EPISODE 950

[INTRODUCTION]

0:00:00.0 ANNOUNCER Welcome to the Real Estate Syndication Show. Whether you are a seasoned investor or building a new real estate business, this is the show for you. Whitney Sewell talks to top experts in the business. Our goal is to help you master real estate syndication.

And now your host, Whitney Sewell.

[INTERVIEW]

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Whitney Sewell: This is your daily real estate syndication show. I'm your host, Whitney Sewell. Today our guest is Jonathan Feniak. Thanks for being on the show, Jonathan.

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Jonathan Feniak: Thank you very much for having me.

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WS: Yeah, honored to have you on the show. A very important topic for anyone that's in our business, especially if you are investing passively. But a little about Jonathan. He's a general counsel for Cloud Peak Law and a partner at its subsidiary, Colorado Trust and LLC attorney. Prior to becoming an attorney, he worked with sophisticated investors in high net worth individuals at hedge funds and as a financial advisor. Now he assists investors and implementing asset protection and privacy enhancing structures.

Jonathan, welcome to the show. As I said before, very important topic. And I've heard different methods about this, different thoughts behind it, but probably not often enough. And I think many investors are investing long before they ever really think about the long-term implications of not having some type of asset protection plan. Then all of a sudden, you know, they think about what about privacy? And it's not something you know... We've probably spent enough time educating about before we get into this business. So, welcome to the show. Give us a little about, you know, the asset protection stuff that, you know, you're working on now and let's dive in in helping that passive investor that's listening.

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JF: Yeah. well thank you for having me again. One of the things we like to think about with asset protection and privacy is, what are your attack surfaces? And this is something I've gotten from my friends and colleagues who were in the cybersecurity space. And they think about what is the potential weakness in the structure you have created? And there's likely, when you're first starting out, there's a lot of them. People will know who you are. They'll know you own these properties because your name will be listed in the title records if you're purchasing properties as an individual. They will see your name there. If you're forming LLCs, just going through the Secretary of State's site, perhaps you're acting as your own registered agent and your information becomes available there, you're potentially putting information about yourself in on social media or putting information about yourself on LinkedIn, on your website on podcasts like this. And each of those represents a potential attack surface for you.

Now the thing to think about is, you know, I mean, people know who you are, there's absolutely a lot of benefits to that. But having people know what you own is potentially something that could be disruptive in your life. You know, I think about over the course of someone's life, what could potentially go wrong? And we see well COVID it happened, right? That happened, you know, this year over the last year. Oh, and the 2008 financial crisis. We had the 2000 financial crisis. We had many... You know, the savings and loan crisis before that. Every decade or so there's another crisis that could potentially bring on you some sort of financial hardship. You know, we call these credit events.

Now there's external credit events, and then there's internal credit events. And internal credit events would be something like you own a piece of property, someone slips and falls and hurts themselves and hurts themselves badly. A credit event could be you getting in a car accident, you're totally at fault, and you've harmed someone. Each of these things is also something that could disrupt your overall plan if you haven't focused on asset protection and privacy from the start. I heard some of your other guests talk about if something happens, can they find out what you're worth? Are you a good target for a plaintiff's attorney? And by practicing privacy right from the start, and then implementing asset protection structures behind that, you're going to be less of a target. When one of these things, which is almost guaranteed to happen, happens.

Hope is not a plan. That will be sort of something we talked to our clients about all the time. Getting something in place even if you're a little bit further down the road. If you haven't done things right from the start, it's not too late.

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WS: That's good to know right there, that it's not too late. And so, let's talk a little bit about... or maybe you can like walk through a typical structure for somebody that's looking to invest in real estate syndications or something like that that, you know, they want the privacy, they want the asset protection. What is it... And sometimes, I think, people just don't because it seems a little bit overwhelming and I gotta be, "Okay, you know, that's not going to happen to me." Right? But, you know, what's a typical structure that you would lay out for someone? Or some things they need to be thinking about as they're planning to invest?

