Estate Planning Studies®

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Better Estate Planning

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Practical observations from the field, including:

- Illustrations of holistic planning
- Building the planning foundation
- Planning fatigue
- What a better approach can provide
- Intelligent, not "simple"
- Process is important

Introduction

Every advisor involved with estate planning might believe he or she has a mastery of the estate planning process. He or she may, but in far too many situations, planning is incomplete and inadequate. This often is not due to the technical limitations of any advisor, but rather the emotional hurdles and misconceptions clients have, or the advisors not working collaboratively to help move the client forward on all facets of the planning. The result is often significant gaps in client planning. The solution is to address planning through a different lens. Although many advisors prefer learning new technical nuances of planning, it is these qualitative issues that are often the most important to address.

Estate tax rules have changed dramatically over the years, and if there is a change in administrations in Washington, they may change in significant ways yet again. The traditional intact married family that has been viewed as the base of most estate planning discussions is now only about 20% of family units. Estate planning more than ever before should encompass income tax and investment planning. Longevity is transforming planning for aging clients. Technology has transformed how we work and communicate, with both clients and other advisors. This environment necessitates a different approach to planning than what might have sufficed historically.

Better estate planning requires more than what sometimes occurs. Estate planning too often is viewed by clients, and even some advisors, in too limited a manner. Many clients begin the estate planning process by asking for a will. Although every practitioner is aware that a "will" is not an estate plan, and without more is not sufficient to address most of the issues clients face, clients are not. Yet each advisor may view planning primarily through his or her lens, without sufficient focus on the broader planning goals.

- An attorney may view an estate plan as primarily requiring the preparation of core estate planning documents: such as a financial power of attorney, health care proxy, living will, HIPAA release, pour-over will, and a revocable trust.
- A CPA may view the estate plan primarily from a tax planning and tax compliance perspective: trust income tax returns, gifts to reduce the potential size of an estate (if estate taxes are viewed as an issue for the client), and gift tax returns to report gift or other transfers.
- A wealth advisor might view the estate plan primarily from a financial perspective: a budget, financial projection, and an asset allocation.
- An insurance consultant might view the estate plan primarily from an insurance perspective: life insurance, disability insurance, and long-term care coverage.

But when these siloed perspectives are taken, important gaps may remain. A broader, more holistic, collaborative approach can benefit clients and protect advisors.

Illustrations of holistic collaborative planning

Example: A client's estate planner drafts all the appropriate core estate planning documents, which the client dutifully signs. The client's financial advisor reviews the client's budget and prepares financial forecasts that demonstrate with an 80% likelihood, the client should not run out of funds by age 95. The client's CPA meets annually with the client to review income tax planning and handles all tax filings. The client, an estate planner herself, is sued. All the well-intentioned planning may be for naught if the client had inadequate liability insurance coverage (both professional malpractice coverage and personal excess liability coverage, depending on the nature of the underlying claim). The client also should have taken steps to safe-guard assets that might have included creating and funding irrevocable trusts before a claim occurred, and perhaps creating limited liability companies (LLCs) for rental real estate assets that might generate a claim (e.g., a tenant being injured), perhaps a separate LLC to hold passive investment assets with the ownership of that LLC fractionalized between the clients and their irrevocable trusts. Too often this planning does not occur even if an advisor recommends it to a client. After all, there may be no estate tax issue, and the client may view such significant planning as too costly (until a claim is filed). Although this planning is obvious to most advisors, it might not be to even sophisticated clients. Unless the advisors all direct the same recommendations to the clients, the clients may not hear the message. As a collaborative team, this is more likely to occur. If a client hears from her wealth advisor, for example, that asset protection is critical, she may hear that message differently from when it is communicated by the attorney, whom the client might perceive as having a vested interest in creating the documentation for the plan. When the same message is delivered by each of the client's advisors, it carries more weight.

Example: Creating a durable power of attorney to facilitate an agent's handling of financial matters in the event of disability is important for most clients. However, if the client lacks disability or long-term care coverage, the legal documents alone will not suffice. Many long-term care policies permit the insured to name a designee to receive notice of a lapse in the policy. But clients rarely coordinate with the estate planning attorney whom they name in such ancillary documents so that the person named may differ from the agent named under the durable power of attorney, creating potential conflict and communication gaps.

