ESTATE PLANNING

Society of FSP™ Financial Service Professionals

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Estate Planner as Estate Counselor

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Introduction

The role of estate planner has evolved over time, but the changes in recent years have been dramatic compared with those in the past. The most dramatic change, however, may prove to be President-elect Donald Trump's proposed repeal of the estate tax. So evolution of the role is not merely a theoretical platitude but a reality I see in my own practice, one with which I continue to grapple. But the evolution of the estate planning process is not limited to estate planning attorneys but affects every profession involved in estate planning: wealth managers, CPAs, insurance consultants, attorneys, and more. These changes affect the services each of the allied estate planning professionals provides to clients, how each communicates and markets to clients, and more. A significant impact can be seen in how each of the allied professions must work with other professionals to serve clients in the new estate planning environment. It is not just how we serve and interact with our clients alone but how we work with one another to meet clients' evolving needs that will determine our success.

Factors Changing Estate Planning

The evolution of the role of the estate planner flows from the changes to estate planning and is be-

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EDITOR'S COMMENTS

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Gary L. Flotron, MBA, CLU, ChFC, AEP

Back in November 2015 at the National Association of Estate Planners & Councils Conference and then again in January 2016 at the Heckerling Institute, I heard Marty Shenkman speak on his concept of the estate planner as estate counselor. My immediate reaction to his almost revolutionary and profound perspective was a WOW and that he was right on! At both conferences Marty's talk was a potpourri of insights, thoughts, obser-

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ing transformed by myriad factors in addition to the changes in tax law.

- **Commoditization:** The traditional services all the allied professionals have provided are being commoditized at a rapid pace. Even if you are confident that your clients will not choose robo-advisors, TurboTax, and LegalZoom over you (and you should stop being so confident), many clients' perceptions of what their professional advisors accomplish has been forever changed by the growth of commoditized alternatives. A senior executive at a major wealth management firm shared his view that 10 years in the future, the investment results of many of the larger wealth managers will likely fall into a fairly narrow band of performance. What he forecasted would differentiate one advisor from the others is service. This observation applies to all of the estate planning disciplines and suggests that the means to differentiate any practitioner will be something more than a good tax return for a CPA, asset allocation for a wealth manager, or trust instrument for an attorney. Personal service, with an emphasis on addressing issues that commoditization cannot manage, is the key. I know your will, asset allocation, or 1040 is better than all others, but does the "better" really matter to the client? Does it really differentiate your documents, investments, useful techniques and ideas, and wisdom gained through a distinguished practice of more years than he probably wants to admit.

EDITOR'S COMMENTS (cont'd.)

When checking back at the materials from these conferences and other publications by Marty, I was unable to find any written information or mention of this revolutionary paradigm shift of estate planner to estate counselor. So, I called Marty and asked him if he would mind writing an article for *Estate Planning* on the "Estate Planner as Estate Counselor." He told me he had never written on the topic, and he graciously agreed to give *Estate Planning* an exclusive, first-time article on his concepts and thoughts on the subject.

Rather than write the article in the traditional third-person fashion for academic and technical articles, Marty wrote this article in the more personal first-person style. What you will read in his article are the factors that are causing fundamental changes to the practice of estate planning, what needs to be done to respond to the transformation of the estate planning environment, and how Marty has personally grappled with the changing estate planning process.

What I particularly like is Marty's call for collaboration between all the members of the estate planning team—that I should now call the estate counselor's team—to more fully serve and gain complete perspective on the client and on serving the client's needs, and to put the client first.

From this article, you will learn that Martin M. Shenkman is not only a prominent estate planning attorney and outstanding practitioner, but also a humanitarian and extremely caring person, which is the hallmark of a true professional.

I hope you enjoy this issue of *Estate Planning,* and please tell us what you think on the Estate Planning Section eGroup. ■

ments, or tax returns from all others in the client's perspective? This trend will only grow as artificial intelligence makes more of the services and guidance professionals provide obsolete. Successful professionals will embrace these changes instead of clinging to what has historically been done. Forward-thinking advisors will distinguish themselves with new, better, more tailored, and more creative guidance and services. Commoditized offerings of professional services cannot replicate the experience and knowledge of a personally involved professional.

