \$100,000 as discussed above.

New Law: The new law prohibits the concurrent calculation of periods of ineligibility and instead prohibits the running of any period of ineligibility during the running of any previous period. This approach achieves results similar to requiring overlapping periods of ineligibility to be run consecutively.


5. Miscellaneous Issues:

The new law will also change the manner in which annuities and loans are treated. For the most part, where an annuity and/or loan does not meet specific statutory requirements, the purchase of that annuity or loan will be considered as an uncompensated transfer of a non-exempt asset and result in a period of ineligibility based on the total amount of the annuity and/or loan. Additionally, where an annuity does not adhere to specific requirements, the State of California will automatically become a beneficiary of that annuity by operation of law.

6. Implementation:

While the changes contained in the new law will present a challenge to long term care planners, there is still time to devise plans under the current and more lenient law. As contained in SB 483, the State will not retroactively apply the new law. Any transaction that occurs prior to the implementation of the new regulations will be considered under existing law without regard to the law in effect at the time of application for Medi-Cal Long Term Care benefits.

As indicated above, Long Term Care Planning under the existing law is much more flexible and "client friendly" than it will be under the new regulations. It is important to realize, however, that Long Term Care Planning is not for everyone and should not be used simply because you feel you might need Medi-Cal in the distant future. If you, your spouse or a loved one are currently considering long term care planning due to failing health, diminished capacity or potential placement in a skilled nursing facility within the foreseeable future, it is definitely more advantageous to complete those plans prior to the implementation of the law.

If you would like to discuss establishing a new estate or long-term care plan or have your existing plan reviewed, please contact our scheduling assistant Christy Godfrey at (cgodfrey@randicklaw.com), to arrange an appointment. 

Book Review By Kathi Vermont

Memorial Day, © 2004 by Vince Flynn


If you are a fan of novels concerning political intrigue, espionage, and/or the fight against terrorism, you will want to check out the series of political thrillers written by Vince Flynn, featuring Flynn's fictional CIA counterterrorism operative Mitch Rapp. The series begins with *Transfer of Power* (although Flynn's first book, *Term Limits*, includes some of the same political characters), and continues through *Pursuit of Honor*, which was published in 2009.

Having read several of the series, my favorite thus far has been *Memorial Day*, an action-packed page turner that begins as our nation's capital is preparing for an extravagant Memorial Day celebration to honor our country's World War II veterans. Seven days before the ceremonies are to take place, the CIA receives credible information that a major terrorist attack is being planned somewhere in the U.S. Our hero Mitch Rapp is sent to Afghanistan, where he leads a special forces unit on a commando raid of an Al Qaeda hideout on the Afghanistan-Pakistan border. When the team discovers maps, computers, and bills of lading for numerous freighters heading to the U.S., it becomes clear that the terrorists plan to detonate a nuclear weapon somewhere on the East Coast.

After relaying the information back to the CIA, a U.S. strike

force is able to intercept and disarm the nuke just after it arrives in Charleston, South Carolina. The CIA and leading government officials believe the crisis is over, but Mitch Rapp isn't so sure. Following his instincts, he soon discovers that the plot is far deadlier than anyone thought – and that it is still operative. You will have to read the book to see if Rapp's instincts are on target.

Rapp's character is a true patriot, willing to sacrifice his personal life to protect the lives of his fellow citizens. He is impatient with the politics that get in the way of capturing and interrogating terrorists, and believes that it is okay to suspend the civil rights of active terrorists. The book also explores the pros and cons of the Patriot Act and will have you pondering the balancing act which is necessary between our civil liberties and the actions necessary to preserve our freedom.

Like it or not, Mitch Rapp knows what it takes to stop terrorists. Some readers may be put off by the descriptive scenes of Rapp extracting information from the terrorists, while others will cheer him on. Although I found some of the detailed descriptions of the artillery used on various raids to be a bit tedious, I highly recommend this fast paced and entertaining thriller. You may even find yourself wishing there is a true life Mitch Rapp out there somewhere! 

