

THE SPOTLIGHT

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WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP



SECRETS

WELCOME TO THE SPOTLIGHT

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The Spotlight is the result of ongoing collaboration between our national trial practice and estate planning groups, with the goal of providing a forum to discuss the latest news and other issues impacting the trusts and estates community. Whether you are a trustee, beneficiary, trust officer, attorney, financial advisor, or other professional in this area, we hope that you will find this newsletter interesting, informative, and perhaps at times even a bit entertaining.

As leaders and teachers in the field of wealth planning and administration, our attorneys have built a reputation for excellence in meeting the needs of individuals and organizations from basic to complex testamentary planning. We counsel individuals and business owners in all aspects of estate planning and business succession, providing them with peace of mind and reassurance that their legacy is in the best of hands.

Furthermore, should a conflict arise, our wealth disputes attorneys are well positioned to resolve the matter with thoughtfulness, creativity, and compassion. Our national reputation for litigation excellence includes wins in the fiduciary arena for trustees and fiduciaries, personal representatives, beneficiaries, guardians, and conservators. Whether litigating fiduciary matters, inheritance issues, or contested charitable donations, we help clients cut through confusion to find a path to resolution.

Is there a topic affecting your practice that you would like us to discuss in an upcoming issue of the Spotlight? Let us know at TPentelovitch@RobinsKaplan.com.

- Denise S. Rahne and Steven K. Orloff

To learn more about our wealth planning, administration, and disputes attorneys and the services we provide, contact one of our experienced partners:



DENISE S. RAHNE

Partner; Co-Chair, Wealth Planning,
Administration, and Disputes
Minneapolis, MN
DRahne@RobinsKaplan.com
612 349 8500



STEVE A. BRAND

Partner
Minneapolis, MN
SBrand@RobinsKaplan.com
612 349 8731



STEVEN K. ORLOFF

Partner; Co-Chair, Wealth Planning,
Administration, and Disputes
Minneapolis, MN
SOrloff@RobinsKaplan.com
612 349 8500



MATTHEW J. FRERICHS

Partner
Minneapolis, MN
MFrerichs@RobinsKaplan.com
612 349 8500



ANTHONY A. FROIO

Managing Partner, Boston, MA
Member of the Executive Board
AFroio@RobinsKaplan.com
617 267 2300



BRENDAN V. JOHNSON

Partner
Sioux Falls, SD
BJohnson@RobinsKaplan.com
605 335 1300

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INSIDE THIS ISSUE

CAN YOU KEEP A SECRET? AND SHOULD YOU?	3
QUIET TRUSTS: THE BENEFITS OF PRIVACY IN ESTATE PLANNING	5
AVOIDING GUILT BY ASSOCIATION	6
WELCOME MYLEAH WIEDMANN	7



CAN YOU KEEP A SECRET? AND SHOULD YOU?

BY ANNE LOCKNER

One of the perceived benefits of closely held corporations is their ability to keep secrets. Indeed, closely held corporations can legally hide a great deal of information. Family businesses are especially likely to keep certain information “within the family,” so to speak. Publicly traded companies, in contrast, are required to disclose material information, including the number of shares owned, bought, and sold by its directors and officers; its financial condition; the salaries and bonuses paid to its executive; and its risks and potential liabilities, including lawsuits and claims that could materially affect the company. A closely held corporation need not disclose this kind of information publicly.

That’s why closely held family businesses often create a culture of secrecy that can undermine the long-term viability of the company. Therefore, it’s important to understand the conditions when secrecy may be a good thing and when it should subordinate to more transparency.



FOR THESE COMPANY MATTERS, SECRECY CAN BE GOOD—INDEED, NECESSARY:



ATTORNEY COMMUNICATIONS. Secrecy is both good and necessary when trying to preserve a company’s attorney-client privilege. All companies, at some point, are going to need legal advice. To ensure that the advice, and the communications involved in giving it, remain privileged, those communications must be kept private and disclosed only to those individuals who have a need to know it. The law can vary by state as to whom can be communicated with and still maintain the privilege, but the point is that a company should not disclose the advice of its lawyers to all employees and certainly not to anyone outside the company.

