Martin M. Shenkman's Meeting Notes from Heckerling 2018: Days 4 and 5
Thursday Morning/Afternoon Notes and Friday Morning Notes

These notes are prepared and published quickly without proofreading or review so be cautions that there will be typographical errors, citation omission and mistakes.

Over the course of many years, **LISI** has been delighted to provide members with **Marty Shenkman**'s notes from the proceedings at the **Heckerling Institute on Estate Planning**. Heckerling, as it is affectionately known, is the nation's leading conference for estate planners, attorneys, trust officers, accountants, insurance advisors and wealth management professionals. 2018 is the 52nd installment of Heckerling, and for those not fortunate enough to be in sunny Orlando, the meeting this year runs from Monday, January 22nd through Friday, January 26th.

These materials have been published with specific permission from the **Heckerling Institute on Estate Planning** and **LISI** very much appreciates the courtesy! Because of the length of Marty's commentary, **LISI** has made his notes from the sessions on January 25 and 26, 2018 available to members through the following link:

Related LISI Webinars: on February 2, 2018 2pm EST Marty will be joined by Jonathan G. Blattmachr and Joy E. Matak to present a webinar on creative trust planning strategies after the Tax Cut and Jobs Act of 2017 which will reflect ideas gleaned at Heckerling. Click here to register: **[LINK].** On February 8, 2018 1pm EST Marty will present a webinar on planning nuggets gleaned from the week long Heckerling proceedings, the highlights from the extensive notes LISI will publish. Click here to register: **[LINK].**

Martin M. Shenkman, CPA, MBA, PFS, AEP, JD is an attorney in private practice in Fort Lee, New Jersey and New York City who concentrates on estate and closely held business planning, tax planning, and estate administration. He is the author of 42 books and more than 1,000 articles. Marty's latest book, **Estate Planning After the Tax Cut and Jobs Act of 2017**, is available as an e-book on

https://www.amazon.com/Estate-Planning-after-Jobs-2017-ebook/dp/B0797F1NVD/ref=sr_1_5?s=books&ie=UTF8&qid=1516724216&sr=1-5&keywords=martin+shenkman or as a PDF download on www.estateplanning2018.com. Some have inquired about a hard copy of the book. Due to time constraints there is no hard copy but you can simply download and print the PDF from the first website above.

Steve Leimberg recently noted that:

> Every tax professional in the country will (or should be) reading this book! This is the most complex and far reaching tax law passed in the over 50 years I've been studying, teaching, and writing about tax law and this resource arms you not only with the necessary and vital information you need to know but also the thinking and planning concepts of three of the brightest minds in the tax world!

Marty is the Recipient of the 1994 Probate and Property Excellence in Writing Award, the Alfred C. Clapp Award presented by the 2007 New Jersey Bar Association and the Institute for Continuing Legal Education; Worth Magazine's Top 100 Attorneys (2008); CPA Magazine Top 50 IRS Tax Practitioners, CPA Magazine, (April/May 2008). His article "Estate Planning for Clients with Parkinson's," received "Editors' Choice Award." In 2008 from Practical Estate Planning Magazine his "Integrating Religious Considerations into Estate and Real Estate Planning," was awarded the 2008 "The Best Articles Published by the ABA," award; he was named to New Jersey Super Lawyers (2010-15); his book "Estate Planning for People with a Chronic Condition or Disability," was nominated for the 2009 Foreword Magazine Book of the Year Award; he was the 2012 recipient of the AICPA Sidney Kess Award for Excellence in Continuing Education; he was a 2012 recipient of the prestigious Accredited Estate Planners (Distinguished) award from the National Association of Estate Planning Counsels; and he was named Financial Planning Magazine 2012 Pro-Bono Financial Planner of the Year for his efforts on behalf of those living with chronic illness and disability. In June of 2015 he delivered the Hess Memorial Lecture for the New York City Bar Association. His firm's website is www.shenkmanlaw.com where he posts a regular blog and where you can subscribe to his free quarterly newsletter Practical Planner. His website www.shenkmanlaw.com has information of interest to advisers and you can register for his quarterly planning newsletter Practical Planner.

Heckerling Institute 2018: Thursday January 25 and Friday January 26

1. **<u>Dealing with Foreign and Domestic Community Property Issues in Your State</u>**. Joshua S. Rubenstein.
    a. US Stock Market and Real Estate is attractive to foreign citizens, but they also bring their own unique views/laws on property when they purchase those assets.
    b. Loss of the SALT deduction will cause additional movement throughout the US, as people move from high tax states to low tax states.
    c. Could have conflicts when you have anyone who has assets in more than one state, as each has a different legal system and clients may not realize the magnitude of the differences. In contrast, Europe is the exact opposite as their small countries all have noticeably different cultures and languages so that it is obvious and assumed that there may be different systems.
    d. American legal regimes are based on three different property systems: UK, French or Spanish. Need to determine which style you are working with.
    e. Community Property States: Anywhere from 8 to 11.
        i. 8 states have community based upon their common law. Each one has slight differences in the rights to access during life, whether premarital assets are subject to community property, etc.
        ii. Wisconsin adopted community property law, but you can opt out of it.
        iii. Elective Community property states:
            1. Alaska (need to be residents of Alaska, or create an Alaskan trust)
            2. Tennessee (the most recent, 35-17-1013108).
            3. South Dakota.
        iv. As California and Texas have community property, there is a disproportionate amount of Americans living with community property, so even though there are only 11 states, a large amount of the country lives under this regime.
        v. Puerto Rico has community property.
    f. Three broad categories of community property:
        i. Universal Community (French based). When you get married, ALL of your property becomes community, even premarital. Forced heirship as well, which defers it to the second death.
        ii. Community of after acquired property (most of Europe)- property acquired after the marriage is community.
        iii. Community on dissolution (Latin America)- Community property rights triggered when the marriage ends, either through death or divorce.
    g. Additional points on community property.
        i. Community on dissolution. Title controls until marriage ends.
        ii. US states have community on death. On divorce it is 50/50.
        iii. Restatement says common law of US presumes as you move from state to state the character of the property stays the same. So, if you have community property and move to non-community property state it is presumed to be the same unless you have agreement to contrary. Gifts and inheritances during marriage are exempted.

    iv. If someone comes from France property is presumed to be community unless lived, for example, in the UK, and should have presumed it was separate property.
    v. 16 states have uniform act - Uniform Dispositions of Community Property Death Act. This Act enforces the community nature of property on death. Lifetime transfers not addressed in the Act.
    vi. Example, client moves to NY, a non-community property state, from a community property country or state. Apply the law of jurisdiction from which couple came. So, unless proactive action is taken the property retains the community property characterization it had in the prior jurisdiction.
    vii. 3 areas where federal legislation trumps state law in rights of succession:
        1. ERISA.
        2. Copyright law (if copyright holder dies before first renewal period the revert to heirs, so it is analogous to a forced heirship).
        3. Bankruptcy.

h. Situs
    i. For tangibles and realty, the law governing is controlled by the law of the situs. In all other instances the law is controlled by law of domicile.
    ii. In Re Schneider's estate – NY court was going to apply Swiss law but Swiss law would look to law of domicile, so NY applied NY law because Swiss law would have looked to NY law.
    iii. Holland conveys property rights on unmarried couples.
    iv. Most civil law countries that have community property have different rules as to which law to apply.
    v. Three possible laws that could apply to community property on marriage: celebration, original matrimonial domicile, current matrimonial domicile.
        1. Example: Mexican couple moved to NY. Husband's position was that the move to New York severed the Mexican community property laws that would have otherwise governed the assets. Wife took position it was community property under Mexican law. Experts said apply Mexican law in creation of property in the marriage. But Mexican law provided that you have to look to law of the location of the celebration of the marriage. The couple had a destination wedding in Miami so New York law applied FL law.
        2. So, when couple moves unless you take affirmative action to change character of property you have not severed.
    vi. What about bank accounts in different states? If invested in state without moving to that state, presumption is that they expected to be governed by laws of state in which they invested.

i. Non-titled spouse has current vested rights.
    i. Forced heirship rights are easy to avoid. Sign a contract that by laws of state that does not have forced heirship.
    ii. You can convert interests to something different.
    iii. If mixing civil law and common law, it is complex.

iv. Civil law has concepts of movable property. Different concept. US person owns mortgage secured by French real estate. US would say US law applies. In France a mortgage secured by French property is secured by immovable property so governed by French law. Irreconcilable differences opposite results. Moral it is best to plan in advance.

j. Matter of Renard.

i. Secretary in NY. Retired to France. Son claimed assets were his under French forced heirship law. NY Will. NY court said NY law governed NY property, but that son could in fact benefit from France's forced heirship law as to non-NY situs property, but in this case, that was quite limited.

k. Income taxation of community property.

i. Poe vs. Seaborne - income from community property is divided 50/50.

ii. Taxpayers began to abuse this so Congress changed the law. For example, If the wife was American and she moved to Columbia and married a wealthy Columbian, she had to report ½ of all income as community property income. That But if a very wealthy American business person moved to Columbia that wealthy American could have under prior law shifted ½ of their income to the Columbian spouse thereby avoiding US income taxation on ½ of income. Congress acted to close this loophole.

iii. In 1976 Congress enacted Sec. 879 which provides:

1. If community earned income it belongs 100% to person who earned it.
2. Community business income belongs to person in business.
3. Community income form premarital property that is separate belongs to person that owns that property.
4. Only passive investment income is divided 50/50.

l. Transfer taxation of community property.

i. Only ½ of community property is included in return.

ii. Tracing rules avoided because 50% is an irrebuttable presumption.

iii. Double step up in basis.

iv. Sometimes want to sever community nature of property, e.g. for divorce protection. Example – don't want premarital property converted to community property.

v. Sec. 879 is an income tax section and has no bearing for transfer tax purposes. So, if non-moneyed spouse lives in community property jurisdiction with moneyed spouse, and if moneyed spouse makes large gift that non-moneyed spouse is subjected to US gift taxation. If neither spouse is a US citizen then only subjects US situs property to transfer tax.

vi. Plan for above using prenuptial or marital agreements.

vii. In UK until recently prenuptial agreements were unenforceable. Now will consider if fair, but that is still not the enforceability that may be desired.

viii. Some countries enforce prenuptial agreements but not post-nuptial agreements. Theory is a post-nuptial is in contemplation of divorce.

m. Step up in basis for community property.

i. Really it is not a step up but more akin to a mark to market regime as basis can be stepped down as well.

ii. Automatic discount because each spouse owns ½ interest.
iii. If client is not residing in a common law state you can replicate. If you knew who would die first you can put all assets in that person's name.
iv. Instantaneous creditor protection as creditor can only get rights and non-debtor spouse has rights. In common law states can use tenants by entirety for real estate, a few have extended to personal property.
v. Disadvantages of community property.
  1. Gifting is harder as spouse must sign.
  2. For transfer tax purposes only can deduct ½ of expenses since only ½ property owned.
  3. Harder to do GRATs and QPRTs if spouse has interest included in estate so must sever the community property interest first. How long do you have to wait from time of severing?

n. Preserving Community Property States.
  i. Have to do an accounting to figure out title.
  ii. You can segregate assets having community and non-community assets.
  iii. Use joint revocable trusts.
  iv. If you retitle assets you have argument that you are subject to law of you are living in.
  v. Have community property agreement.

o. Ethical considerations.
  i. One person can coordinate planning but do you need separate counsel to sever community property interests? It may change outcome if divorce follows.
  ii. Cover in engagement letter.