- **Aging Population:** Those over age 65 constituted 12.4 percent of the population in 2000 but will constitute 19 percent of the population by 2030. The growth rate of the older population is projected to slow after 2030, when the last of the baby boomers attain age 65-plus. The U.S. Census Bureau projects that the population aged 85 and over could grow from 5.5 million in 2010 to 19 million by 2050.[1] Americans 85 and older are the fastest growing demographic group.[2] As clients age, they need different and more personal services from what most advisors have traditionally provided. Providing a client a durable power of attorney to designate an agent to handle financial matters in the event of disability has been a cornerstone of estate planning, but is that really enough to protect and help most aging clients? Not really. More is needed, and the "more" is not the traditional document preparation estate planning attorneys are accustomed to, nor is it the traditional services many advisors on the team have provided.
- **Boomers Transform Retirement:** Baby boomers born between 1946 and 1964 number 75 million. Their move into retirement will increase the need for retirement planning and the need for estate planning services. As boomers flow into retirement, their cohort will remake retirement and estate planning, just as this cohort has shaped so many other areas of life. Planning for boomers as a whole will likely have important nuances that differ from planning for prior generations. As one example, more boomers will work to a greater degree postretirement than any prior generation has. Thirty percent expect to retire later than they had planned. Of this group, 27 percent say they need their salary, while 32 percent report that they enjoy working.[3] This changes cash flow projections, income tax planning, insurance needs, and more.
- **Demise of the Estate Tax and the Rise of the Basis Step-up:** The change in the tax environment affecting estate planning has been discussed so frequently that it has become the new mantra of planning. The estate planner for the past few decades became so focused on minimizing estate taxes that the role was that of an "estate tax minimizer." It is common knowledge that the current large estate tax exemption ($5,490,000 in 2017) and fewer than 20 states with a death tax make estate tax irrelevant for most clients. While there has been much discussion of the increased importance of maximizing the step-up in income tax basis on death, this goal, while certainly worth pursuing, will never be the driver that the estate tax had been. While it is possible that future legislative changes could eliminate the estate tax and perhaps replace it with a capital gains tax on death (and perhaps a capital gains tax on gifts), the transformation of the practice of estate planning has evolved so far that the relevance of all tax planning will never return to its old stature for other than the ultra-high net worth clients. I think we've all grabbed on to the basis step-up idea since we have been so conditioned to focus on taxes. We have to make a determined effort to see the broadening of what constitutes estate planning.
- **Family Structure:** The traditional intact family of mom, dad, and children accounts for only about 20 percent of family units. Most estate planning has been on the assumption of an intact family, which is only a fraction of the family units planners deal with. Selection of fiduciaries, trust structures, and so forth has to evolve to address the realities of most client circumstances.

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Responding to the Transformation of the Estate Planning Environment

- **Collaboration:** A key to providing better advice and service is to foster a collaborative effort among all of a client's advisors. Planning has become more complex, even if the estate tax has waned in importance for many clients. Advisors who collaborate will obtain more and better information on their clients, have access to more and better ideas, and have a consistent planning message delivered to their clients. Too often practitioners talk collaboration but retreat to their silo perspectives. A client might be able to get a will on the Internet, use tax return preparation software, or use an online asset allocation template, but even if these are all done, LegalZoom and TurboTax don't communicate with your robo-advisor to create an integrated plan, or to identify and address unique client circumstances. Professionals who collaborate best will provide better service to their clients and will thrive. These professionals can inject significant creativity or tailoring to client needs into the traditional tax-oriented estate plan (i.e., bypass/qualified terminable interest property trusts and insurance), or what might become the new "tradition" if a Trump administration successfully repeals the tax. Many of these traditional plans were fairly routine from client to client. A decline in the estate tax planning emphasis (whether the estate tax as we know it or as it may be modified by the new Trump administration) and a shift to issues of aging (assuring resources for decades of postretirement life, mitigating risks of identity theft and elder financial abuse, etc.) require deeper and more personal information on the client. Collaboration is critical to obtaining this richer information to help clients plan, so the evaluation of planning goals requires more collaboration than traditional estate tax planning.
- **Technology:** Technology has and continues to transform the planning landscape. Document-generation systems have changed how estate planning documents are drafted. The Internet has transformed marketing, client communications, and the ability to work from anywhere. But many advisors I work with have not adapted to new technology and its capacity to transform their practices. Estate planning from a legal perspective has been transformed by paperless technology, document-generation software, and more. But have practitioners really embraced all that technology can offer? Many estate planning attorneys in supposedly paperless firms still work with traditional paper files and Redwelds, bring yellow pads to meetings, and so on.
- **Modern Estate Planning:** Perhaps a simple way to illustrate modern estate planning is to contrast it to traditional planning. A traditional trust for a child may have held assets, paid income each year, and at age 35 distributed all assets to the child. A modern trust would have an independent trustee, often an institutional administrative trustee. The trust should have no income distribution requirement but preferably a purely discretionary distribution standard. The trust should not end at any given age but rather continue for as long as the law permits in order to secure and maintain tax, asset protection, and divorce protection benefits. Traditional trusts were quite rigid. A modern trust might include an array of provisions to enhance flexibility: A trust protector role may be added so that a person independent of the trustee can be granted the authority to make changes to the trust (change trustee, situs, or governing law); the trustee may be given the authority to merge (decant) the trust into a new trust to modify administrative provisions; and the trustee may be given authority to change governing law and situs if no trust protector is serving. Many modern trusts are structured as directed trusts so that a family member or other designated person can make investment decisions while still having an independent institutional trustee. Modern trusts are

