



## *Duke Law Firm, P.C.-in the News*

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***Merry Christmas and Happy Holidays from Duke Law Firm, P.C.!***

***Warmest wishes of the Christmas and Holiday Season to you and your families from Richard Duke, Melanie Hahn, and the staff at Duke Law Firm.***

### **Announcing!**

Congratulations to Melanie Hahn and her husband, Patton Hahn, on the birth of their son, William Patton Hahn, Jr., born on November 24 at 8:32 AM.

Patton, Jr., weighing 7 lbs. even and 20 3/4 inches, was welcomed by Mom, Dad and big sister, Cameron. Congratulations to Melanie and her family!



### **Recommended Reading**

"One of a Kind: Learning the Secrets of World Leaders" by Walter H. Diamond and Dorothy B. Diamond

### **Book Description**

A world-renowned tax authority, author, and economist shares lessons in life and observations on great men he has met and known.

In this detailed yet highly readable memoir, Walter H. Diamond tells how his prestigious career evolved and how he came to recognize and cultivate personal and intellectual traits that were crucial to achievement, such as perseverance, memory, and affinity for foreigners.

Diamond's work as a bank examiner for the U.S. Treasury led to new challenges in World War II. As an officer in the U.S. Navy he was involved in six military operations in both the Pacific and Europe, including D-day. He was asked to engineer the safe return of 1,800 survivors of a sunken flotilla. As trade and investment adviser at the U.N. he helped more than 100 world leaders--from kings to presidents, prime ministers to finance ministers--draft plans for fighting poverty. Now, Diamond tells what he feels separates the great from the weak, which leaders have impressed him most, and why. Finally, he offers a revelatory assessment on terrorism, and a feasible route to world peace through trade.

### **About the Author**

Walter H. Diamond is a respected international tax authority and eco-

nomist. He is coauthor, with his wife, Dorothy, of 81 tax and trade books and more than 100 investment booklets. He has written 500 speeches covering the international scene.

- **Hardcover:** 312 pages
- **Publisher:** Syracuse University Press (December 25, 2005)

Available through

<http://www.Amazon.com> and  
<http://www.SyracuseUniversityPress.syr.edu>

### **Transfer of Appreciated Property to an Offshore Asset Protection Trust**

One question that commonly arises with respect to implementing an offshore asset protection trust (hereinafter "offshore trust") is whether appreciated property, such as stocks and bonds, can be transferred to the trustee. The answer is yes. The next question is whether gain is recognized upon the transfer of appreciated property to the trustee of an offshore trust.

Under Internal Revenue Code Section 684(b), the transfer of appreciated property to a "grantor" trust does not result in the recognition of gains or losses. Only when the trustee sells those appreciated assets will the gains or losses be attributed to the grantor. An offshore trust is a "grantor" trust and all income, gains and losses are taxed to the settlor because the trust has a U.S. beneficiary. Under Internal Revenue Code Section 679(a), the transfer for a U.S. person (settlor) of property, directly or indirectly, to the trustee

of an offshore trust that includes a U.S. beneficiary is a "grantor" trust and the settlor is taxed on all income, gains and losses as the grantor, irrespective of whether the income is distributed by the trustee. Such a transferor is treated as the "grantor" and is further treated as if he owned the trust assets for tax purposes and is taxed on all income gains and losses upon the sale of trust assets by the trustee of the offshore trust.

### **Colorado Foreign Capital Depository Act**

In 1999, Colorado adopted the Colorado Foreign Capital Depository Act (Col. Rev. Stat. § 11-37.5-101, et seq.). Montana previously adopted such a law. Colorado Foreign Capital Depositories ("FCDs") are attractive to non-resident aliens by providing banking services including enhanced privacy and asset protection relative to other banking opportunities in the U.S. In addition, FCDs may, at their option, offer trust and trustee services to nonresident aliens.