2. **<u>Divided Trusteeship and the New Uniform Directed Trust Act</u>**. Robert H. Sitkoff.
  a. Introduction.
    i. Directed trusts raise issues as how to allocate law of trusteeship.
    ii. Prior to directed trusts use to allocate between co-trustees. Today the proliferation of directed trusts gives rise to issue of how much of law of trusteeship should be assigned to adviser instead of trustee and what that means for the trustee.
    iii. Uniform act is set of default rules of construction.
    iv. Points to consider.
      1. What should be the fiduciary obligation/duty of the directed trustee.
      2. What do we do with non-fiduciary matters in directed trust?
      3. What about Acceptance, limitations periods, vacancy, etc. Has adviser accepted appointment? Can the adviser sue? If instrument provides no answers most state laws have no answers.
      4. Co-trusteeship. How can law of co-trusteeship law be reconciled with directed trustee. Can one co-trustee direct the other?
      5. Scope of uniform act and elaborate system of exclusions. The uniform act has made efforts not to disrupt existing trust practices.
  b. Scope and exclusions.

i. A non-trustee with power of direction, e.g. investment director. Focus on power to someone who is not a trustee. A trust director holds power of direction regardless of title (e.g., investment advisor or director all the same). A trustee subject to direction is a directed trustee. Note that the term “trust director” is used to generically encompass a “trust advisor” or other similar positions.
ii. Broad enough to include power to tell trustee to do something, to make an investment or to veto an investment, or to amend terms of a trust, or to act by directing a trustee.
iii. Term includes power over investment management. Comment to Sec. 6 for a non-exhaustive list.
iv. Anny power over trust given to non-trustee triggers statute.
v. Exclusions.
    1. Trustees are excluded from coverage by the Act since the Act is not remaking law of trusteeship.
    2. Any power over administration of trust held by non-trustee – this is an open-ended structure. Only has powers granted by trust. Thus, a director only has the powers expressly granted by the trust instrument. An alternative model would be what is referred to as an “off the rack” list of powers. This is where the statute gives powers to anyone named as a particular director, such as an investment adviser. Opted for the enabling structure instead of the bundling approach because they did not have confidence that any selected listing or bundle of powers would necessarily reflect what the draftsperson wanted.
    3. Thus, a trust director is creature of the instrument and has only powers granted by instrument.
    4. Further 6b1 suggests a change to drafting practices. Unless the terms of the trust provide otherwise, a trust director may exercise any further power appropriate to the powers expressly granted by the instrument. This is analogous to a “necessary and proper” clause so you have ancillary powers to undertake the actual specific powers granted. For example, even if not stated in the instrument the director will have the power to bring litigation, to employ consultants, etc. as necessary to carry out the duties given. In a South Carolina case, Schwartz v. Wellen, the trust protector did not have standing to bring litigation. If you have 6b1 language, or the statute provided it, then it would give the director all further powers to resolve any difficulties in the enabling structure. This resolves issues of further or ancillary powers that were overlooked.
vi. Exclusions.
    1. Give non-fiduciary power of appointment.
    2. Power of direction literally, or DE statute, holder of POA is swept into trust regime and could be characterized as a fiduciary. Such existing statutes, if taken literally, could destroy a power of appointments effectiveness.

3. So, the Act carved out powers of appointment.
4. You can have fiduciary direction committee or non-fiduciary direction committee. So, people can order distributions.
5. Uniform Act 5c power to distribute property is presumptively not a fiduciary power. POAs generally aren't drafted to expressly provide that they are not fiduciary powers.
6. Power to remove or appoint a trustee. That is a power over the trust. Without an exclusion that person would be a fiduciary. Under many state statutes that person may be a fiduciary.
7. Settlor over a revocable trust. If you can revoke you have power to command the trustee in every respect. That means settlor has power over trust. No one wants that type of typical revocable trust to be characterized as a directed trust. This is similar to power of appointment issue. No one wants settlor subject to that, so the Act excludes it.
8. Power of beneficiary is a power over the trust but if the power only effects that particular beneficiary, it makes no sense to make this a fiduciary power subject to a fiduciary duty. However, if it is a power over others then the Act would address it. Example: A majority of the beneficiaries can release the trustee. Case law says no. but the Act says yes as those persons being trust directors to the extent they can release/bind other beneficiaries and is not by virtual representation.
9. Settlor's tax objectives - Sec. 5 provides that a power over the trust, and power must be in non-fiduciary capacity to achieve settlor's objectives, then the power is held in a non-fiduciary capacity. Example: Power to substitute assets to achieve grantor trust status. A swap power is a power over the trust and under some state statutes that would make the holder automatically subjected to a fiduciary standard, but that would negate the intended result (because a swap power must expressly be held in a non-fiduciary capacity to accomplish the objective of the provision).

c. Allocating fiduciary responsibility.
   i. What is fiduciary duty of trust director, and what is fiduciary duty of the directed trustee in a trust with a trust director? How do the duties of each relate?
   ii. Most state statutes say that a trust director is a fiduciary. But most statutes end at that point without clarifying what type of fiduciary the trust director is, and what fiduciary duties are imposed on that director. The Act says that the same duty is imposed on a director as would have been imposed on a trustee under similar circumstances. Functionally a trust director has like duties to a trustee with that similar power. Can this vary? Yes, they can vary by terms of trust to extent you could vary those duties or responsibilities for a trustee. This imports state law governing trustees to also govern directors. Trustee duties vary from one state to another so this

applies state duties as to trustee to the director. This resolves issue for court as to what it means that the director is a fiduciary. Answer is look to local law governing trusts.

iii. A trust might say Rob is trust director and Rob has no function until a beneficiary requests Rob make distribution. A springing power. Once sprung would have duties of a similarly situated trustee.

iv. 8b excludes a medical professional acting in such capacity from being a director/fiduciary. For example, a trust instrument might provide: "A committee of my children and my physician shall determine my competence or sobriety." The medical professional has a power over the trust but do not want to saddle the physician with a fiduciary duty since none would act subject to that risk/liability. So, the Act carved out the physician but everyone else is subjected to the rules governing a director.

d. What about fiduciary duties of the directed trustee.

  i. Approaches.

    1. UTC 808/common law – has failed. Not a viable option. Every state that has legislated on directed trusts has done something different then UTC 808. Only states with 808 are those that adopted UTC in its entirety.
    2. Some state laws provide that a directed trustee has no duty, example AK, NJ, NV, and SD have this. The theory is that the greater includes lesser. I could have made the person named director a trustee, so why can't I give all duties/liability to the director. This would relegate the role of trustee to a ministerial one. Opposing view is to say directed trustee has a very reduced liability, e.g. DE says directed trustee must avoid willful misconduct. You're still a trustee and must have some duty but that duty is substantially reduced when a director is named.
    3. The Uniform Act follows the above DE model. The number of DE directed trusts in DE suggests the reduced standard is sufficient to make directed trusts work. Some feel willful misconduct may be more protective of directed trustee then a "no duty" provision. Under the "no duty" regime a court might find an implied covenant of good faith which would actually be a harsher standard for the directed trustee.

  ii. Act says directed trustee must take reasonable actions to comply with a direction given by the direction trustee. Must act reasonably in executing. Directed to buy Apple stock, you have to act reasonably. You cannot self-deal. You cannot ignore order for three weeks (e.g. director directs the trustee to by ABC stock and the trustee ignores the order for an unreasonable period of time), etc.

  iii. The Act provides a safe harbor for the directed trustee to petition for instruction in order to follow the direction. The trustee has a duty to comply, but the trusts must have a safe harbor if it does not comply. What if the instruction to the directed trustee is not clear or trustee might worry

that following instruction is itself might constitute willful misconduct. So directed trustee can file for instructions on how to proceed.

e. Information sharing.
    i. Another important problem that is insufficiently addressed in existing statutes is the sharing of information. Example: Distribution director must communicate with investment trustee or director so that a proper investment allocation can be devised with consideration to distribution liquidity needs. Example: Protector amends the trust but doesn't tell trustee. Or the investment and distribution directors don't speak to each other about how distribution needs affect investments. If instrument did not address information sharing problem it is unclear how to resolve this. Act Sec. 10 provides all trust directors have duty to give information reasonably related to trustee duties and vice versa. All fiduciaries must affirmatively and responsively share information.
    ii. This is adapting law of trusteeship for fracturing of trustee duties to various fiduciaries.
    iii. Sec. 10 regarding sharing information is subject to the rule in Sec. 11 which states that there is no duty to inform or advise anyone else that you think what they are doing is a bad idea. To overcome Rollins case. You do not have a duty to monitor a trustee etc. concerning an instance in which you might have acted differently. If you do give advice some time that does not create a duty to give ongoing advice (or to have an ongoing responsibility).
    iv. There is a safe harbor to rely on what other fiduciaries communicate to you. You can, for example, rely on a valuation given or other information subject only to you own willful misconduct.

f. Subsidiary rules of trusteeship.
    i. Rules of decisions for jointly held powers. If committee holds investment power is unanimity required or majority? It is majority under act.
    ii. Sec. 16 provides that state law applicable to trustee as to acceptance, reasonable compensation, resignation, removal, vacancy, etc. apply by default to director. This can provide fill in the gap rules for directors when the trust instrument is silent and it does so without creating new law or complexity, but buy piggybacking existing state law regarding trusts.
    iii. Exception for reasonable compensation. You don't want statutory commissions for many of the director roles.

g. Litigation issues.
    i. Cases are becoming more common concerning directors.
    ii. Can directors be indemnified? Indemnified for attorney fees?
    iii. Not addressed by statute or in most documents.
    iv. It is addressed in Sec. 13, 14, 15 of the Act.
    v. Director gets same limitations period as for trustee under local law with respect to release from claims.
    vi. If report eliminates liability after some period of time that same accounting would provide protection for director.

Sec. 15 addresses defenses.

h. Co-trusteeship.
    i. Under traditional law, UTC 703, and Sec. 81 of the Restatement, Trustees must share information and have duty to take reasonable steps to prevent breach by other trustees.
    ii. Even in matters for which trustee is relieved of responsibility but, if the trustee knows a co-trustee is committing misconduct, the other trustee has a cross-monitoring obligation. This is in contrasts with directed trust concepts. Why can't the same concepts be applied to co-trustees. Co-trusteeship may be preferred.
    iii. Terms of trust may relieve co-trustee of duties or liabilities to same extent that a trustee in a directed trust may be relieved of liability as a result of being directed. The default rule is that traditional co-trusteeship rules apply. But if in construing instrument the settlor would have preferred directed trust rules for trustees then that model would apply.

