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Subject: Martin Shenkman's Day 1 Notes from the 44th Annual Notre Dame Tax and Estate Planning Institute

The **44th Annual Notre Dame Tax and Estate Planning Institute** was held on October 11th 12th at the **Century Center** in South Bend, Indiana. Members should click this link to review the meeting agenda: 44th Annual Notre Dame Tax and Estate Planning Institute.

The Institute presented topics of interest to a broad range of estate planning professionals, whether their clients are high net worth individuals exposed to the estate tax or more moderate net worth individuals who are below the estate tax exemptions. Of particular interest was the fact that a number of **LISI** commentators served as faculty.

Congratulations go out to program director and **LISI** commentator **Jerry Hesch** for this amazing two-track conference.

As in the past, the Institute provided topics focused on income tax planning, planning with non-grantor trusts, addressing new Section 199A, the new Proposed Regulations for 199A and 643(f), elimination or deferral of state income taxes, and much more. With dual sessions, individuals attending the Institute could choose topics relevant to their clients.

An area of particular interest were the sessions devoted to evaluating different life insurance policies and proposals using life insurance that sometimes seem too good. Another topic covered that will become increasingly important planning for the modern family. With seemingly constant tax law changes a number of sessions addressed integrating flexibility into trust and estate planning.

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**. Marty was a speaker at the **Notre Dame Tax and Estate Planning Institute** and has graciously agreed to share his meeting notes from the sessions with **LISI** members.

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 1,200 articles.

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 in 2018 he joined the NAEPC National Board; 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. He posts less technical consumer videos to www.laweasy.com and writes a blog for Forbes.com on charitable planning.

HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!

Martin Shenkman

CITE AS:

1. **Current Developments of Importance to Estate Planners** - Turney Berry and Charles Redd.
    a. Introduction.
        i. Basis planning.
        ii. Split-dollar life insurance planning developments.
        iii. Charitable vehicles.
    b. Charitable planning.
        i. Doubled standard deduction after 2017 Tax Act.
            1. Rev. Proc. 2018-18, 2018-10 I.R.B. 392 (March 5, 2018).
            2. Bunching of deductions to a given year. Consider making the bunch contribution to a donor advised fund (DAF) and decide later as to which charities that this should be distributed. You will get the same deduction that you would have had you made the donation directly to the intended charities.
            3. **Comment**: Bunching has received a lot of media attention post-2017 Tax Act but it seems that given the myriad of limitations on itemized deductions that this may only be useful for a limited range of clients that are close to the standard deduction threshold.
        ii. 501(c)(4) = C4s.
            1. Transfers to C4s are not taxed as gifts.
            2. Does not generate an income tax deduction but no gift tax.
            3. If client will not qualify for an income tax deduction in any event a C4 may be an interesting option.
            4. Not subject to many private foundation (PF) rules, e.g. 5% since it's not a PF.
            5. You can fund political contributions out of a C4.
            6. Other uses for C4. If you have a business and want to leave it to a PF but self-dealing and excess business holdings are problematic.

If give voting stock to a C4 you can give non-voting equity to a PF and you avoid the excess business holdings, etc.

iii. Trust makes contribution and takes deduction.

1. Trust can take deduction up to trust taxable income. This can be a great idea.
2. **<u>Comment</u>**: See discussion elsewhere about creating new non-grantor trusts for this purpose.
3. Trust may not have language permitting charitable contributions. Can you amend or decant the trust and add the appropriate language? IRS position is that such a step will not be effective. Trust only gets income tax deduction for contributions made in accordance with the governing instrument, and for this purpose that means the original instrument not as amended.
    a. CCA 201651013 - IRS held that the trust after modification was not the "governing instrument."
    b. "*In Old Colony Trust Company v. Commissioner, 57 S.Ct. 813 (1937), the Supreme Court reversed a decision of the First Circuit (87 F. 2d 131). A trust document authorized but did not require the trustees to make current charitable payments if they could do so without jeopardizing the payment of annuities from the trust to non-charitable beneficiaries. The Board of Tax Appeals denied most of the income tax charitable deduction under the predecessor of § 642(c)(1) because it found that the taxpayer had not met its burden of proof regarding whether most of the payments were actually made from trust income during the year made*."
4. Consider making distribution from a trust to a C4 organization as they are not governed by 642(c) and you get a DNI deduction for such a distribution.
5. Solution to above for new trusts is to permit contributions, etc. If concerned about trustees acting inappropriately require that donations by trustee require approval of say a majority of the beneficiaries.
6. Rev. Proc. 2004-5 provides another solution. If a trust is a partner and the partnership makes a charitable contribution then to the extent that the distribution is of taxable income (i.e., not principal) and that flows to trust on K-1 the trust can take the deduction. It does not appear to matter how the partnership was formed or by whom or whether the trust itself formed it.

c. State income taxation of trusts.

i. Evolution in legal developments with respect to a state's ability to impose income tax on irrevocable non-grantor trusts.

ii. Basis on which state can tax.

iii. Fact that trust has situs in a given state for state law, property disposition, etc. may have nothing to do with the whether or not that state has the right to tax the income of that trust.
iv. Different ways states seek to impose income tax on trust.
    1. Where settlor lived when trust was established or at time it became irrevocable.
    2. Where trust property is located.
    3. Where is administration carried out.
    4. Where do beneficiaries live.
    5. Where do trustees reside.
v. Cases.
    1. Chase Manhattan bank case.
    2. Gavin – CT Supreme Court.
        a. "*Gavin, 733 A.2d at 801. The court held that the Grantor's domicile at the time the Trusts became irrevocable did not confer subject matter jurisdiction over gain and income from items of intangible personal property not located within the state of Minnesota*."
    3. Kaestner – North Carolina June 8, 2018.
        a. New York trust, NY trustee, documentation in NY, tax returns and accountings prepared in NY. Asset custodian was in Boston. NC connection is applicable statute said they can tax a trust if any beneficiary lives in NC. NC Supreme Court said that was not a sufficient basis to impose income tax on a trust. Held that beneficiaries separate and apart from the trust and must look at trust itself and the trust itself must have link to NC.
    4. Fielding - July 18, 2018.
        a. MN Supreme Court.
        b. 4 irrevocable trusts 675(4)(C). years later grantor relinquished these powers making the trusts non-grantor.
        c. MN statute was "old fashioned" statute that said income tax can be imposed if at time trusts created settlor resided in MN.
        d. Trustee sold stock and incurred capital gain and MN tried to tax. MN Supreme Court repudiated earlier cases like Gavin and Chase. Held that settlor's residence at time trusts created alone is not sufficient to create tax nexus. No property of trusts was situated in MN and in fact only one of the trusts had a MN resident beneficiary. Court held that even as to that trust with a beneficiary in MN and settlor was in MN coupling those two facts is not sufficient to justify imposition of MN income tax.
    5. Wayfair.

            a. No physical connection to impose sales tax. Engaging in electronic commerce is a sufficient nexus to justify a state's imposition of sales tax.
            b. Might post-Wayfair a court find that a trustee sending distributions to a beneficiary in that state suffice? Speakers not certain.
            c. "*In Sveen v. Melin, 584 U.S. _____ (S. Ct. 2018), the Supreme Court overruled Quill in a case dealing with state sales tax. The effect of that decision on the direction of state income taxation cases like Kaestner is yet to be determined*."

d. Grantor trusts.
    i. Grantor trust.
        1. IRC Section 678 and the Beneficiary Deemed Owner Trust (BDOT).
        2. Trustee of Old Trust can withdraw all assets from another trust (New Trust) then the withdrawing Old Trust will be treated as owner of the other New Trust.
        3. This has interesting applications to move assets among different trusts.
        4. Can your reform trust to permit such withdrawals?
    ii. Reimbursement of Taxes - Millstein v. Millstein.
        1. Before 2004-64 no provision in instrument allowing toggling off grantor trust status or that allowed trustee to make distributions to settlor to pay income tax of settlor resulting from inclusion of trust income on grantor's return.
        2. Ohio case.
        3. Grantor tired of paying income tax on grantor trust and wanted reimbursement.
        4. Trust did really well from a total return point of view and the income taxes passed through to settlor Norman Millstein added up to millions of dollars.
        5. Son refused to reimburse father. Father filed suit in Ohio and Appellate court held that settlor did not have an equitable right to force trustee to reimburse. Since no express term in governing instrument.
        6. Consider including provisions in trusts, trust protectors, etc. to facilitate controlling this situation.
        7. See Millstein v. Millstein, 2018-Ohio-2295.

e. Amending of trusts.
    i. Horgan v. Cosden. Florida.
    ii. Shire v. Unknown Heirs. Nebraska.
    iii. In both cases all beneficiaries of trust had power under state law to amend trust with court approval. In Horgan trustee had to sign on. In Shire the court found that all unborn heirs had not been joined by virtual representation.

iv. In both cases courts were "grumpy" about this and the expectation that courts would really just rubber stamp what beneficiaries want. Trusts were supposed to pay income to income beneficiaries and remainder to remainderman. Income beneficiary wanted lump sum and remainder wanted to accelerate getting the money and divide up trust now.
v. Courts found that termination would violate a material purpose of the trusts.

f. Decanting.
    i. Hodges case from NH.
        1. Trustee did a decanting.
        2. Trustee changed the beneficiaries to remove a child. This was a breach.
    ii. "*In Hodges v. Johnson, 2017 N.H. LEXIS 232 (N.H. 2017), two irrevocable trusts were established in 2004 for the benefit of the grantor's wife, children, step-children and other descendants. The Trustees had a discretionary power to "distribute all or any portion of the net income and principal of the trust to any one or more of the group consisting of [the beneficiaries] and distributee trusts, in such amounts and at such times as the Trustee, in the Trustee's discretion, may determine*."

g. Removal of trustees.
    i. Pennsylvania UTC.
    ii. Had specific provision to remove trustee but must show something wrong.
    iii. "*The Supreme Court of Pennsylvania reversed the Superior Court and ruled against the grandchildren beneficiaries' request to reform the trust in In Re Trust Under Agreement of Taylor,164 A.3d 1147 (Pa. 2017). The Supreme Court concluded that the UTA does not permit the removal and replacement of a Trustee without Orphans' Court approval*."

2. **<u>An Estate Planner's Duties</u>** - Richard Oshins.
    a. Introduction.
        i. Concept of a "Beneficiary Controlled Trust" to give the beneficiary all powers possible similar to outright ownership of property, constrained by requirements of meeting tax and asset protection objectives (maximizing controls and protections).
        ii. Note that for less competent, immature, irresponsible beneficiaries, managerial controls will be modified/reduced/delayed/refined or possibly not be given at all.
        iii. Limitations should include actions that are illegal or against public policy. Certain fiduciary restraints cannot be waived such as good faith, fairness, honesty, and candor.
        iv. Assets transferred in a properly designed, sitused and managed trust are more valuable to the recipient than those same assets would be if they were transferred outright. But heirs need to have reasonable control and understand the concepts.

b. **Comment**: Dick's view of trusts is exactly correct and the optimal approach for far more clients then actually have this type of planning. It is remarkable how many trusts are still created that are simplistic local trusts lacking so many of the benefits modern trust design and using trust friendly jurisdictions can afford. Dick's comments from his outline are reproduced below and for those practitioners not practicing as Dick suggests, please give thought to adapting his perspective.
    i. "*I am often told by advisors – "My clients do not want the complexities of trusts"; "trusts are too complex/too expensive/too controlling" or "my clients want to stay local and not use the laws of a different situs"; etc. …*
    ii. *My conclusion is that the cost/benefit and/or alternative design strategies were not adequately explained by the advisor(s). It is inconceivable that properly informed clients would reach those determinations. Certainly, they would not reach these conclusions with the present prevailing frequency. It is one thing to tell clients various options, and another to properly explain them so that the clients can arrive at a properly informed conclusion*."

c. Concepts.
    i. Modern trust design.
    ii. Trustees duty of loyalty.
    iii. Prudent person rule.
    iv. Duty to advise.
    v. Most trusts are drafted assuming a competent beneficiary. This is a mistake.
    vi. Trustee may also be a beneficiary. What issues does that raise? Must comply with fiduciary obligations.
    vii. There will be many lawsuits in these areas.
    viii. Too many trusts are drafted to create tax benefit, but the real problems may lie in these areas.

d. Serving as trustee or executor.
    i. Many liability risks.
    ii. Too many fiduciaries assume they can do whatever they want but they cannot.
    iii. What are traps and "high risk" propositions.

e. Modern trusts are created for tax and creditor protection purposes.
    i. Not to protect the remaindermen from the wishes of the primary beneficiary.
    ii. Modern trust design strategy.
        1. All powers over the type of property which an unmarried competent owner has over individually owned property.
        2. Must comply with fiduciary standards and "many people will ignore this."
    iii. Duty of loyalty is the most fundamental duty owed by a trustee to the beneficiary. Scott.
    iv. Key concept is the sole interest rule.

