

Asset Protection



MICHAEL W. NEWCOMB
ATTORNEY AT LAW

BUSINESS LAW • ASSET PROTECTION • INTELLECTUAL PROPERTY • REAL ESTATE LAW

[HTTP://WWW.NEWCOMB-LAW.COM](http://www.newcomb-law.com)

TEL: (951) 541-0220

[MICHAEL@NEWCOMB-LAW.COM](mailto:michael@newcomb-law.com)

The Basics



A COMPREHENSIVE APPROACH

Michael W. Newcomb, Esq.

Asset Protection – What it is ...



- **Comprehensive Approach**
 - Personal Transactions.
 - Business Transactions.
- **Lawsuit Avoidance**
- **Appropriate Insurance**
- **Use of legal entities to ...**
 - Obfuscate asset ownership.
 - Segregate assets from attachment by creditors.



The
Masters
Weekend

A Gathering of Experts

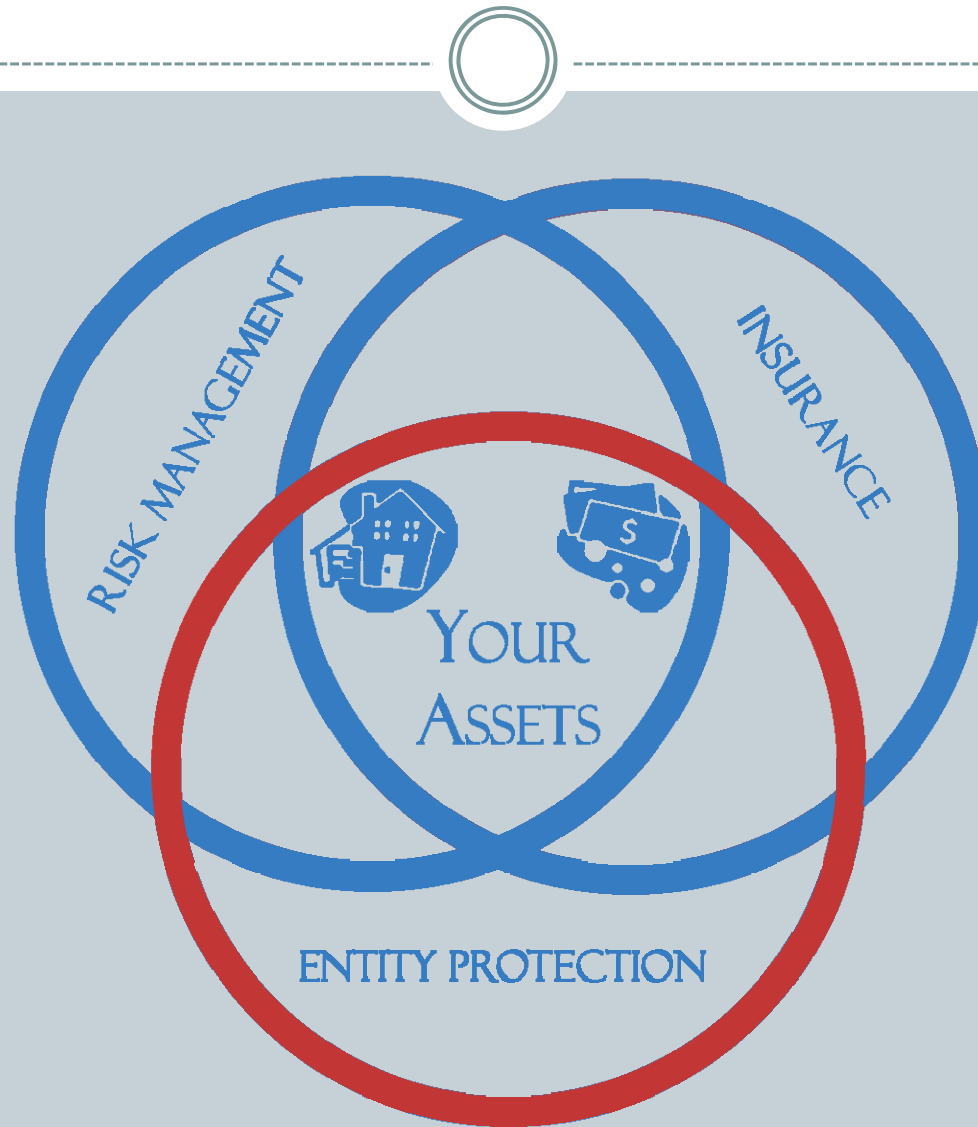
Michael W. Newcomb, Esq.

Asset Protection – What it is not ...



