

Estate Planning for the Muslim Client

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A KEY ESTATE PLANNING GUIDE

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Estate Planning for the Muslim Client

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Some General Thoughts

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Islam in America

- 2017 Pew Study on U.S. Muslim Population:
 - 3.5 million Muslims living in America.
 - Muslim Americans considerably younger than overall US Population.
 - 58% are first-generation Americans; 34% have been in the U.S. for at least three generations.
 - 31% are college graduates; 11% have postgraduate degrees.
 - Higher fertility rates than the general American population.
- Estimated 10% of Physicians in the United States are Muslim.

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Very Brief Introduction to Islam

- Monotheistic Faith.
 - Muslims believe to be culmination of Abrahamic faith traditions.
- Five Pillars – Proclamation of faith, daily prayers, almsgiving, fasting, and Pilgrimage to Makkah.
- "Sharia" loosely translates to Islamic Law – encompasses moral, ethical, social, and political codes of conduct:
 - Similar to Jewish Law in many respects.
 - Derived primarily from the Quran and Sunnah.
 - Governs private contracts, devotional worship, relationships, and inheritance rules.

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Sharia Law Application in the Unites States

- Professor James Sonne of Stanford University highlights three primary areas where Sharia has domestic applications:

1. Marriage and Family Law
2. Estate Planning
3. Alternative Dispute Resolution

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Anti-Sharia Legislation Background

- Voters passed a constitutional amendment banning "Sharia" as part of the "Save our State Amendment." *Awad v. Ziriax* (10th Cir. Okla. 2012).
- Lawmakers could not identify a single case in which Oklahoma court ever applied Sharia law.
- A Muslim resident of the state filed suit arguing the amendment would prevent him from having his will probated in accordance with his faith in violation of Establishment Clause and Free Exercise Clauses of the First Amendment.
- Federal Judge granted a permanent injunction which was affirmed unanimously by the 10th Circuit Court of Appeals.
- Nonetheless, since 2010, 201 anti-Sharia law bills have been proposed in 43 states.

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Should an Attorney Address Religious Considerations?

- Many practitioners are reluctant to address religious issues, viewing them as outside of the purview of matters appropriate for an attorney or estate planner. The tremendous impact which religious rituals and traditions can have on each estate planning document, and many of the common estate planning techniques, practically assures that important personal goals of the religious client will be violated if the planner does not address them. No practitioner would knowingly violate a client's religious wishes.
- As you seek out and address client's religious and other personal wishes, you will create a bond with them that will take the relationship beyond that of being as mere Scribner or consultant, to that of being a confidant and family adviser. The rewards of providing that level of personal service, and the strengthened client bonds, will enhance your practice, client retention and more.

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Anti-Sharia Legislation Makes it Imperative to Consider

- The proliferation of anti-Sharia legislation makes it imperative that planners expressly address a Muslim client's wishes in estate planning documents. Make preference clear.
- It may be advisable in some instances to use trusts with situs and governing law in a jurisdiction that does not have antagonistic law.
- Consider including change of situs and governing law clauses routinely so that a trust can readily be moved from a state that has or may enact legislation that thwarts the Muslim client's wishes to a state that will respect them.
- If there are particularly worrisome will challenge issues that might be implicated consider a pre-mortem probate of the will in a state that does not have anti-Sharia laws.

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The Goal of Estate Planning

- Estate Planning should not be just about the transmission of wealth.
- Estate planning should also be about the transmission of values.
- For many Muslim clients, estate planning is viewed as an act of religious devotion and an attempt to comply with inheritance laws outlined in the Quran.

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Areas of Estate Planning Commonly Impacted by Considerations of Islamic Law

- Disposition of assets on death.
- Charitable giving.
- End of life medical decision making.
- Burial, funeral and post death arrangements.
- Transmitting religious values to children and other heirs.
- Fiduciaries need authority to disburse funds for religious education (e.g. supplemental religious education, or private school), religious travel (pilgrimages to Mecca for The Hajj which is a mandatory religious duty for Muslims that must be carried out at least once in their lifetime), charitable giving (to inculcate a core religious value), and other purposes consistent with Islamic religious goals.
- Fiduciaries must be selected that have the appropriate knowledge and sensitivity to address the above and other religious issues.
- Ethical and miscellaneous issues (disinheritance, in-terrorem clauses, mandatory arbitration of certain claims before a religious body, charging of interest ("Riba"), ethical investment standards, etc.)