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JF: Yeah. Well, syndications are interesting in that, you know, you don't have a lot of that if somebody slips and falls at the property that you're an investor. Syndication probably not going to come after you as an individual. It's highly unlikely that they would, but I've had clients who wind up being co-investors on deals, syndication deals, with people who were really not people they wanted to be associated with. So, let's imagine you were a co-investor on a deal as a limited partner with Jeffrey Epstein. Okay? You now are seen in the public's eyes being your partner, and you are a partner with Jeffrey Epstein. Pick someone else, you know, who's unsavory or has done absolutely terrible things in the public space. Your name would potentially be released right alongside that terrible person's name. That right there is a reason to not be investing in limited partnerships without having it through an entity of some sort. Do it through an anonymous trust. Do it through a limited liability company which is formed anonymously in one of the states which allows it. And we can sort of talk about that. There's about four states that allow for anonymous LLC.

We've actually begun to offer anonymous LLC filings in every state doing it. We are your attorney and so we will form that entity in any state for you, but just as a limited partner. It's critically important to maintain your privacy. If all you're investing in is limited partnerships, that may be enough because there isn't a lot of....there is a financial downside on those deals. But you are limited. If you have a... Either you're a sponsor of it, you're the general partner of the deal, you're putting it together. You may have much greater liability in that transaction. If you are purchasing properties, outright purchasing them to rent, to buy and hold, or fix and flips, you have a significant amount of liability that would go beyond just investing as in an LLC. You know, we view that sort of the basic structure as six different things you do to protect yourself when it comes to asset protection and privacy. And number one, I used to be insurance licensed when I was a financial advisor. Having good liability insurance, you know, whether if you're sponsoring an offering, then doing it as having a director and officer or, you know, insurance in place. Things may happen if you're renting property out, if you're owning and renting property, then having liability policy landlord tenant policy in place, huge first step because 95% of the time that's going to satisfy any potential plaintiffs and plaintiffs attorneys. Beyond that, investing in liability producing assets through a limited liability company.

Now just having an LLC is often not enough. Many states have fairly weak Limited Liability Company laws which will allow for something called veil piercing. I'm sure people have talked about this on your podcast before. How do you avoid veil piercing? Every state's a little bit different, but number one is, well, there's no fraud being perpetrated by the Limited Liability Company. And then, is it your alter ego? So do you have a separate bank account for it? Do you have separate books and records for it? And you have to think about these things. You need to go before a judge and convince the judge that this entity is separate and distinct from you. How are you going to prove that?

That's one of the approaches we like to use is thinking about the situation where you're in front of a judge and you're in front of a jury established that you're not the same as this LLC. Then thinking about anonymity. What is it, or what information of yours is going into the public record? Some people try to save a little bit of money. They don't hire a Registered Agent. They don't hire someone to form their LLC for them. Well, they are then in the Secretary of State website and that will be there forever. We form... Wyoming and New Mexico and Delaware are three states in which we have operations and we can form, private, LLCs for you there. So our name goes into the Secretary of State's records is organizer. And then once you have one of those entities setup, you can then form a subsidiary in any of the 50 states that will also be private. So, we will have listed as the member of your, say Tennessee LLC, list the Wyoming or New Mexico, or Delaware entity as the parent company. This way your name stays out of those Secretary of State records. We do that frequently for our clients.

Another thing that we do for our clients, which I don't know that there's sort of firms of our scale which are doing it, but we offer nominee services. So, a simple document, a deed. It's going to go into the public record that will attach... will go into the chain of title and it will attach your company to a particular piece of property. We will sign as a nominee manager for your entity. We could sign as a nominee manager for your limited partnership investments and I call it sign and resign. You know we have an agreement which lays out what our responsibilities are. But we will serve in a role as a manager of your company for just that single transaction, sign the documents, our name, one of our team's names goes into the public record. And all that's going to be there as well, it's this LLC, this person acted as the manager at this particular point in time, but it's not connecting back to you. So, you got those sort of the three foundational topics there, you know.

And then another thing... and listening to to a number of your guests, you know, you talk about mezz debt. And you talk about preferred. And there's a lot of investors who don't like to use that and I totally get it. They like to, even though it diminishes the returns, just the idea of having debt on the properties upsets them. Do you see that quite a bit, Whitney?

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WS: Yeah. There are many people that are in that way of thinking. They do not want any debt.

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JF: Well, one of the things that that they can do is set up a lending entity. So, they're going to have two parts to their investments in their deals into this piece of property, right? Even if they're paying...They have all the cash available but have an entity which is the lender that they completely control and have the entity which is the equity investor which they completely control. And so you have a 70% coming from your lending entity. It's an intercompany loan. Companies do it all the time. And you are then the equity investor over here and the debt investor over here. They've got different risk profiles, but if we think about it, the equity investor, your equity in that deal is going to be subject to claims of creditors. That's the part that's potentially going to be lost if something goes horribly wrong.