v. If a trustee undertakes a transaction that involving self-dealing or a conflict between the trustee's fiduciary capacity and personal interests, good faith and fairness are not enough to save the trustee from liability. In such case, no further inquiry is made, the trustee's good faith and reasonableness of the transaction are irrelevant. See Dukerminer & Sitkoff, p. 591.
vi. The sole interest rule is strict. Act must be in sole interests of the beneficiary. The mere possibility of self-dealing can incur liability to the trustee.
vii. Undivided loyalty to beneficiaries.
viii. This is not a "best" interest rule.
ix. Honest and dishonest trustees are treated the same.
x. The auction as an illustration
    1. Trust owns artwork and want to sell some of the art to raise funds.
    2. Go to a respected auction house and it auctions the property.
    3. The trustee is willing to pay more than what the highest bidder is willing to pay. Trustee makes a bid and wins the auction.
    4. The trustee is in breach even though trustees bid helped beneficiaries.
    5. Trustee is liable. This is counter-intuitive, but this is the rule.
xi. Conflicts occur often in real world situations.
    1. Example – dentist recommending a crown, can he install it? An auto-mechanic finds engine problem, does he have to send you elsewhere to install? But if a trustee finds a problem can he provide service?
    2. If it is a conflicted transaction involving a trustee no further inquiry is necessary, it goes straight to measuring damages. The plaintiff may choose remedies.

f. Optimal remedy election.
    i. Disgorge profits.
    ii. Consequential damages – plaintiff's harm.
    iii. Punitive damages.
        1. In addition to remedy election.
        2. Crucial for deterrence.
        3. To offset difficulty of detecting and proving wrongdoing.
        4. Prevent "efficient fiduciary breach."

g. Defenses.
    i. Settlor authorization. Express or implied.
    ii. Beneficiary consent after full disclosure. All material facts which might affect beneficiaries.
    iii. Conflict sanctioned by implication.
        1. Example child named trustee of CST.

h. Prudent person standard.
    i. Must act with common sense.
    ii. Duties of vigilance compared.

        iii. What is reasonable under the circumstances at the time the trustee took the act.
    i. Prudent person standard.
    j. Duty of impartiality.
        i. The primary beneficiary receives the maximum control and enjoyment permissible.
        ii. Even to the exclusion of all others.
        iii. The remaindermen receive whatever is left over.
        iv. Duty of impartiality waived.
        v. Trustee may engage in any conceivable transaction that might enhance the trust. This conflicts with fiduciary standards.
        vi. I'd give it outright but for tax and creditor protection.
    k. Core fiduciary rules.
        i. Loyalty, prudence, impartiality.
        ii. Consider typical default rules.
        iii. Can be expanded, restricted, eliminated or altered by trust provisions.
        iv. Trustee is not liable if acts in reliance.
        v. Certain duties that cannot be modified: good faith, fairness, candor and honesty.
    l. May want to authorize self-dealing.
        i. Is it prudent for trustee to buy a non-controlling interest in a closely held entity?
        ii. Is self-dealing inherently wrong?
        iii. Settlor authorization.
        iv. Require good faith, adequate and full consideration in money or money's worth.
        v. Trustee may disregard whether a particular investment will produce a reasonable rate of return or result in preservation of capital.
        vi. May add exculpatory language that the trustee is not liable merely due to nature of investments and degree of risk of the investments. Trustee instruments cannot waive liability in certain circumstances.

3. **<u>Ethical and Practical Obstacles in Retaining Important Clients</u>** - Darren Case.
    a. **<u>Comment</u>**: This is a really great topic and great outline. Good food for thought! We've already made multiple changes to our firm retainer agreement based on the great suggestions of this speaker. Get the outline and review it with an eye to what updates might be useful in your billing/engagement documentation and forms.
    b. Introduction.
        i. Client retires/moves to new state. Can long time attorney from old state, who is not licensed to practice in new state, ethically maintain an attorney-client relationship that still best serves the client's needs?
        ii. Economics to old attorney - acquiring a new customer is anywhere from five to 25 times more expensive than retaining an existing one.
        iii. Attorney should consider the practicality of maintaining a relationship with the client in a new jurisdiction.
    c. Formalities of terminating moving client.

i. General ethical rules of terminating a client apply to the client moving to a new state, if counsel or the client opt not to continue the relationship.
ii. See ABA Model Rule 1.16(d) Declining or Terminating Representation requires attorney to take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any unearned fees, etc.
iii. Use a file closing letter to make clear to former client that the attorney/client relationship has terminated so that the client is on notice to retain new counsel. ABA Model Rule 1.3
iv. "*The written termination should attempt in some manner to confirm that the client has in fact received the writing, such as a return receipt or signature confirmation if done through traditional mailing methods, or a delivery receipt and read receipt if done through electronic methods. Of course, if the client is picking up their file from their office, a live signature of their receipt of the hard file could coincide with the acknowledgement and understanding that the attorney-client relationship has been terminated*."
    1. **Comments**:
        a. While certainly reasonable to do or no doubt protective it is doubtful that many lawyers would send a certified letter return receipt requested confirming that a terminated client is on notice of the termination of the relationship. Many clients and former clients would likely be annoyed or worse at receiving a certified letter confirming termination. It would seem more than reasonable to send a polite letter, wishing the client well, that also confirms the new status. The answer might differ if the attorney is returning a file, and certainly if returning original documents, in which case an overnight carrier or postal service confirmation of delivery would be advisable. But since a growing number of firms are paperless there may be no documents to return suggesting that formal confirmation might not be necessary.
        b. **Sample Language**: The following might be adapted in some form to include in the letter suggested: "On Month Day, Year, we returned all your original documents. We retain no original documents. We also believe that the document return completed the provision to you of all documents that constituted your client file that we held. If you believe there is anything that we may have that you may now in the future need, please let us know immediately…Since you advised us that you are moving to New State, you should retain new counsel in New State to

assist you with your estate planning. Our file will remain closed since our last meeting."

c. There should not be an implication of a standard of practice that an attorney should require a signature of a client to close a file.

d. Dormant Client/Attorney not notified of move.

   i. The speaker addresses the reality, which is all too common, of the client not notifying counsel, leaving counsel unaware of the move.

   ii. "…how can the attorney protect himself or herself from potential liability?"

      1. **Comment**: Kudos to the author for endeavoring to address this issue, but there is something inherently unfair that a client moves to a new state, not notify counsel, and yet counsel have any modicum of responsibility for the planning or documents. It should be common knowledge that different states have different laws and that something as significant as moving to a new state would require consultation with professional advisers to inquire.

   iii. Footnote 11 of the speaker's outline quotes the ACTEC Commentaries on the Model Rules of Professional Conduct concerning a "dormant client" which is very helpful to all planners: "*The execution of estate planning documents and the completion of related matters… normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client… Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual communication or a form email, letter, or similar mass communication regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs*."

   iv. **Comment**: With the availability of very inexpensive cloud-based newsletter software all firms should consider sending out a periodic email update (whether as a simple memo, letter or more formal newsletter) to their entire client list when there is a new change in law, or even just periodically reminding clients of the importance of updating their documents and planning. The issues of dormant representation may be incorporated.

   v. **Sample Language**: Consider including in your engagement/retainer agreement:

1. "Once a meeting, document and/or task is completed, our representation ceases and your file and Matter will be deemed closed until formally re-opened. General or information communications will not keep your Matter or file open."
2. "You as the client have significant responsibilities if our relationship is to succeed and progress is to be made towards achieving your planning goals. You must provide us with complete and accurate information. If facts appear to change you must notify us so that we can discuss the impact on planning. You should consider the general communications we send you and contact us if you believe any might apply to you so that we can help you determine whether modifications to your planning or documents are appropriate."

e. Automatic Termination.

   i. If a client moves to another state and there may be an issue as to whether the documents suffice, the speaker's outlines suggests a clever solution. Provide in your retainer agreement that in such case the representation is terminated.

   ii. **Comment**: We are able to track some relocations by sending out a physical newsletter and providing for "Return Service Requested." The Post Office will return the undelivered newsletter and charge another first class mail fee per newsletter. When we are informed of a new address we update our mailing list and endeavor to send a letter to clients who have moved informing them of the need to update their documentation with local counsel. Based on this speaker's outline we'll update that letter and offer clearer parameters on how we can remain involved. But the reality is that this approach is very costly and time consuming and not feasible for most practitioners unless they are committed already to a paper newsletter or mailing. Also, many newsletters are returned "undeliverable" or "no forwarding address" so it is impossible to ascertain whether many of the intended recipients have moved, died, or what. So, the practical limitations on any steps any practitioner can take to address this are quite limited.

   iii. **Sample Language**: The speaker's outline provided sample language that might be useful in retainer agreements on which the following is loosely based: "Following the execution of any documents, if you change your residency or domicile to a different state, our client file for you will be closed and our representation of you will automatically end. This is because a change in residency or domicile could have a significant and possibly adverse impact on planning and documents we prepared, and it is incumbent upon you to proactively address those possibilities. Following such a formal termination of our attorney-client relationship, if you would like to re-engage our firm for again, please contact us and we can potentially establish a new attorney-client relationship with a new engagement letter detailing the legal representation. We welcome the opportunity to continue to represent you in your new jurisdiction so long as we are able to do so in a manner that comports with rules governing attorney ethics, including restrictions on the unauthorized practice of law in a state where we are not admitted. That new relationship will require co-counsel in your new state if we are not admitted to practice in that state. We can also help you determine if it will be cost effective to pursue that route versus merely hiring new counsel in the new state."

iv. The issue that continued representation may create is the unauthorized practice of law in a new state where the firm may not be admitted. Consider ABA Model Rule 5.5 regarding the unauthorized practice of law. An attorney may only practice law only in a jurisdiction in which authorized to practice. While gaining admission to the bar of the other jurisdiction may satisfy this issue, it will not equip counsel with knowledge of that new states laws. ABA Model Rule 1.1 requires competent representation of a client.

v. ABA Model Rule 5.5(c) and (d) provides specific exceptions to the restrictions on the practice of law by out-of-state lawyers to facilitate multijurisdictional law practice in situations that serve the interests of clients and the public and do not create an unreasonable regulatory risk.

vi. An attorney is permitted to temporarily practice law in a state in which the lawyer is not licensed when the legal services provided:

1. (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter. Issues that the multiple attorneys face when using this safe harbor is the division of labor and then the communication of the division of labor and the fees and costs associated therewith to the client.
2. … or (4) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Considerations might include (see Comment 14):
    a. The client may have been previously represented by the lawyer or may be resident in or have substantial contacts with the old jurisdiction.
    b. The matter may have a significant connection with the old jurisdiction.
    c. The services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of law.

f. File memorandum.

i. "If an attorney still wishes to retain their important client, it will be important for the attorney to properly document their file. It is recommended that the attorney draft a memorandum to the file that notes which safe harbor exceptions he or she believes apply, enabling such attorney to temporarily practice law in an unlicensed jurisdiction."

ii. **Comment**: How many firms actually prepare such a memorandum? Likely very few if any. Should a client pay for such a memorandum?