3. **<u>Planned Giving in a Changing Tax Landscape</u>**. Michele A.W. McKinnon.
    a. Changes in philanthropy.
        i. How philanthropy is being viewed is changing.
        ii. Tax law changes impact charitable giving. Won't impact high income donors.
        iii. No simplification has happened IRC Sec. 170 remains complex.
        iv. Low interest rate environment. Suggest donors address interest rate sensitive techniques now.
    b. New tax law.
        i. Income tax deduction charitable deduction rules.
        ii. Must itemize to get deduction.
        iii. PEASE reduced itemized deduction by 3% or 80% of total. This had been troublesome in charitable giving. Suspended by the TCJA until 2026.
        iv. Cash gifts limited to 50% of AGI. If gift appreciated property 30% AGI limit applies. 50% has been increased to 60% but added a new provision that if you make a cash gift you can deduct up to 60% but only applies is cash gifts to public charities. Few people will give that much of AGI and only in cash. If contribute to private foundation etc. and non-cash gifts effect this so rule is not simply 60% if making
        v. New rule on receipt and reporting by charity.
        vi. ESBT rules. Under new regime charitable deduction for ESBT are based on percentage rules applicable to individual. No longer require to be paid out of gross income or based on governing instrument. All substantiation rules that apply to individuals apply to ESBTs and typically you don't see those under 642(c).
    c. Other rules.
        i. Private foundation. Appreciated property donation limited to basis not FMV.
        ii. Must hold property for a year to receive FMV deduction otherwise it is basis.

iii. 3.8% surtax remains.
iv. Consider state tax, plus surtax, so income tax benefits remain significant despite rate reduction.

d. Transfer tax have changed.
   i. $10M inflation adjusted $11.18M.
   ii. Repeal did not occur.
   iii. How does this impact donors? Charitable sector says huge impact.
   iv. This will reduce charitable giving at death.
   v. In 2010 there was a significant decrease in charitable giving because of absence of estate tax.
   vi. **Comment**: The $22M+ exemptions will eliminate any estate tax benefit for charitable bequests for almost all taxpayers, even wealthy ones. Consider as options paying bequests during lifetime for high income taxpayers who may exceed the new $24,000 standard exemption for a couple or allocating estate income to charity to perhaps obtain an estate tax charitable contribution deduction. For the former amend durable powers of attorney and/or revocable trusts to permit agent/successor trustee to prepay charitable bequests.
e. Standard deduction doubled.
   i. 30% taxpayers had itemized under pre TCJA law, and post-TCJA only 5% will itemize.
   ii. $13-24B in lost donations has been estimated.
   iii. High net worth taxpayers will itemize but smaller donors won't.
   iv. **Comment**: Clearly many donors will never qualify for a charitable contribution as they won't surpass the new standard deduction hurdle. Consider creating a simple non-grantor trust. Have the trust instrument include IRC Sec. 642(c) language, and perhaps name children or other heirs as beneficiaries. Gift sufficient investment assets to the trust to generate income to fund the intended charitable gifts. The trust can allocate gross income to charity without a reduction or loss of benefit trying to reach the hurdle of the new standard deduction amount. The taxpayer can preserve their standard deduction for full benefit as well.
   v. But charitable giving is changing from other perspectives.
   vi. Bunch gifts. Make 5 years of gifts at a time then don't itemize for several future years. But clients have resources to do this.
   vii. Use donor advised fund ("DAF") to bunch gifts.
   viii. Fund private foundation to use for annual giving.
f. Charitable rollover is permanent.
   i. Use IRA for gifts if over 70.5 to get tax benefits.
   ii. If you have appreciated property you still avoid capital gain as if you had sold the property even if no deduction.
   iii. **Comment**: When planning to convert traditional IRAs to Roth IRAs reserve or continue sufficient regular IRAs to use for this purpose.
g. Economic factors impact charitable giving.
   i. Low interest rates favor CLATs, remainder interest in residence.
h. Why donors engage in philanthropy.

i. Non-tax motivates predominate.
ii. 33% participate in impact investing and 34% of those use that as part of charitable giving and 5% use impact investing instead of charitable giving.
iii. Taxes are not driving philanthropic conversation.
iv. Younger clients are coming into great amounts of wealth and the non-tax benefits resonate more with them. Example: Zuckerberg Chan initiative. Mission investment.
v. Religious reasons motivate gifts.
vi. Personal reasons – hospital saved donor's life.

i. Gifting techniques.
   i. Gift annuities low rate is detrimental reduces value of gift. Most of these are small donations and likely not itemizers. Exclusion ratio says how much of annuity amount received by donor is not subject to tax. As rates are low the exclusion ratio is higher.
   ii. Speaker sees fewer CRTs despite the dramatic rise in stock prices in recent years.
   iii. 7520 Rate CRAT impacted. Charitable gift must be at least 10% if 2.2% 7520 rate spouses must be over 64 for CRAT to work. Run the numbers especially if donor is younger.
   iv. Private foundations ("PF") continue to be attractive. Permits control. Rules have been in place since 1969 and there is guidance and certainty in the law.

j. Client conversations.
   i. Not primarily interested in taxes. Interested in objectives.
   ii. What do you want to do for family? What do you want to do for community? Do you want your family involved? Most want to contribute because they feel fortunate and want to help.
   iii. Impact investing and non-traditional vehicles.

k. Crowdfunding.
   i. **<u>Comments</u>**: Crowdfunding is the practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet. Crowdfunding is a form of crowdsourcing and of alternative finance. In 2015, it was estimated that worldwide over $34 billion was raised this way. There is little law and many issues with respect to crowdsourcing. Some of these issues include:
      1. Can the donations be made tax-deductible to the donors to increase the amount of donations and perhaps the number of donors?
      2. Can more accountability of the use of the funds donated be provided to increase the likelihood that funds raised are used as intended?
      3. Can legal structures be provided that safeguard the funds raised for their intended purpose? For example, if the funds are owned by, or given to, a particular beneficiary, will those funds be entirely consumed by medical care costs that, perhaps, Medicaid might otherwise cover? If so, might a supplemental needs trust arrangement be grafted onto the campaign to protect those funds to

serve their intended purpose of helping the beneficiary with the many expenses Medicaid will not cover, and preserving some of the funds for other purposes?

4. **Planning for Real Estate Investors**. Farhad Aghdami.
    a. Real estate is intangible, immovable, and they cannot create more of it. Allows for depreciation deduction opportunities, and with rents allows for clear cash flow.
    b. Real Estate professionals is a term of art, but it allows them to deduct any losses they have under the IRC Sec. 469 passive loss rules, and greatly reduces their tax burden.
    c. Ownership structures that give you fractional interest discounts.
    d. Market Absorption Discount.
        i. Law of supply and demand on the date of death the client is deemed to have sold all the assets. But if you put all the real estate the client had on the market at the same time, it would depress all the values of the real estate due to the large supply relative to the demand, which causes a discount.
    e. Valuation Issues.
    f. How will you structure the ownership interest? Does the client own both a GP and an LP in the same partnership? it would cause the valuation to have aggregation between the GP and the LP interests and boost the valuation due to being able to liquidate.
    g. Pass Through entities, non-corporate pass through entities, are the main vehicle for holding real estate interests, developers do not use corporate entities as extracting the property from the corporation often triggers capital gain tax.
    h. Pierre case dealt with the issue of owning an interest in a single member LLC, wants to transfer to a trust for benefit of children. Was she transferring the underlying assets, or an interest in the LLC? Court determined it was a transfer of the LLC interest even though it was single member, and sustained a discount of almost 38%.
    i. If you have more than one owner of an entity, but the owners are disregarded for income tax purposes, and the entity is disregarded, (most planning involves grantor trusts and disregarded entities), the entity/trust structure will still be respected for legal purposes. Generally, want to avoid triggering gain under Sec. 1001 by using grantor trusts in planning.
    j. IRS challenges family business entities often. Arguments: 2703, 2704, 2036, trying to disregard the entity and collapse the planning scheme. But the use of entities in commercial real estate is real and not tax motivated. Developers need to worry about creditors, worry about environmental issues, asset management.
    k. Managing valuation risks in estate planning transactions for real estate. Consider using defined value clauses.
        i. Wandry Clause.
        ii. Or a more robust defined value clause.

l. Annual Exclusion. Consider whether a gift to the intended donee of a minority interest in a real estate entity can qualify for the gift tax annual exclusion. Issue is whether the governing documents for the entity, e.g. operating agreement, excessively restrict the donee's right to realize economic benefit on that gifted interest. If it is overly restrictive, may cause annual exclusion to be disallowed. Consider adding a put right in the operating agreement. Let the donee for example, redeem entity equity interests for 30 days after receiving it. This can be analogous to a Crummey power in a trust.

m. Wealth Transfer Planning.

    i. Guarantees on note sale transactions. Issues as to whether a Guarantee without the payment of a fee is considered a gift. There has not been much guidance on this. If a guarantee is going to occur within the family, make sure to have a guarantee fee paid, as it may take out some of the gift issues indicated in the PLRs above. You should have at least 10% seed gift to a sale transaction before transferring to a grantor trust- so on a $100M sale, trust should have at least $10M in assets. Also note that as you give a gift of $100M, but receive a note of $100M, your gift is zeroed out.

    ii. **<u>Comment</u>**: Some commentators suggest that a guarantee without a guarantee fee if made by beneficiaries of a trust does not require a fee as the beneficiaries are protecting their beneficial interests in the trust by providing the guarantee. Another school of thought goes to the heart of the need for guarantees in the first instance. Guarantees are used by some practitioners when insufficient seed capital is in a trust to support a note sale of further assets to that trust. While some commentators subscribe to the mythical requirement of a 10% seed gift (and is that calculated by a 10:1 or 9:1 ratio?) others dispute the existence of that rule of thumb. Yet other commentators suggest that it is rather the reality of sale construct, not the mythical 10% seed capital, that should be the touchstone as to whether the sale should be respected. Opinions on these issues span the spectrum.

    iii. Grantor's payment of income tax liability is not an additional gift to the trust. Allows for income tax liability to be paid to grantor trusts, gives more flexibility.

    iv. All losses on the real estate flow through. **<u>Comment</u>**: Consider the range of hurdles that might have to be navigated to benefit from those deductions: passive loss limitation rules, at-risk rules and more.

    v. Cash flow can be used to pay the interest payments on the promissory note.

    vi. Selling real estate interest to the grantor trust and receiving a note. Is there a wealth transfer? Consider using a self-cancelling installment note ("SCIN") which states that if the holder of the note dies before the completion of the note, the remaining balance is forgiven. A note with a forgiveness provision will have a mortality risk, so you should have a premium on the interest rate for that note, for example. **<u>Comment</u>**: As with so many transactions, there are those practitioners that are cautious about using SCINs.