2 **Trade secrets.** Almost all companies keep some level of trade secrets. Trade secrets are defined as information that has either actual or potential independent economic value by virtue of not being generally known, has value to others who cannot legitimately obtain the information, and is subject to reasonable efforts to maintain its secrecy. An obvious example is the Coca-Cola recipe, but any number of objects and matters can be trade secrets: a company's strategic plan, pricing, and terms of its supplier contracts are just some examples of information often considered trade secrets. But a trade secret will lose that status if a company takes no steps to keep it secret. So, to protect this sensitive information, companies should ensure that it is marked confidential, stored in a secure fashion, and protected so that only people with a need for the information have access to it.

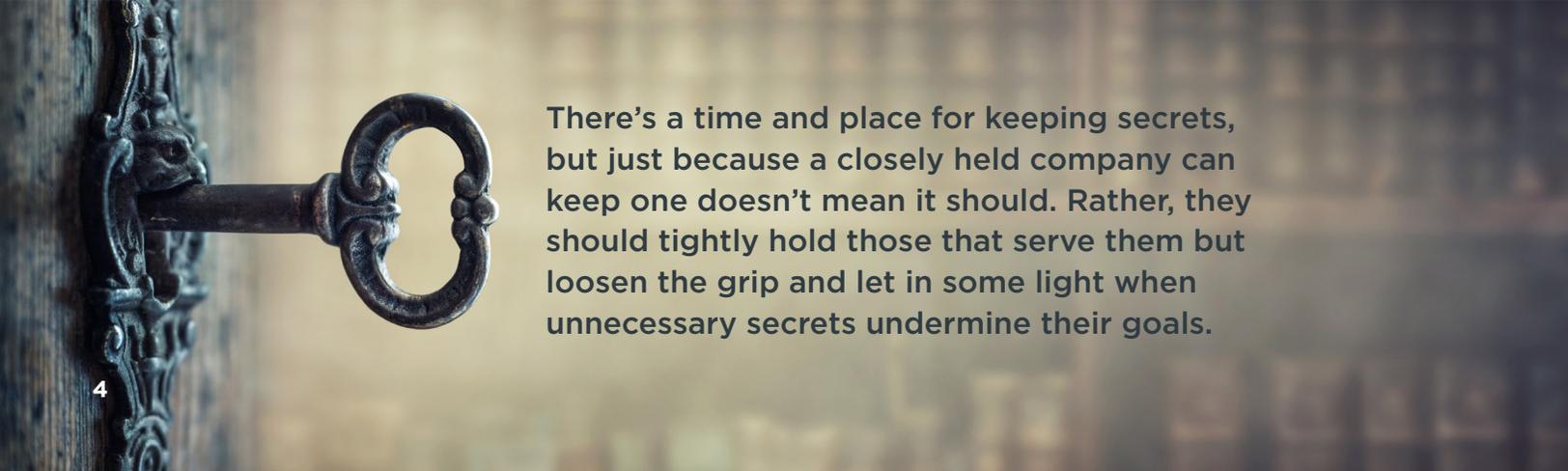
3 **Confidential information.** Trade secrets are only one of many types of confidential information. Others include salary information, health information, customer lists, and systems and processes used by a company—essentially anything that one knows only by virtue of being employed at a company. But a company needs to make known to its employees what it considers the company's "confidential" information and would be well served by issuing clear policies and confidentiality agreements. If a company's work requires sharing its confidential matters with a third party—such as a supplier or a potential strategic partner—it should require a non-disclosure agreement or, "NDA," which contractually obligates the other party to maintain the confidentiality of the information disclosed. And, the scope of any such disclosures should be limited only to the information necessary to accomplish the task at hand. Any information or documents exchanged should also be marked "Confidential."