4. **<u>Using Non-Grantor Trusts for Estate and Income Tax Planning</u>** - Jonathan Blattmachr and Martin Shenkman.
    a. **<u>Comment</u>**: Since it would be a tad challenging to take notes simultaneously with giving a presentation the following is an adaption/modification of an article on planning for non-grantor trusts that appeared in CPA Magazine that is more basic then the presentation given, but which will hopefully provide readers useful information and make these notes more complete.
    b. Why You Must Understand the New Planning Benefits of Non-Grantor Trusts
        i. The 2017 Tax Act dramatically changed tax planning. In the new tax environment, there are significant income tax saving your client may realize. But for many of these planning ideas you need to understand and use non-grantor trusts.
    c. Substantial tax benefits of non-grantor trusts might include:
        i. 199A benefits by splitting qualified business income ("QBI") to avoid the taxable income limitation and the impact of the phase-outs (yes, even with the new Proposed Regs). Watch out for the anti-abuse rules, 643(f) rules, and so forth.
        ii. Charitable contribution benefits with a dollar for dollar benefit without regard to the new doubled standard deduction. Watch the 642(c) requirements.
        iii. Property tax deduction up to at least another $10,000 despite the tough state and local tax ("SALT") limitations imposed by the 2017 Tax Act. Note the figure is a mere $5,000 married filing joint and these figures are not inflation adjusted by the new chained CPI.
        iv. State income tax savings which are more valuable and important to planning given the tough new restrictions on SALT deductions.
        v. While there are other potential benefits (e.g. net investment income tax savings) this focuses on just the primary ones above. If you are able to identify further savings using non-grantor trusts for your clients, all the better.
    d. What is a Non-Grantor Trust
        i. A non-grantor trust is a trust that is treated as a separate taxpayer and which pays its own income tax. Although a non-grantor trust pays its own income tax it has a deduction for distributions made to beneficiaries thereby shifting the income tax burden on income distributed, in simple terms, to the recipient beneficiary. Thus, it is not merely enough to know for planning purposes whether a trust is a non-grantor trust, but also the amount of distributions it makes and other factors. After the 2017 Tax Act the use of non-grantor trusts has been greatly enhanced because of the possibility of such trusts enhancing the income tax benefits above in comparison to the income tax results that would be realized if the taxpayer himself or herself instead reported the tax item directly on his or her own personal return.
        ii. A key challenge practitioners will face in crafting non-grantor trusts after the 2017 Tax Act is meeting the three requirements or objectives many clients will have for these trusts: 1) completed gift to use temporary

exemption, 2) access to the assets as many clients push to transfer a larger portion of their net worth then was historically common to such trusts (and with the desire for practitioners to avoid the buyer's remorse common after much 2012 planning), and 3) non-grantor trust status.

    iii. Melding the above goals may require new trusts, non-grantor spousal lifetime access trusts dubbed "SALTy-SLATs" and completed gift variants of the traditional ING trust (intentionally non-grantor trusts).

e. How Non-Grantor Trusts can Provide Charitable Deductions Taxpayers Otherwise Could Not Realize
    i. Creative uses of non-grantor trust planning can salvage a charitable contribution deduction for moderate wealth clients who have no particularly need for estate planning in its traditional sense. Practitioners should be alert to educate clients that "estate planning" can be valuable even for those who do not view themselves as wealthy.
    ii. Example: Taxpayer is married and makes a $10,000 charitable contribution for the year. Because her standard deduction is $24,000 she realizes no tax benefit from the deduction. Instead she creates a simple non-grantor trust in her state naming her sister as trustee. The trust lists charities and descendants as beneficiaries. Taxpayer gifts $200,000 to the trust which earns 5% or $10,000 which her sister the Trustee donates to charity. The trust realizes $10,000 of income and $10,000 of contribution deduction since as a non-grantor trust it is treated as a separate taxpayer. Trusts do not receive a standard deduction, so the full donation is deductible. Taxpayer still benefits from her entire $24,000 standard deduction.

f. Compare Non-Grantor to Grantor Trusts
    i. Although grantor trusts have been the default planning tool for wealthy clients, in the current tax environment, many clients, even those that may not be "wealthy", may realize income tax benefits from creative uses of non-grantor trusts. Practitioners, especially those who have believed that they did not have to get involved with "estate planning" or who viewed their clients as not being sufficiently wealthy to benefit from estate planning, need to reconsider how important non-grantor trust planning is for their clients.
    ii. Despite the potentially valuable benefits of using non-grantor trusts, client estate plans will likely include a blend of grantor trusts and non-grantor trusts in a mix to optimize planning for that particular client.
    iii. It is also important to understand the difference between a non-grantor trust and a grantor trust. This is crucial for practitioners not only because of the different tax compliance implications, but because of several important tax and other ramifications. Grantor trusts can have in the trust document a swap or substitution power. In fact, that is the mechanism many grantor trusts use to characterize the trust as a grantor trust. This power enables the settlor who created the trust to swap appreciated assets from the back into his or her name to achieve a basis step-up on death. That is a potentially valuable benefit that may be lost with the use of a

non-grantor trust that practitioners should weigh. But that loss is not assured as it may be possible to modify even an irrevocable trust in the future and add to it a swap power, thereby changing its status from non-grantor to grantor. But this is just one of the factors that must be weighed in helping clients assess the potential benefits of using non-grantor trusts.

iv. Grantor trusts also can permit the tax-free sale of assets. Thus, for UHNW taxpayers, grantor trusts will remain a main component of many plans. Example: Taxpayer owns a valuable closely held business she started a decade ago in her garage. She sells a minority interest in the business to a trust for a note. One goal is to lock in valuation discounts and another is to freeze future appreciation outside her estate. If that sale were made to a non-grantor trust income tax would be triggered. If made to a grantor trust it would not be.

v. Grantor trusts can own stock in S corporations. However, if a non-grantor trust holds stock in an S corporation that trust will have to qualify as either an Electing Small Business Trust ("ESBT") or Qualified Subchapter S Trust ("QSST"). The latter presents compliance and other complications practitioners should be aware of. If the trust involved does not have the appropriate ESBT or QSST provisions the trust will have to be modified (which will itself present costs and complexities) in order to hold S corporation stock.

vi. Life insurance generally may only be held in a grantor trust. This is because if a trust can use trust income to pay insurance premiums on policies insuring the settlor's life the trust will be characterized as a grantor trust for income tax purposes.

g. Non-Grantor Trusts May Permit Saving Property Tax Deductions

i. This is another potentially valuable planning idea that, just like the charitable planning idea above, can benefit moderate wealth clients. Again, that is a critical point for all practitioners to understand as too often clients and practitioners alike dismiss the importance of "estate" planning without first understanding the valuable income tax benefits the process can provide to clients who are not "wealthy." To understand how non-grantor trusts might save clients property tax deductions, the limitations of the 2017 Tax Act must first be understood.

ii. The 2017 Tax Act severely restricted the Code Section 164 tax deduction for non-business state and local income, sales and property taxes to $10,000 annually. Both individual and married couples filing jointly get the same $10,000 limit. Married couples filing separately are limited to only $5,000 a year. Also, this $10,000 cap is not indexed for inflation. The bottom line is that many clients will lose most of their property tax deduction. Can practitioners help? In many instances yes. The answer is in the creative application of non-grantor trust planning.

iii. Although some might express concern about the impact of the multiple trust rule in the new 199A Proposed Regulations (discussed below) neither those Proposed Regulations or any other law in any way prevents the use of one non-grantor trust for this purpose. For many clients, salvaging an additional $10,000 of property tax deduction per year will alone justify the planning.

iv. If a portion of the taxpayer's house is transferred to a non-grantor trust, that trust should be treated as a separate taxpayer and will be permitted to deduct up to $10,000 annually for state and local taxes, e.g. property tax on the home it pays. For this deduction to be realized the trust must earn income at least equal to the property taxes it pays. The trust realizes the property deduction. The individual taxpayer will still have their own $10,000 state and local tax ("SALT") benefit and will qualify for his or her full standard deduction. Thus, just as illustrated for the charitable contribution deduction above, this planning idea can provide an additional $10,000 tax benefit each year. If combined with the charitable contribution deduction planning illustrated above, a single non-grantor trust can provide valuable benefits many clients will have lost under the new law.

v. But just as with so many creative planning ideas there are wrinkles practitioners will need to address. For example, no home sale exclusion under Code Section 121 is available. This might be mitigated by selling the house to the non-grantor trust at inception and obtaining a tax-free step up in basis up to the amount of the exclusion. Alternatively, the trust could in a future year, at least two years before sale, be converted to a grantor trust so that the gain will be included in the taxpayer's return.

h. How A Non-Grantor Can Increase 199A Benefits

i. Practitioners are no doubt by now well familiar with the general concepts contained in Code Section 199A. This new tax benefit enacted as part of the 2017 Tax Act can provide a deduction of up to 20% of income from a domestic business operated as a sole proprietorship or through a partnership, S corporation, trust, or estate. The income must be qualified business income ("QBI"). The activity must be a trade or business as defined under Code Section 162. If that business is a Specified Service Trade or Business ("SSTB") further restrictions apply. One of the key limitations on the new 199A deduction is the taxable income threshold. If married taxpayers have taxable income above $315,000 for a non-SSTB then a wage or wage and tangible property limitation may apply to reduce the amount of QBI that can qualify for the 20% deduction. If the business involved is tainted as an SSTB then the 20% deduction is phased out ratably from $315,000 to $415,000 at which point no deduction is available.

ii. After enactment of the law, many commentators speculated that the taxable income threshold could be circumvented in some instances by transferring equity in the business to non-grantor trusts. The basis for this planning idea, which in part or whole still is viable, is that a non-grantor trust is its own taxpayer and as an independent taxpayer would be subject to its own taxable income threshold of $157,500 as if a single taxpayer.

iii. Example: Taxpayer has an SSTB that might qualify for the 199A 20% deduction but her taxable income is over $500,000 so she cannot realize any benefit. The SSTB generates $400,000/year in income. She gifts 30%

of the SSTB to three different non-grantor trusts, one for the benefit of each of her children. Each non-grantor trust realizes 30% x $400,000 = $120,000 of income which is under each trust's $157,500 taxable income threshold for 199A phase out purposes. Each trust might qualify for a full 20% 199A deduction.

iv. The IRS, aware of the planning ideas practitioners were considering, endeavored to attack the above planning with non-grantor trusts in the Proposed Regulations.

i. How the New Proposed Regs May Inhibit Non-Grantor Trust 199A Planning

  i. On first blush the Proposed Regulations appear to eliminate this planning with non-grantor trusts by promulgating anti-abuse rules attacking the use of multiple trusts. Before examining those rules consider:
  ii. Nothing in the Proposed Regulations suggests that use of a single non-grantor trust is problematic. However, practitioners will have to consider the aggregation and control tests that apply to SSTBs which may restrict splintering an SSTB into SSTB and non-SSTB components, and perhaps gifting part to a non-grantor trust. Thus, the above planning seems to be viable if only one non-grantor trust is created. That could be beneficial to a client. Also, in evaluating the benefits versus costs of such planning consider how many different uses a particular non-grantor trust might provide a particular client (home property tax, charitable contribution, 199A, etc.).
  iii. The Proposed Regulations are merely proposed at the present time and may well change before finalized.
  iv. Many commentators have attacked the Proposed Regulations as exceeding the authority granted to Treasury and also, especially with respect to the multiple trust rules they contain, contradicting the specific provisions of Code Section 643(f) for which they are providing rules.
  v. Depending on the reading of the Proposed Regulations by some commentators, the planning in the above example, if done properly, may still be viable.
  vi. Again, each practitioner should help each client weigh the pros and cons of this planning with each individual client and also caution clients about the potential for an audit, which certainly cannot be quantified.
  vii. The preamble to the Proposed Regulations provides: "Section 643(f) grants the Secretary authority to treat two or more trusts as a single trust for purposes of subchapter J if (1) the trusts have substantially the same grantors and substantially the same primary beneficiaries and (2) a principal purpose of such trusts is the avoidance of the tax imposed by chapter 1 of the Code [highlights added]." That language comports with the statute which has a conjunctive three prong test requiring substantially the same grantors and primary beneficiaries and a principal purpose of tax avoidance. Note that as for the tax avoidance being a "principal purpose" if the trust also provides estate tax benefits by using an exemption that is scheduled to sunset, provides important asset protection benefits, etc. will the income tax avoidance be a "principal purpose?"

viii. The last example in the Proposed Regulations deals with the multiple trust rule. After illustrating how trusts can in fact surmount the requirements to avoid having substantially the same primary beneficiary, and thus be respected under the newly formulated multiple trust regulations, the following language appears: "Under these facts, there are significant non-tax differences between the substantive terms of the two trusts, so tax avoidance will not be presumed to be a principal purpose for the establishment or funding of the separate trusts. Accordingly, in the absence of other facts or circumstances that would indicate that a principal purpose for creating the two separate trusts was income tax avoidance, the two trusts will not be aggregated and treated as a single trust for Federal income tax purposes under this section." Thus, the Treasury/IRS are suggesting that if there is a "principal purpose" of income tax avoidance the trusts can be aggregated even if the other two conjunctive requirements of the statute are complied with. That interpretation is clearly contrary to the statute and it is not clear that it could be upheld.

5. **<u>Estate Planning Income Tax, Financial and Personal Objectives</u>** - Steven Siegel.
   a. "The estate planner has a new challenge—the majority of our clients' estates will not be subject to the federal estate tax when death occurs. How are we to plan for them—and indeed, convince them that planning is still important and necessary? This outline discusses the new reality in financial and estate planning."
      i. **<u>Comment</u>**: Steve's outline begins with a critical issue facing most practitioners, pretty much anyone who works with clients below the UHNW threshold. Tough. Please forgive the soap box chanting that follows. For decades we as an industry relied on estate taxes to drive clients into our offices. That driver for most is now irrelevant. But in the bigger picture many CPAs relied on the complexity of the tax laws to drive clients in for tax compliance. If you've read the 199A Proposed Regs you know that complexity abounds and increases (and no doubt you still have Excedrin headache 199A). But the reality is that tens of millions of taxpayers should in fact be able to file returns on post cards. The new doubled standard deductions will eliminate itemizing deductions for 5/6ths of taxpayers that use to claim them. So, CPAs are losing a big driver they've had for decades. Wealth advisers who felt that they were secure are facing similar challenges. Low cost index and other funds are an option for many clients. Many fine trust companies offer unbundled options to trust and wealth management services so that clients, instead of paying a fixed asset management fee each year might pay lower fees in years that they do not require additional services. There is no shortage of financial blogs cautioning or lamenting these changes. But there does seem to be a solution that keeps attorneys, CPAs, wealth advisers and trust officers relevant and valuable. The commoditized mini-me versions of real advisers cannot provide:
         1. Creative planning.

