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Shoemakers With Barefoot Children: What Estate Planners Need to Know About Their Own Planning

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INTRODUCTION

Too many estate planning attorneys are simply living as the barefoot shoemaker. This article won't introduce planning concepts that are new to estate planners, or that are technically complex. The goal of this article is to motivate you the reader to make an action plan and protect yourself and your loved ones, if you have not already done so (and too many of us have not!). We won't discuss tax planning, you're likely expert at that. But we will discuss, the basic insurance protection and legal protection we all should evaluate for ourselves. We'll vary from the more typical article of speaking in third person and will offer some comments about our personal planning. Not because the authors are models of planning, but rather to emphasize how important these obvious but too often overlooked steps are for all of us. If you're like us, your planning always struggles with the: ''I'll get to it as soon as I finish . . . [fill in the blank which likely includes a long list of client matters].''

Example: One of the authors spoke on a panel presentation a few years ago for a group of estate planning attorneys in New York City about creative uses of irrevocable trusts. At one point in the discussion one of the panelists asked the audience for a show of hands as to how many had irrevocable trusts for their own asset protection planning beyond just a simple life insurance trust. The two speakers raised their hands. No one else did. Why this simplistic story? To emphasize the premise of this nontechnical but perhaps important article. We need to give attention to our planning just as we do to client planning.

STEPS YOU SHOULD TAKE

Make an action plan of key steps you need to address. Prioritize that plan and make a decision to address perhaps one or two items every few months. With the pressures we face in our practices, the idea of crafting and implementing a comprehensive plan over some reasonable number of months, as we do for our clients, likely won't happen. Write down your plan. Tell your spouse, partner, colleagues — someone to hold you accountable to address your action plan. Trite? Perhaps, but again the reality is that if most of us had addressed our personal planning with the same zeal with which we address client planning, we'd have skipped over this article.

Example: One of the authors and his wife applied for long-term care coverage as their 50th birthday presents to each other (you can tell how romantic we both are). While the applications were pending the spouse was diagnosed with a health issue and could not obtain coverage. Had the application been made even six months earlier the coverage would have been obtainable. Waiting to act, whether on insurance or other matters, is a risky gambit, even for estate planners.

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Check your wallet! Take an inventory of your information no different than you would do for a client. If your firm has a questionnaire or estate planning organizer, fill it out just as you would ask a compliant (not average) client to do. Of course, you don't need to complete an organizer for you, as you know the relevant information and hence the planning and documents that are necessary. That may be true but consider that your spouse/partner/family may not know that information. Further, if you are incapacitated the data in that questionnaire could be critical to your family or loved ones. Further, you have standards and processes by which you handle most client estate plans, use the same approach for your own planning. The structure that your typical approach provides to facilitate your completing client work efficiently and properly should be used for your own planning as well. That structure may well be more important for our planning since many of us will focus less on our needs than on our clients' needs.

ASSET PROTECTION PLANNING

Malpractice cases against estate planning attorneys are growing and should be a concern of every practitioner, no matter how careful or capable we might view ourselves.[1] Too many of us are simply too busy handling client matters to focus on our own personal planning. We might assume that our firm is addressing defensive practice techniques. But this issue is far too important to leave to assumptions. Consider that many CPA firms and appraisal firms limit their liability to fees earned in their engagement letters. Because lawyers are prohibited from doing so by ethical rules, we may have more exposure that anyone else on a client's estate planning team. That might suggest that we should take more precautions than other advisers do.[2]

We should address malpractice protection planning from several perspectives, including defensive practices, firm malpractice coverage, and personal asset protection planning.

What defensive practices can our firms implement specifically as to estate planning matters? While practitioners are familiar with many or all of these techniques, have they really been addressed? Evaluate prospective clients with internet or other searches not just conflict checks. Do you or your partners accept less desirable clients because of pressures to generate origination and billing?

Insist on written signed retainer agreements from every client. Incorporate disclaimers on every planning memorandum. Many CPA firms do this. Insurance and financial consultants include lengthy disclaimers on projections and statements (look at the fine print at the end of your investment statements). Few estate planning attorneys seem to do so despite not being able to limit liability.

Does your retainer agreement cover more than your rates and fees you might charge? It could address client responsibilities (e.g,. to provide complete and accurate information, to return for annual reviews, etc.), that there are no guarantees of results, that there are risks associates with every planning technique and that many tax planning steps may have offsetting negative tax consequences, and that tax laws can and do change frequently and could thereby undermine a plan that may have been beneficial when first proposed, etc. Do you memorialize in a written client communication risk of a particular transaction? A common issue in malpractice cases is "The attorney never told me that there were risks." Make a habit of documenting concerns in writing.

What about your own personal asset protection steps? Have you maximized retirement plan savings that may offer protection? Is your home held as tenants by the entirety if you are married and applicable state law provides protection? Do you have significant nonpension assets held in irrevocable trusts to perhaps provide some protection of those assets from malpractice claimants? Many of us discuss spousal lifetime access trusts (SLATs), domestic asset protection trusts (DAPTs), hybrid-DAPTs, special power of appointment trusts (SPATs), irrevocable life insurance trusts (ILITs) and other techniques with clients. But have we used that same arsenal toward protecting our own assets? If significant assets are to be transferred to irrevocable trusts, have we evaluated the possible increased need for various additional insurance coverages?