IN OTHER INSTANCES, SECRET-KEEPING CAN BE COUNTERPRODUCTIVE AT BEST AND HARMFUL AT WORST. CONSIDER THINKING TWICE ABOUT KEEPING COMPANY SECRETS IN THE FOLLOWING SCENARIOS:

1 **Secrets regarding succession planning.** While succession-planning decisions need not be broadcast on social media channels, family and other closely held businesses are well served by honestly discussing how the process will look and be undertaken. A company should discern who may have expectations about their future roles in the company, and those expectations should be managed accordingly. While some may feel disappointed with the ultimate decision, allowing some transparency into the process will help ensure a fair decision and minimize the likelihood that the ultimate successor will be undermined by a poorly perceived process.

2 **Secrets kept from your lawyers.** As mentioned above, every company will need advice from an attorney at some point. The advice received is only as good as the information conveyed to the lawyer giving it. If a company keeps secrets from its attorneys, the advice will be less helpful and could potentially backfire, depending on the nature of the secret. For instance, if a company has been colluding with its competitors to fix prices but keeps that information from its attorney, then the attorney is likely to recommend a more aggressive strategy than she would if aware of the improper conduct. Moreover, the company's failure to disclose that information in a timely fashion could void participation in the Department of Justice's leniency program, which allows the co-conspirator who first self-reports and meets certain criteria to avoid criminal convictions and resulting fines and incarceration. You hired the attorney for a reason; be sure to allow them to best serve you by giving them all the material information they need.

3 **Secrets regarding employee performance.** Whether they are performing poorly or beyond your wildest imagination, employees should not be kept in the dark about how you view their performance. It's especially unfair to the employee to withhold candid feedback on whether they're meeting expectations, how they can do better, and whether they have a future with your organization. Not only is it the right thing to do from a management perspective, having a clear record of accurate feedback will also mitigate risk of employment claims.



There's a time and place for keeping secrets, but just because a closely held company can keep one doesn't mean it should. Rather, they should tightly hold those that serve them but loosen the grip and let in some light when unnecessary secrets undermine their goals.

QUIET TRUSTS: THE BENEFITS OF PRIVACY IN ESTATE PLANNING

BY MYLEAH WIEDMANN AND TIM BILLION

In the wake of the “Pandora Papers,” the use of secret trusts has come under fire. The media has depicted secrecy in trust administration as a tactic to allow the wealthy to conceal their riches and avoid tax obligations. With coverage and public outrage focused on the worst examples, less attention has been paid to the value of privacy in estate planning for average individuals. This article will explore “secret” or “quiet” trusts, how they can be used, and some of the reasons for those trusts.

WHAT ARE QUIET TRUSTS?

State laws usually require that trustees provide certain trust information to beneficiaries of a trust. For a variety of reasons, though, a person may not want to share information about a trust—or even the fact of its existence—with a beneficiary. Often, this occurs when the beneficiary is a child. Enter the “quiet” or “silent” trust.

Quiet trusts enable a trustee to avoid giving certain trust information to beneficiaries. Quiet trusts can also allow the trustee to delay the time that trust details are given to a beneficiary (i.e., when the beneficiary reaches a certain age). They can also allow the trustee to provide information to only one beneficiary, or to some other individual who is designated to receive the information, like a trust protector or some other trusted advisor.

WHY USE A QUIET TRUST?

There are many reasons that families and their estate planners opt to use a quiet trust. Many individuals and estate planners decide to utilize a trust, because it provides an extra layer of privacy. Quiet trusts can enhance these privacy benefits by limiting the number of people with knowledge of a trust or its assets. Such limits can help avoid a beneficiary’s misuse or oversharing of trust information, whether inadvertent or intentional. In turn, limited transparency can minimize the risk that a beneficiary is taken advantage of, whether through a scam or some other predatory practice.