2. One-off, tailored planning for a particular client. Neither a client nor a Walmart priced low-cost investment management alternative is likely to be able to make asset location decisions to place the appropriate assets into a new non-grantor trust that has unique tax attributes.
3. Aging and other challenges need proactive planners and team efforts. Clients are aging. Elder financial abuse, identity theft and more are all real challenges that in their mildest forms make the fees we planners charge look insignificant. But we have to educate clients as to steps that can be taken and offer real solutions. While no doubt as AI progresses, more safeguards can be baked into banking and other routine matters, real planning will be beneficial for a long time to come. The mini-me commoditized version of advisers can't do this.
4. Communicate and collaborate. Collaboration absolutely provides better results and technology facilitates doing it a low cost and efficient manner. But the big stumbling block is that too many advisers don't really collaborate (even if they like to talk about it at cocktail parties). Getting a smart CPA, attorney, and wealth advisers putting heads together for a client can be incredible and something that can make the collective (think the Borg) a valuable value-add for any client.

b. Estate tax return scary stats from Steve.
   i. **Comment**: If you weren't worried about the profitability of your probate practice read the stats from Steve and weep:
   ii. In 2001, 120,000 federal estate tax returns were filed, of which 60,000 were for taxable estates. In 2010, 15,000 returns were filed. In 2012, less than 4,000 taxable estate tax returns were filed. Estimates are that less than 0.1 percent of Americans—fewer than 2 out of every 1,000 people who die—will be subject to the federal estate tax with the current exclusion structure in place. The Tax Policy Center suggests that only 1,800 estates in the United States (1 in every 1,400 people who die) will pay any estate tax in 2018.

c. Simply dangerous.
   i. "The client may want to opt for the simplest (and least expensive) of plans, which may make complete sense when viewed solely as a tax planning decision, but which may be a serious mistake when other planning considerations are raised."
   ii. **Comment:** Steve is again nailing it but a big part of the solution to this challenge which effects even those practitioners serving rather wealthy clients now is education. That education cannot start when clients show up in an estate planning attorney's office. It needs to be echoed across the planning team at all meetings. Wealth advisers, if they really want to help clients, need to educate them about the importance of proper planning and not play into clients harmful and unfounded complaints about simplicity and legal fees.

d. New focus of planning.
    i. Core dispositive planning.
    ii. Income tax planning (such as achieving basis step-up at death).
        1. A high capital gains tax in the future, resulting from loss of a second basis step-up for assets on the death of the surviving spouse, e.g. assets that might be held inside a bypass trust, may be an unacceptable choice to some clients.
        2. The potential 20% federal capital gains tax, a 3.8% NIIT (net investment income tax), state income taxes, etc. could result in a capital gains tax of 30%.
        3. Simple will bequeathing all of the assets outright to the surviving spouse will achieve a basis adjustment at the deaths of both spouses.
        4. Consider shifts of assets between spouses before the first spouse's death but watch the rules in Code Section 1014(e).
        5. **Comment**: But post-2017 Tax Act it has grown to so much more. Creative uses of non-grantor trusts broaden dramatically the income tax planning topics estate planners can touch.
    iii. Preservation of assets.
    iv. Management of assets.
    v. Revising old estate planning documents that could be dangerous. Watch formula clauses that might harm the surviving spouse. Are formula clauses still needed if the client lives in a decoupled state. Is there still a need for a credit shelter trust that no longer may generate federal estate tax savings?
        1. The DSUE amount is not indexed for inflation. Is there concern about long-term appreciation between the first and second deaths? The bypass trust protects the surviving spouse's estate from being taxed on appreciation between the first and second death. But those assets won't get a basis step up on the surviving spouse's death.
        2. Growth in the assets in a bypass trust is excluded from the estate of the survivor. Growth is not excluded from the gross estate of the surviving spouse where assets are received outright, or if they pass to a QTIP trust. (Code Sections 2033, 2044). So, it's a trade-off with basis step up versus estate exclusion etc.
        3. There is no portability of the GST exclusion. A bypass trust at the first death of a member of a married couple passing ultimately to skip persons can secure the benefits of the first decedent's GST exclusion, leaving the survivor able to use his or her own GST exclusion in the future.
        4. There is an unlimited statute of limitations on values for purposes of determining the DSUE that begins to run from the time the first deceased spouse's estate tax return is filed. Reg. § 20.2010-3(d); Estate of Sower, 149 T.C. No. 11 (Sept. 11, 2017).
        5. In a blended family situation, substantial inequities may result if the credit shelter approach is not used.

6. **Comment**: Many clients will not fund credit shelter trusts, but the result might be no assets being available to children or other heirs. Coupled with possible longevity of the surviving spouse and aging costs there may be little left for intended heirs and they may receive it at such a late age that the enjoyment it could have provided is lost. Perhaps more tailored solutions, e.g. funding a credit shelter trust up to a specified dollar amount (but not in excess of the amount that will not create a tax costs in case the laws change yet again) might be preferable?

vi. Reconsider gift planning. If there has been a pattern of gifting to family members that was motivated by transfer tax concerns that no longer apply, what are the expectations of those family members?

1. **Comment**: Great point by Steve. So now that mom and dad don't need to give the kiddies annual exclusion gifts to save estate taxes, they might opt to stop. Why bother. But what about the kiddies who have become addicted to those annual gifts to cover necessities of living? His recommendation to have a discussion, by the team, not only the wealth adviser, is really what the future of planning should be: more advisory, more personal, more holistic and team based.

vii. Planning for disability and incompetency.

viii. Business succession planning. – pay attention to the baby boomer generation of business owners approaching retirement age (with or without concerns that the estate tax will force a succession plan to be implemented).

ix. Planning for possible divorce and other family relationship dissolutions.

x. Charitable giving.

1. Will charitable bequests generate an estate tax deduction? If unlikely consider options.
2. Bequeath instead dollars to children for them to make the donations to the decedent's charities and they can get an income tax benefit subject to exceeding the newly doubled standard deduction.
3. The client could instead create a trust to make distributions of trust income to charity. Be sure to meet the requirements of Code Section 642(c) so that charitable deduction will offset the trust income and satisfy the charitable intent of the creator of the trust.

xi. Life insurance planning.

xii. Fiduciary litigation.

xiii. Use temporary exemption before sunset or law change. Consider one spouse using all of her exemption so the other spouse retains his unless the couple can use the entirety of both exemptions. That may preserve more exemption overall.

xiv. Identifying guardians for minor children.

xv. Eldercare planning.

xvi. Evaluating prior discount planning.

1. Planning for years focused on maximizing valuation discounts
2. A majority of clients no longer face a federal estate tax, claiming valuation discounts will provide no estate tax benefit and will reduce the basis step-up and raise capital gains costs.
3. Can old planning be modified when appropriate? Example: amend governing documentation to flip provisions that had supported discounts, so they do not. Caution – watch asset protection implications.
4. 754 election - available for partnerships and LLCs taxed as partnerships. On death of member/partner heirs get the partnership or LLC interests with basis = date of death value. Code Section 1014. This is the "outside basis." The basis of the LP/LLC in its assets = "inside basis" is not affected by the death. A Section 754 election permits the entity to adjust the inside basis of the decedent partner/member (e.g., step-up). Consider amending LP/LLC agreements to mandate 754 election be made.

e. Portability.
   i. Choose to file a federal estate tax return (Form 706) making the portability election. Reg. 20.2010-3(a)(3).

f. Non-grantor trust income tax planning.
   i. Steve makes the case for distributions out of trusts to flow out income because of compressed trust tax brackets as contrasted to individual income tax brackets, etc.
   ii. Compressed income tax rates for trusts. Trust income over $12,500 (2018) taxed at max 37%. 20% capital gain rate is reached at $12,700. $12,500 is the 2018 threshold for NIIT. In contrast thresholds for individual taxpayers much higher. Married TPs (MFJ) reach NIIT threshold at $250,000 of AGI and 37% rate at $600,000 of taxable income (2018).
   iii. In new trust:
      1. Give trustee discretion to distribute capital gains to the income beneficiaries.
      2. Permit sprinkling of income among large class of beneficiaries to shift income to lower bracket beneficiaries.
   iv. For existing trusts:
      1. Does state law have a "power to adjust" allowing distribution of capital gains?
      2. Does trust prohibit distribution of cap gains?
      3. Is there authority granted to a trust protector or other fiduciary to modify the document to permit cap gain distributions?
      4. Can trust be decanting into new trust permitting inclusion of capital gains in trust income.
      5. Use election under Code Section 663(b) to have amount paid to beneficiary within 65 days of end of tax year treated as if paid during prior year if advantageous.

g. Life insurance.
   i. As an income tax shelter.

ii. Consider assuring grantor trust status to avoid transfer for value issues. Rev. Rul. 2007-13, IRB 2007-11, 684; PLRs 200518061 and 200514001.

iii. If no estate tax concern moderate wealth taxpayers may not use ILIT. Retaining direct personal ownership of policy permits insured/owner to access long-term care rider, and to withdraw cash values as needed without having to look to trustees or strain the language of a trust to secure a withdrawal from the policy. **Comment**: Change in tax law, lawsuits, etc. all make that a potentially risky gambit.

iv. Consider keeping appreciated assets like business and real estate interests in the estate for step-up and have life insurance in ILIT to address estate taxes, etc.

v. With large exclusions and portability survivorship life insurance may no longer be needed for estate taxes. What should be done with policy and the ILIT?

   1. Cancel policy and trustee can distribute proceeds.
   2. Convert to paid up policy.
   3. 1035 exchange for a qualified annuity or another insurance policy that could offer more attractive terms (such as faster cash value builds up that can be withdrawn or a payout at the first death of a married couple) than the second-to-die policy offers.

vi. Make ILITs are easier to administer by avoiding Crummey powers and gift tax returns by:

   1. Having all beneficiaries sign written waivers of all future withdrawal rights. Turner v. Commissioner, T.C. Memo 2011-209.
   2. Have beneficiaries/powerholders sign a one-time waiver stating that all Crummey rights in the future need be only given verbally if trust permits this.
   3. **Comment**: ILITs are not just for taxes but for asset protection, protection of irresponsible beneficiaries, etc. If the ILIT requires certain formalities and they are not adhered to because the tax need for them has waned (well, maybe…) might that not create the potential for a creditor to claim the formalities of the trust have been ignored so why should they be restricted by those legal distinctions in satisfying their claim. In most cases the cost of compliance with these formalities is not particularly expensive relative to the insurance involved, and often not particularly expensive even relative to the premiums, so counsel should be cautious recommending short cuts that are not really a big deal (although the client might view them as such) and which might have negative repercussions. If instead of handling Crummey powers as a one-off item if they are combined with an annual review meeting that provides a value-add to the client, then they might be viewed differently as a component of that work rather than having just the cost of Crummey powers stand out. A better approach may be to merge or decant an old ILIT into a more robust modern SLAT lessening the number of trusts the client has,

avoiding the need for gifts or Crummey powers since income in a better funded trust may pay premiums, etc.

h. IRA and Qualified Plans.
    i. If the estate is not subject to estate tax, and portability permits CST to be avoided, bequeath IRA directly to the surviving spouse for income and estate tax deferral at the first death and rely on portability to be able to utilize the deceased spouse's DSUE. **Comment**: Do consider with longevity the risk of the surviving spouse remarrying and possibly jeopardizing those assets. While the approach is compelling from a simplicity standpoint, tax and legal perspective, is it as safe as the client will want as longevity issues evolve over time?
    ii. If protection of trust advisable retirement plan assets could be bequeathed to a QTIP Trust but that is complex to draft and administer. Rev. Rul. 2006-26 may result in faster required withdrawal.