Example: One of the authors embarked on the path of creating his own planning when decades ago a client, with whom he was discussing the importance of an insurance trust inquired: "What do you have in your insurance trust?" The response was can I answer that question next week, and that Sunday, his first irrevocable trust was created. We shouldn't have to wait for clients to embarrass us into carving out the time to address our own planning.

INSURANCE PLANNING

Insurance planning needs to be evaluated based on your personal circumstances. Needs change over time

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[1] *Raia v. Lowenstein Sandler LLP and Eric D. Weinstock*, No. A-1365-19T1, 2020 BL 230787 (N.J. Super. Ct. App. Div. June 22, 2020); *Wellin v. Nixon Peabody, LLP*, No. 20-1120, 2021 BL 447527 (4th Cir. 2021).

[2] *See* Sandra D. Glazier, Martin Shenkman, Jonathan G. Blattmachr and Joseph Garin, *Wellin v. Nixon, Peabody, LLP — Case Lessons on Defensive Practice*, LISI Estate Planning Newsletter #2934 (Jan. 20, 2022); Martin Shenkman, Sandra Glazier and Howard Zaritsky, *Raia Lowenstein Sandler LLP — Thoughts on a Recent Malpractice Case*, LISI Estate Planning Newsletter #2724 (May 16, 2019).

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so periodic reviews are critical. For example, during the course of a young couple's life there are a number of times you would be in a position to offlay a portion of your personal or business owner risk to an insurance company.

For example, when. . . .

- You buy a first house and obtain a mortgage. A child is born and there's a need to provide for family income and an educational fund. A second child is born and/or when they move into a larger home. You're involved in a law practice or in another profession or business and you have or should create and fund a buy-sell agreement.
- You obtain disability insurance to guarantee your monthly income if you can't work.
- You a highly compensated attorney, executive, or business owner uses life insurance to supplement your retirement.
- You protect your retirement savings from an unexpected, unreimbursed long-term illness.
- You face a state and federal estate tax and you purchase a life insurance policy.

Years ago, purchasing life insurance to protect a family or business interest was simple. You had a choice of either whole life or term, both with 100% guarantees as to the premium you would pay, the duration of time you were covered, and the amount of the death benefit. However, ever since the mid 1980's the number of insurance options has grown. While that makes it more complex, it also provides greater flexibility. There are now more than six types of policies while perhaps 50–60% of current coverage that's in force today is guaranteed. The insurance industry has decided to offlay a greater percentage of the investment and mortality risk they've usually assumed, onto you the insured. Unfortunately, many of you still think that all coverage you have or are considering is guaranteed like it used to be, but that is often not the case

You have to be aware of and understand the greater share of risk you as an insured have, often unknowingly, assumed based on the type of policy you are considering, the duration of the coverage, and the premium you are considering paying.

Since this is not your father's/grandfather's life insurance policy a consumer must be more vigilant with any type of coverage they purchase or are responsible for as either an unskilled/amateur trustee for your family, or as a professional trustee for your clients' ILITs. Point is that life insurance can't be placed in a drawer and forgotten about. Life insurance today is a ''Buy and Manage'' asset Not a ''Buy and Hold'' asset, as so many consumers mistakenly believe. Life insurance must be actively managed by evaluating its performance on an ongoing basis just as you would your stock and bond or real estate portfolio.

A WORD ABOUT LIVING BENEFITS

Again, as planners we are all somewhat familiar with the basics, or much more, of life insurance planning. The coverage we need will evolve over time as our circumstances and needs change. When we are younger and growing our family, we need life insurance to protect against a premature death. In the event you become disabled and can't earn an income, a robust disability insurance policy with a benefit period to age 65 along with a built-in inflation factor, and a definition that protects you in your specific occupation even if you can only work part time is critical if you aren't able to earn an income after your six-month short term disability coverage ends

Life insurance as a ''Death Benefit'' can serve a variety of purposes in addition to protecting your loved ones in the event of your premature death. It provides the funds that assures that the value of the deceased's business partners interest will immediately be paid to the deceased's partners family in exchange for their percentage ownership share in the business or professional entity according to the terms of a funded buy-sell agreement. In other cases, the death benefit is used to pay for future estate taxes.

It can also act as a backstop to a non-reciprocal SLAT or other irrevocable trust plan from the risk of premature death, funding a buyout for our practice and much more. If we endeavor to protect assets by shifting some of our nonretirement plan wealth to irrevocable trusts, expanded insurance coverage in light of our reduced personal net worth may make sense and should be evaluated.

As an ''Asset Class'' life insurance contains several ''Living Benefits'' you should become familiar with. It can serve as a tax-deferred savings vehicle over and above any IRA or 401k plan limits to supplement our own retirement income with no interference as to governmental regulations.