Another reason that a settlor may decide to use a quiet trust is to incentivize their children to make their own way in life. Most parents want to make sure their

children develop a sense of fiscal responsibility and the tools needed to manage funds appropriately. They also want their children to find a career path and have the ability to earn their own income. Withholding trust information until the child has reached a certain age (or, in another formulation of the same idea, until the child has obtained a degree or chosen a career path), or only providing general trust information, is one way many parents choose to promote a work ethic and financial responsibility. In the words of Warren Buffett, many parents would like their children to believe they have “enough money so that they would feel that they could do anything, but not so much that they would feel like doing nothing.”¹

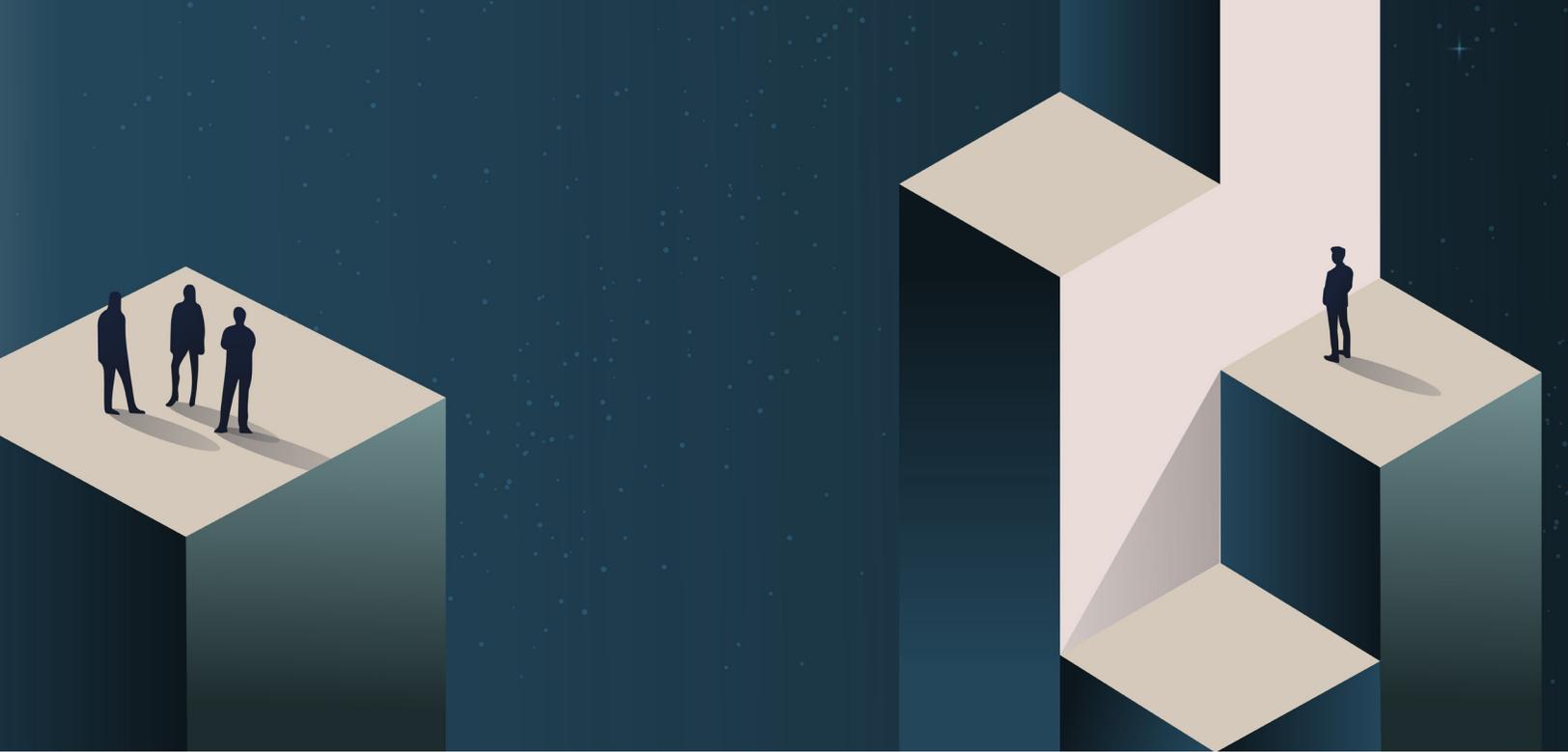
Finally, limiting trust information provided to a beneficiary can help minimize disputes among beneficiaries or between beneficiaries and a trustee. For example, if one sibling beneficiary gets more money from the trust (often because that sibling needs more financial support than others), that disparity can lead to resentment, simmering family conflict, and, possibly, litigation. Settlers can discourage that type of fighting by limiting information, thereby preserving more of the trust funds for the beneficiaries. This also allows the trustee to make distribution decisions based on individual beneficiary needs without worrying about upsetting others. Although some argue that a lack of information leaves beneficiaries vulnerable to a trustee’s breach of duty, a settlor can minimize that risk by requiring disclosure of all information to a trust protector or other advisor to act as a check on the trustee.