i. QPRTs.
    i. Many no longer beneficial as lose basis step up on house on death and no estate tax benefit because of high exclusions.
    ii. Some considerations to unwind QPRTs are:
        1. Client lives in residence without paying any rent, asserting a retained interest despite the QPRT document's terms once the term of use has expired resulting, arguably, in a Section 2036 estate inclusion.
        2. Grantor purchases the residence from the trust.
        3. Beneficiaries exercise a prohibited commutation that will void the QPRT qualification.
        4. **Comment**: Can a taxpayer succeed in this manner? Will any of these be respected by IRS and if not what tax, interest and penalties might be assessed?
    iii. Caution is in order.
        1. Decoupled state unwinding could trigger state estate tax.
        2. Consider holding period:
            a. Residence that will be sold by beneficiaries soon after grantor's death so basis important.
            b. Residence e.g. family farm/vacation home not likely to ever be sold so basis irrelevant.
            c. Might residence qualify as principal residence, and might Sec. 121 home sale exclusion be availed of and beneficial?
            d. Consider the requirements of the trust.
            e. Consider obligations of the trustee.
            f. Consider concerns of the beneficiaries.

j. FLPs/LLCs.
    i. Should entity be dissolved? Consider non-tax and asset protection benefits.
    ii. Distribution to one partner of appreciated property contributed by another partner within seven years triggers the pre-contribution appreciation. Sec 704(c).

iii. Consider amending FLP/LLC agreement to remove provisions supporting/causing discount so that the value on death will be fair market value, not a discounted value. **Comment**: These changes may give family members more control then desired and negate some of the asset protection benefits the entity had provided.

k. Planning techniques to consider.
   i. Powers of appointment ("POA"). Consider giving a beneficiary a general POA ("GPOA") to cause estate inclusion and a possible basis step-up.
   ii. Consider giving the trustee or a trust protector the right to convey a general power of appointment to a trust beneficiary. **Comment**: Consider the liability of a trustee holding such a power. Can a trustee ever exercise such a power if she has a fiduciary duty to existing trust beneficiaries? Should the right instead be given to a person who is not a fiduciary and expressly be designated as given in a non-fiduciary capacity?
   iii. Use the Delaware tax trap. Sections 2041(a)(3), 2514(d).
   iv. Will/Revocable trust options.
      1. Outright bequest to spouse with flexibility to disclaim to a CST with spouse as primary or sole lifetime beneficiary. Concern whether spouse will disclaim. Qualified disclaimer must be done in 9 months. If surviving spouse is beneficiary of CST funded by disclaimer she cannot be given limited power of appointment over that trust. Reg. 25.2518-2(e)(2).
      2. Partial QTIP or Clayton QTIP provision. Clayton v. Comm., 976 F. 2d 1486 (5th Cir. 1992); Reg. Sec. 20.2056(b)-7(d)(3) and 7(h), Example 6.

6. **Donor Advised Funds, Community Foundations, Private Foundations and 501(c)(4) Charities** - Andrew Katzenberg.
   a. Formation
      i. Donor-Advised Fund
         1. Sponsoring organization (often a financial institution) maintains fund
         2. Sponsoring organization prepares all of the documentation to establish the DAF saving donor time and cost.
         3. 1 week to establish. Quick and easy.
      ii. Community Foundation
         1. It is a pre-existing charity.
         2. It is a sponsoring organization and can establish donor-advised funds.
      iii. Private Foundation (two structures)
         1. Structures.
            a. Trust.
            b. Corporation.
         2. More complex and costly and requires significant donation/assets to be worthwhile.
      iv. 501(c)(4) = C4.

        1. Can be a corporation (but could be a trust).
        2. Unincorporated associations.

b. An estate or trust may be allowed a charitable income tax deduction for amounts paid to domestic and foreign charities. The deduction available is not subject to any percentage limitations, but the amount paid to charity must come from gross income. Sec 642.
c. Trust structure and corporate structure for PF = private foundation or 501(c)(4) = C4.
    i. Trust structure may be quicker.
    ii. Trust may be harder to modify then a corporate structure. Client may not want later generations to change so trust may be preferable.
    iii. Incorporation may take longer. Some states can take time and even create difficulties to create the corporation with state agencies, etc. Business judgment rule and better liability protection with corporate form.
    iv. DAF vs. Community Foundation vs. Private Foundation vs. C4.
        1. PF cold take 4-12 months to get IRS approval. This is why some clients are hesitant to use a PF if they need the deduction.
        2. You have 27 months to make exemption retroactive.
    v. C4 – optional filing Form 1024. Automatically tax exempt no mandatory filing.
    vi. Day to day administration.
        1. DAF – handled by DAF not client in terms of paperwork.
d. DAF Excise Taxes
    i. § 4966 – Taxable distributions.
    ii. Similar to taxable expenditures for private foundations.
    iii. § 4967 – Prohibited benefits (advisor or her family)
    iv. § 4958 – Excess benefit transaction.
    v. § 4943 – Excess business holdings - Also applies to private foundations. If give bequests to a charity, such as DAF, you have 5 years before excess holdings issue is relevant and you may be able to get IRS to approve another or 2nd 5 years = 10 years.
    vi. § 511 – Unrelated Business Taxable Income (UBTI). Also applies to private foundations.
e. Private Foundation Excise Taxes
    i. § 4940 – 2% investment income tax (can be decreased to 1%).
    ii. § 4941 – Self-dealing.
    iii. § 4942 – 5% minimum distribution.
    iv. § 4943 – Excess business holdings.
    v. § 4944 – Jeopardy investments. Exception with bequests. If give gift to PF jeopardy investment rules don't apply. Rationale is fiduciaries did not make the decision it was given to them. But if manipulate agreement concerning that investment you fall back into jeopardy investment rules. Example, gift of hedge fund. There is then a trigger in the hedge fund agreement and that is technically a new deal and the fiduciary of the PF must evaluate whether they can stay in it. Is the hedge fund investment now not diversified? PF may then have to liquidate.

   vi. § 4945 – Taxable expenditures.
   vii. § 4960 – Executive compensation.
   viii. § 511 – Unrelated Business Taxable Income (UBTI) – Tax is not just corporate rate but depends on structure. If a corporation have 21% rate. A trust is taxed at 37% rate. Should new PF be set up as corporation because of this? Should existing PF convert from trust to corporation structure because of this?

f. Other DAF Advantages.
   i. Sparsely regulated some view this as bit of a wild west but regs may be enacted that might harm some clients.
   ii. Anonymity – DAF can make contribution without advising charity who is making the gift, e.g. check can just say "Fidelity Charity." Some clients have political or social reasons they don't want their names known or attached to gift so a DAF can provide that important benefit.
   iii. Not subject to certain private foundation rules:
      1. Investment income tax, self-dealing and minimum distributions do not apply. Minimum distribution 5% not applicable to DAF which can be helpful to many clients. What if PF gives to DAF? IRS does not like that, but a DAF is a public charity and PF can give to DAF since not in control. So, PF can gift 5% to DAF if not sure where they want to donate and defer making that decision. So, some clients run a DAF in tandem with their PF.
      2. Use to avoid and negate all private foundation rules.
      3. Often easier to make donations abroad.
   iv. Public charity test is 1/3rd public. There is no 2% cap. So, if public charity gives to another charity those dollars count towards public status. So, if a PF can claim public status if believes it will qualify. DAF are public dollars so if send money from DAF makes a PF a public charity and can avoid minimum distribution and other rules.
   v. Higher deduction limits:
      1. 60%/50% of adjusted gross income (AGI) for ordinary assets. 60% is if give cash post-2017 Act.
      2. 30% of AGI for capital assets.

g. Smaller charitable contributions (below $1M).
   i. What is right size to do PF or another vehicle? If below $1M or if will use only for brief time use DAF. If over $10M perhaps PF makes more sense. If $1-$5M either might work but there may be reasons a particular client will prefer a DAF or PF.
   ii. Gifting abroad if DAF is not set up to give overseas then DAF is not an advantage. If DAF is set up to give overseas it is much easier to use for that purpose.

h. Other DAF Disadvantages
   i. Additional cost of administrator of DAF (not investment fee) – DAF fees add up and at some level a PF might be able to afford to hire staff and handle more cost effectively.

ii. Differences between each DAF – no sponsoring organization is the same. Some give abroad, some don't. Some hold certain assets, others do not.
iii. Limitation on Assets:
    1. Holding periods
    2. Complex assets – less of an issue now as more DAFs are willing to take on more assets. Some DAFs will hold broader assets to enhance the comparison of DAF vs. PF.
iv. No paid directors, officers or employees – can't pay since none in DAF. Best practice is not to pay in PF kids, etc. as it is a red flat.
v. Limitations on grants:
    1. None to private foundations.
    2. None to individuals.

i. Other Private Foundation Advantages.
    i. Can hold any type of asset (with exceptions).
    ii. Can pay officers and directors (with exceptions). Management fees for a real estate company were deemed OK but not janitorial services that would be disqualified payment to a service organization.
    iii. Can hire and pay employees (with exceptions).
    iv. Can give to some organizations that DAFs will not. PF can give to other PF but must exercise expenditure responsibility. PF can give to for profit organization that is doing a non-profit activity, e.g., an educational program. DAFs will generally balk at this because they do not want to put entire fund at risk.
    v. Grants to individuals permitted. Example: Can set up scholarship and awards programs but need IRS approval. Cannot do this through a DAF.
    vi. Scholarship and award programs (IRS pre-approval needed).

j. Other Private Foundation Disadvantages
    i. Costs associated with keeping books and records (administrative costs)
    ii. Handle all paperwork - written acknowledgement required to get deduction. Can be significant. Must write letter to every donor over $250 – acknowledgement. Most people do not think about this. Client setting up PF should write herself such a letter, but many do not realize this.
    iii. Deduction limited.
        1. 30% of AGI for ordinary assets and 20% of AGI for capital assets. Few clients give over these limits, some, but not too many.
        2. Limit to basis for capital assets (except for publicly traded stocks).
    iv. Must disclose donors (Schedule B of 990-PF). This is a significant concern for some clients. Cannot hide fact of donation from the particular PF. 990PF must list donors to the PF. This is public record, and anyone can search the names. So merely listing an anonymous name for the PF won't suffice to keep donor names confidential. So, if client wants anonymity for social or political reasons it may be problematic. Giving through DAF may provide insulation.

k. Other Community Foundation = CF Advantages.
    i. Limited excise taxes apply (excess benefit transactions, UBTI and executive compensation).

    ii. Higher deductibility limits than private foundations.
    iii. Variety of funding options (including DAFs and scholarships).
    iv. Everything handled administratively, including vetting potential donors.
    v. Able to receive "qualified charitable distributions" from IRAs.
    vi. CF is itself the charity. Often community related and spend money in that county/area. Can make restricted gift, e.g. health care or education and CF will spend in that area and give donor a report back as to what was done.

l. Other Community Foundation Disadvantages
    i. Costs are higher because of additional services provided such as locating and vetting donee charities and causes. This may actually be an advantage. Example, might charge 50 basis points to vet donee charities.
    ii. Differences between each community foundation (e.g., some do not administer scholarships).
    iii. Usually not set up to donate abroad.
    iv. Limitations on grants.
        1. None to PFs.
        2. None to individuals.
        3. None to 501(c)(4)s.

m. Other 501(c)(4) Advantages
    i. Operated exclusively (defined in regs as primarily) for social welfare. Examples are homeowners' associations, veterinarian organizations, etc. 51% should be used for social welfare so 49% can be used for political activity. Two C4s working together can get 64% (approx.) of funds to political activity. IRS was looking at this and Congress passed legislation telling IRS to not investigate this until after 2016. Issue seems "off radar."
    ii. Limited excise taxes apply (excess benefit transactions, UBTI and executive compensation).
    iii. Big advantage C4s have that other charities cannot do are the ability to lobby or engage in political activities.
        1. Lobbying – there is no limitation. This can be the primary purpose. Examples are ACLU and NRA.
        2. Political activity – as long as it's not its primary activity (i.e., less than 50%).
        3. DAFs will not touch anything that looks like these.

n. Other 501(c)(4) Disadvantages
    i. No income tax deduction for contributions. For many clients this ends the discussion. But for some clients who will not get a deduction anyhow the C4 may then be a great option.
    ii. No estate tax deduction for contributions. Gift tax deduction was codified about 2015. Before that thought many practitioners thought that would be the case. But in 2012 IRS started to reverse its position and Congress stepped in and codified gifting without transfer tax.
    iii. If gift to C4 during life and have strings 2036 may pull it back into client's estate and cause estate tax and that tax will be "phantom" since the money triggering the tax is in the C4 that cannot be tapped to pay that tax.
    iv. No "qualified charitable distributions" from IRAs.

        v. Administration not handled by 3rd party.
        vi. Form 990 must be filed and made public (however, donor and donee information is now limited)
    o. Crowdfunding/Crowdsourcing.
        i. A practice of raising funds for charitable, personal or commercial projects via the internet. No controls.
        ii. Vetting crowdfunding campaigns. Anyone can set up a crowdfunding site. Can be a charity or just an individual. Gifts to individual provides no income tax deduction. If report as deduction on tax return that is a problem. Charities have regulations to control use of funds raised. Individuals have no controls. Recent in the news issue of homeless veteran with a GoFundMe page. $400,000 spent by people who set up the site that they kept the site. Vet sued them. They have not been convicted but it looked like they stole the money and they have no money left. This illustrates the risk of crowdfunding.
        iii. Written acknowledgment required for donations of $250 or more.
        iv. 501(c)(4) disclosure requirements.
    p. DAF Updates.
        i. Notice 2017-73. Charitable Pledges - Can satisfy donors' personal pledges without penalty if makes no reference to pledge. Deemed incidental benefit.
        ii. Public Support Test: Consider the abuse noted above of using DAF to get around PF rules. Deemed contributions from original donor. Anonymous contributions deemed from one single donor only from sponsoring organization if prove not from DAF or advised by donor.
        iii. Notices can be retroactive – See § 7805(b). If retroactive it would be "extreme." How would you unwind prior transactions that were not self-dealing and treat them as self-dealing? Must be careful going forward.
    q. Newman's own exception.
        i. Left to PF and excise tax on excess business holdings 5 years and 5 years additional or would have to liquidate.
        ii. 2018 bipartisan budget bill was added into Code as an exception if got 100% of voting stock and all net income of business it could own and operate a bona fide business. So narrowly drafted seemingly for Newman's own. Might be expanded in the future.