As we age, and perhaps find ourselves in a position where life insurance coverage or disability coverage is no longer needed, it may make a great deal of sense at some point in the retirement cycle and nearer the end of our career to redirect the premium we've been paying for disability insurance and instead use it to pay for our long-term care costs by either purchasing a traditional long-term care policy, or a combination/linked life insurance policy that gives the insured, or their trustee if held in a trust, the ability to withdraw dollars from the death benefit of the life insurance policy tax free up to the federal limit geared to inflation, to pay for qualified long-term care costs.

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Or we could use the accumulated cash value of a life insurance policy to supplement our retirement income through its distinct ability to defer any gains during the entire accumulation period and then when desired, without any governmental regulations, we're able to take tax-free distributions through a series of surrenders and loans that never have to be paid back, as long as the policy survives the insured.[3]

In some cases, such a conversion may be a better allocation of resources if the objective is to support our retirement. Whenever such a decision is made it's always important you compare the alternative of turning an unneeded life insurance policy back to the insurance company for the cash value, as opposed to selling the policy on the secondary market to an institutional investor as a life settlement where the payout can be significantly greater than the stated accumulated cash value within the insurance policy.

HOW NOT TO DO RETIREMENT PLANNING

We should all be mindful of any mandatory retirement ages our firm has and what planning we might need to be prepared for that eventuality. If your firm requires retirement by age 68 unless the management committee approves an additional year to year of practice, then we should be prepared financially for that upcoming date. Ideally planning for that should begin decades prior. That should include all the obvious steps we either suggest to clients or hear their other advisers recommend, budgeting, financial modeling, asset allocation and so forth.

AN EXAMPLE

One of the most significant mistakes I've seen in this area of retirement planning involved a 62-year-old senior partner that had previously retired from one of the major accounting firms. In order to maximize his retirement income, the agent from a major life insurance company that was contracted to provide advice to the retiring partners suggested he take his full pension, leaving no benefit for his wife should she survive him. It was explained to him that he could allocate a portion of the additional income he received to purchase a $1.5 million dollar association group life insurance policy which at his death would provide the same amount of annual income the wife would have received from his pension had he chosen the 50% survivor option. However, using this strategy, at the wife's subsequent passing the $1.5 million life insurance proceeds would be left to their two children as an inheritance. Had he taken the 50% survivors benefit that option would not have been available at the wife's subsequent passing. It made sense and he went ahead with the transaction[4]

Several years later this client was referred to me by his attorney for a second opinion regarding his entire life insurance portfolio. It was soon discovered that the policy increased in five-year increments and by the time the client turned age 75 his premium would have increased from an initial $13,000 annual premium to $31,000, and by the time he was 85 the premium would have increased to $59,000. Once the client realized the mistake that he made and what was going to happen, he purchased a guaranteed universal policy with a smaller death benefit in exchange for a manageable premium that he could afford long term and which would be guaranteed to last till the client was age 95.

A FURTHER WORD ABOUT ASSOCIATION GROUP TERM AND INDIVIDUAL TERM INSURANCE

Association group term life insurance for accountants and attorneys is initially the least expensive form of term life insurance up to age 45. However, if you plan to maintain your coverage to age 85 and beyond association term is not the right product. Reason being in later years the premium becomes exorbitantly expensive, and the death benefit gets reduced at age 75.

Term insurance through its conversion privilege provides an opportunity for an insured in poor health to convert their term policy for a permanent policy without any evidence of insurability. However, this conversion option is only available up to a specific age usually to age 65 or 70. If your health has deteriorated it's important that you take advantage of this important conversion feature before it expires.

For some of us the thought of retirement is dreadful. If that is the case, then planning for the dreadful might not receive much priority. "Lawyers are living longer, their practice settings are changing, and the nature of the work itself is in flux. Retiring in place is harder to do. Yet, 73% of lawyers in private practice say they want to practice law until they 'die at their desks' "[5] If the latter is your goal, that too should be planned for. As a CFP practitioner of 35 plus years, I can attest to the fact that it's far better when you plan ahead and allocate a sufficient portion of your current

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[3] Randolph Whitelaw and Henry Montag, *The Advisors' and Trustees' Guide to Managing Risk*, American Bar Association (2017).

[4] *Id.*

[5] Edward C. Winslow III, *Not Fade Away: Can Old Lawyers Age Successfully?*, Law Practice Today (Jan. 14. 2020).

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income to a retirement plan that provides sufficient assets to earn a desired preset retirement income at a preset age.

CONCLUSION

A life insurance policy today is far more flexible, comprehensive, and complex than a typical life insurance policy issued just 15 years ago. It's more important than ever to have the right type of a policy for the specific objective you have in mind. If you don't have the expertise in this area develop a relationship with an independent experienced financial, insurance, and estate planning professional who that can assist you and your family.

As a profession, estate planning attorneys are expert at helping clients identify and then solve a wide range of planning issues. Some of us need to direct that same skill set to addressing our own personal planning.

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