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A MESSAGE FROM LUKE

Happy New Year to everyone! The beginning of the year is always a time for reflection, planning and goal setting. One of my goals is to serve

you and help you meet your goals for 2006. Make it a great year! Please call me if there is anything you need.

Luke H. Paladino

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THE 4TH AMENDMENT AND YOU

The Fourth Amendment of the Constitution reads:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

In plain English the search and seizure provision of the 4th Amendment protects Americans privacy. To honor this freedom, the 4th Amendment protects against unreasonable searches and seizures by state or federal law enforcement authorities. However, the 4th Amendment does permit searches and seizures if they are reasonable. Practically this means that the police may override your privacy concerns and conduct a search of your home, barn, car, office etc if:

The police have probable cause to believe that they can find evidence that you committed a crime and a judge

issues the search warrant

or

The particular circumstances justify the search without a warrant in the first place.

The fourth amendment applies to a search only if a person has a “legitimate expectation of privacy” in the place or thing being searched. If there is no expectation of privacy, the fourth amendment provides no protection.

Another distinction that most citizens fail to understand is that private security guards are not limited by the 4th Amendment. Evidence seized due to a search by a private security guard can be used against a defendant despite any objections under the 4th Amendment. This is an important distinction due to the fact that private security personnel outnumber police officers in the United States by three to one.

A common incident where citizens will encounter the 4th Amendment, usually unknowingly is on the streets and highways in vehicles. A common

method that law enforcement officials legally employ to circumvent the 4th Amendment requirement is consent. After a police officer or highway patrolman has given a driver a ticket they may sometimes ask if it is ok for them to search the car. Most people, out of fear and lack of knowledge of the law, will give the officer consent to search the vehicle. Clearly if there is illegal goods or weapons in the car, there are bigger issues here. However, if you are an honest law abiding citizen and would rather the police not search the car and intrude on your privacy, be aware that you can refuse consent.

The existence of the 4th Amendment is something that most people take for granted. While it is true the some people may never encounter a situation where their knowledge of this amendment will assist them, I hope that you now have a better grasp on your rights and what you can do to protect your privacy from the state and federal government.

WHAT IS PROBATE?

Probate is the legal process that occurs when an individual dies with or without a will. If a living trust is involved, however, probate can be avoided. The probate process includes proving that a deceased's persons will is valid, identifying and inventorying the deceased person's property, appraising the property, paying debts and taxes and distributing the remaining property per the will or if there is no will per the applicable state statutes.

The personal representative, which

is a person named in your will, must find, secure and manage your assets during the probate process which takes from 5 months to a year to complete. Depending on the content of the will, and the amount of the decedent's debts the personal representative will have to determine if some property must be sold to pay for the debts. After all the debts of a person's estate are paid and all matters resolved the property will be transferred to its new owners.

The probate process on its own right

is a necessary administration of the estate to ensure that all of the debtors and creditors of the decedent are paid. For people who due to their wealth, health or advanced age want to avoid the probate process and its attendant costs there are estate planning devices that can be employed. Most notably a living trust can be drafted to avoid the probate administration costs, keep the individual's assets private and significantly reduce the estate's tax liability.

BUSINESS PLANNING

A common question that I get from entrepreneurs and individuals with successful part-time businesses is if they should form a legal entity of some type to protect their personal assets from liability. I normally counsel clients that the various entities differ in four main areas: formation, liability, control and tax consequences. There are other areas of distinction but clients inevitably are concerned about these four.

First, the formation and paperwork requirements vary widely between entities. A sole proprietorship requires no formation expense as it is the legal name for an individual who is legally inseparable from their business. A partnership is equally easy to form but normally involves a partnership agreement whereas the partners agree to the terms of their arrangement. Limited Liability Company "LLC", formation is more formal and normally more expensive. Several documents need to be drafted and some filed with the Secretary of State. The ongoing upkeep is less than for corporations, but can require changes if individuals decide to invest or divest their ownership. Finally, corporations require the most formation costs and paperwork upkeep. Ongoing minutes of meetings of directors and shareholders must be kept in the corporate books.

Second, the liability exposure also differs based on the entity selected. A sole proprietorship leaves the owners personally liable for business debts. A general partnership also leaves the partners personally liable for all business debts. An LLC allows limited liability as long as the members are truly treating the company as a separate entity and not a shell entity. An owner's liability is normally limited to the amount of capital contribution made to the LLC. Finally, a corporation typically allows the shareholders to have limited liability for personal debt.