Example: An attorney and CPA may craft a plan to take advantage of the current high temporary transfer tax exemptions by having spouses each contribute assets to non-reciprocal spousal lifetime access trusts (SLATs). In such a plan wife may contribute assets to a dynastic, GST-exempt trust that benefits her husband and all descendants. The husband creates a similar plan benefiting the wife and descendants. Properly structured, the plan should remove all of the assets transferred from both estates using exemption. Because each spouse is a beneficiary of the other spouse's SLAT, the couple together can access as beneficiaries all the transferred assets. But if one spouse dies prematurely, the surviving spouse may no longer have access to the assets of the trust he or she set up. This is because the deceased spouse is no longer a beneficiary of that trust. There are several ways to address these risks. The attorney might draft the trust as a self-settled trust (a so-called domestic asset protection trust or DAPT) for which the donor spouse is also a named beneficiary. Alternatively, the trust might be drafted to provide that the settlor spouse may be added as a beneficiary by a person named to act in a non-fiduciary capacity. That approach might avoid characterizing the trust as a self-settled trust unless and until the settlor is added as a beneficiary. Some believe this lessens the risks associated with a self-settled trust. But other alternatives also should be explored because the risks of any variation of a self-settled trust cannot be measured. For example, a simple life insurance policy held in each spouse's SLAT can increase the assets available to the surviving spouse in the event of premature death. What type of policy, how much coverage, and for how long is it necessary? That may be a way to quantify indirectly the cost of avoiding whatever risks may be attendant to a self-settled trust approach. Yet another approach is to have the client's wealth advisor forecast budget and investment results. It may be that the surviving spouse will have adequate resources without tap-ping his or her own trust. That might then negate the need to purchase life insurance or to accept what-ever risks a DAPT or other technique might afford. In many instances evaluating this process from each lens will result in a hybrid position that might include a more modest amount of insurance merely to fill the gap created by the risk of premature death of one spouse (e.g., a 10-year term policy instead of a larger permanent policy).

Example: Under current law two-year rolling (also called "cascading") grantor retained annuity trusts (GRATs) are a common planning tool especially for wealthy clients who have fully utilized their temporary exemption. In the traditional application of rolling GRATs, if funded with marketable securities, a key ingredient to a successful plan is the selection of the assets with which to fund each GRAT. Often the investment location decisions might have a separate asset class in each GRAT, or perhaps if sufficient wealth were involved to sup-port a more granular approach, a specific security in each GRAT. That might maximize the upside volatility that a GRAT may remove from the settlor's estate. This is because appreciation in one security won't be offset by depreciation in another. If the Democrats take control of Washington in 2020, and an estate tax bill similar to that which was proposed by Senator Bernie Sanders is proposed, GRATs as we historically knew them may disappear. That might permit a final round of GRATs before the effective dates of such legislation. It might be that long-term GRATs might be used (e.g., to lock in the last GRATs that may not be subject to the new restrictions). These last GRATs will require a different investment strategy during their administration than has been used for GRATs in the past. Such a technique will require active input by the client's wealth advisor. In particular, historically commonly used short-term rolling GRATs easily can be "immunized" by substituting cash for a highly appreciated asset. However, immunizing to lock in appreciation in a longer-term GRAT cannot realistically do that as few clients would be willing to have a longer-term GRAT, e.g., a 10-year GRAT, hold cash for nine years if a swap years if a swap to immunize appreciation were consummated in year one. Immunization of a longer-term GRAT will depend on the skills of the client's investment advisor and might involve more than merely cash, but a portfolio designed with minimum downside risk so that the appreciation that occurred before immunization is not lost.