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WS: And then you can have a lien on that property?

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JF: Correct. File a mortgage. Making it a bonafide loan is one of the things that that many people miss. If you have a... You know, it's nothing more than a piece of paper that's easily... and again thinking about getting before a judge, prove that this is a bonafide loan. If it's just a piece of paper, judge is going to say "No, probably not." Right? But signed mortgage, signed promissory note entered into the title record, UCC is filed, if that's required, making an actual transfer to value, funding the loan, pretend that you're lending in it or not pretend, act as if you're lending entity is Wells Fargo, it's the lender in this deal. What would Wells Fargo want? It would want security. Is there adequate security? Right? Was there an actual transfer value? A 100,000 came from this entity, went to this entity to fund the purchase. Okay? And then once the deal's done, the equity portion is making loan payments back right.

And so one of the interesting things about it is you're going to have a deduction for the interest expense here and you're going to have on this side, you're going to have recognition of the income from the interest here. But when it all flows up into your holding company, those sort of get cancelled out. And you're not really causing yourself any additional tax burden on it. But you are protecting the assets here from the claims of creditors have this limited liability company.

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WS: I wanted to back up a little bit and kind of get through the whole scenario. You had mentioned, you know...I think you mentioned Wyoming, Mexico, Delaware, and to have that privacy, right, to be anonymous, and then we would have a subsidiary LLC maybe in our home state. I think you said in any state.

So, are we having a Registered Agent on both of those entities or just the first one? We are so in both. And which entity is as purchasing that investment or investing, making that investment? I assume it's the Wyoming, Delaware, or you know one of those. Walk me through that a little bit. Which entity is making the investment? And who's... I guess what's the purpose of the specific subsidiary LLC?

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JF: Right. So, if it's a situation where you have a piece of property that's located in a particular state, by most state's laws, you would be treated as engaging in business in that state. And so you need to have either an entity registered as a foreign entity. Let's say, Tennessee. Let's use Tennessee as an example. Buying a piece of real estate in Chattanooga, you have to have an LLC which is located in or formed under Tennessee law or an outside state entity which is registered to do business in Tennessee. Okay? So, the Wyoming holding company forms the subsidiary in Tennessee. The Tennessee entity buys the piece of property. You have another piece of property in Missouri. Okay, Missouri, or Wyoming LLC forms a Missouri LLC subsidiary that Missouri LLC owns the piece of property.

Now let's say all you're doing is investing in limited partnerships. It's important to not have those partnerships be able to so people can tie them back to each other. If there is one entity that's investing in 100 deals, well once somebody sort of can figure out that this one entity is attached to you, they may be able to find out that 100 entities are attached to you. It can get a little bit crazy to register that many LLC. And part of it depends on sort of how much you're investing. If someone's investing, you know, $50,000 in a deal, I'm okay with saying, "You know, when you get to sort of five or $250,000 worth of equity exposed, at that point, start up a new LLC." So this would be, you know, maybe it's your 2020 LLC, and your 2020 LLC invested in five deals, start up a new LLC. Your 2021 LLC will invest in five deals and in this way, you've got them compartmentalized in case there is anything that happens, whether it's your privacy's exposed and if for some reason your name gets into the public, you will only be exposed for those five LLC.

So, sort of compartmentalizing that risk and those privacy concerns. That though, all of those entities would be disregarded. So, the subsidiaries are disregarded entities for tax purposes because they're single member LLCs. So, you're not creating an additional tax burden. But the other thing you are doing is, you're creating greater limited liability protection because you will have separate books and records for each of those LLC separate bank accounts. When you're funding the deals, you're going to flow the money from the holding company down at the subsidiary out to the deal. The income comes into that subsidiary, sort of netted out and then whatever is left gets float up. So, there's some bookkeeping but there is an additional tax expense that you need to worry about.

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WS: Wow. That can be challenging. That's why we need somebody like you're on our team that we can ask. I know every situation is different, right? You know, whether we're just an LP, whether, you know, maybe we're, you know, a GP and an LP, you know. I think, you know, like myself. And so we have two sides of that coin in trying to figure out the best structure. So, yeah, it can get confusing and I'm glad you mentioned like when we should think about having another LLC. People say often, "Well, I'll put 10 investments in one LLC and then I'll start another one." Something like that. And you put $1 figure on that. Is that correct? Or you said, you know, annually, something to that nature.