7. **<u>Managing Tax Basis</u>** - Paul Lee.
    a. Old planning.
        i. The planning motto had been old when in doubt, transfer out.
        ii. In the past the transfer tax savings were almost certainly much greater than any potential income tax savings that might result from the basis adjustment at death.
        iii. In many cases that is no longer appropriate.
    b. General planning considerations.
        i. Estate planning will move away from avoiding the transfer tax and become more focused on the income tax.

ii. Consistency had existed across the U.S. for similarly situated clients e.g. most $20M clients might have had similar plans but in the new environment this will no longer be true.

iii. **Comment**: The variation between plans, the granular nature of planning, or tailoring to each client's circumstances, will be more important than ever. Paul's outline provides a list of factors that may need to be considered in planning for each client. This complexity and diverse array of issues will in far more cases require a team approach, i.e. the estate planner may need input from the client's CPA as to income tax planning and forecasts from the client's wealth adviser to optimally plan. Here's Paul's list:

1. Time horizon or life expectancy of the client;
2. Spending or lifestyle of the client, including charitable giving.
3. Size of the gross estate;
4. Future return of the assets;
5. Tax nature of the types of assets (for example, to what extent will a "step-up" in basis benefit the client and the beneficiaries?);
6. Expected income tax realization of the assets (for example, when is it likely that the asset will be subject to a taxable disposition?);
7. State of residence of the client;
8. State of residence and marginal income tax bracket of the likely beneficiaries;
9. Expectations about future inflation.

iv. Use as little of a client's Applicable Exclusion Amount as possible during lifetime because it will represent an ever-growing amount that will provide a "step-up" in basis with little or no transfer tax cost at death. Based on this goal "zeroed-out" estate planning techniques like installment sales to grantor trusts and zeroed out GRATs may be preferred transfer techniques. **Comment**: It depends on a range of factors.

c. Community Property – the approach to estate planning for spouses in community property during the lifetimes of both spouses, limit inter-vivos transfers and maximize value of the assets in order to benefit the most from the basis adjustment under section 1014(b)(6). **Comment**: But as with all generalizations there are exceptions and practitioners should be careful to consider all the nuances of each client situation and not rely on generalizations.

d. Sec. 1014.

i. Step-Up in Basis to Fair Market Value. 1014(a)(1), the "basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent" is the "fair market value of the property at the date of the decedent's death.

ii. Definition "Property Acquired From a Decedent" – what is included?

1. Includes assets in a revocable trust Section 1014(b)(2).
2. Property transferred by the decedent during his lifetime in trust to pay the income for life to or on the order or direction of the decedent with the right reserved to the decedent at all times before his death to make any change in the enjoyment thereof through the

exercise of a power to alter, amend, or terminate the trust (Sec. 2038) is included under Sec 1014(b)(3).

3. QTIP trust assets under Sec 2056(b)(7) and 2523(f) for which an estate or gift tax marital deduction was taken.

iii. Consider the impact of the basis consistency reporting rules for property acquired from a decedent. Sec. 1014(f) and 6035.

e. "Joint Exempt Step-Up Trust" ("JEST") so non-community property spouses can get "step-up" in basis similar to couples in community property states as under Sec 1014(b)(6). Concept is to use a joint revocable trust. Each spouse contributes/owns a separate equal interest. Either spouse may terminate the trust while both alive. Joint rev trust becomes irrevocable when first spouse dies. Each spouse has a general power of appointment over all trust assets hence a basis step up. There are issues as to whether this technique is effective.

f. Section 2038 Estate Marital Trust.

   i. Another technique to get full basis step up on death of first spouse.

   ii. Another possible method of providing a "step-up" in basis for all marital assets on the death of the first spouse to die is using what is sometimes referred to as a "Section 2038 Estate Marital Trust." The basic features of a Section 2038 Estate Marital Trust are:

      1. Grantor Spouse gives assets to trust fbo the Beneficiary Spouse.
      2. On death Beneficiary Spouse trust pass to the Beneficiary Spouse's estate.
      3. The Grantor Spouse retains a right to terminate the trust prior to the Beneficiary Spouse's death. Upon such termination, the trust assets must be distributed outright to the Beneficiary Spouse (not to the Grantor Spouse).
      4. The Grantor Spouse retains swap power.
      5. Trust qualifies for gift tax marital deduction.
      6. Contribution of assets to the trust should be a completed gift.
      7. If Beneficiary Spouse dies first assets payable to her estate and in gross estate under Sec 2031.
      8. If the Grantor Spouse dies first trust assets are in gross estate under Sec 2038 because enjoyment of property can be changed through exercise of power by the decedent alone or by the decedent in conjunction with any other person to alter, amend, revoke, or terminate.

g. Consider tax character of assets to determine benefit of step. Greater appreciation more benefit. Collectibles taxed at 28% benefit of step-up greater than for other assets the gains on which are taxed at max 20% capital gains rate.

h. IRA and qualified plans.

   i. IRA and qualified retirement assets are income in respect of a decedent (IRD). Sec 691. These assets cannot be transferred during plan holder's lifetime or gain will be triggered. No step up.

   ii. Use to fund charity.

   iii. Bequeath to spouse for rollover to defer gain.

i. Tax basis management in estate planning.

i. For low basis assets and those that would benefit substantially from step up plan to cause estate inclusion. If low basis assets will be subject to estate tax use of Graegin loans, estate tax deferral under 6166, insurance in ILITs, and other techniques to cover estate tax of those asses included in the estate for basis step up should be considered.
ii. For assets subject to estate tax, especially if basis is not an issue, plan to remove from estate.
iii. Use swap power to swap appreciated assets held in grantor trusts back into estate.
iv. Remove/eliminate discounts if not beneficial.
    1. Unwind fractionalization of assets among family members.
    2. Modify governing documents to reduce/eliminate discounts.
    3. To the extent a child transfers assets to an ancestor, the ancestor will include those assets in the ancestor's estate and may shelter those assets with the ancestor's estate and GST tax exemptions. Dissolve entities if not needed.
    4. Convert LP to GP.
    5. Argue that section 2036(a) of the Code applies, relying on the argument set forth in Estate of Powell v. Comm., 148 T.C. No. 18 (May 18, 2017). **Comment**: See also the recent Cahill case and following settlement. The court in Cahill argued the same "in conjunction with" position that the Powell court used.

j. General Powers of appointment.
    i. If holder exercises a testamentary GPOA property is deemed to have passed from the deceased power holder without full and adequate consideration and gets step-up. Reg. Sec. 1.1014-2(a)(4).
    ii. If holder dies without exercising testamentary GPOA property subject to GPOA deemed to have been acquired from the deceased power holder and gets step-up. Reg. Sec. 1.1014-2(b)(2).
    iii. Complexity and risks of formula GPOA planning might suggest using a trust director as a third party empowered to modify/grant the GPOA may be preferable. Example, third party give right to expand LPOA into GPOA.

k. Upstream planning.
    i. If child shifts assets to parent, then parent's estate and GST exemptions may be used to shelter/transfer that asset.
    ii. Use annual gifts and GRATs to shift assets upstream with modest/no exemption use.
    iii. Comment: A concern clients raise with upstream planning is the risk that say a sibling may gain access to the assets of the transferor/child. Paul points out an interesting planning idea to mitigate that risk: "*Child could ensure that assets were not diverted to a sibling by purchasing from the siblings an assignment of any rights the siblings receive in assets appointed by parent that originated with child. The assignment would be independent of parent but would limit the ability of a creditor (or the government) to argue that the child transferred the assets to parent in a*

manner that did not give parent any true control. The ability to reach such an agreement with minors is limited."

l. Accidentally Perfect Grantor Trust (APGT).
    i. The transferor uses a parent's unused estate and GST exemptions, benefits from a "step-up" in basis, but still retains grantor trust status after the parent's death.
m. Debt.
    i. Use of debt may allow client to reduce estate tax cost, but still increase the step-up in basis.
    ii. Example: Assume client owns a $10M asset fully depreciated. If client transfers -0- basis asset e.g. by gift, GRAT, etc. loses basis step up on death. Instead client borrows $9M, using asset as collateral for the loan. At client's death amount included in estate is $10M and adjusted tax basis of asset is also increased to $10M by step-up. Client transfers $9M using gift, GRATs, note sales, etc. Estate is worth only $1M because debt offsets $9M of $10M value of assets (estate entitled to deduction under Sec. 2053(a)(4) for unpaid mortgage). Client's estate would receive a full step-up in basis to $10 million on a taxable estate valued at only $1 million.
    iii. What if debt is put on an asset in a QTIP (perhaps cash received on refi is distributed to spouse) does full value of property get step up on surviving spouse/beneficiary's death or just net value?
n. Qualified Small Business Stock ("QSBS").
    i. Sec. 1202.
    ii. Maximum excluded eligible gain is greater of:
        1. $10 Mil. in aggregate for all prior taxable years; or
        2. 10 times adjusted basis (without regard to additions to basis after original issuance.
    iii. $50 Mil. aggregate gross assets limitation:
        1. Cash, and
        2. Basis of property held by corporation (but contributed property is deemed to have basis equal to FMV).

8. **<u>Estate Planning for the Modern Family: Special Considerations and Drafting Tips</u>** - Naomi Cahn, Kim Kamin, and Amen Webster.
    a. Traditional nuclear family.
        i. 2.5 kids. Married young. Male handled finances.
        ii. Expectations for nuclear family was that each generation would repeat the same family structure.
        iii. That has not occurred.
        iv. By 2016 average number of children down below 2/family.
    b. What has lead to changes in family.
        i. Divorce rates spiked. Blended family from remarriage.
        ii. Delaying Marriage. By 2013 average age 27/29 nearly a decade longer.
        iii. Long term couples who don't marry.
        iv. Same sex couples. Recent Gallup poll estimated 20% of population as gay. Based on national self-reports at only 3.5%.

   v. Single parents by choice. People choose never to marry or have a child single.
   vi. Multicultural and multinational families. About 7% biracial.
   vii. Changes in gender roles. More equality for women. 70% of women work out of home as of 2012.
   viii. Gender fluidity, gender roles, and identities. Transgender has become main stream.

c. Evolving laws.
   i. Mirror societal changes above.
   ii. Civil unions and domestic partnerships.
   iii. Same sex marriage now legal post-Obergefell in all 50 states.
   iv. Inheritance rights for adopted children.
   v. International adoptions. Quadrupled from 1982 to 2004.
   vi. Rights for non-martial children.

d. Medical conditions.
   i. Increase in autism and special needs.
   ii. Cryopreservation.
   iii. Assisted reproductive technology.
   iv. Longer lifespans from medical innovations.

e. New assets.
   i. Digital assets.
   ii. Crypto currencies.
   iii. Robotics.

f. Modern family.
   i. Modern family typified by the TV Show "Modern Family."
   ii. Blended family grown children. Younger new spouse from foreign country.
   iii. Young teenage stepson.
   iv. New baby with new husband and wife.
   v. Jay's daughter Claire stay at home mom went back to work to run family business.
   vi. Son Mitchel with same-sex partner and an international adoption daughter and married when it became legal.

g. Marriage.
   i. Under ½ of people are married, a huge decline from years ago.
   ii. A variety of different coupled and uncoupled states.
   iii. Some married, divorced, singles, cohabiting couples, polyamorous relationships, living apart/together.
   iv. Number of people over age 50 cohabiting has increased 75% in past decade.
   v. Polyamorous as many as 4-5% of Americans participate in some form of ethical non-monogamy (meaning everyone knows what is going on and agree).
   vi. 20 million over age 65 are single.
   vii. Same-sex couples are treated same as married couples for many purposes as a result of Obergefell v. Hodges, 576 U.S. ___.