Col. Rev. Stat. § 11-37.5-301 provides, in part:

(1) The general assembly understands that asset protection includes the ability to minimize or avoid both the potential financial impact and loss of privacy resulting from lawsuits. The general assembly also recognizes that asset protection is a vital component of a foreign capital depository, which is designed to serve the interest of individuals with high net worth who are not United States citizens and do not reside in the United States.

(2) The general assembly further acknowledges that foreign judgments rendered in a foreign state, unlike judgments rendered in other states of the union

under the United States constitution, are not entitled by Colorado courts to conclusive full faith and credit under common law and that the principle of comity that encourages one country to extend legal recognition to the judicial acts of another country does not apply to the relations between Colorado and a foreign country.

Additional information regarding the Colorado Foreign Capital Depository Act will be provided in future newsletters.

### **The Elephant and the FTC**

D.C. Circuit Uses Scalia Analogy to Smack Agency for its Privacy Disclosure Rule

*By Terry Carter*

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The Federal Trade Commission engaged in "attempted turf expansion" beyond its authority when it sought to regulate lawyers through a statute requiring financial institutions to send privacy disclosure notices to customers, the U.S. Court of Appeals for the D.C. Circuit said Tuesday.

The opinion was issued in consolidated lawsuits by the ABA and the New York State Bar Association seeking a declaratory judgment that the FTC did not have the authority to regulate lawyers under the law, the Gramm-Leach-Bliley Financial Modernization Act of 1999.

The FTC tried to thread a needle with dozens of definitions of "financial institution," but none worked for the appeals court as far as lawyers are concerned, or for the trial court that first heard the matter. The agency had relied, unsuccessfully, on judicial deference to agency powers when a statute is ambiguous. *ABA v. FTC*, See: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200512/04-5257a.pdf>, No. 04-5257

The appeal was heard by a three-judge panel that included now-Chief Justice John Roberts. Having moved to the U.S. Supreme Court, he did not take part in the decision. It was decided by the two remaining judges, David B. Sentelle and Douglas Ginsburg.

In a blistering opinion, Sentelle borrowed from Supreme Court Justice Antonin Scalia's opinion in another case: Congress does not "hide elephants in mouseholes."

Sentelle went on to write: "To find this interpretation deference-worthy, we would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence."

"The decision flat-out leaves no wiggle room on the key aspects as far as I'm concerned," says David L. Roll, a Washington, D.C., lawyer who represented the ABA. "There was a theme in the opinion, and it was the theme in my first statements in oral argument in both the trial court and the appeals court: It just doesn't fit. Like Johnnie Cochran."

Noting the FTC's exhaustive list of definitions of "financial institution" in trying to argue that lawyers and law firms come within one or more of them, Sentelle wrote that "practice of law" is not mentioned in the Gramm-Leach-Bliley Act. Further, he wrote, while the word "attorneys" does appear twice, the context concerns financial institutions providing attorneys customer information if they are authorized to receive it.

The Gramm-Leach-Bliley Act said agencies could develop "such regulations as may be necessary to carry out the purposes of this subchapter with respect to the

financial institutions subject to their jurisdiction under section 6805 of this title." 15 U.S.C. § 6804(a)(1). The definition set out in section 6809 describes a "financial institution" as "any institution the business of which is engaging in financial activities as described in section 1843(k) of Title 12."

The appeals court, apparently showing its exasperation with the FTC's attempt to shoehorn the practice of law into the definition of "financial institution," included a footnote spread across six pages of the opinion listing all the activities detailed in Title 12.

"Like the statute, the [FTC] regulations at no point describe the statutory or regulatory scheme as governing the practice of law as such," Sentelle wrote.

In 2001, the FTC indicated that the act gave the agency authority to regulate lawyers' ethical obligations concerning client confidentiality. The ABA requested an exemption for lawyers engaged in the practice of law, and when that was rejected, the association and the New York bar sued.

The Conference of Chief Justices and 25 state and local bar associations filed friend-of-the-court briefs supporting the challenge.