more likely to be formed in a trust-friendly jurisdiction than in the client's home state. From a tax perspective most trusts are structured as grantor trusts to facilitate planning flexibility (e.g., swap powers and income tax burn on the grantor's estate). Flexible trusts might now include provisions to permit, if advisable at some future date, vesting ownership of some or all trust assets back in the grantor to cause estate tax inclusion in case that becomes useful in the post-Trump estate planning era.

How I Have Grappled with the Changing Estate Planning Process

While I certainly have no particular training or expertise in practice management and am merely grappling with the change that I see around me, some of the steps that I have taken might prove helpful to others, or at least stimulate other ideas of how to capitalize on change. These include:

- **Communications**: As estate planning goals have grown more complex, and in particular, more financial in focus, collaboration is more important than ever before. However, collaboration requires two steps: client authorization and colleague cooperation. I ask new clients for the names and contact information of their other advisors and authorization to consult with them. In my practice, I address this by having new clients sign an "intake form" that includes a place for this information as well as a box for clients to initial authorizing communication. This is completed, initialed, and signed at the first meeting to ensure that it is done. Few clients have questioned the process, and none have rejected it. In many cases, I will later have a more formal authorization letter we prepare over the client's signature to all advisors authorizing and directing them to collaborate. This is often helpful when clients initially do not have all the key advisor roles filled or have other gaps in their team.
- **Memorandum/Letter**: Following most meetings, I prepare a draft letter or memorandum summarizing the discussion with the client and circulate it to all advisors for comments before sending the final letter/memorandum to the client. The results of this have ranged from nothing (in a modest number of cases where, to my amazement, some colleagues simply don't want to collaborate by reviewing and commenting on a letter) to the more common result of various advisors each adding important facts that I or others were not aware of. In the best situations these communications have served as the catalyst for significant improvements in the client's planning. I have found that planning memoranda have become more eclectic and varied as the estate planning process has broadened. As the tax issues have taken up less air in the planning room, the array of planning topics has grown significantly. Property and casualty insurance, long the stepchild of the planning process, is now a common discussion. While asset protection has often been viewed through the lens of complex trusts or family partnerships, the first step in the process should be a discussion of risks and insurance coverage. It is common to find clients with no or inadequate excess liability (i.e., umbrella) policies. Another common issue is a client insuring a rental property, or a property that an adult child occupies, as if the property were a principal residence of the client, instead of based on its actual use. The planner's role has broadened and evolved in every area of planning.
- **Paperless and Technology**: While my office is paperless, I have found for complex estate planning transactions (e.g., a note sale to a grantor trust), it is helpful to have a paper file that is quickly accessible to address calls and questions from clients and other advisors. These files are organized in a manner similar to a real estate or corporate closing binder. This is one of a few examples where paper files can enable better service. But the planning and drafting process has changed more fundamentally. Drafting a document using document-generation software permits a different type of thought process from drafting documents using document templates, which had been the norm for so long.
Further, the reduced emphasis on drafting permits more opportunity (in terms of time and fees) to consider the bigger planning picture. It also reduc-

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es costs, making clients more willing to commit resources to more-significant planning objectives. I have found that compared with perhaps 5 years ago, overall billing for most clients has shifted. There is significantly less time spent on drafting and revising documents and more time on meetings, collaboration with colleagues, and other value-added efforts. I routinely find clients generally welcome Web meetings for routine interactions, such as document reviews. Capitalizing on technology allows estate planners to provide more important and broader services as they limit time spent on more traditional or core services.