New Statute Prohibits Deficiency Judgements On All First Deeds Of Trust In California After A Short Sale By Phil Vermont

The mortgage crisis continues. Too many people continue to lose their homes to foreclosure. Many lenders are still pursuing borrowers after a short sale, for deficiency judgments.

Finally, though, the California legislature has passed a new law which will provide some protection and assistance for people in a short sale situation involving their primary residence.

California Code of Civil Procedure Section 580(e), a bill that Governor Schwarznegger signed October 11, 2010 will take effect January 1, 2011. The statute prohibits a deficiency judgment under a note secured by a first trust deed for a dwelling of not more than four units in any case in which the trustor sells the dwelling for less than the remaining amount of the indebtedness due at the time of sale with the written consent of the holder of the first trust deed (that is, a "short sale").

This means that in a short sale, if there is any deficiency between the amount of the sale price and the amount of the first trust deed, the lender will not be able to pursue the borrower for that deficiency.


This statute does not address or alter the rights of a second trust deed holder.

However, there are other potential protections for borrowers in a short sale or foreclosure situation. If the second deed of trust was also a purchase money mortgage, used to secure the purchase of the borrower's primary residence, then upon foreclosure, the second deed of trust would likewise be eliminated, pursuant to California Code of Civil Procedure

Section 580(b) and no deficiency judgment would be available to the lender. However, if the second deed of trust is not a purchase money mortgage, or if the first and/or second loan had been refinanced, then the protections of California Code of Civil Procedure Section 580(b) (also known as the anti-deficiency rule), do not apply.

Then, the borrower should consult California Code of Civil Procedure Section 580(d). That section states that no judgment can be rendered for any deficiency upon a promissory note secured by a deed of trust upon real property in any case in which the real property has been sold by the lender under the power of sale contained in the mortgage or deed of trust. In other words, if the lender proceeds with a non-judicial foreclosure (that is the foreclosure that occurs under the power of sale under the deed of trust, rather than pursuant to the lawsuit known as a judicial foreclosure action) then, once the sale has taken place, no deficiency shall be available to that lender.

It is critical that borrowers consult with their counsel or accountant before deciding on pursuing a short sale or allowing a foreclosure of their primary residence. It may well be that allowing the home to be lost to foreclosure would better protect the borrower than pursuing a short sale.

Remember also, there are tax ramifications and adverse credit ramifications from a short sale or foreclosure. For these reasons as well, the borrower faced with this dilemma should consult his or her attorney or accountant, or both. 

TOMATO BRUSCHETTA

6 large ripe tomatoes, seeded and diced
(optional for color: 10-12 yellow pear tomatoes, diced)
1 small white onion, finely chopped
20-25 Calamata olives, finely chopped
4-6 cloves fresh garlic, pulverized
1/2 cup finely chopped fresh basil
1/4 cup finely chopped fresh parsley
1 tbsp fresh lemon juice
1/2 tbsp extra-virgin olive oil
1/4 tsp crushed red pepper flakes

Mix all ingredients, add salt and pepper to taste. Refrigerate at least 3 hours before serving; stir well before placing on toasts.

Toasts

2 baguettes, cut no thicker than 1/4"
Extra-virgin olive oil
Crushed basil, thyme, rosemary to taste

Heat oven to 400°F. Cover cookie sheet with heavy duty foil and pour enough olive oil onto foil to

cover entire surface. Sprinkle salt and crushed herbs evenly across oiled sheet. Place bread slices evenly across sheet to soak one side in oil, then flip slices. Bake at 400°F for 8 minutes or to desired crispness. Cool on rack.

To serve, spread desired amount of bruschetta over toast and enjoy. Refrigerate unused bruschetta in tightly covered container.



Serving Suggestion

Why Should My Corporation Hold Annual Meetings? by Nancy Hargiss

Clients who are not publicly traded, and only have one or two shareholders, sometimes don't understand the importance of having annual shareholder and director meetings. But there are some very good reasons why it is a good idea to do so:

First, it is required by law. California Corporations Code requires that shareholder meetings must be held annually and that director meetings be held on a regular basis. Written consents in lieu of holding an actual meeting can satisfy this requirement, and meetings can be held by electronic means, e.g. by teleconference, under certain conditions. At least minimum minutes should be prepared for each year setting forth the elected officers and directors of the corporation, approving the company's financial statements, and ratifying the actions of the directors and officers of the corporation.