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Every Aspect of Planning Can be Imbued with Religious Considerations

- Each aspect of your client's financial (e.g. investment standards), retirement, insurance, death (dispositive scheme) and post-death (e.g., trusts for heirs) planning can all be imbued, to the extent your client wishes, with the same Islamic religious values that the client lives now.
- This process will not require a different type of financial plan, or a unique type of legal document, in most instances it will require sensitivity and some modifications to each step and each document in the traditional or typical estate planning process.
- Small changes, however, can make a tremendous impact to your client, your client's faith and the organizations your client is involved with, causes your client believes in, to your client's family and heirs.

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Variations and Interpretations

- Practitioners should understand that there are different schools of Islamic law, and different interpretations.
- A practical and prudent approach for the professional adviser, especially one who is not Muslim, is to encourage the client to review any planning technique or position, and even relevant sample modifications to legal documents, with an appropriate Sharia scholar/advisor.

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Estate Planning for the Muslim Client

Letters of Instruction are Important

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Letters of Instruction - 1

- Muslims still comprise a small percentage of the American population and many advisers, trust companies, etc. are not familiar with Islamic law, so a letter of instruction to provide more background then might be practical or appropriate to incorporate into legal documents, can be helpful to carrying out the Muslim client's wishes.
- A letter of last instruction should be written to family and loved ones addressing religious matters. A separate letter should be written to any institutional trustee. This will enable you to communicate your client to communicate feelings in their own words.

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Letters of Instruction - 2

- What type of funeral is desired?
- What type of mourning process should be observed?
- Which religious customs, if any, should govern?
- What about guidance for those that you leave behind?
- What type of life do you want your children or grandchildren to lead?
- What type of education should children and grandchildren be given? Should private religious education be paid for even though more expensive?
- What if a child or grandchild strays from the faith?
- What types of investment policies should be pursued?

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Islam and Living Wills and Health Proxies

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Living Wills and Health Proxies

- What is defined as death? This can have profound implications on medical care decisions. Death can be viewed as either the cessation of cardio-pulmonary function or cessation of brain function.
- An agent can withhold nutrition and hydration if in accordance with Islamic religious precepts. For example, if brain death is viewed as death then life support can be withdrawn.
- Does quality of life have any relevance in light of Islamic religious beliefs?
 - See Asim Padela, Islamic Perspectives on Clinical Intervention Near the End-of-Life: We Can But Must We: https://www.academia.edu/28513722/Islamic_Perspectives_on_Clinical_Intervention_Near_the_End-of-Life_We_Can_But_Must_We
- Differences of opinion as to whether Muslim clients can donate organs but most Islamic scholars do not allow donating a body for research or medical training.

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Living Wills and Health Proxies

- What funeral and burial customs? Quick burial preferred, usually within 24 hours with no autopsy unless required by law.
- Burial Instructions particularly important for clients with non-Muslim family members.
- What religious end of life requests do you have?
- **General Religious Statement:** I wish to condition the effectiveness of this directive upon its conforming to Islamic bioethics and beliefs to which I subscribe. In order to effectuate my wishes, if any question arises as to the requirements of my religious beliefs, I authorize my Agent to seek the guidance of Imam _____ or the religious director of the Islamic Center of _____.

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Living Wills and Health Proxies

- The agent named in the health care proxy should agree to implement the Islamic religious wishes outlined in your clients living will.
- In states where a living will is not recognized, this instruction to your agent in the form of a living will can still be done, but the agreement to adhere to it may be morally rather than legally binding.
- What if your client signs a POLST – Physician Order for Life Sustaining Treatment? Can that be modified to reflect your client's Islamic religious wishes?