Third, the control issues inherent to each entity can be vary widely. Control of an entity is simply the amount of flexibility and influence that a business owner will have in the operation of the business. For sole proprietorships clearly an owner would have all of the control as the business and the individual are the same. In partnerships the amount of control is governed by the partnership agreement. In some situations a partnership is structured so that a limited partner invests capital and agrees to have little control over the operation in return for limited risk. An LLC can be structured similarly and the owners can have as little or as much control as they desire. A corporation

is somewhat different. In order for a shareholder to have direct control they will have to also serve as an officer in the company. For smaller family owned businesses, the officers and owners are typically one in the same, but in situations with outside investors clearly the control is not always in the exclusive hands of the shareholders.

Fourth, the tax advantages and disadvantages of each entity must be considered. For sole proprietorships and partnerships the owners are taxed according to their individual tax basis. LLC are also flow through entities which allow the owner to pay tax on their portion of the gains as apportioned according to their ownership percentage. Corporations depending on under which chapter of the Internal Revenue Code they are organized can provide advantages. In particular, for small business owners subchapter S corporations provide valuable tax advantages because of the different treatment under the tax code between capital gains and income tax.

The process of founding a new business is always exciting and challenging. Selecting an entity for the benefit of the business is always an intelligent decision and one that can provide peace of mind and numerous other benefits to the small business owner.

NEW BANKRUPTCY LAW WILL AFFECT ALL INDIVIDUALS WHO FILE.

The Bankruptcy Abuse Protection and Consumer Protection Act of 2005 went into effect October 17, 2005. While no one ever purposely situates themselves financially so as to necessitate bankruptcy, it is a reality of life that many Americans face every year. Following is a list of the seven primary differences with the new law in comparison to the prior Bankruptcy law in effect prior to October 17, 2005.

1. Before filing for Bankruptcy most applicants must now go through credit counseling in a government approved program.
2. If an applicant wants to file under Chapter 7 they must qualify under the "means test". Under the means test if your current monthly income is under the median income for the state of your residence, you can file for chapter 7. But if your current monthly income is above the median income in your state, and you can afford to pay \$100 per month toward paying off your debt, you cannot file under Chapter 7 and must proceed under Chapter 13 (more on Chapter 13 below). Whether you can afford to pay \$100 per month (or \$6,000 over a five-year period) is based on a formula that includes your monthly income, your expenses, and the total amount of your debt .

3. Under the new bankruptcy law, people wishing to file bankruptcy under Chapter 7 or Chapter 13 must show proof of their income by providing federal tax returns from the last tax year. If a bankruptcy filer has not paid taxes for the previous tax year, he or she must do so before the bankruptcy can proceed.
4. As discussed above, if a bankruptcy applicant is ineligible for filing under Chapter 7 based on the "means test," he or she must file under Chapter 13 instead. There are a number of major differences between Chapter 7 and Chapter 13 bankruptcy, but the main distinction is that under Chapter 13, the debtor enters into a five-year repayment plan in which he or she must pay a certain amount of money to creditors, based on a strict expenses-to-income formula.
5. People who file for bankruptcy have traditionally been entitled to certain immediate protections from creditors and others -- including most debt collection and lawsuit actions. These protections are part of what is called the "automatic stay" effect of a bankruptcy filing, because many potential legal actions against the filer are stopped (known as

"stayed" in legal terms). But, under the new bankruptcy law some of these protections have been eliminated. For example, filing for bankruptcy no longer delays or stops eviction actions, driver's license suspensions, legal actions for child support, or divorce proceedings.

6. Bankruptcy laws provide a system of re-payment priority for people and companies that are owed money (called "creditors"). Under the new bankruptcy law, among the changes in creditor priority is that people who are owed unpaid child support and alimony (i.e. the bankruptcy filer's family members) take priority over any other creditor.
7. After the conclusion of bankruptcy proceedings, but before any debt can be discharged, bankruptcy debtors must participate in a government-approved financial management education program. You can get more information on the procedure for financial management education (and a list of approved debtor education providers) from the U.S. Trustee Program (a component of the Department of Justice responsible for overseeing the administration of bankruptcy cases).

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