- **Will not help you evade taxes ...**
 - But may give you additional tax deductions.
- **Will not prevent creditors from suing you for your personal wrongs ...**
 - But will discourage frivolous lawsuits.
- **Will not make your life simpler ...**
 - But will give you peace of mind that you won't lose everything.

Asset Protection Trilogy



The
Masters
Weekend

A Gathering of Experts

Michael W. Newcomb, Esq.

Risk Management



LITIGATION, N. A MACHINE WHICH YOU GO INTO AS A PIG AND COME OUT OF AS A SAUSAGE.

THE DEVILS DICTIONARY

Risk Management



The Masters Weekend

A Gathering of Experts

Michael W. Newcomb, Esq.

Risk Management



- **Managing your business risks:**
 - Good contracts and agreements.
 - Protect Intellectual Property (trademarks, trade secrets, etc.).
 - Implement and enforce good internal policies / procedures.
 - Consult with professionals (lawyers, accountants, etc.).
- **Managing your personal risks:**
 - Good contracts and agreements.
 - Avoid high liability activities.



The
Masters
Weekend

A Gathering of Experts

Michael W. Newcomb, Esq.

Insurance



INSURANCE, N. AN INGENIOUS MODERN GAME OF CHANCE IN WHICH THE PLAYER IS PERMITTED TO ENJOY THE COMFORTABLE CONVICTION THAT HE IS BEATING THE MAN WHO KEEPS THE TABLE.

THE DEVIL'S DICTIONARY

Insurance



The
Masters
Weekend

A Gathering of Experts

Michael W. Newcomb, Esq.

Insurance



Typical Insurance Policy:

All loses to the Insured's property are covered by Insurance Company, except the following:



Insurance – Commercial



- **Property Insurance**
 - Boiler and Machinery (equipment)
 - Debris Removal
 - Builder's Risk (damage/destruction of construction projects)
 - Glass Insurance (store windows)
 - Inland Marine (damage to third party property)
 - Business Interruption (loss of income)
 - Ordinance/Law (cost to rebuild to code)
 - Tenant/Renters (damage to improvements/property)
 - Crime (protects employees and outsiders)
 - Fidelity Bonds (employee theft)

Insurance - Commercial



- **Liability Insurance**
 - Errors and Omissions (E&O) (negligent services)
 - Malpractice (for professionals, also referred to as E&O)
 - Automobile
 - Directors' and Officer's Liability (lawsuits against fiduciaries)
- **Worker's Compensation**
- **Health Insurance**



The
Masters
Weekend

A Gathering of Experts

Michael W. Newcomb, Esq.

Insurance - Personal



- Homeowners Insurance
- Automobile Insurance
- Disability Insurance
- Health Insurance
- Life Insurance
- Umbrella Policies

Entity Protection



***CORPORATION, N.* AN INGENIOUS DEVICE
FOR OBTAINING INDIVIDUAL PROFIT
WITHOUT INDIVIDUAL RESPONSIBILITY.**

THE DEVIL'S DICTIONARY

Entity Protection



The
Masters
Weekend

A Gathering of Experts

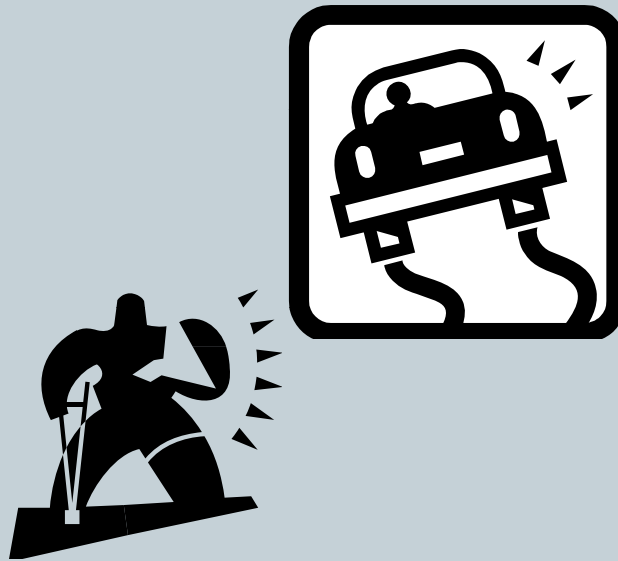
Michael W. Newcomb, Esq.

Entity Protection



- **Corporation**
 - Excellent liability protection – operating companies.
- **Limited Liability Company (“LLC”)**
 - Good liability protection for real estate with tax pass through.
- **Limited Partnerships**
 - Tax advantages for foreign investors.
- **Trusts**
 - Revocable.
 - Irrevocable.
 - Off-Shore.