vii. Also consider a sale for a private annuity so that the real estate is transferred for an annuity.
    1. 2003 Constanza case- a sale including a self-cancelling note was approved, but the Davidson case more recently challenged these notes again, and the IRS won, showing a $300M estate tax deficiency.

viii. Rev. Rul. 2008-22 - Substitution power is not considered a retained interest that would cause estate inclusion.
    1. **Comment**: But read the ruling carefully there are more twists on the Ruling then some recognize.

ix. GRATs.
    1. Some do not advocate use of GRATs for real estate. Challenge here is that real estate valuation issues (need to get the underlying real estate appraised every time you need to make an annuity payment) could make it hard to determine if the GRAT will be successful, as well as mortality issues. Real estate appreciates slowly over time, it would need to be a long term GRAT, so increased mortality risk. If you put in a majority interest into the GRAT, it will have a valuation premium, but every time you make a payment, it will be minority, so depressed valuation.
    2. **Comment**: In some instances, the discounts on the entity used to fund the GRAT, low interest rates, and term of the GRAT relatively the client's actual life expectancy (have an analysis done) might suffice so that the net income from the real estate entity may suffice to cover the annuity payment and not require in-kind distributions. Where valuations are complex some practitioners might prefer the certainty of the GRAT valuation adjustment mechanism, baked into the Regs, as compared to the risks some perceive using defined value mechanisms.

x. BDIT.
    1. Numerous challenges and issues need to be considered when using a beneficiary defective irrevocable trust ("BDIT).
    2. Finding someone who is willing to setup and fund the trust may be a challenge. Also, difficult to get additional assets into the BDIT.
    3. **Comment**: Some practitioners favor a BDIT strategy and use guarantees (see above) to support the BDITs purchase of large value assets in a note sale transaction by the beneficiary. Further, for those who subscribe to the reality of sale construct as the litmus test for the validity of a note sale transaction, a BDIT may not be so difficult to structure.

n. Paying of Estate Tax Strategies.
    i. IRC Sec. 6166 estate tax deferral. Installment payments to stretch out the cost of the estate tax, paying interest for 5 years, then 10 additional years to pay off the principal. **Comment**: The IRS asserting a lien on the property to protect its interest in the estate tax so deferred might have

many real estate developers prefer outside commercial financing even if they can qualify under IRC Sec. 6166.

ii. IRC Sec. 6161 can provide and extension on filing 706 showing reasonable cause, and then an additional time period to pay the estate tax.

iii. Graegin Loan- borrow money to pay off the estate tax, but you are not allowed to pay off the loan prematurely. Koonz case has weakened this technique.

iv. Life Insurance- Put the real estate and the life insurance policy in the same trust, allows the cash flow of the real estate to pay the premiums for the policy, avoid Crummey notices. **Comment**: Be cautious. If the trust is a directed trust and the client/developer is named investment trustee or director a separate insurance trustee/director must be named to avoid a 2042 issue.

o. Ancillary considerations.

i. Make sure you review the operating agreement that it has provisions to allow the estate planning transfers you are contemplating.

ii. Lender approval - be sure to get the approval of the lender, as if the loan does not allow the transfer and you do the transfer without the approval, it could cause the loan to be called.

p. Non-Tax Considerations.

i. Personal residences - Planning in states with tenants by the entirety- severing that can be dangerous due to the loss of asset protection.

ii. Purchasing any properties with LLCs for asset protection- use a simple name including the address of the underlying real estate for ease of organization.

iii. **Comment**: Consider gifting a house LLC to a non-grantor trust to salvage property tax deductions the SALT limitations restrict.

q. Use of websites like AirBnb, Zillo, etc. to get a quick and easy FMV of renting the property. This is also an issue because the method by which these sites calculate a rental value may not be accurate and that may hinder the type of rent that the particular plan suggests to be more appropriate.

r. Consider giving a child a small real estate interest in the property- 1 or 5%, and they can occupy it 100% of the time without gift issues.

i. **Comment**: Be cautious as if the house is to be sold that nominal interest held by a formerly compliant heir, that is now held by an angry or antagonistic heir, could be an outsized headache. If the child is a minor and a portion of title was shifted to a minor it may be difficult or impossible to sell without a guardian ad-litem being appointed.

s. Transferring residence to a trust for the benefit of the spouse. Duchess case- because you are married to your spouse and she is the beneficiary of the trust, you can stay in the trust and it is not considered a retained interest without paying rent.

i. **Comment**: If the trust is structured as a non-grantor trust to salvage a SALT deduction the spouse’s receipt of income would require approval by an adverse party to avoid grantor trust characterization. If so, does the use of the house require a similar approval and how should that be evidenced?

t. Transfer the residence to the trust, but retain the ability to reside in it for a term of years.
u. QPRTs have fallen out of favor due to the low interest rate environment.
    i. **Comment**: Also, loss of basis step up and now higher exemptions obviating the need for many moderate wealth clients to engage in this planning. For existing old QPRTs clients who no longer have an estate tax benefit because of the now substantial estate tax exemptions may lose a basis step up as a result of the house in the QPRT and have no offsetting estate tax benefit. Consideration may be given to planning steps to obtain that estate tax inclusion.
v. If you give the vacation home to the children, maintaining a family vacation home is often onerous on the children, they may not want to do so. Sell the vacation home to a grantor trust, receive back a note, and then sign a lease to the vacation home, so that the vacation home trust can then pay expenses and the note based upon the rent it receives from the lease.
    i. **Comment**: The above technique can provide a means of shifting gift tax free value into the trust if the rent is higher than the expenses. For clients in high tax states see above comments on using non-grantor trusts to salvage the SALT deduction on a vacation home.

5. **Special Sessions III-E: Ethical Issues in Advising Clients on Planning for Creating, Operating and Transferring Control of Ownership of and Dissolution of Closely held Businesses**. Fox, Osborne, Radford.
    a. Disciplinary complaints.
        i. Number of lawyers affected is low.
        ii. 1 in 10 in ratio to number of lawyers with active license.
        iii. 3100 disciplined.
        iv. 321 disbarred.
        v. Focus on ethical rules for lawyers but concepts apply to other disciplines. Principles are essentially the same.
    b. Case study:
        i. Converting C corporation to S corporation.
        ii. Must understand old and new law and understand if transaction costs outweigh benefits. Must be citizen or resident of US to hold S corporation stock, and the child in the case study was a foreign citizen. A shareholder was to be a trust. The types of trusts that can hold S corporation stock is limited: a voting trust, QSST (with only one current beneficiary and income is required to be paid out), ESBT, grantor trust. The attorney should have known this. The trust used did not qualify.
        iii. Even if trust could be reformed IRS may not accept as a retroactive healing of fatal flaw.
        iv. Who did attorney represent in transaction?
        v. Did C corporation have built in gains – BIG tax?
        vi. So, attorney did not show the requisite competence to handle the matter.
    c. Case study.
        i. Metadata and technology considerations.

ii. Attorney representing closely held corporation and corporation is getting ready to purchase another corporation.
iii. Can fax, or scan and send as PDF, etc. to remove metadata.
iv. Lawyer must be aware of technology and impact on confidentiality.
v. Model Rule 4.4 amended to provide that if lawyer receives document or electronic information and the lawyer knows or reasonably should know the document was inadvertently sent should promptly notify sender. The document was intentionally sent but metadata was inadvertent.
vi. ABA 06-42 Takes approach that only requirement is to notify sender. Many states have taken a different approach. Some say you have to assume metadata was inadvertently sent. Some states prohibit looking at meta data.
vii. Many ethics opinions deal with metadata and there is little agreement between different views of states. Some make a distinction in process of reading metadata. Some differential looking at date of preparation, etc. But using a program that un-scrubs metadata is deceitful and prejudicial. CO bar said not deceitful to search for metadata. Miss. There is a different between reading native software material and actively mining metadata which they view as peeking into closed brief case of opposing counsel.
viii. **Comment**: A recent ethics opinion dealt with similar issues that affect practitioners. Technological advances are changing how we all practice. Attorneys need to assess the security and other protective measures they take with respect to communications and electronic data. A recent ethics opinion reflects the now common use of tech such as tablet devices, smartphones, and cloud storage. Ethics Opinion 477, May 11, 2017, updates Ethics Opinion 99-413. Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties under Rule 1.1 of the ABA Model Rules concerning competency, confidentiality, and communication. Comment 8 to the rule requires lawyers to be current regarding the benefits and risks of associated with relevant technology. What steps should estate planning attorneys take to become current and to demonstrate that they are current? Are there competencies the attorney herself must have or may an attorney rely on in-house or independent IT consultants? Lawyers must take reasonable efforts to ensure that communications with clients are secure and not subject to inadvertent or unauthorized security breaches. The Opinion states: "What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method." Attorneys must use "reasonable efforts" to ensure the security of client information. This is a facts and circumstances test. Consider: Sensitivity of

the information being transmitted; Risk of disclosure if additional security measures are not taken; Cost of additional measures.

d. Case study. Insurance issues and transfer value agreement in buy sell agreement. Shareholder died while agreement being worked on for 5 months. Stock left by will to bad kid.
   i. Has she violated her duty to provide competent representation.
   ii. Competence issues are more difficult as to what she should have known under model rule 1.1. Lawyer should be up front with client about level of expertise.
   iii. What were expectations of client. Spending 5 months studying and still had not produced work product.
   iv. Competence requires diligence in communication with client and keep client reasonably informed. Model Rules 1.3 regarding diligence and 1.4 regarding communications.
   v. If clients engaged her knowing her limited background then perhaps the time is not an issue.
   vi. Has attorney violated duty to provide timely service? Perhaps yes. But this might vary depending on facts that may not be provided in case study as to communications.
   vii. Model Rule 1.3 requires attorney to act with diligence and competence.
   viii. ACTEC commentaries suggest that procrastination is a shortcoming that is resented by clients and may destroy confidence in lawyer.
   ix. People vs. James – client hired attorney to prepare a will which was executed eight months later after client filed complaint with state bar. Attorney was disbarred.
   x. Failure to act with reasonable diligence is a problem.