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Living Wills and Health Proxies

- **Pregnancy:** Pregnant women should carefully address the issues of pregnancy in a living will since considerations of mother versus fetus vary greatly between different religions.
- **Islamic View:** Under Islamic law, saving the mother's life is generally given preference over saving the life of the fetus.
- **Pain Relief:** Many people and health care providers view the alleviation of all pain to be an essential and critical goal. Not necessarily the case in Islamic law.

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Religion and Powers of Attorney

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Powers of Attorney - 1

- Islam, as does every faith, promotes charitable giving. If you have been charitable during your lifetime and would wish such charitable giving to continue, or even if you have not but would like charitable giving to be a factor considered if you are disabled, authorizing an agent under a durable power of attorney to make charitable gifts on your behalf in the event of your disability or incapacitation is essential. Otherwise, no one may have access to your funds to do so.
- If children or grandchildren are to be aided with financial help to defray the cost of Islamic religious education you may wish to expressly provide your agent with the authority under your power of attorney to pay such expenses. Addressing this in your will alone may not suffice in many situations. If paying for grandchildren's religious education is an important objective, then specifying the authority for such gifts and expenditures in your power of attorney is likely to be advisable.

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Powers of Attorney - 2

- Islamic law prohibits taking or paying of *Riba*, or interest.
- The rather generic provisions that authorize an agent to borrow money or make loans that appear in most powers of attorney need to be modified.
- The agent should also be instructed to invest assets in accordance with Islamic Financial ethics.
- Dispute resolution mechanisms that will help support a proper interpretation of Islamic law may be included in the documents. It does not seem advisable to have a secular court attempt to interpret provisions governing Islamic investment standards, restructuring a transaction to avoid interest so that it is compliant with Islamic law, etc.

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The application of Islamic Inheritance law in wills and trusts

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Islamic Inheritance Law - 1

- In a famous *hadith* (statement of the Prophet Muhammad), he said "Do not let two nights pass without writing a will."
- Islamic Inheritance laws are derived directly from the Quran, primarily from Chapter 4 verses 11, 12, and 176.
- Shares are non-discretionary. Testator may choose to leave up to 1/3 as a bequest to non-heirs.
- Lifetime gifts on the other hand have no limitations.
- Consider the conflict between Islamic bequest and state law spousal right of election. Should a prenuptial agreement be used to address this?

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Islamic Inheritance Law - 2

1. Joint Representation of Clients. Consider the impact on each spouse having different Islamic heirs, the Muslim order of inheritance, etc.
2. Modes of Property Ownership.
3. Surviving Spouse's share under Islamic Law.
4. Restricting Inheritance to Muslim Heirs. Can an heir be disinherited for leaving the faith? How can that be done without legal challenges? How does one define "Muslim" for these purposes?
5. Disparate Distributions on the Basis of Gender.
6. Recalculating Heirs upon Birth/Death.

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Islamic Inheritance Law - 3

- Enabling Surviving Spouse to Remain in the Primary Residence
- Optimizing Tax Consequences and Asset Protection while Ensuring Religiously Compliant Distributions.
 - What can be done in a decoupled state with a \$1M exemption, a desire to maximize state estate tax savings, provide for the surviving spouse, yet comply with the Quranic dispositive requirements?

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Islamic Inheritance Law - 4

- **Sample Islamic Interpretation Clause:** It is my express intent that certain dispositive provisions of my Will be interpreted in accordance with the laws of inheritance specified in the Quran. In the event of any issue arising as to the interpretation of those provisions of this Will, or the application of Islamic law, I expressly direct and authorize my Executor to consult with *Imam _____ for the resolution of same. If any beneficiary under my Will in any manner, directly or indirectly, contests this will or any of its provisions, in particular any interpretation given to the dispositive provisions intended to be in accordance with the dictates of the Quran, or brings suit or other action against any other beneficiary with respect to any matter hereunder, or with respect to any asset received hereunder, then such contest or dispute shall be submitted to binding, non-appealable, arbitration, in *CITY, *STATE, before _____ as arbitrator.

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Trusts v. Wills For Muslim Clients

- Should funded revocable trusts be the default plan (with pour over wills) to facilitate flight to a jurisdiction that does not enact anti-Sharia law?
- Can trusts be used to avoid Sharia forced heirship? Irrevocable trusts and lifetime gifts are an option.
- How can Sharia compliant investments be mandated?
- Should Sharia compliant provisions be included in trust and/or letter of wishes?
- Consider provision for appointing Sharia scholar/advisor?