h. Divorce.
    i. Stats vary by location in the country.
    ii. Marriage rate is 6.9 people per 1,000 and divorce rate is 3.2 people per 1,000.
    iii. There has been a slight decrease in the divorce rate.
    iv. Divorce is higher for those who are remarried. “I’ve done it once and know there is nothing to fear from doing it again.”
    v. Inverse relationship between education and divorce rate.
    vi. 80% of first marriages last 20+ years if woman has bachelor’s degree. Only 50% of marriages survive for woman who only have some college.
    vii. Trend is the rise of collaborative divorce. Couples choose to hire attorneys who agree not to go to court.
    viii. High net worth long-term separations, e.g. Warren Buffet.
    ix. Recognize that there are so many different kinds of divorce when drafting.
    x. Consider nesting where children live in home and parents come in and out.

i. Cohabitation.
    i. 18 million cohabiting couples.
    ii. About 12 jurisdictions recognize common law marriage.
    iii. Domestic partnership statutes. Require legal registration with state so it’s deliberate.
    iv. Cohabitation agreements.
        1. Legal agreement ideally entered into before relationship ends addressing obligations when relationship ends, etc.
        2. Uniform act being started.
        3. Expenses while cohabitating?
        4. Obligations upon relationship termination?
        5. Alternatives to cohabitation agreements. These are different legal statuses or relying on common law remedies.

j. Same-Sex couples.
    i. Still face issues that opposite sex couples do not face. Discrimination still exists.
    ii. Some states permit discrimination as to adoption as between opposite sex and same-sex couples.

k. Marital status and remarriage.
    i. Many require planning for former, spouse, surviving spouse, prior children, etc.
    ii. Standard of living for children from subsequent marriage.
    iii. Age gap often results in wealth gap.
    iv. Blended families.
        1. Standard of living for step-children.
        2. Step-child’s role in family governance.
    v. Spouse’s role in family governance.
        1. First spouse.
        2. Subsequent spouse.
    vi. Should trustee remover or protector have power to remove “spouse” from trust?

vii. Warren Buffet situation – polygamous family members where too costly to get a divorce so they just all agree to a new relationship. Then have to plan for a new non-spouse. Might want life insurance for that new person. Some of the relationships are quite open. New person might even be acknowledged in the obituary.

l. Multinational families.
   i. What country or countries are involved.
   ii. Which laws apply?
   iii. Jurisdictional aspects?
   iv. Examine tax treaties.
   v. Be careful of annual gift limits with non-citizen spouse of $152,000/year (inflation adjusted). Too often people make a mistake and forget that there is no unlimited marital deduction for non-citizen spouses.
   vi. Consider marital trust planning, use QDOTs instead of QTIPs. Cannot do lifetime QDOT so it is a testamentary plan.
      1. Ordinary explicitly trust.
      2. Governed by US law.
      3. US trustee.
      4. Authority to withhold.
      5. Security/bond.
      6. Timely QDOT election. Some relief. Election on 706 have up to one year after due date = 27 months.
   vii. Avoid unintentionally creating foreign trusts. US persons have to exercise (control) all decisions and US court can exercise jurisdiction. Who have clients named as trustees and trustees and trust protectors?

m. Supplemental needs trust planning.
   i. 53 million adults are living with a disability.
   ii. With longer lifespans Alzheimer's rates, etc.
   iii. Rates have risen 55% and will quadruple by 2050.
   iv. Rise in autism. In 1980s 1 in 2000 now 1 in 150 children in US have autism.
   v. Down syndrome increased 30%.
   vi. More special needs planning needs to be done.
   vii. Difference between entitlement like Medicare or Social Security Disability Income which you are entitled to regardless of means test. But Medicaid is means tested and you have to be concerned if client will qualify.
   viii. Third party trusts – to "supplement but not supplant."
   ix. Self-settled trusts:
      1. payback trusts under d(4)(a); When beneficiary dies trust has to pay state back.
      2. or pooled trusts under d(4)(c). for small trusts. Avoid spending money to set up standalone trust.
   x. Consider trust protector who can add the required language.
   xi. ABLE accounts.
      1. Created in 2014.
      2. Similar to a 529 plan but for disabled beneficiaries.

        3. TCJA increased amount up to federal poverty line for 1-person household or the individual's annual compensation.

n. Transgender clients and family members.
    i. Increase in transgender individuals.
    ii. Estimates are 1.4 million adults. Figure does not include children identifying as transgender.
    iii. Gender reassignment has gone mainstream.
    iv. Assisting transitions.
    v. Planning for transgender families.
        1. Consideration of gendered nouns and pronouns.
        2. New honorific is not Mr. or Mrs. but "Mx."
        3. Consider trust distributions for "health."
        4. Other considerations.
    vi. Gender fluidity. "Hi, I am Name and my gender pronoun is ________."

o. Adopted and non-marital children.
    i. How are old documents interpreted? Historical understandings?
    ii. Defining descendants and adoption.
        1. Adoption of minors.
        2. International adoptions.
        3. Adoptions relating to surrogacy.
        4. Informal or equitable adoptions.
        5. Adult adoptions. Some are being undone when done before same-sex marriage was permitted. Had been done in the past to avoid challenges on death of inheritance, etc.
        6. Step-children.
        7. Same-sex partners.
        8. Non-marital children.
            a. 4% in 1960.
            b. 40% In 2018.
            c. More than ½ born to cohabiting couples.
            d. Rely on state law or provide definition in document.
            e. Cultural views with regard to nonmarital parents.
            f. Establishing maternity (typically gestation).
            g. Establishing paternity.
                i. DNA test.
                ii. Acknowledgement.
                iii. Functions as parent.
                iv. Hybrid.
    iii. Drafting techniques.
        1. Should document mirror requirements of Uniform Probate Code (UPC) or should adults who were adopted be included in the category of descendants.

p. Assisted Reproductive Technologies ("ART").
    i. Artificial insemination.
    ii. In-vitro fertilization.
    iii. Surrogacy.

        1. Partner's sperm then no issue as to parentage.
        2. Gestational surrogate.
        3. Gestational carrier.
q. Cryopreservation vs. Cryonics.
    i. Cryopreservation low temperatures for genetic material.
    ii. Cryonics freeze head or entire body hoping to revive at a later date. Animals such as Artic squirrels and frogs have been frozen.
    iii. Successful revival of frozen human body is currently science fiction.
    iv. Range of costs.
    v. Revival trusts.
    vi. How to plan and draft for this?
r. Digital assets.
    i. Definition of digital assets.
    ii. New uniform law.
        1. If user has not used online tool providers rules may apply.
        2. Important to plan for access to digital assets on client's death or incapacity.
        3. Facebook legacy contact. Under securities settings.
        4. Google inactive account manager. Use a google search.
        5. Set up who user will give access to google accounts.
        6. 85% of US teens use YouTube. Instagram is 78%.
s. Planning for all modern families.
t. Drafting for flexibility.
    i. Administrative trustees, distribution trustees, special trustees for special assets, etc.
    ii. Powers of appointment. Broad special powers of appointment.
    iii. Trust protector.
        1. *"Schwartz v. Wellin, No. 2:13-cv-3595-DCN, 2014 WL 1572767 (D.S.C., Apr. 17, 2014) (where Trust Protector filed suit against trustees, suit was dismissed since the Trust Protector lacked standing as he was neither a trustee nor a beneficiary*)."
        2. Is protector a fiduciary or not?
        3. What might Schwartz case imply as to this?
    iv. Change of situs and governing law.
    v. Someone who can grant general powers of appointment for basis planning including upstream planning, etc.
    vi. Privacy protection. Keep as little family information as possible in public documents like wills.
    vii. Digital assets importance of legacy controls. Documents should name a fiduciary who can act with respect to digital assets. But if turn off social media account that will override.
    viii. Definition of descendant.
u. Grantor trust status.
    i. Millstein v. Millstein, 2018-Ohio-2295 - could not turn off grantor trust status.
        1. What to endeavor to get into grantor trusts.

2. Belt and suspenders approach.
3. Include swap power.
4. Reimbursement by independent trustee.
5. Ability to toggle on/off.

9. **<u>Using Estate Planning Techniques for Your Client's Income Tax Planning</u>** - Stacy Eastland.
   a. A perfect income tax and transfer tax strategy, or combination of strategies, would accomplish all of the following:
      i. The strategy would be consistent with the taxpayer's nontax investment goals and stewardship goals.
      ii. The strategy would eliminate a taxpayer's current transfer taxes and/or transfer taxes that may be imposed by a future Congress.
      iii. The strategy would either enhance the basis of the taxpayer's low basis assets to equal their fair market value or eliminate any capital gains if the assets are sold.
   b. Leveraged Asset To An Intentionally Defective Grantor Trust ("LAIDGT").
      i. This is Stacy's variation or enhancement of the common note sale to an intentionally defective grantor trust or sale to a IDGT.
      ii. One goal of this enhancement is to endeavor to protect against the note in the sale transaction being attacked by the IRS as constituting a disguised equity interest in the buying trust under equitable tax principles.
      iii. In the LA-IDGT sale transaction the client/donor creates an LLC. The LLC could be a multiple member but disregarded LLC. For example, the client and grantor trust No. 1 might be members of the LLC.
      iv. The client then sells the intended asset to that LLC.
      v. This results in a leveraged entity/LLC with a note which he structures as a convertible note. For example, the note could be convertible into the number of non-managing units of the LLC equal to the outstanding principal balance of the note at the option of the holder. Conversion may be mandatory on death.
      vi. The client, after the leveraged sale above to the LLC, then contributes an interest in that entity/LLC to a grantor trust No. 2.
      vii. The conversion features provide basis enhancing benefits in that if the note is converted the entity interests revert to the client's estate for step-up.
   c. Using a convertible note to enhance a note sale transaction.
      i. In addition to the income tax and basis enhancing advantages of the LAIDGT.
      ii. Balance of the retained note could be converted into a preferred partnership interest without any income tax consequences on the conversion.
      iii. The disregarded entity status for income tax purposes of the FLLC can be easily turned on or off by admitting or redeeming other owners who are not grantor trusts.

iv. The note could be a convertible note at the election of the holder of the note into that number of units of non-managing interests of the FLLC equal to the then outstanding principal of the note. That conversion right could be mandatory at the death of the holder of the note. Such a conversion feature would have the following advantages:
    1. The conversion feature would support the value of the note.
    2. The conversion feature would give the holder of the note the option to participate in the growth of the FLLC assets after the conversion.
    3. The conversion feature could lead to a step-up in basis of the assets of the FLLC to the extent of the outstanding principal value of the note at the death of the holder.

d. Plan for implications of Powell case.
    i. Powell v. Comm'r, 148 TC 18 (2017).
    ii. There should be a substantive nontax reason for the creation of the partnership. If not then decedent's right to amend an LLC or FLP agreement or terminate the agreement, with the consent of all other partners, is a retained interest under Sec. 2036(a)(2).
    iii. "*It should be noted that many commentators have criticized that holding*."
    iv. The Supreme Court held in Helvering v. Helmholz, 295 U.S. 93 (1935), that a joint power to alter beneficial enjoyment, amend an agreement or terminate an agreement is not sufficient to produce inclusion in the gross estate if it merely reproduces rights already available under applicable state law.
    v. Consider strategies suggested by Stacy to deflecting a Powell-type attack:
        1. If donor is a GP or managing member of a FLLC, he or she may retain a distribution power if that distribution power is subject to a standard in the organizing documents that could be enforced by a court (see Revenue Ruling 73-143, 1973-1 C.B. 407).
        2. There could be two different classes of managing member interests with the donor retaining a Class A managing member interest that has all management powers (including investment management powers) that are not delegated to the Class B managing member interest with the Class B managing member interest having distribution, amendment and liquidation powers. The Class B managing member interest could be contributed by the donor to a trust in which a family member (other than the donor) or family advisor is the trustee. The donor could have the right to remove and replace the trustee as long as the replacement is not related or subordinate (Rev Rul 95-98, 1995 C.B. 191).
        3. The general partnership interest or managing member interest, that has the distribution power, the liquidation power and the amendment power, could be contributed by the donor to a corporation. The corporation's organizational documents should have normal fiduciary duties for management and the stockowners. Under those circumstances, the donor could own the voting stock

and his transferees could own the nonvoting stock (see Rev Rul 81-15, 1981-1C.B. 457).