- **Drafting and Planning for the Aging or Infirm Client:** A better approach to the traditional durable power of attorney (although that document is not eliminated) is a fully funded revocable trust. While revocable trusts are almost universally considered to minimize or avoid probate, their most powerful use is as a tool to protect an aging or ill client. If a cotrustee is named, then the client can have assistance to the degree needed in light of the client's circumstances at any point in time. The traditional concept of a client being well and then disabled is generally not the reality. The reality of the aging client, barring an acute medical event or injury, is imperceptible declines in capability over a long time period. The power of attorney is far less useful than the living trust is to address the varying needs of a client who wants to stay in control. Consider using a separate tax identification number for the revocable trust to hinder those seeking to commit elder financial abuse or identity theft. Build in a trust protector role to provide a checks and balances on successor trustees if the client is incapacitated.
- **The Moving Quarterback:** It seems that each advisor would like to be the quarterback of the planning team. Sometimes this occurs naturally because one advisor has more knowledge or ability than the others. Often it is a power play, sometimes subtle and sometimes overt. The concept is outmoded. There are times in the planning process when the estate planning attorney should serve in the role as team quarterback. There are other times when the input or expertise of the CPA, wealth manager, insurance consultant, or other advisor should have

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Articles should focus on practical applications of topics and trends within the broad area of estate planning. Specific topic areas include:

- Wills and trusts
- Estate and gift tax planning
- Charitable giving
- Wealth accumulation
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that adviser serve as quarterback. A more effective approach is for the role of quarterback to shift as appropriate for the phase of planning. When a significant plan is being structured, it might be logical for the estate planning attorney to assume the quarterback role. Once the plan structure is in place, the quarterback role may shift to either the wealth manager or CPA.

- **Jigsaw Advising:** The model of many wealth management firms has been to expand the presence of a range of advisory functions. Some firms have deeper benches of estate planning talent or tax advisors than the client's law or CPA firm. The expertise of law and CPA firms in the estate planning specialty varies significantly. Instead of viewing the roles of each specialty in a rigid manner, it would be more productive for all advisors to view it more like a jigsaw puzzle with pieces of varying shapes fitting together to make the whole. If a particular advisor is weaker on a particular skill or matter, another advisor should assume a more proactive or involved posture. Too often, instead of assuming a greater role to complement the shortcomings of another advisor, the role is usurped, which undermines the team, hinders the planning process, and harms the client. This makes the role every estate planner serves, regardless of profession, more variable and challenging.
- **Client First:** As the nature of the estate planning process evolves and technology advances, tradi-

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SIX REASONS TO PLAN YOUR ESTATE

This chart, created by attorney Phil Levin, can be a useful tool for financial service professionals in communicating the value of estate planning to their clients.

	With a Plan	Without a Plan
1	YOU decide who receives your probate assets and nonprobate assets.	State laws of intestacy determine who inherits all of your assets, regardless of their age or experience.
2	YOU decide how and when your beneficiaries will receive their inheritance.	State law controls when your heirs receive all assets. Your children could be given complete control too soon.
3	YOU decide who will manage your estate, by appointing your executor.	The probate court appoints an administrator to manage and distribute your estate.
4	YOU can plan now to reduce federal estate taxes and state inheritance taxes and administration expenses.	Expenses are higher due to increased legal proceedings and fewer opportunities to save federal estate taxes and state inheritance taxes.
5	YOU select the guardian(s) to raise your children and manage your assets until they attain specified ages under there terms of your will, which can include trust provisions for your family.	The probate court appoints a guardian to raise your children and manage your assets until they attain age 18, at which time an outright distribution to them is required by state law.
6	YOU can provide for the orderly continuance or sale of a family business.	Financial loss and family hardships often result upon the death of a business owner, from an untimely forced sale or liquidation.

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tional planning often falls short. For example, it has been traditional that when a client dies the estate planning firm has a paralegal or junior associate marshal assets. While this process is certainly necessary, it often can be avoided. If clients are encouraged to consolidate assets and planning with a single wealth advisor, the need to marshal and value assets postdeath is obviated to a mere routine administrative function of the wealth advisor.

Conclusion

Estate planning needs and tools have evolved. The traditional role of estate tax minimizer has evolved into a broader and more complex role of estate tax counselor as the estate planner has to address an array of family, aging, and other planning needs in a more collaborative manner than had previously been the norm. Planners, whatever profession, can thrive in this new evolving environment and provide a better level of service to clients when they broaden their perspective. ■

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