Second, it is required by the bylaws of your corporation. Proper bylaws should state the date and time of the annual meeting of shareholders. Annual director meetings are typically scheduled to be held immediately following the annual shareholder meeting. Corporate bylaws sometimes require monthly or quarterly director meetings, and special director and/or shareholder meetings can be held at any time.

Third, it's just a good idea for everyone to touch bases once in awhile. Often, the officers of a small corporation take care of all of the business decisions and actions, and it's always good to keep the line of communication open

between the officers, the directors and the shareholders so there are no unwanted surprises at inopportune times.

Fourth, and perhaps most importantly, besides being in violation of corporate law, it is important that annual meetings be held to maintain the corporation's good standing, to preserve important tax benefits, and the sustain limitation of shareholders' personal liability. Annual meeting minutes will become especially important if you are audited or if you are sued. Failure to have annual meetings (or written consents in lieu of) is one factor that the IRS, the Franchise Tax Board, a creditor, or a suing party may use to pierce the corporate veil and expose you as a shareholders to financial liability.

Finally, if you ever decide to sell your business, a potential buyer may view the failure to observe corporate formalities as an indicator of sloppy or inefficient management of the corporation. That could either result in a reduction of the purchase price, or even kill the deal altogether!

If you are a little behind in holding your corporate meetings and/or preparing the minutes for them, don't wait any longer to catch up. Your attorney can help bring your records current with less cost and bother to you now than if you wait until you are under audit or involved in litigation. Corporate minutes will be the last thing you want to think about at a time like that! ❖

Can Employers Monitor Electronic Communications in the Workplace? by Nancy Hargiss

The use of the internet, email, text messages, and cell phones are rampant in the workplace because of good reason. As the US moves ever closer to an information worker/service type of economy, the convenience and speed of electronic communications increase the efficiency and productivity of employees, and any business without these tools is at a severe competitive disadvantage.

Risks

On the downside, the use of the electronic devices can actually result in a loss of efficiency due to employees' use of employer-provided devices for personal, non-work-related use during work hours. Employees might use the web to visit pornographic websites or disburse inappropriate materials via company email, and therefore expose employers to legal liability for permitting a hostile work environment due to harassment or defamation. Further, the unscrupulous employee could expose the employer's trade secrets, proprietary and confidential information, or engage in inappropriate contact with competitors or customers.

How can you as an employer protect against these risks? The easiest way is for the employer to monitor communications between employees and other parties. But isn't that an illegal invasion of the employee's privacy?

Governing Laws – Employee Protections

Both federal and state law limit an employer's ability to monitor employees' communications. The Fourth Amendment to the Constitution protects every citizen against unreasonable search and seizure, and The Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. §§ 2510 et. seq. extends Fourth Amendment protection to include email and other digital communications. Under the ECPA, the lawfulness of particular monitoring activities will depend heavily upon whether employees' messages are intercepted during transmission or are retrieved from storage on the company's server. Another provision of the ECPA prohibits disclosing "to any person or entity the contents of a communication while in electronic storage by [the company's] service." In other words, employers may under certain circumstances be permitted to discuss the contents of an employee's communications with that employee, but the employer should seek legal advice before disclosing the contents of such communications to anyone else.

Under California privacy laws, specifically Cal. Penal Code §§630 et. seq. the Wiretap Statute provides that the employer must have the consent of both parties to the communication, not just the employee, to monitor real time communication via any media, or else be exposed to criminal and/or civil liability. The California Eavesdropping Statute prohibits anyone who does not have the consent of all parties to a confidential communication from eavesdropping upon or recording that communication. Employers also should be aware of electronic surveillance laws in other states in which they do business and with which employees are likely to have online contact.

Employer Protections

So, then, how does an employer protect himself and his business against inappropriate use of electronic communications by an employee?