Entity Protection – Two Types of Creditors



Outside Creditor



Inside Creditor



The Masters Weekend

A Gathering of Experts

Michael W. Newcomb, Esq.

Entity Protection – Corporations



- **Positives**
 - Excellent liability shield.
 - 200 Years of case law – courts/lawyers have a good idea of what not to do to maintain shield.
 - Accepted by investors.
- **Negatives**
 - Maintaining corporate formalities.
 - Additional tax return.



The
Masters
Weekend

A Gathering of Experts

Michael W. Newcomb, Esq.

Entity Protection – LLC's



- **Positives**

- Good liability shield.
- Formalities are less.
- Can reallocate profits/losses disproportionately.
- Charging orders may be only remedy.

- **Negatives**

- Relatively new – courts/lawyers don't have a good idea of what not to do to maintain shield.
- Additional tax return.
- Can sometimes pay more “franchise tax” than corporations.

Entity Protection – Ltd. Partnerships (LP)



- **Positives**

- Good liability shield for “Limited Partners.”
- Formalities are less.
- Can reallocate profits/losses disproportionately.
- Charging orders may be only remedy.

- **Negatives**

- No liability shield for “General Partners.”
- Additional tax return.



The
Masters
Weekend

A Gathering of Experts

Michael W. Newcomb, Esq.

Entity Protection - Trusts



- **Trust**
 - An artificial entity that is created by entering into a Trust Agreement and that holds and manages property and distributes the property upon satisfaction of certain conditions.
- **Parties to the Trust**
 - Settlor / Grantor – Enters into the Trust Agreement and places property into the “Trust.”
 - Trustee – Is appointed by the Settlor and manages the Trust property.
 - Beneficiary – Receives the benefits, profits and property of the Trust under the conditions set forth in the Trust Agreement.

Entity Protection – Trusts



- **Trustee Not Personally Liable (most of the time).**
 - “A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault.” (*California Probate Code, Section 18001.*)
- **A Revocable Trust is Liable for Settlor’s obligations.**
 - “If the settlor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors of the settlor to the extent of the power of revocation during the lifetime of the settlor.” (*California Probate Code, Section 18200.*)



The 
Masters
Weekend

A Gathering of Experts

Michael W. Newcomb, Esq.

Entity Protection – Trusts



- **Revocable Trusts**
 - Positives
 - ✦ Can protect Assets from Inside Creditors.
 - ✦ Freedom to control assets.
 - Negatives
 - ✦ No protection from Outside Creditors.
- **Irrevocable Trusts**
 - Positives
 - ✦ Can protect Assets from Inside and Outside Creditors.
 - Negatives
 - ✦ Loss of control of assets and changes to trust (unless offshore).

Entity Protection – Real Estate Investors



- **The Problem – Inside Creditor (Renter) Liability.**
 - Insurance may be inadequate or non-existent.
 - Lender Rules/Terms (Fannie Mae - Freddie Mac)
 - ✦ **Due-on-Sale-Clause .**
 - the term “due-on-sale clause” means a contract provision which authorizes a lender, at its option, to declare due and payable sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent. (12 USC 1701j-3(a)(1))
 - ✦ **Refinance Restrictions.** *Borrower must hold property for six months prior to cash-out refinance (Freddie Mac Bulletin – April 22, 2008).*

Entity Protection – Real Estate Investors

- The “Trust” Solution

- ✦ 12 USC 1701j-3 (Preemption of Due on Sale Clause)
 - (d)(8) a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property.
- ✦ Transfers and/or Refinance restrictions do not apply to Living Trust under Freddie Mac / Fannie Mae Guidelines (*Freddie Mac Servicer Guide 22.10*).
- ✦ Trusts comply with 1031 Exchange Rules.

Asset Protection Options



Irrevocable or
Offshore or Both



Nevada LLC

CoTrustee
Inc/LLC

Single
Purpose
\$ Trust

\$ Single
Purpose
Trust

Lend Money to Trusts
w/ Secured Interest.

Charging Order Remedy.

Activity/Liability Limited.

Pass Through Tax Liability



The
Masters
Weekend

A Gathering of Experts

Michael W. Newcomb, Esq.

Asset Protection



Basic and Intermediate

- **Single Purpose Trusts**
 - \$500.00 per Trust
 - \$300 for each additional Trust
- **Entity Formation**
 - \$895 per Entity
 - \$350 -\$600 for Various Agreements
- **Basic Estate Planning Trust**
 - \$950.00
- **Complete Packages**
 - 15% Discount

Advanced

- **Operating Companies**
- **Irrevocable Trusts**
- **Offshore Trusts**