e. Case study.
   i. Buy sell agreement provided for the purchase of stock for $20/share. Shareholder died with $50M estate exclusive of stock, plus 1M shares and paid $20M under buy sell agreement.
   ii. Attorney represented estate in administration and valued stock at $20M for federal tax purposes based on the buy sell. IRS applied IRC Sec. 2703 on audit and valued stock at FMV at $50M not $20M so $20M federal estate tax at 40% rate is owed when estate only received $20M in proceeds. Has attorney provided competent service? It would seem not.
   iii. ACTEC commentaries state that mistake of judgement does not indicate lack of competence. However, IRC Sec. 2703 has been well settled law for many years before the work was done by the attorney in this case study. Seems little justification to use fixed price buy sell price in agreement with no adjustment in light of 2703. The buy sell did not meet any of the IRC Sec. 2703 exceptions.
   iv. It is possible that clients insisted on using fixed price valuation provisions against the advice to the contrary by attorney.
      1. **Comment**: This comment is a bit tangential to the case study, and sorry for getting on a soap box about collaboration, but there is a means by which the attorney apparently caught it this tough case

study might have assured a better result for the client as well as for himself/herself. Every practitioner well knows that many if not most clients simply do not heed the advice of their advisers. Too often the excuse used is cost. But the cost of a disaster is almost always exponentially greater than the cost of doing what the practitioner recommends. Practitioners are then put in a common and incredibly difficult situation which the panel mentioned certainly in the context below of closing a file to make a client's file inactive. The language a practitioner might prefer to use to confirm that the client is not heeding advice of the adviser (not just counsel) is often so harsh that it will alienate the client. Thus, practitioners reasonably trying to maintain their livelihood seek to find a way to communicate to the non-compliant client the advice given, or that if the advice given is not followed dire consequences might ensue. But sending a letter to a client informing them bluntly that the path they are choosing is dangerous and fraught with problems, and that you the practitioner cannot be responsible for the consequences of their conduct, might alienate the client. Every practitioner in every field has agonized over these issues, and writing such letters. If all advisers could not only foster but demand a collaborative team approach, many (not all) of these situations could be made easier for whichever practitioner is primarily effective. Certainly, in this hypothetical the wealth manager, CPA and insurance consultant would support the position advocated by the estate planning attorney to use a buyout arrangement that passes muster under IRC Sec. 2703. If the client hears the same warnings echoed by multiple advisers they will more likely heed the advice of counsel and proceed appropriately. Too often advisor groups remain disjointed and dysfunctional, if they have even coalesced into a team. Collaboration, or teaming, is one of the best ways every practitioner in every discipline can enhance the results for the client first and foremost, and as a byproduct of that, help safeguard all team members, including themselves. Had the estate planning attorney insisted that the client's insurance consultant, wealth manager and CPA be at the meeting reviewing the buy sell (and doesn't each discipline have a role to play in that discussion) the meeting would assuredly have been more productive, and the other advisers would have been afforded an opportunity not only to participate, but the estate planning attorney may have had support on the issue.

v. Consider whether purchaser could be responsible for any of the additional tax on the additional value under state allocation statute.

vi. Conflict of interests which could be waived. Issues of representation of company and number of shareholders in buy sell agreement. Conflict rules of Model Rule 1.7.

vii. Representing estate may be a step too far. How can counsel represent the estate and the company in determining the value of the stock in the redemption? Under a properly drawn buy sell without a fixed price it would have been a significant issue to address in the administration of the estate. Should have tried to negotiate an adjustment of value with the company to possibly resolve the dilemma created by the tax cost relative to the payment received. Therefore, it appears to be conflict. Model Rule 1.7a. Can it be waived by informed consent under Rule 1.7b? Seems fraught with peril.

f. Case study.

   i. Lawyer represents various family businesses. Wanted estate taxes apportioned against non-business assets. Business is $30M and remaining assets $5M. The dispositive scheme calls for an unequal division between the two children. Worse, the child with smaller share would receive nothing because of tax allocation clause allocating tax on business bequest against second heir receiving the modest non-business assets. Lawyer did estate planning for daughter and did not inform her of the above. Daughter asked lawyer if mom's will bequeath assets equally to her and her brother? Lawyer said yes.

   ii. Issues of conflicts of interest and confidentiality when representing multiple interest in same family are important to address in determining representation.

   iii. Model rule 1.6 - Lawyer shall not reveal information relating to representation of a client or the disclosure is impliedly authorized to carry out representation. 1.6b provides exceptions when confidential information can be revealed but they do not apply based on the facts in this case study.

   iv. Lawyer owes duty of confidentiality as to mother. Waived as to son who attended meeting, but if mother did not waive with informed consent then lawyer cannot share the information from mother's planning with the daughter. So, when lawyer agrees to represent daughter she should inform daughter of his/her inability to reveal confidences concerning mother.

   v. Breach under Model Rule 1.2 and issues of informing under 1.4 and perhaps others. Appears to be an ethical volition.

   vi. 1.7a concurrent conflicts and when they can be waived.

   vii. Duty of loyalty may have prevented a concurrent conflict of interest without informed consent by both mother and daughter. This arises when significant risk that representation of one or more clients will be materially limited by lawyer's responsibilities to another client, interests of lawyer, etc. Lawyer failed to obtain informed consent.

g. Case study.

   i. Attorney represented holding company family owned. Hold Co. created to take advantage of favorable tax laws. Years later tax laws changed. Hold Co. sold subsidiary and uses another law firm to handle sale and Hold Co. incurs greater taxes than anticipated and sued former lawyer for failure to inform them of changes in tax law. Did lawyer have responsibility to

inform Hold Co. of changes in tax law. Client was dormant. Model rule 1.4a2 lawyer shall reasonably consult with client about means by which client's objectives are to be accomplished.

ii. Question as to whether lawyer promised to inform Hold Co of changes in tax law and whether its failure to do so were questions of fact for a jury. Changes in tax law would affected and there was sufficient basis for malpractice, negligent representation, etc. This might suggest a continuing duty to keep client informed.

iii. Unless representation is terminated the representation becomes dormant and attorney thereafter has no duty to inform unless representation reactivated. But ACTEC commentaries suggest lawyer may communicate periodically about representation and changes in law but unless there is an agreement that lawyer and client had reached that the lawyer would update the client, then the lawyer is not obligated to send notice of a change in law if the active phase of representation concludes.

iv. Speaker – Will client believe that? Many will not and may believe lawyer has obligation to inform client?

v. How do you avoid upsetting clients? The only way is to terminate representation. Clients do not understand the language of "termination," etc. and get offended. Lawyers want continuing relationship so what can be done? From a practical standpoint lawyer must make decision to terminate representation. Some firms say in their retainer agreement: "On completion of the work our representation is terminated," to avoid above problem.

vi. **Comment**: Sample language to consider: "The firm's work and responsibilities end with the completion of each task, meeting or document and our file will be closed until re-opened by formally being retained again. Correspondence from us that does not expressly commit to undertaking new work will not open a closed file."

vii. Absent above you have to keep client informed of changes.

viii. TCJA 2017 affects clients. You can contact, but should you?

ix. If client hired new counsel you would think new firm should be liable. If representation is not terminated then speaker suggests keeping clients informed. If you do it speaker suggests you should do it for all clients.

x. **Comments**:

    1. With the cost of an email newsletter or blast being modest (the annual subscription to a service like MailChimp) all practitioners in all size firms should consider sending out a periodic update of some sort. Regardless of the marketing implications or benefits, wouldn't a periodic update help address an obligation to inform clients, active or inactive, of changes when they occur? Regardless of whether the obligation exists to inform any client, of a change in the law might an email blast not suffice?
    2. As for clients for which the practitioner does not have an email address it would seem in this electronic age that the client, not the adviser, should have the responsibility to assure that his or her

attorney/adviser has an email address through which to communicate.

3. With respect to the TCJA of 2017 it would seem for any change that substantial no client could suggest that they were not aware from just the general media coverage that there was a significant change in the tax law and that they, the clients, should have the responsibility to contact their advisers.
4. Clients, especially the wealthy group that seek out professionals to assist them with their planning, should be charged with having the modicum of intelligence and responsibility to contact their estate planner after any major tax law change reported widely in the media with no further obligation on counsel.

h. Case study.
    i. Lawyer accepts offer to serve on board of directors. What ethical issues should be considered? Should lawyer for corporation serve on board? Trend in recent years is that fewer lawyers are agreeing to serve. See ABA Opinion 410. Lawyers serving on board of directors must warn corporations that discussion of board may not be protected by attorney client privilege as they may involve business advice not legal advice.
    ii. If attorney asked to serve on board should determine whether acting as lawyer or director. Remember not an advocate for management but rather a fiduciary for all shareholders.
    iii. Speaker suggests that service on board of directors especially when firm represents that entity poses real risks.

i. Case study.
    i. Lawyer had long time estate planning client age 70. Owns series of businesses through C and S corporations, LLCs and LPs. CPA firm that handles taxes suggests that the entities are a hodgepodge. Client wants to simplify. Wants to set up series of LPs and make children and spouse partners. Lawyer is to represent the entities and to advise children as to their rights. The client doesn't want children to have separate counsel as it may be too expensive. Two children work in business, and two children do not work in the business.
    ii. Can attorney representation all these parties without violating conflict of interest rules. Would it make a difference if current wife is a second marriage, or if she is expecting a new child?
    iii. Is counsel representing entity? Is counsel representing entity and by extension representing partners themselves? Complex.
    iv. Multiple representation of individuals, entities and family members – proceed with caution.
    v. Consider a new engagement letter and figure out who attorney is representing. ACTEC commentaries. Not every state treats joint representation the same. Many but not all states say that if you have joint representation information can be shared. Others differ. If one client says I have something to tell you but don't tell my wife… that is a withdrawal of the consent of joint representation so lawyer's only option is to withdraw.

vi. If lawyer can assure she can adequately represent all entities and family member, and they call consent to that, that may suffice.
vii. Model Rule 2.2 permitted lawyer to act as intermediary and not as a lawyer. This rule was withdrawn because of complications/difficulties of seeing where lawyer's duties were.
viii. Duties to consider in these circumstances include: to keep client reasonably informed 1.4, confidential 1.5, and duty to avoid conflict of interest.
ix. If paying for representation under 1.8 if someone else is paying the someone else must understand that just because paying cannot control the representation (e.g., parent for children).
x. When lawyer represents entities who is she representing? Entity, Partners? Combination? Is it the entity lawyer is representing or the constituents of the entity?
xi. ACTEC model engagement letters updated in 2017.

j. Case study.
    i. Law firm partner requested associate to research whether lawyer client relationship has been formed. What factors between corporation and its constitutes Model Rule 1.13f.
    ii. General counsel entity is client. While no prohibition against GC having relationship with constituents but must identify who the client is. 1.13q lawyer may represent directors subject to rules on conflicts.