The ECPA allows employers to intercept electronic communications if the employee consents in advance. To remove

the expectation of privacy by employees, employers should establish a formal Internet Acceptable Use Policy (IAUP) that puts an employee on written notice that any electronic non-business-related activities are done at the employee's own risk and can be monitored by the employer, and that password protection is not an indication of personal privacy. In consideration of the two California statutes, the safest approach is for employers to review the contents of employee communications, not in real time, but only after those communications have been stored on the employer's server. Cell phone calls and text messaging are little trickier to monitor, because California is one of only a handful of states that requires permission of both sender and recipient of a communication to the eavesdropping or recording of that communication.

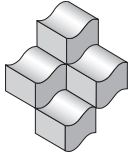
One circumstance when the retrieval of an employee's text messaging or cell phone records is legal is if it is motivated *purely* by a legitimate business need and if it is not excessive in scope. For example, in *City of Ontario v. Quon*, 78 U.S.L.W. 4591, 201WL 2400087 (U.S. June 17, 2010) (No. 08-1332), it was decided that the employer was reasonable in procuring two months' worth of text message records of the employee's, because the employer only wanted to determine if the monthly limit on characters on the current plan was too low for sending work-related messages and if the limit should be increased to accommodate legitimate business requirements.

An IAUP should be a written policy covering all modes of electronic communications, not just internet use. Each employee should sign a copy of the company IAUP in acknowledgement of receipt, and the signed copy should be kept in the employee's file. The policy should clearly establish a code of conduct and specify what is not allowed, e.g. access to pornographic or racist websites; revelation of company trade secrets; obscene, profane, or abusive language; offensive or derogatory images on screen savers; and so forth. The policy should also specify the consequences of violating the policies, such as whether warnings will be issued, or when immediate termination of employment can be expected. Employers should review their IAUP every one or two years to make sure that any new technological advances in communications are addressed.

Another means of protection for the employer (as well as for the employee) is to implement periodic training sessions to sensitize employees as to what is not only questionable but is in direct violation of the IAUP; and to emphasize the legal and other consequences of a violation of the IAUP both for the employee and for the company.

Electronic communication is here to stay. Although it provides many advantages to businesses, certain uses of it by employees can also expose an employer to serious risk and liability. The best protection for the employer is to establish a written, comprehensive policy concerning employee use of email, the internet, texting and cell phones. The policy should be periodically updated and reinforced by training sessions.

If you need assistance in drafting an effective Internet Acceptable Use Policy, please contact your attorney. ☎



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Achieving Results Through Innovation®

Clients On The Go

Randick O'Dea and Tooliatos is pleased to announce that in June, 2010 its long time client, Jae Lim, purchased Stacey's Cafe on Main Street in Pleasanton.

Ms. Lim intends to maintain and even improve the high quality of service that Stacey's Cafe in Pleasanton is known for, plus, Ms. Lim intends to add banquet service, catering and breakfast service as well.

Ms. Lim has also been a strong supporter of the Valley Humane Society in Pleasanton. We thank Ms. Lim for her numerous charitable contributions.

Additional information about Stacey's Cafe can be obtained on the Stacey's Cafe website, at www.eatatstaceys.com. Stacey's Cafe is located at 310 Main Street, Pleasanton, CA. Randick O'Dea & Tooliatos congratulates Ms. Lim on her new business acquisition. 

Did You Know . . .

Anyone who knows our Phil Vermont knows him to be a high-energy, focused and enthusiastic advocate for his clients. But did you know that Phil has a softer side? Phil has served on the Board of Directors for the Valley Humane Society for the last six years. The Valley Humane Society is a no-kill pet rescue organization based in Pleasanton that focuses on responsible pet adoption and ownership, and Phil has been instrumental over the past few years in raising funds for the new state-of-the-art facilities to be constructed on Nevada Street. Phil not only talks the talk, but he also walks the walk. Having owned dogs or cats all of his life, (at one time he considered a career as a veterinarian) he and his wife Kathi recently adopted two handsome cats, Buddy and Trooper, from the shelter to join their family. On behalf of all those homeless cats and dogs in the Tri-Valley area who have found loving homes through the Valley Humane Society, we thank you, Phil! 