SO WHAT?

Despite the recent publicity and criticism of trust “secrecy,” these types of mechanisms can provide meaningful benefits, particularly to parents who want to pass to their children the family farm, a small business, or their wealth. When used appropriately, privacy protections such as the quiet trust can serve a valuable estate planning purpose and help people achieve their financial goals. If you have questions about privacy protections, quiet trusts, or other estate planning mechanisms, please contact a member of the Robins Kaplan Wealth Planning and Disputes Group.



¹Richard I. Kirkland Jr., *Should You Leave It All to the Children?*, Fortune Magazine (Sep. 29, 1986) https://archive.fortune.com/magazines/fortune/fortune_archive/1986/09/29/68098/index.htm



AVOIDING GUILT BY ASSOCIATION

BY DENISE RAHNE

From manufacturers to financial and other professional service providers, no prudent company welcomes attention based upon an unfortunate client or customer affiliation. Still, in our media-saturated world, “foreign” and “wealthy” can be quick shorthand for “corrupt,” even where the label is not sustainable. In a world where the very act of engaging in high-asset and/or international commerce can open the door to suggestive scrutiny, the real story should be whether a respective entity acts in good faith to avoid doing business with bad actors. This is not a new challenge, but rather one with established guidance in both the financial services industry and beyond.

REGULATORY AGENCIES GENERALLY

Specific to the banking and financial services industries, a multitude of federal and state regulations play a role in overseeing any respective entity’s overall operations. Such regulatory schemes focus on a wide range of issues, including institutional viability and risk, cybersecurity, internal controls, and conflicts of interest, among other issues and concerns. That said, they may or may not consistently highlight affiliations that ultimately prove to be problematic or otherwise appear unseemly under the microscope of public opinion.

KNOW YOUR CUSTOMER

The challenge known by various versions of “know your customer” is neither new nor unique to financial institutions. A review of the prominent regulatory schemes reveals some common themes that translate to practical guidance for any company wishing to protect its reputation while engaging in otherwise legal international commerce with wealthy clients or customers.

The U.S.’s Financial Crimes Enforcement Network (FinCEN) has for many years advocated for focused customer due diligence programs to address such ills as money laundering and terrorism financing. While money laundering and terrorism financing are obvious corporate threats, the over-riding goal with customer due diligence is broadly useful and readily summarized: How do you avoid unwitting engagement with a rogue client or customer?

Many find implementation of FinCEN's ultimate rulemaking frustratingly vague. With limited guidance as to what efforts satisfy the obligation, the final rule requires that financial institutions: (1) identify and verify the identity of customers; (2) identify and verify the identity of the beneficial owners of companies opening accounts; (3) understand the nature and purpose of customer relationships to develop customer risk profiles; and (4) conduct ongoing monitoring to identify and report suspicious transactions and, on a risk basis, to maintain and update customer information.

The range of potential efforts and investment is broad. And as an initial challenge, the rule presumes that institutions appropriately categorize customers on the spectrum of low to high risk and then, as they inch from low risk, implement practices such as:

- collecting information about customers at account opening and on an ongoing or periodic basis;
- conducting media searches or screening for news articles on all customers or other related parties, such as beneficial owners; and
- collecting information that identifies related parties.