6. **<u>Special Sessions IV-E: Ethics and Negotiations</u>**. Mignogna, Engelhardt, Franklin, Nenno, Steele, Triggs.
    a. Duty to disclose and educate.
    b. Lawyer has duty to be truthful in mediation. Model Ruel 4.1. Duty not to misstate facts. You are permitting "puffing" about willingness to settle or not, or statements about willingness to take less than $X. Those are allowed, but not misstatements.
    c. Rule 4.1 cannot knowingly make a false statement of fact or law to opposing party.
    d. You have duty to disclose to avoid assisting client with criminal or fraudulent act.
    e. The duty to disclose in some instances is superseded by other duties.
    f. If attorney had previously said something that is incorrect, or additional facts come to light making prior statements deemed a fraud, you must provide new correct information. In a Pennsylvania case the opinion stated that should have divulged that client had life expectancy of less than 1 year when settlement included provision for 3 year of lost wage benefits.
    g. Rule 8.3 duty to report facts of ethical violation. Cannot use this as a threat.
    h. Mediation. Privilege is broader then attorney client privilege as it covers non-parities. Varies by jurisdiction. May be specific statue, court rules, or case law.
        i. Exceptions: confidential communications can be waived by parties.
        ii. Threats of violence are not privileged and must be disclosed.
    i. Should have signed document even if state does not require.
    j. Mediator should make parties aware of any personal bias, conflict of interest, etc. especially if it could taint the process.

k. Use draft document and circulate shell of agreement (boilerplate) so everyone knows what they are working from (e.g. binding nature of the agreement and other terms the mediator would anticipate would be in the final agreement in all events).
l. If settlement is approved you have to ask the court to retain jurisdiction to enforce the settlement.
m. Start with the written agreement. Some mediators use a recording and summarize settlement that will then be memorialized and have all in attendance express verbal consent to that stated agreement. Both of these approaches are attempts to minimize the risks of second thoughts after the mediation is concluded.
n. Confidentiality clauses. Some try to all agreements to court for approval. Include in agreement that everyone was represented and sign off and in those instances, may not get court approval if time does not permit, but preference is for court approval, especially if institutional trustees involved.
o. Bias issues if mediator familiar with a party to the mediation. Should disclose that. But how much should be disclosed? All of it, but then that might mean that the particular person won't be hired as mediator if the bias is significant.
p. In probate disputes parties might suggest paying mediator out of the trust, but that might favor one side or another so it may be better to pay out of pocket.
q. Unless there is an agreement to the contrary fees are usually split.
r. Legal fees are also part of settling case. Does settlement include payment of hourly fees? What of a contingent fee payment? Will contingent fee motivate attorney to settle more quickly? Contingent fees are fraught with issues. There may be an issue of reasonableness. Attorney is in dilemma in that if lose cannot discard contingency fee and try to get award from court on hourly basis.

7. **<u>Doth Thou Roth? IRA Conversions</u>**. Natalie B. Choate.
    a. Introduction.
        i. Roth IRA is great wealth builder.
        ii. Tax free source of income.
            1. With regular IRA take funds out of Roth with no income tax consequences.
            2. Any limitation based on income levels not impacted.
    b. Who is death beneficiary of Roth IRA.
        i. Not charity since it is a tax-free asset.
            1. <u>Comment</u>: Don't convert all traditional IRAs to Roth, rather retain some traditional IRA funds to be used for charitable gifts after age 70.5.
        ii. Name grandchildren. Use see through trust as beneficiary to protect heir. If complies with IRS trust rules will qualify for long life expectancy payout. 10-year beneficiary has 70-year life expectancy for payout tax free from Roth IRA.
        iii. Better choice is surviving spouse as outright beneficiary of Roth IRA and she can roll over to her Roth IRA. Advantage is that it is surviving spouse's Roth IRA so no requirement to take minimum distributions -- Ever! Contrast a child beneficiary has to begin taking distributions year after death.

c. TCJA only change to planning for retirement benefits was Roth Recharacterizations.
    i. See below.
    ii. There had been much talk about eliminating life expectancy payout but nothing happened.
d. Administer trust with Roth IRA.
    i. Parent died child is beneficiary. Child is supposed to be paid out over child life expectancy. See through trust.
    ii. Trustee fee and expenses and minimum distribution from Roth IRA to trust must be paid each year (passed out to child). That is tax free but…
    iii. Trustee duty is to enhance and preserve Roth IRA assets. If charge fee from account it is legitimate but if take fee must still pay minimum distribution. Better to take minimum distribution first and put in trust bank account, then pay fee out of trust bank account. That will help maximize growth of Roth.
e. How do you get a Roth?
    i. Annual contributions. Can put up to $5,500 of compensation into Roth IRA, $6,500 a year if over age 50.
    ii. Income test. To make annual contribution your gross income must be below a specified amount. MFJ $199,000 in 2018 of AGI you cannot contribute to Roth. If single the figure I s $135,000.
    iii. Back door Roth contribution. No income test on making regular IRA contribution. So, contribute $5,500/$6,500 to traditional IRA and next day convert it to a Roth IRA.
    iv. Can convert as much or little as desired to a Roth. But whatever is moved from traditional plan to Roth is taxed as a distribution.
f. Techniques to get low cost or tax-free Roth Conversion.
    i. Case study: NOL carryover. In year of death it would be lost. Widow converted $1M Roth which offset the NOL that would have vanished.
    ii. Must be participant in qualified retirement plan, e.g. a solo 401(k) plan. This technique will not work if only have IRA plans. Second, must have after tax money in qualified plan or in a traditional IRA. $1M traditional IRA and $50,000 is after-tax contributions (from making non-deductible contributions to an IRA). Can you convert $50,000 of after tax money to Roth? But if withdraws $50,000 from IRA and rollover that is not a success because of the "cream in the coffee" rule (when you pour out of the coffee cup you get mixed/pro-rata portions of coffee and cream – when you distribute from IRA you get prorate portions of pre-tax and post-tax dollars, which can make planning difficult). When you take a distribution from IRA it comes proportionately from pre- and post-tax dollars. It is also not just from that particular IRA account but from all IRA accounts in aggregate so even if segregated non-deductible IRA contributions it does not matter. If 5% in total was after tax then only 5% of $50,000 rollover will be treated as pre-tax.
    iii. Can rollover IRA to qualified plan i.e. upstream with one exception can only roll pre-tax money. When you roll money upstream only pre-tax

money can roll up so pre-tax dollars come out first. So, in example go to 401(k) plan administrators and confirm they will accept rollover of pre-tax dollars. Has IRA provider pay $950,000 to 401(k) plan. Deposited as a rollover in rollover account at 401(k) plan and has to certify all pre-tax dollars. Now has $50,000 "stub" IRA that is all post-tax dollars and can now convert that after-tax money to a Roth with no tax.

iv. Tip: Document contributions each year to be able to prove how much after-tax money in the plan. IRA providers will not do this recordkeeping.

v. Example: $500,000 is in a 401(k) plan and $100,000 is after tax money. Retiring and wants to roll to an IRA. Has 401(k) plan cut check by direct rollover to traditional IRA and note on transfer "pre-tax" funds and then does $100,000 direct rollover to Roth IRA and transfer notes on it "post-tax dollars." You have successfully separated the cream from the coffee. IRS has approved this and rulings have useful examples.

g. Recharacterization of Roth conversions.

i. JCTA major change to retirement planning.

ii. Cannot reverse Roth conversion.

iii. From 1998 to 2017 if converted you could reverse the transaction. Convert to Roth and if investments declined in value you could convert back to traditional IRA called "recharacterization" and avoid income tax cost of conversion so long as done by October 15 of following year (and moved earnings back as well).

iv. TCJA eliminates this. If do a Roth conversion it is permanent.

v. IRS says you can still recharacterize 2017 conversions until October 2018 but conversions after 2017 cannot be.

vi. IRA contributions generally 408A(d)(6) addresses recharacterizing IRA contributions and applies to both types of IRAs. If make contribution to IRA no. 1 you have time to recharacterize as contribution to IRA no. 2 by moving funds from IRA no. 1 to IRA no. 2 with earnings and only by direct transfer and by deadline (October 18 of following year). This can be done to fix certain types of IRA mistakes. Example: Dad dies and rollover to child's IRA when it should have gone to an inherited IRA. This remaining type of recharacterization may solve the problem to get the IRA back to the correct inherited IRA.

vii. **Comment**: See: https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-iras-recharacterization-of-roth-rollovers-and-conversions

8. **Trustee Discretion: Better part of Valor or Vulnerability?** Amy K. Kanyuk.

a. Introduction.

i. Trustee discretion is a gray area.

ii. Historically trusts paid income to current beneficiary and passed principal remaining to remainder beneficiary. Trend now is for more flexibility and moving away from traditional model.

iii. Trend is for flexibility but if trustee has no guidance it is difficult. So, no guidance can be helpful or problematic, e.g. if tension among beneficiaries.
iv. Discretionary trust does not entitle beneficiary to distribution, just a mere expectancy.

b. Grantor intent.
   i. What is abuse of discretion? Depends on grantor's purposes and intent as expressed in the trust agreement.
   ii. Trustee's job is to act in a manner that is consistent with grantor's intent as to distribution power. Many trust agreements have conflicting statements of intent.
   iii. Often there is little thought to language in trust agreement concerning trustees exercise of discretion. Even if drafting does not reflect grantor's intent trustee must still rely on instrument to discern intent.
   iv. What about personal residence in the trust? Who will occupy and under what terms? Must beneficiary pay rent and carrying charges?
   v. If sprinkle trust with multiple beneficiaries is one a primary beneficiary? If sprinkling beneficiary are spouse and child is spouse primary beneficiary and under what circumstances can trustee make distributions to children and descendants? Should spouse be sole beneficiary with limited POA to distribute to children so you can get distributions to them without making them beneficiaries? If children are beneficiaries they are entitled to information, etc.
   vi. If trustee makes distributions without sufficient guidance beneficiaries may challenge trustee decisions? Challenges usually do not occur for many years after drafted and at that point it may be difficult to interpret the trust agreement.
   vii. If drafting be cautious about coupling discretion with a standard. "Trustee shall distribute income in its sole discretion as Trustee determines in accordance with.…" Mixing a "shall" which is mandatory, with "sole discretion" (and perhaps also with a HEMS standard) is confusing, what is the intent? How can seemingly contradictory concepts be reconciled?
   viii. If trustee is secure in exercising discretion it will be able to administer better.
   ix. Easier to correct underpayment then to correct overpayment. You cannot get the toothpaste back into the tube. Once you've given a distribution it is impossible to get it back.

c. Abuse of discretion.
   i. Depends on terms of discretion, trustee duties and grantor' intent.
   ii. It can occur if trustee acts dishonestly, e.g. beneficiary bribes trustee.
   iii. Perhaps the individual (non-professional) trustee has not read the trust agreement, or doesn't understand agreement or applicable law. Common with non-professional trustees. Should prepare abstract of trust terms.
      1. **Comment**: How many times has an individual (non-professional) trustee had a meeting with the attorney, wealth adviser and CPA to review the pertinent provisions of a trusts they are charged with

administering and prepare such an abstract to guide everyone involved. The CPA should not be preparing an income tax return without having a copy of the trust and ideally an abstract that highlights tax considerations of relevance in the trust permanent file. The wealth adviser should refuse to invest trust funds without a similar abstract prepared by the estate/trust attorney highlight issues of relevance to the wealth manager. The comment from the speaker is spot-on but why do so many clients not do this? The excuse no doubt is cost, but the modest cost of preparing an abstract and having a trust administration meeting with all advisers is likely to be insignificant relative to the costs of fixing income tax reporting, investment, distribution or worse problems down the road.

iv. Abuse can occur if trustee acts arbitrarily or refuses to exercise discretion.
v. Morris v. Kraft. 30 years later wanted to decant. Went to court and asked for court to acknowledge common law right to decant in Mass. In part because grantor submitted a post funding statement to the court. Paramount consideration is the grantor's intent.