The appeals court said the FTC's attempt to regulate lawyers did not merit deference because "Congress did not intend to leave sufficient ambiguity to support deferential review." And it went further, noting that "regulation of the practice of law is traditionally the province of the states." If Congress chooses to alter the constitutional balance between the federal government and the states, it must make its intention to do so "unmistakably clear in the language of the statute," the court said, quoting from another case.

"This ruling underscores that for more than two centuries, we have rightly relied on state supreme

courts to exercise responsibility for oversight in order to protect and safeguard the confidentiality of attorney-client communications and the public interest," ABA President Michael S. Greco said in a prepared statement.

Claudia Bourne Farrell, a spokeswoman for the FTC, says, "We still have [the appeals] decision under review and have not announced what to do about it yet."

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### **ABA Tax Section Seeks Further Revision of Circular 230 Rules** Published by Tax AnalystsTM

Dennis Drapkin of the American Bar Association Section of Taxation has urged the IRS and Treasury to revise the final Circular 230 rules (T.D. 9165) on written tax advice, asserting that any benefit the rules produce for regulating written tax shelter communications is offset by the creation of barriers to the provision of that advice.

Members state that complying with the rules is time-consuming and expensive and does nothing to further the objectives of the regulations in a meaningful way. Members also state that the use of legends in correspondence has resulted in confusion and discord between practitioners and their clients and that the rules encourage the use of oral advice. Practitioners' fear of penalties for noncompliance will cause them to follow a literal interpretation of the regs, even though they have complied with the core ethical principles, members conclude.

Document: (Doc 2005-24468)  
Electronic Citation: See 2005 TNT 233-15

### **Solomon Suggests IRS and Treasury May Need to Rethink Circular 230 Approach** Published by Tax AnalystsTM

Eric Solomon, Treasury deputy assistant secretary (regulatory affairs) and acting deputy assistant

secretary for tax policy, said on December 9 that the reaction to the controversial Circular 230 shelter rules could indicate they've been written too meticulously.

Speaking at an international tax conference in Washington hosted by George Washington University and the IRS, Solomon said the wrangling over the minutiae in Circular 230 is missing the "forest for the trees."

"Circular 230 is really about ethical principles--actually some pretty straightforward common-sense ones," he said. "What the dialogue in many ways has become is focusing narrowly down into the issues."

Since the IRS issued final Circular 230 rules on tax opinion standards late in 2004, the rules have been widely panned by practitioners. Both IRS and Treasury officials have acknowledged that the rules may not be functioning as intended. While government officials have assured practitioners that their concerns are being heard and addressed, IRS Chief Counsel Donald Korb said as recently as October that the IRS would not back down on the rules.

Solomon stressed that the continuing dialogue on Circular 230 is helpful and necessary, but said its focus and tone have caused him to rethink the government's strategy.

Solomon told Tax Analysts he wanted to challenge the audience to think about the essence of Circular 230. "Should these rules be more general based on general principles rather than specifically tailored rules?" he asked. "Maybe we should think about writing the rules in a different way--more as broad principles."

Solomon praised Treasury and the IRS for finishing guidance on the American Jobs Creation Act of 2004 (Jobs Act; P.L. 108-357) so quickly, but discussed many of the remaining areas of contention. He

warned the audience that the three previous notices on repatriation of foreign earnings under section 965 will be the last word and said taxpayers had enough information to make a determination.

But he said the IRS and Treasury were still grappling with some of the stickier issues of the section 199 domestic production deduction--especially whether online software qualifies.

"How can we draw the line?" he asked. "It cannot be that every service that's provided that has some technology element in it is treated as manufacturing."

Document: (Doc 2005-24945)  
Electronic Citation: See 2005 TNT 237-2

### Conferences/Seminars

J. Richard Duke will be speaking on International Estate Planning at the **Chartered Wealth Manager Course** (January 27-29, 2006). The Web site will soon be updated to reflect that the conference is being held at the Ashford Suites, High Point, NC:

<http://mfsfinancial.com/bsiexecutiveeducation/id32.html>

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