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JF: Yeah. And how much are you willing to lose? Because the first claim against an LLC is going to be for liability policy. But let's assume that the claims of the plaintiffs go above and beyond the liability policy, then it's going to be the equity in the LLC. Whatever's there, that's going to be the next thing that a judge will give them. Say, "Okay, you get these properties, you get liens on these properties, you get the cash in the bank accounts. Okay. How much are you willing to lose?" And you sort of balance it out.

LLCs are not that expensive, right? Especially Wyoming. It's very inexpensive. Many states are very inexpensive to form them. Some states are more expensive. California, Texas, $800, $400 in other states. Nevada is generally more expensive, but in most states there, you know 70-50 to a couple of hundred dollars. I think that's a small price to pay as sort of your overall asset protection budget, thinking about your liability insurance as part of that budget, thinking about your entity structure as part of that budget, and thinking about your bookkeeping as part of that budget. Those three things. How much are you spending on an annual basis? You start out small. You know, maybe you're only making $10,000 a year. Well, let's dedicate $500 to our risk budget, right? Protecting ourselves. We're now making $100,000 a year. Did you increase your risk or your asset protection budget accordingly? Most people don't.

They probably should at least evaluate it periodically to see if they're protected in the event of one of these terrible downside, whether it's personal issue that occurs, or it's an issue related to just general economy. If you haven't gone through them through one of these things in your life, you probably haven't been investing very long. It's just about everyone I know who's been investing for more than a decade has been through one of these things. We've seen two, you know. 2008, 2000. And then we saw the 2000 financial crisis. And then again you just sort of keep seeing these things, these cycles happening.

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WS: Before we have to move on to a few final questions, Jonathan, any other big issues that you see investors making right now as far just around asset protection?

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JF: Probably what you said at the beginning here where, you know, they didn't do things 100% correct from the start. And they throw up their hands and say, "Well, there's no point in trying

to fix it now." I totally disagree with that. It's not too late to fix it in a lot of cases. It's a little bit more you need to spend to set up the structures.

But with, you know, transfer of property from your personal name, if that's how you're holding now, getting it into an LLC, trying to create privacy, if you didn't have privacy with your formation of your entities at the start. Forming new entities or at least going forward, don't continue to commit more or don't continue to expose more equity to that entity which is connected to you.

So, taking steps now to going forward, fixing things, and most people will not hold on to a piece of property for their entire life. So there's going to be some terms of whether you're holding it for, you know, five years or 10 years when those properties roll off and you get into the next one. At that point, making sure that you are in a private and asset protective structure.

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WS: Jonathan, any habits, daily habits that you are disciplined about that have helped you achieve success?

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JF: We established a plan for our firm and really just keep trying to keep it simple, you know. People have running list of goals and tasks. That doesn't work for me. We have a... We call it PPM, right? And it's a Products, Productivity, and Marketing. And so what are we doing on a daily basis that fulfills one of those goals? We want to give new products to our clients because we think there's a real need there. How can we increase our productivity so that we push the price of those products down, that we're able to offer them at really attractive prices to our clients? And then marketing. How are we getting our message out there that we exist and that these products are available for people to use and enhance their privacy and asset protection? I love mnemonics. I use them all the time. And so it's easy for me to keep it in my head. It's not a list I even need to look at. How is this fulfilling one of these PPM goals? What I'm doing today. And if it's not, I really need to think about should I even proceed with it? It's not PPM. Let's move on to something else.

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WS: I don't think I've ever heard that before. Products, productivity and marketing. It's definitely three extremely crucial points we should be focused on in any business. But we just need to think about that. Like you said, as tasks come up because we're always being distracted, right - whether it's email, whether it's social media, whatever it may be... Oh, and that reminded me... But PPM. I like that. Especially in our business as well. But I wanted to ask you quickly. You mentioned earlier that reminded me, that putting my info on social media. You know, like, obviously, you know I'm everywhere on social media, and on purpose. So, you know, there's lots of people that are listening that are doing the same thing. You know how big of a risk is that posing as far as you know their asset protection plan?