d. Letter of wishes.
   i. Some settlors provide side letter of wishes that can be useful to explain settlor's intent. This is particular useful if there is a sensitive matter that should not be put into the trust agreement.
   ii. No authority on efficacy of a letter of wishes. Can beneficiaries discover them? Are they enforceable? They may have ambiguities and conflict with trust agreement? There may be tax issues. Might IRS interpret letter of wishes as an element of control or otherwise having a tax impact?

e. Ascertainable standard.
   i. HEMS or ascertainable standard. When accompanied by words enlarging trustee's discretion the scope of the standard becomes uncertain.
   ii. What is 'health'? Restatement contains no cases addressing. Regs are vague and do not say much. Courts have turned to dictionary to define the term. Need more guidance in the agreement. Beneficiaries can be creative about what they believe to be health. Michigan case said, "well-being of soul" was not part of health. If want expensive nursing care that should be included.
   iii. What is a standard of living? Meanings are not limited to necessities of life. Includes premiums on life insurance, customary pattern of vacations, etc. If can meet beneficiaries' accustomed standard of living but it would exhaust trust for remainderman that would violate trustee's duty of impartiality.
   iv. Support does not allow trustee to make distributions to allow beneficiary to make large gifts. Example spouse form later marriage might want distributions to divert to gifts to her former children.
   v. "Education" is also vague. Trust agreement should make clear level of education intended.

vi. **Comment**: Religious education private school and educational travel are all the types of special considerations that warrant mention.
vii. “Comfort” not clear what this means.
viii. “Welfare and happiness” – Happiness is much broader then support and might justify any reasonable distribution. Consider “__________ will make me happy.” There are almost no limits on what a beneficiary might say about what might make them happy to extract a distribution.
ix. “Emergency” this is strictly construed as including extreme need.
x. If the trustee does not know what the word means it may not be willing to make a distribution based on that.
xi. If beneficiary can remove or replace trustee with someone who is related or subordinate it will create a general power of appointment. State in trust agreement that successor trustee cannot be related or subordinate to the beneficiary. Related or subordinate is defined in 672(c) parents, spouse, siblings, descendants and employees.
xii. Grant of discretion creates range in which trustee can act. What does it mean to act “in good faith.” Means to act honestly and observe common standards of fairness and reasonableness.
xiii. Trustee cannot act capriciously.
xiv. Extended discretion may prevent challenge by remainder beneficiary but might make it harder for current beneficiary to obtain judicial intervention.
xv. Exercise of discretion is subject to judicial review. Court’s willingness to intervene will vary by state and may only occur if there is an abuse of the trustee’s discretion.
xvi. No grant of discretion is absolute. If beneficiaries have no rights to enforce the arrangement will not be a trust.
xvii. Judicial intervention might undermine grantor’s intent in giving trustee broad powers.
xviii. Terms of the trust agreement not beneficiaries themselves that define beneficiaries interest and the settlor is free to define those interests however the settlor wishes. If trustees exercise of discretion falls within grantor’s purposes court will not intervene.

f. Litigation.
i. Often based on trustee acting unreasonably. Court may impose standard of reasonableness even if trust agreement does not. UTC does not impose reasonable standard to exercise of discretion but comment to 814 recognizes that court might do that.
ii. Draftsperson can write out a reasonableness standard so trustee is not bound by that.
iii. Trustee should create written record of distribution request and trustee’s response.
iv. When evaluating distribution requests, the trustee should document that a process was used. Require beneficiary to make distribution requests in writing. Trustee should collect other documents that it relies on in exercising discretion, e.g. tax returns or other financial records evidencing

beneficiary's needs. Create written record or memo documenting impartiality.

1. **Comment**: How often do individual family trustees do any of this? When counsel recommends the client use an institutional trustee the first response is often that it will cost too much. But what will the "cost" on the family be of Aunt Jane as trustee making distributions without a formal process leading to a family war? What will be the cost in actual dollars of litigation should it occur? These same clients are also likely to rebuff recommendations but their professional advisers to have an annual trust meeting to review trust administration.

v. Trustee needs to be reasonably informed when exercising discretion. Trustee should be familiar with terms of trust agreement and have abstract. Should be aware of grantor's intent and scope of trustee's discretion. Trustee can be challenged if improperly applies trust terms.

vi. Impartiality – current and remainder beneficiaries. Duty of impartiality does not require equal treatment but rather equitable treatment. Grantor is free to authorize trustee to favor one beneficiary over the other. Can authorize trustee to deplete trust corpus for one beneficiary to the exclusion of another.

vii. Must trustee consider beneficiary's other resources? If trust is silent the general rule is that the trustee must consider other resources but has some discretion in doing so. The trust instrument can override this. Court decisions on this point are inconsistent. May consider earned and unearned income, court order support payments, etc. Trustee may consider whether beneficiary is unemployed and can work but won't, whether beneficiaries' parents have a legal obligation to support the beneficiary, whether beneficiaries' spouse has resources, etc.

viii. How should valuable but not marketable assets such as equity in home and a business be considered as resources?

ix. Trustee can usually rely on information supplied by the beneficiary, tax returns, financial statements and budgets, alimony, etc. that beneficiary may receive. If trustee feels beneficiary is providing inaccurate information, then then trustee cannot rely on it. What if beneficiary won't provide information (which happens frequently) trustee may choose not to make a distribution (which only angers the beneficiary).

x. If trustee does not have to consider other resources can still take into account how the beneficiary is using other assets, e.g. what is beneficiary doing with mandatory income distributions when exercising discretion as to principal.

xi. Adopt policies and procedures to evaluate principal distributions. Read trust and letters of instruction as to grantor's intent. Prepare abstract of trust agreement. If the agreement has many amendments prepare a master document reflecting all amendments and what was added and when. Determine whether there is a standard for making distributions. Maintain accurate records. Obtain updated appraisals of non-marketable assets.

Determine if you have to consider other resources and if so how that information can be obtained. Are there conditions before distributions?

xii. Trustee should coordinate investment policy with anticipated distributors to be certain that there is sufficient cash to meet those needs.

9. **Wrap-Up**: Jonathan Blattmachr and Martin Shenkman (thanks to Thomas Tietz, Esq. for his notes on this).
    a. TCJA was a significant Act and will create more work and has created many new planning opportunities.
    b. Planning for increased temporary exemption.
        i. Use it or lose it - will sunset in 2025. It may be changed by a future administration before that time.
    c. Net worth of 5M now may be 10M+ in 2025 - so gifting now leverages that appreciation out of the estate. At only 7% a year, which is less than the percentage you make on the stock exchange, it means in 30 years, $5M now will grow to $40M. Many clients will simply feel they don't need to plan based on the current size of their estate but it is the future size of their estate, with growth, relative to what the future exemption might be, that is the relevant litmus test.
    d. Complex goals for those of "moderate" wealth, due to the sheer amount of money you can give away. Consider:
        i. Access to assets.
        ii. Income tax issues.
        iii. Completed gift challenges.
    e. Moderate wealth with the new high exemptions might be a range of $5M-45M or $50M, moderate is a different definition now. Someone with $40M net worth may be very uncomfortable giving away $22M.
    f. UHNW clients planning is business as usual, augment existing plans. Never know what is going to happen in Washington. The $5M exemption for an UHNW client is just augmentation, e.g., additional gifts to existing structures to support further note sales, etc. This may be a great window of opportunity (no 2704 regs, higher exemptions, etc.).
    g. Need to address completed gifts, SALT deductions, leverage the exemption to help with income tax planning.
    h. The TCJA has transformed estate planners- we now need to maximize income tax planning, beyond just basis. Income tax savings can be a new way to bring in clients.
    i. Common Plans for Double exemption:
        i. SLATs: Make sure to avoid the reciprocal trust doctrine, power to loan to permit access to trusts. Will remain foundation of planning, but can split it into a 4-trust plan consisting of two Grantor trusts with certain assets to continue the estate tax burn (e.g. active business interests and rental real estate that would be taxed in all events in the high tax state, and life insurance which should not be in the non-grantor trusts added to the plan), and also two Non-Grantor trusts with certain assets in them to maximize income tax savings, as well as grow assets outside the estate by use of the increased exemption.

j. DAPTs. Variants, power to add settlor as beneficiary (Hybrid DAPT), or distributions to settlor in discretion of non-fiduciary (adverse party, to avoid grantor trust status).
k. Basis Step Up: Consider 2038 power and other mechanisms to cause assets to be included in the estate.
l. Asset Protection.
    i. Even if exemptions have been doubled, numerous clients will still benefit from planning, for asset protection and other concerns. However, without the planning benefit of estate tax reduction for the transfers, the danger of transfers being deemed fraudulent conveyances increases.
    ii. The increased exemption allows for larger gifts to be made to irrevocable trusts. Wealth managers, trust companies, and other advisers need to revise their traditional rules of thumb as to how much a client can transfer into such structures (e.g., 30% of a client's total net worth might serve as the limiting factor preventing the client from using more of her temporary exemption).
    iii. Even if the state you are in does not require one, it would be prudent to have each client sign affidavits of solvency confirming they will remain solvent after the transfer, both for the client and to protect yourself as a practitioner after the gift tax exemption increases of TCJA.
    iv. Due Diligence: Perform judgement and lien searches to show that there are no outstanding issues at the time of the transfer, or any creditors that may have claims. Have the client sign an affidavit of judgment and lien confirming they know of no issues the J&L search did not identify.
m. Large Estate planning during the current window of opportunity.
    i. Transfers to Non-Grantor Trusts:
        1. While a Note Sale to a Grantor Trust has been traditional planning (had to be to a grantor trust to avoid recognition of gain), sales to Non-Grantor trusts after the death of the Grantor may be in some instances useful as a part of the practitioner's toolkit.
        2. Grantor Trust converts to Non-Grantor on death of the Grantor, and any assets in the Grantor's estate will receive a step up in basis. Sales to the newly Non-Grantor trust before any appreciation is realized could be completed.
        3. If the assets on the death of the Grantor pass to a QTIP for the surviving spouse, would need to distribute assets to surviving spouse to be able to do planning. Review terms of QTIP- if principal can only be taken out based on HEMS standard, could be issue. But some believe a court in some instances may approve.
        4. Need a two-tier defined value clause: an adjustment on both income and estate tax audits, if either.
    ii. Collateral Swap:
        1. Perform sale to an existing irrevocable trust which has significant assets in it already.
        2. Do not use assets being sold as collateral in the transaction- secure with assets already in trust.