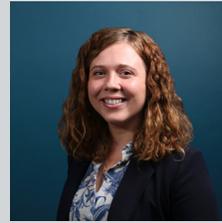
Outside observers have provided practical guidance as to the implementation of FinCEN's rule, including helpful inquiries that any industry might ask when engaged in international high-net-worth commerce. Such questions generally include:

- Where is the customer located? This question includes whether the relevant jurisdiction has enacted effective monetary regulations and/or has high levels of corruption.
- Is the client forthcoming about affiliates?
- Does the institution have a direct face-to-face relationship with the client or customer?
- Is the customer or client involved in a heavily regulated industry?
- If the client or customer owns a relevant business, how complex is the ownership structure, and how available is related information?
- Is the client's or customer's primary enterprise cash-based?

The approach from other regulatory agencies overseeing lucrative international commerce confirms and supplements the spirit of this guidance. The Bureau of Industry and Security ("BIS") oversees, among other things, foreign exports as well as commerce with non-U.S. businesses and individuals. While generally concerned with manufacturing and technology, the approach taken by BIS bears some light beyond its official jurisdiction.

Broadly, BIS requires that companies account for abnormal circumstances or "Red Flags" that, while specific to manufacturing and technology, provide an analogy to the type of inquiry that might be warranted by any company. Generally these would include disconnects in the client or customer's profile; a practice of cash-based transactions; identifiable connections with problematic individuals, companies, or countries; and reluctance to provide information. In addition, and perhaps most important, BIS requires that business not "self-blind." In the most basic terms, to "self-blind" means putting on blinders that prevents a company from learning bad information about a client or customer.

We live in a complex world—that fact should not discourage lucrative international commerce. And while you engage in these efforts, earnest due diligence about your customers and clients should go a long way.



Robins Kaplan Welcomes MyLeah Wiedmann

MyLeah Wiedmann recently joined Robins Kaplan as a staff attorney focusing in the areas of Wealth Planning and Administration, Trusts and Estates, Conservatorships and Guardianships, and Wealth Disputes.

Prior to joining Robins Kaplan LLP, MyLeah practiced at a law firm in Eagan, Minn., during which time she became skilled at handling a variety of cases. In assisting clients to navigate life's unexpected challenges and achieve new goals, she saw how critical it is for an attorney to connect with and understand the unique needs of each individual client and their family members.

MyLeah previously worked as a judicial law clerk for the Honorable Robert A. Awsumb in Ramsey County District Court in Minnesota and also previously worked as a paralegal and as a court clerk for Wright and Ramsey County District Courts. She also held an externship at the ACLU and interned at the Department of Homeland Security - Office of Chief Counsel.

MEET OUR ISSUE EDITOR:



MANLEEN SINGH

Manleen is a versatile attorney committed to her clients, to understanding their businesses, and to helping them achieve their goals and meet their needs with efficiency and creativity. Manleen represents large and small companies in a variety of sectors, including retail, food and beverage, and manufacturing, on matters involving litigation and business relationships. She is also dedicated to her diverse *pro bono* practice, which includes religious employment discrimination and applications for minor immigrant clients to receive Special Immigrant Juvenile Status. She can be reached at MSingh@RobinsKaplan.com.

BISMARCK

1207 West Divide Avenue
Suite 200
Bismarck, ND 58501
701 255 3000 TEL

BOSTON

800 Boylston Street
Suite 2500
Boston, MA 02199
617 267 2300 TEL

LOS ANGELES

2049 Century Park East
Suite 3400
Los Angeles, CA 90067
310 552 0130 TEL

MINNEAPOLIS

800 LaSalle Avenue
Suite 2800
Minneapolis, MN 55402
612 349 8500 TEL

NEW YORK

900 Third Avenue
Suite 1900
New York, NY 10022
212 980 7400 TEL

SILICON VALLEY

2006 Kala Bagai Way
Suite 22
Berkeley, CA 94704
650 784 4040 TEL

SIOUX FALLS

140 North Phillips Avenue
Suite 307
Sioux Falls, SD 57104
605 335 1300 TEL

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