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Trusts Selecting Fiduciaries

- One of the most important decisions for the Muslim client seeking to imbue estate planning documents with religious values, or to transmit a Islamic religious values to a child or other heir, is the selection of fiduciaries that have one or all of the following:
 - Knowledge of the faith.
 - Affiliation or observance of Islam themselves.
 - Sensitivity to the specific needs of the heirs in light of the client's Islamic goals and objectives.
- The person who best fits these criteria may not be the person best suited to handle investment and other fiduciary responsibilities, so that a combination of an individual fiduciary sensitive to religious concerns and an institutional co-fiduciary may be called for. The client's selection of fiduciaries has a profound effect on the administration of their estate.

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Religion and Vacation Home Agreements

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Vacation Home Tenants in Common Agreement- 1

- **Example:** Three families purchase a beach house for shared use. A tenants in common agreement governing the use of a vacation home is prepared. In addition to the usual issues concerning repair and maintenance, financing, sale, etc. However, religious sensibilities can be important in such an agreement. Consider:
- Rotation of dates of use considering religious holidays.
- Should Islamic religious dietary restrictions be observed in the kitchen (e.g., Halal foods only must be used).
- Should the financing of the property be structured to comport with religious restrictions against charging interest (e.g., Islamic law restrictions on Ribba).

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Vacation Home Tenants in Common Agreement - 2

- A dispute resolution mechanism can be included that respects religious sensibilities.

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Religion and Loans/Interest

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Loans

- There are different scholarly views on what constitutes "riba". Some say modern interest comes under the concept "riba" which connotes usury in a modern concept. If there is no change in form, such as money is repaid with interest as money, it may be viewed as "riba". Other scholars say that modern interest, such as a mortgage is not "riba". Therefore, there must be care exercised in any estate planning transaction which is based on an interest payment.

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Religion and Financial Planning

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Financial Planning and Religion

- How you spend money, the allocation to charitable purposes, religious education for children and more, can all have a significant impact on your budget.
- Wealth must be earned in an ethical manner.
- Debt is discouraged.
- *Riba* (interest) and *Gharar* (excessive speculation) are prohibited.
- Life insurance is considered impermissible by some Islamic scholars so be certain to have the Muslim client consult with an appropriate Islamic scholar before implementing an insurance plan.
- These concepts should be reflected in every Investment Policy Statement ("IPS") and financial plan.

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Investment Provisions and IPS - 1

- "The duty of loyalty requires the trustee to act exclusively for the beneficiaries---no form of 'social investing' is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries – for example, by accepting below-market returns – in favor of the interests of the persons supposedly benefited by pursuing the particular social cause."
- What the above comment means practically is that if a testator or grantor wishes a socially acceptable method of investing, which would include investing in accordance with Islamic religious doctrines, he or she must carefully word the governing instrument to make this an exception to the Prudent Investor Rule.

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Investment Provisions and IPS - 2

- For many people, maintaining a portfolio which is consistent with their underlying social morals is important. However, this may not always be reconcilable with a Prudent Investor Standard. For example, is it still feasible to use index funds if those indices would include investments which violate the social goals? Presumably, the universe of appropriate investments would be narrowed to exclude those investments which are inappropriate. Thus, a more personalized portfolio may have to be developed. If this occurs, it may affect the fees which can be charged.

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Investment Provisions and IPS - 3

- Similar to the issue of socially responsible investing is the matter of investing in accordance with a prescribed religious standard. Each of the issues raised in the preceding paragraphs concerning socially responsible investing must be addressed where a religious standard applies. Can a fiduciary invest in a manner under the Prudent Investor Rule that is consistent with both the rule and the religious beliefs of the grantor, testator, or beneficiaries?

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Religion and Charitable Giving

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Islamic Charitable Planning

- A Waqf, also known as hubous, is an inalienable charitable endowment under Islamic law, which may involve the donation of a building, or other assets, for Muslim religious or charitable purposes. The asset so donated are an irrevocable transfer that cannot be reclaimed.