    3. Potentially reduce chance of IRS challenge?

n. Trusts: New Planning/Drafting approaches.
   i. Asset Protection:
      1. Use of Non-Grantor Trusts for justification.
      2. As noted previously, higher exemptions mean clients with “moderate” wealth can no longer use estate tax planning as reasoning for doing planning that also also gave them asset protection. If there is no other justification for the planning but asset protection, that itself could increase risk of fraudulent conveyance claims.
      3. Preparing a Non-Grantor trust that also provides current income tax planning benefits may increase chance of trust being upheld as legitimate because it provides a significant non-asset protection motive for the planning.
   ii. Can make the Non-Grantor Trust a SLAT, but must have an adverse party confirm any distributions to be made to spouse.
      1. IRC Sec. 672(a).
      2. Allows access to funds, albeit with additional hoops to jump through. May not be for every client, but is another arrow in the practitioner’s quiver.
      3. Adverse Party: Someone who has a substantial beneficial interest in trust, whose interest would be harmed through allowance of distribution to surviving spouse. Concern: The adverse party may be making a gift to the trust every time they authorize a distribution to surviving spouse. However, with the current large exemption, which will be halved in 2025 (which is also when the SALT deductions are supposed to revert back to their previous unlimited deduction standard) gifts made by the approval of distributions may not be as large of a concern as in the past.
      4. See 2514 for guidance on who is an adverse party.
   iii. SALTy SLATs.
      1. Most clients will take the standard deduction now due to it being doubled to $24,000. Deductions such as SALT deduction may no longer be usable for most clients.
      2. Could create non-grantor trusts to hold real estate, which may allow for getting $10,000 SALT deduction in home, while client continues to use own standard deduction.
      3. JB: Has $40,000 in property taxes on home in NY, and SALT deduction already used up through income taxes. Will create 4 irrevocable trusts with various differences and put 25% of home in each one, should be able to then deduct $10k in each to get deduction for all property tax costs. Need to be sure to place sufficient assets in each irrevocable trust to generate $10k in income per trust.
      4. If planning to sell home within 2 years, cannot have in Non-Grantor trust, as you will lose the Sec. 121 home sale exemption

deduction. Convert back to Grantor Trust at least 2 years before client plans to sell home.

5. Caution: If creating multiple irrevocable trusts to hold real estate interests for SALT deduction, need to avoid Sec. 643(f) irrevocable trust aggregation rules, which collapses trust for same beneficiaries, same purpose, and only made to avoid income taxes into a single trust. However, the Section specifically notes that the Treasury regulations should be referenced, and none have ever been promulgated. SIIH Partners- IRS code sections that rely on regulations, and no regulations have ever been promulgated, have no teeth.
6. IRS may prepare regulations under 643(f) now if clients begin to consistently use trusts to increase SALT deductions they can take advantage of. However, any regulations would just be proposed regs, and would take time to become enacted.

o. SALTy-SLAT Drafting Tips:
   i. Begin with a Beneficiary Defective Irrevocable Trust format to prepare your SALTy SLAT, to ensure that the trust is non-Grantor.
   ii. Trust cannot have powers that traditionally make a grantor trust (ability to loan assets without adequate security, ability to swap assets, ability to name a charitable beneficiary, etc.)
   iii. Remove Crummey Power to avoid grantor to beneficiary.
   iv. Form the trust in a trust friendly jurisdiction, namely one without state income tax. If assets are contributed to the trust beyond real estate (which will always have income taxes attributed due to nexus in the high tax state it resides in), may potentially avoid income taxation on those assets as well as get the additional SALT deduction.

p. INGs post TCJA.
   i. Traditional ING (intentionally non-grantor) in a state like NY where they have been deemed grantor (which was done to prevent ING abuse in avoiding state taxes) would allow trust to be deemed non-grantor as to federal estate tax purposes, but grantor as to NY tax purposes, allowing real estate tax deduction to flow through to taxpayers NY tax return, but not federal.
   ii. Completed gift ING- could be used to shift income tax deduction to a low tax state. Will be described in a future article.

q. BDIT.
   i. Could be used to have a parent in a high tax state to save family unit income tax (especially in light of the SALT limitation).
   ii. Shift business opportunities to trust that is grantor as to son who lives in a low or no tax state. Parent sets up BDIT which is grantor to son, and transfers business opportunities (which have little to no value) to begin growing assets in trust, which will then avoid the high state taxes as it is grantor as to son.

r. Charitable Deductions Trust.

i. Most clients, especially those of more moderate income, will take the standard deduction, the charitable deduction will no longer be usable by them.
ii. Consider forming a very simple, home state, non-grantor, trust with a family member as trustee, transfer sufficient assets to generate amount of income that you wish to donate to charity each year, use trust to make charitable donations. Allows you to take standard deduction personally, and the trust will take charitable deduction (as a trust has no standard deduction). This retains the full doubled standard deduction and salvages a full charitable contribution deduction to offset the investment income earned in the non-grantor trust.

s. 199A- Some Additional Thoughts.
i. Story of previous physician client: Had a ENT practice, associates would make partner, then soon after leave practice and sue practice to get additional assets. Created numerous different entities to hold various practice related assets: (1) held the underlying real estate in separate FLP and leased to practice, (2) held the Intellectual property and trademark assets in separate FLP and licensed use to practice, (3) held all furnishings in separate FLP, along with expensive medical equipment, and leased back to practice. Next time a newly made partner left and sued practice, the amount of assets in the practice was basically only the account receivables and supplies. Could you repurpose this structure to now separate SSB and non-SSB assets, to allow for 199A deductions where they were not used previously?
ii. **Comment**: The Conference Report for TCJA included the following: "*An activity has the same meaning as under the present-law passive loss rules (section 469). As provided in regulations under those rules, a taxpayer may use any reasonable method of applying the relevant facts and circumstances in grouping activities together or as separate activities (through rental activities generally may not be grouped with other activities unless together they constitute an appropriate economic unit, and grouping real property rentals with personal property rentals is not permitted). It is intended that the activity grouping the taxpayer has selected under the passive loss rules is required to be used for purposes of the passthrough rate rules. For example, an individual taxpayer has an interest in a bakery and a movie theater in Baltimore, and a bakery and a movie theatre in Philadelphia. For purposes of the passive loss rules, the taxpayer has grouped them as two activities, a bakery activity and a movie theatre activity. The taxpayer must group them the same way that is as two activities, a bakery activity and a movie theatre activity, for purposes of rules of this provision. Regulatory authority is provided to require or permit grouping as one or as multiple activities in particular circumstances, in the case of specified services activities that would be treated as a single employer under broad related party rules of present law*." How will rules designed to separate active versus passive endeavors be applied to reasonably govern the division (or not) of specified service

business activities/revenue from non-specified service business activities and revenues? The constructs are different. The examples in the above quote are so obvious as to be of no practical value.

   iii. Ancillary entities above appear to be non-SSB assets of the practice, as they do not have anything to do with the healthcare aspects of the practice.

t. You could potentially gift parts of the non-SSB entity interests to several irrevocable non-grantor trusts, each of which may have its own $157,500 threshold amount before the 199A deduction begins to phase out, potentially increasing amount of deduction possible. Note: 704(e) concerns need to be addressed with this planning, material income producing factor test.

u. Real Estate Developers:
   i. Want to take advantage of 199A deduction, but employees are all housed in a separate management company (while the properties are all in their own specific entities) how do you spread around the W-2 employee costs for the Zone 2 199A deduction phase out formula?
   ii. Potential solution: adjust contract between the management company and the real estate entities to characterize the management company as agent for the entities, and then flow the W-2 costs through to the entities on a pro rata basis. Can corporate be able to draft documentation to support this position? While the new arrangement is contrived, the TCJA created a new construct that never before existed in the law to require client to divide or allocate income and expenses in the manners discussed.

v. REIT.
   i. Large Law and CPA firms (and smaller firms who band together) may be able to form REITs with their real estate in their firm. A leasehold interest is an intangible and cannot apply for the 2.5% nondepreciated basis calculation for 199A phase out deduction.
   ii. However, REITs automatically qualify for the full 199A deduction. So, if a REIT can be formed, which contains the leases or properties of the firms involved, those assets can now qualify for the full deduction automatically.

w. Restructure Impact:
   i. The 199A deduction sunsets in 2025. Clients who rush to restructure their entities to take advantage of it need to be informed that in 7 years it may all need to be revised again.
   ii. There are significant ripple effects of the restructuring discussed in this article, and other post-TCJA changes clients will make, on buy-sell agreements, estate plans (some entities may be owned by irrevocable trusts, others not), that all these issues need to be addressed when the changes are being made. Needs to involve the entire planning team to ensure balls are not dropped when restructuring. If a client restructures a management entity and property entities are owned by pre-existing dynastic grantor trusts, what is the impact on those trusts?

x. Misc. planning ideas post TCJA.
   i. C Corporations and Accumulated Earnings Tax.

            1. Corporate tax concepts that have not been seen for decades are again relevant: personal holding company tax and the accumulated earnings tax as examples.
            2. How to justify maintaining funds accumulated in the corporation beyond those needed for standard operation: could life insurance be the answer? Keeping assets in the entity for Buyout reasons, redemption agreements made in buy sell agreements? Need to find reasons for maintaining capitol in the corporation, as the IRS may start to seriously look at corporations trying to avoid the second part of the taxation beyond the 21% corporate tax rate.
            3. Consider high cash value insurance for buy/sell agreements, instead of traditional term insurance.
      ii. Kiddie Tax/NIIT considerations.
            1. The Senate Report appeared to suggest that the threshold for application of the NIIT for those subject to the Kiddie Tax would also be pegged to the application of trust income tax rates, making the threshold NIIT amount for those subject to the Kiddie tax only $12,500. However, Sec. 1411 was not amended so those subject to the Kiddie Tax still have the $200,000 threshold.
            2. May still avoid the NIIT by distributing income to a child beneficiary below $200,000.
      iii. Tax Preparation Costs are no longer deductible.
            1. This poses a danger to professionals, as it may end up with clients being more aggressive paying planning fees out of a business for deductions. Practitioners should include language in their billing arrangement cautioning against such.
y. Matrimonial:
      i. Non-deductibility of alimony payments on all divorces completed after December 31, 2018 (note that if you get a PSA completed before December 31, 2018 you can be bound under old laws, even if you do not get officially divorced until 2019).
      ii. Personal exemptions for children were often negotiated in PSAs as to who could take them. Those are now gone and may change the economics of the PSA.
      iii. 529 plans can now be used for elementary and secondary school. PSAs may have contemplated required distributions based upon only use for college. Now what should be done? What if one parent uses the money for a high cost secondary school, will they be able to argue for additional funds for college?
z. Powers of attorney.
      i. Gift provisions: Still needed with the doubled exemption? For clients well below the exemption amount, they may simply become potential weaknesses in the estate plan which allow for elder financial abuse.
      ii. For UHNW clients: consider allowing gifts up to the exemption amount, potentially only to specific irrevocable trusts. If client becomes incapacitated before making gift of exemption, could still allow for use of

exemption before it sunsets and is lost. An inadequate power of attorney was a key issue in the recent Powell case.

aa. Charitable giving:
    i. Use of Donor Advised Funds to allow for bunching of deductions. If you bunch charitable giving into one year, could overcome the standard deduction and allow for itemized deduction of charitable giving, as well as the use of the few itemized deductions remaining (such as the medical expenses deduction, make medical improvements to house same year you make large charitable gifts).
    ii. Could use make charitable gifts of IRA RMDs after 70.5.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Marty Shenkman

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