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JF: I don't think it's a risk as long as you're keeping it separate and distinct. You're going to hold your investment and your net worth close to your vest. Do I know where Whitney lives? Can I look it up? Did you purchase that property in a land trust to give you some privacy? What partnership interests are you invested in? Did you invest in those through anonymous LLCs? what LLCs do you own? Can I look it up on the Secretary of State's records attorneys have access to and much like private investigators? And others have access to databases where I can show every piece of or see every piece of property you have been attached to over your natural life.

And so, it's okay for Whitney to be an individual and a public figure. That helps you. But what more do people know? You say you're doing very well investing $100 million worth of deals and like, "Can I look and find out every deal that you've invested in?" If I can, that's probably the problem, right? Not that you're saying that you did it. We trust you. I hundred percent trust you, but can I look and find out? Well, he owns the property on South Main Street. He was involved in this investment here.

And I had one client. He was an executive at a very prestigious financial services firm. And people were unhappy during the financial crisis that he was involved with this firm. And he went up with protesters outside of his home, outside of his rental properties, outside of businesses he was associated with. That is never a situation we want our clients to be in. Don't expose yourself in that way. If they want to post on your Twitter feed or social media great, but we don't want people coming to your house.

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WS: Wow. Yeah, we definitely don't want that. I'm thinking you know the poverty, I mean they're on the website, right? So people can see them on the website pretty easily. It wouldn't be hard to find some of that stuff. But, yeah, hopefully not my home. Nobody coming here. But that's awesome. Good things to think through though, right? I mean, thinking through these things before you get, you know, 10 years into the business. Jonathan, was the number one thing that's contributed to your success?

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JF: Willingness. A willingness to change, you know. I started out in operations. Right out of college, I worked at UPS. Put myself through college and did that for about a decade. Started getting my MBA. I was willing to change and realize I needed a change in my life. Got my MBA and went into finance. Worked at hedge funds, worked in financial services. Got securities license. I was seven and 66 securities license, insurance license, and all of that. And then realizing I needed a change in going to law school later in life.

So, being willing to sort of find my happiness. Find my sweet spot. And in each point in time, I've built on that prior experience to offer more to my clients. Having been in operations when I was working with high net worth individuals at. I was a financial advisor with Wells Fargo Advisors. They knew that I knew what they were going through as a business owner. Having been in finance, I have a view that most attorneys don't have having been on that side. What it's like to, you know, be up laying awake at night worrying about your money. And I've implemented each of these things as I progressed to make myself happier and more fulfilled and be able to give more to my clients.

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WS: And on that note how do you like to give back?

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JF: We give... Almost all of our clients are sort of budding entrepreneurs, or maybe most of them, right? They're just starting out. They're forming an LLC with their spouse, with their friend, with their brother, with their sister. We give every client 15 free minutes to talk to an attorney. Right.? It takes up a significant portion of our time. 99 times out of 100, there's nothing else we sell to them out of that. But we give them 15 minutes. What are your questions about running an LLC? Here's how you can get realized the promise of a limited liability company.

And so it's not a I'm going down on the weekends and doing things. This is every day. It's part of our business to help out those who are budding entrepreneurs. And this is a way to fix so many of the things that are wrong in our society right now, by helping people get a leg up, and people who may have never spoken with an attorney before. They're not hanging out at the club. They don't know attorneys, but they do have great business ideas from the construction business to the makeup business to just being a social media star. Whatever it is, they can talk to an attorney. And then after that, once they've sort of seen the value we offer, very easy access to attorneys in small increments, half an hour, book with an attorney who's an expert in the area you need help with. Very easy to do.

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WS: Jonathan, it has been a pleasure to get to know you and just talk through this incredibly important topic, you know, as investors are growing their net worth and investing in lots of projects or even as a general partner, you know, operating many deals and investing. We need to know...we need to think through our privacy and how we can be as anonymous as possible. No doubt about it. We need somebody like yourself on our team. I mean it's just a must if you're investing, you're growing a business or brand. So tell the listeners how they can get in touch with you and learn more about you.

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0:26:55.0 ANNOUNCER: Thank you for listening to the Real Estate Syndication Show, brought to you by Life Bridge Capital. Life Bridge Capital works with investors nationwide to invest in real estate while also donating 50% of its profits to assist parents who are committing to adoption. Life Bridge Capital, making a difference one investor and one child at a time. Connect online at www.LifeBridgeCapital.com for free material and videos to further your success.

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