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Making a Charitable Statement

- Add to your will a bequest to an organization that has been to your life, or which embodies the values you hold dear. "I give and bequeath \$10,000 to *NAME-OF-ORGANIZATION." Making a charitable bequest to a religious organization is a wonderful way to demonstrate the importance of charitable giving, religious values, priorities and more for your heirs. But, with a modicum of additional effort you can perhaps emphasize those values even more. What if the will included the bequest written in the following manner: "I give and bequeath \$10,000 to *NAME-OF-ORGANIZATION to demonstrate to my children the importance of my religious value of charity, and the importance of the *ORGANIZATION/RELIGION in my life, with the hopes that each of my children establish a similar bond with the *Church/FAITH/ORGANIZATION."
- Write a letter of final instructions, often referred to as an ethical will, to your heirs.

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Business Entities

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Sample Clause for Operating Agreement

- LLCs and other entities are commonly used in estate and related planning. These entities can also be tailored to reflect the client's Islamic beliefs.
- **Sample Clause:** The Manager is authorized and directed to structure activities and investments of the Limited Liability Company ("Company"), to the extent feasible, to be in accordance with Islamic religious principles. Such standard may include by way of example and not limitation, a prohibition against paying or earning interest based on a prohibition of making a guaranteed profit on capital. In the event of any dispute as to the application of Islamic investment standards the Manager shall contact _____ for further clarification. If such action is not feasible, or not determinative, the Manager may consult any Islamic scholar or Imam of the Manager's choice and rely on the determination of same.

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Restrictions on Operations

- If a Muslim client, or an entity owned by the Muslim client, owns commercial real estate, might restrictions on the operations be included in the operating agreement to confirm with Islamic law and conduct? Might these same restrictions be incorporated into trusts to avoid inappropriate activities by the trustee?
- **Sample Clause:** It is expressly prohibited to lease LLC real property to certain specified types of tenants such as a bar, liquor store, adult bookstore, or similar activities.
- Addressing these concerns on the formation of the entity or trust may avoid conflict at a later operational stage.

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Restrictions on Interest Activities - 1

- Under Shari'ah (Islamic legal doctrines derived from the Quran, the teachings of the Prophet Mohammed, and interpretations by Islamic scholars), Muslims are prohibited from paying or receiving interest, called "riba," for the use of money. Although the term "riba" may be translated as "usury," tradition interprets the restriction to apply to all interest. This restriction does not prevent a modern commercial real estate transaction; rather it will affect the documentation and structure of the transaction. Riba means unearned profits that are not reflective of business risk.
- Instead of charging interest on a financing transaction, the transaction could be structured with a sale to a middleman, who then resells the real estate to the ultimate purchaser. The price the middleman sells at would be inclusive of a profit that would be in lieu of an interest charge. This structure is referred to as "murabaha."

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Restrictions on Interest Activities - 2

- Another approach is to structure a partnership arrangement, called "musharaka." The lender contributes funds to the partnership, and the partnership agreement provides that the lender will participate in the profits of this partnership in accordance with a prearranged formula.
- Another method by which a transaction can be structured as similar to a leasing arrangement. The lender can purchase the property and lease it to the intended owner. At the end of the lease term, the intended owner can purchase the property for the intended purchase price. The economics are identical to a financed purchase, but structurally the transaction transforms what otherwise would have been a prohibited interest payment into rent. This technique is referred to as "ijara."

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Restrictions on Interest Activities - 3

- Inherent in each of the above modified transactions is the risk of ownership, so that the return to the "lender" is not a pure or guaranteed return equivalent to interest under Shari'ah law.

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Conclusion

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Conclusion

- Many Muslim clients want some aspects of their faith reflected in their financial, charitable, estate and related planning.
- If advisers would both ask and explain that there are broad implications more clients would wish these matters to be addressed.
- The changes required often only require a minor effort in terms of drafting but can have a profound impact on heirs and others.

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Resources

- Yaser Ali's new ABA book titled "Estate Planning for the Muslim Client"
- <https://www.americanbar.org/products/inv/book/347245059/>

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Questions or Comments

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