10. **<u>Life Insurance Product Selection, Design and Funding</u>** - Jon Forster, Barry Flagg, Rebecca Ryan, and Brian Schick.
    a. Performance of life insurance policies is based on:
        i. Cost of Insurance charges (COIs) for death benefits claims.
        ii. Policy expenses for actuarial design, marketing, distribution, underwriting and administration.
        iii. Investment earnings on premiums in excess of above.
    b. How to Evaluate insurance carriers.
        i. Financial Strength & Claims Paying Ability.
        ii. Cost Competitiveness.
        iii. Pricing Stability.
        iv. Cash Value Liquidity.
        v. Historical Performance of Invested Assets Underlying Policy Cash Values.
    c. R.A.T.E.
        i. R - risk tolerances of client.
        ii. A - assets & asset class preferences.
        iii. T - time horizons.
        iv. E – expected returns.
    d. Monitoring portfolio of life insurance policies.
        i. Objective, risk profile/RATE and health profile/life expectancy.
        ii. Portfolio status under-funded, on-track, over-funded.
        iii. Costs: actual vs. expected.
        iv. Expected and appropriate benchmarks
        v. Performance: actual vs. expected and appropriate benchmarks.
    e. Portfolio management options.
        i. Increase/Decrease Premium Funding.
        ii. Decrease/Increase Death Benefits.
        iii. Changing Cash Value Asset Allocations.
        iv. Exchange/Trade Portfolio Holding(s).
        v. "Wait-and-See" (with Grantor Election).

11. **<u>Analysis of the Day's Proceedings by the Trusts & Estates Journal's Advisory Board</u>** - Susan Lipp, Lou Harrison Kim Kamin and Martin Shenkman.
    a. Current environment and flexibility.
        i. $22M+ exemption and portability.
        ii. States need money. Domicile planning is more important.
        iii. Different attitudes towards money.
        iv. Information is more readily available, and decisions are made quickly.
        v. Political times are different.
        vi. How practices have changed substantially.
            1. Estate tax aspects substantially reduced.
            2. Impact on drafting has changed dramatically.

3. Basis step up should be a primary topic.
4. Creditor protection.
5. What are value adding to our clients?
6. Choice of trustees and trust administration. This is an important matter to address.
7. Flexibility.
8. Continuing sophistication of planning.

b. The following comments are based on an outline/agenda for the Trusts & Estates panel prepared by Kim Kamin and Lou Harrison.
c. Kim Kamin and Professor Cahn just spent two hours talking about planning for modern family including some drafting tips. But there is still a lot more to say about diversity and drafting for the modern family.
d. Religious diversity was not covered in Kim's two-hour session and is an important consideration for modern families. Marty, at a high level, what should estate planners think about with regard to discussing client's religion and any impact on planning?
    i. Should Advisors address religious considerations?
    ii. What is the goal of Estate Planning?
    iii. Do clients care about religious considerations?
    iv. What areas of estate planning are impacted by religious considerations?
        1. Estate Planning should not be just about the transmission of wealth.
        2. Estate planning should be about the transmission of values.
        3. For many, it should encompass the transmission of beliefs as well as values. This can be done by Integrating religious considerations into the estate planning process.
        4. Do Clients Care about Religious Considerations?
        5. According to many surveys, 95+ percent of Americans believe in God or some type of higher power, yet few estate plans address any aspect of religion, or a particular philosophical outlook.
        6. This inadequacy has tremendous personal impact. No area of the law is more fraught with religious issues than estate planning.
        7. If you endeavored to live your life in conformity with your religious beliefs, then your final medical decisions, funeral arrangements and distributions under your will should be consistent with those beliefs.
        8. Areas of Estate Planning Commonly Impacted by Religious Considerations:
            a. Charitable giving.
            b. End of life medical decision making.
            c. Burial, funeral and post death arrangements (rituals, autopsies, etc.).
            d. Transmitting religious values to children and other heirs.
            e. Disposition of assets on death.
        9. Fiduciaries need authority to disburse funds for religious education (e.g. supplemental religious education, or private school), religious

travel (pilgrimages to holy sites), charitable giving (to inculcate a core religious value), and other purposes consistent with religious goals.

10. Fiduciaries must be selected that have the appropriate knowledge and sensitivity to address religious issues.
11. Ethical and miscellaneous issues (disinheritance, in-terrorem clauses, mandatory arbitration of certain claims before a religious body, charging of interest, investment standards, etc.).
12. Every Aspect of Planning Can be Imbued with Religious Considerations.

v. Living Wills, Health Care Proxies, End of Life Values and Alleviation of Pain

1. What is defined as death? This has been a vital issue in many highly publicized cases and is fraught with controversy and complexity. Specifying specific beliefs about this.
2. Can your agent ever withhold nutrition and hydration without violating your religious precepts?
3. Does quality of life have any relevance in light of your personal religious beliefs? Define with detail what quality of life might suffice to justify heroic measures even if you are terminally ill. Different religions, and different levels of observance within any particular religion, can have significant impact on this.
4. Must certain medical procedures be avoided?
5. Can your organs be donated? In some faiths this is linked to the definition of death.
6. What of funeral and burial customs?
7. Should maximum pain relief be tempered to preserve some consciousness to enable you to partake in end of life rituals?
8. What religious end of life requests do you have?
9. What type of memorial or monument, if any, should be used.
10. Should you be informed, or not, of all medical conditions. Some faiths may restrict the need for full disclosure, especially if the disclosure would negatively impact your health.
11. Religious Statement: I wish to condition the effectiveness of this directive upon its conforming to Name of Faith religious doctrines and beliefs to which I subscribe. In order to effectuate my Wishes, if any question arises as to the requirements of my religious beliefs, I authorize my Agent to seek the guidance of a *Priest *Imam *Rabbi *Other selected in accordance *Indicate Mechanism.
12. The agent named in your health care proxy should agree to implement the religious, or non-religious, wishes you outlined in your living will. In states where a living will may not be recognized, this instruction to your agent in the form of a living will can still be done, but the agreement to adhere to it may be morally rather than legally binding.

13. What if you have no one to name as agent and instead rely on a POLST – Physician Order for Life Sustaining Treatment? Can that be modified to reflect your religious wishes or refer/incorporate your living will?
14. Buddhist Handling the Body Following Death: In the Buddhist tradition, it is a common belief that incense should be burned near death to help provide symbolism of the path upward toward enlightenment and to guide your last thoughts upward. Many Buddhists believe that for a period following death often for a minimum of at least one week, the spirit may remain with the body and, therefore, the body should not be tampered with or even moved. These traditions may be impossible to carry out in any medical or health care facility, so it could be quite important to make advance arrangements to spend one's last days in a hospice sensitive to these religious beliefs or at home. Unless this is addressed in a living will, it is unlikely to be known to many and, therefore, unlikely to occur.
15. Pregnancy:
    a. Pregnant women should carefully address the issues of pregnancy in a living will since considerations of mother versus fetus vary greatly between different religions.
    b. Catholic View: Generally speaking, in Catholicism no direct action may be taken that would likely cause the death of the unborn child. Thus, you cannot choose the life of the mother over the life of the unborn child since the church views that all life is sacred and is in God's hand. Unless this is expressly set forth in the living will, no one may know the degree of your devotion and you cannot expect health care providers not schooled in these rules to have the knowledge necessary to carry out your wishes.
    c. Jewish and Islamic View: Under Jewish and Islamic law saving the mother's life is generally given preference. This is quite different than the Catholic view, highlighting the importance of people of all faiths to communicate their wishes to health care providers.
16. Pain Relief:
    a. Many people and health care providers view the alleviation of all pain to be an essential and critical goal.
    b. Orthodox Christian View: However, for an Orthodox Christian, for example, the act of suffering can be an experience providing for purification, redemption, and salvation. While suffering is clearly not encouraged, pain relief to the point of making someone unconscious during their last days may prevent them from addressing profound and moving observances essential to their religious beliefs. The customs of the Christian Orthodox church encourage

you to be lucid during your last days so that you may be free to confess sins and receive Holy Communion. If the attending physicians are not aware of this, they cannot be assumed to respect and foster this type of care.

vi. Benefits of including Religious Statement in directives
vii. Different views of Living Wills – many practitioners do not generally prepare/use them.
viii. Disposition of Remains
ix. Testamentary Disposition Impacted by Religious Dictates.
x. Impact on Investments/Loans/Interest.

e. The need for flexible trusts: see article on “Gumby Trusts” in October 2018 Trusts & estate magazine.
   i. Why planning for modern family and considering diversity is particularly important at this point in time? What is unique about planning at this time?
   ii. $22M credit impacts planning.
   iii. States need money. Domicile planning so much more important.
   iv. Portability.
   v. Attitudes towards money.
   vi. Technology.
   vii. Other recent changes of significance: social, legal and medical/technological changes.

f. Estate tax planning is further reduced in the menu choices and percentage of what we are doing for clients-therefore, what else is it that planners should be doing?

g. Also, major shift in drafting.

h. Finally, with the pace of change being so fast, global economy, food distribution and water scarcity, international terrorism reaching our shores, we have to recognize that our planning needs to be revisited, and flexible to address unexpected situations.

i. Continue sophisticated planning but consider “Simplification where appropriate.”
   i. What is meant by “simplification?”
   ii. What spousal planning options exit?
   iii. Flexible funding solutions (see some classic A/B planning and also see disclaimer/Clayton election) approaches.
   iv. Single Fund preference as simple and flexible.
   v. Drawbacks (post-mortem risks and leaky trusts).
   vi. But even dividends are at 2 or 3%. And what about hyperinflation-consider Clayton flip in the drafting.
   vii. With portability, the urgency in terms of estate tax planning to use the credit is not as much. But does not take advantage of full GST planning or post mortem appreciation at first spouse’s passing.
   viii. Solutions that we used to do on reallocation to spouses because we don’t know who will die first. But should we, the estate planner, be comfortable with asset re-designations.

j. Avoid gendered nomenclature in drafting.

k. Radical change in drafting. How about asset allocation then and allocating to A/B Trusts to preserve GST?
l. Transmutation on divorce-is it the spouse's separate property or still marital?
m. Unlikely to re-allocate although we discuss it. Divorce is 50%.
n. Post mortem appreciation and even GST is not a concern in 99% of the cases. Others might suggest that GST or post mortem appreciation is so great that we should do asset allocation?
o. Use of Powers of Appointment and Trust Protectors?
p. Say that your clients are worried about the impact of money on their kids. What is it you are doing in your trusts to deal with this problem. Consider both lifetime irrevocable trusts as well as testamentary. But start with testamentary because lifetime trusts have other issues (relating to changes in estate tax laws) that we need to deal with.
q. At the testamentary level, why not create broad LPAs? However, in a second marriage situation that would not work.
r. Considering including in LPAs charitable organizations. Make sure power of appointment can modify trusts to children to be more limited in dollars to G2 during life.
s. So now we return to irrevocable trusts: At a $22M exemption, estate tax planning has been reduced, and the percentage of ILITs, grantor trusts, GRATs, all effective strategies, have been reduced. But for those that are created, any changes under the current environment?
t. Emphasis on SLATs as escape valves in the event that grantor needs funds back.
u. How about those beneficiaries that become "bad" beneficiaries? How do we feel about trust protectors either carving back trust provisions for those individuals, or eliminating them all together?
v. How about a Trust protector? Trust protectors to change ultimate beneficial enjoyment.
w. What about a broad LPA that would allow trust protector to return funds to grantor?
x. Merger options? Decanting alternatives?
y. Grantor Trust Considerations?
    i. Regarding irrevocable trusts, the importance of grantor trust status continues. But whereas we used to have a one-way switch to turn off grantor trust status, how do we feel about toggle switches to turn it back on?
    ii. Decanting under certain states to get non-grantor trust to grantor trust.
    iii. Substitution powers? Loans to grantor? Adding charitable beneficiaries?
    iv. Is Trust protector with power to add beneficiaries enough?
    v. Turn off grantor trust powers?
    vi. Include grantor trust reimbursement so grantor doesn't have to turn off.
    vii. Opinion on grantor trust considerations
z. New Appeal of Non-Grantor Trusts.
aa. Divorce and Providing Creditor Protection?

i. Divorce-could they get any worse than they have been? Yes, when there is money and in those rare cases where spouses do not get along and there is not a collaborative divorce practice.
ii. Change in title of assets and impact of divorce.
iii. Floating spouse clauses and impact versus using LPOA.

bb. Consider creditor protection trusts for children, noting spousal protection, and its importance. And why a major aspect of estate planning discussion is on the funds to be left in trust for the children and the protections afforded.
cc. Flexibility for each generation (e.g., let them control trusteeship and have broad special powers of appointment.)
dd. Consider Expansive Definitions of "Child."
ee. Allow Beneficiaries to Expatriate or hide off the grid.
ff. We probably should add "security" provisions in the definition sections of trust under "support" or "maintenance" clauses. Expending funds for personal security likely is going to be important in the future, as well as shifts in domicile outside of the US-something to think about in drafting.