What a better approach can provide

A holistic, comprehensive, and collaborative approach can:

- Provide better results for clients. This is illustrated in the examples above.
- Build deeper relationships between clients and advisors. When any advisor touches the client in many spheres, the relationship may grow, and the client is more likely to believe that the advisor is more than a technician and is someone who cares.
- Lessen the potential liability exposure practitioners face. There is no doubt that the world is more litigious and risks to advisors have continued to grow. A collaborative team can be more protective for the advisors than the siloed approach that too often remains the norm. Each advisor views the client and planning from a different lens. When the insights from each are combined, it is more likely that issues will be spotted and addressed. Clients often have different relationships with different advisors and, as a result tell different advisors different things. When all the advisors collaboratively share that information, the team can do a better job for the client than any one advisor could do alone.
- Differentiate the advisors from commodified versions of planners. Clients can obtain legal documents online, have their tax returns prepared by online software, and use a low-cost robo advisor for their investments. Everyone of the allied estate planning professions feels the cost and other pressure of these developments. But the commodified versions of planners, while useful for many, cannot yet collaborate, cannot provide creative and tailored planning, and cannot yet address most human elements of the process that are so vital to many client plans. Although artificial intelligence will address more of this, that is not yet the case.

If clients and advisors alike would take a broader view of what estate planning entails, practice in a non-siloed holistic and collaborative manner, more creative solutions would be generated for many potentially significant issues. This result will prove worthwhile, and many clients will appreciate the peace of mind it affords. But the process is different from what many clients expect from estate planning. Thus, the first step is for each advisor to educate clients as to why this is the appropriate approach.

What is estate planning?

Too often clients and their advisors have a preconceived notion of what estate planning is supposed to be, or what documents or steps their estate planning will require. Often these preconceived notions are too limiting and make the process more difficult and less effective. Educate clients that before they begin, or continue, the estate planning process, they should give thought to the many goals they might have that directly or indirectly affect their estate. These might include: worries about aging and health issues (many fear the impact of dementia), their current and future financial picture, their family and loved ones, and how they define these terms, and the people they wish to include. The better a client can identify his or her objectives and concerns, the more likely the estate and related planning process will help achieve these goals. Encourage clients not to limit the process to only the goals they identify, e.g., the goals the client enunciates when meeting with the advisor. In most cases the identified goals can lead to discussions of other important ancillary or secondary goals that are essential to address as well. But the clients need to be open-minded to this. It will make the process more rewarding for them.

How to do effective planning

To address critical goals, the process must be holistic and consider a broad range of considerations, not just simple questions such as "who do you want as your executor?" or "how do you want your estate divided?" A wide range of personal, financial, and other issues almost always needs to be addressed. Although these are unique to each client, they often include: family dynamics, business succession, religious considerations, financial and retirement planning, asset protection, planning for longevity, income tax planning, business issues, health issues, as well as estate taxes, and disposition of assets. Taking a broader approach often leads to sounder answers that solve real problems, which are often not included in the list of questions or goals clients recite as the reason they wanted to meet. This process can be more time consuming and costly. It also can result in discussions of topics that are inherently unpleasant. Although a more sterile and superficial approach can be taken, which is common in too many estate plans, it will not lead to the results that most people want. It will not provide the planning most people need to protect themselves and their loved ones. Advisors should view their role as helping educate and guide the client, and most important, as a listener. Carefully listening to how clients respond to questions, and considering not only the information the client brings to the meeting but also the information they don't bring, can provide "hooks" to open up valuable discussions. That might involve delivering tough news on family issues, client expectations, finances, or other problems. To do anything less would lack integrity and not truly be helpful. Explain to clients that their slogging through what can be an unpleasant process may be essential for increased security and peace of mind for the clients and those they care about.

Build the planning foundation

Although documents are almost always an essential part of the estate planning end result, they are never the entirety of the result, nor often the most important component. Many clients do not understand this, and the entire planning team should endeavor to educate clients as to the broader steps necessary for the client to achieve his or her planning goals. Documents must be based on a plan. A good plan almost invariably will require the input or even active involvement of other planning team members, such as the client's wealth manager, CPA, and insurance consultant. Financial forecasts are often useful to quantifying the quantum of gifts to be made, the types of trusts to which gifts should be made (e.g., does the client require access to funds after gifts are made), etc. The tax characteristics of the trust might be planned based on an analysis by the client's CPA of the state or federal income tax impact of the proposed trust plan. This might consider whether it is worth creating a non-grantor trust. Is it worthwhile to plan trust situs in a no-tax jurisdiction? Might the transfer of business interests to a trust for which the trustee (or perhaps the trust investment director) might be an active participate avoid the net investment income tax? Life, disability, and long-term care insurance should be coordinated with the overall plan, filling gaps and provide safety nets as appropriate. This, in turn, may influence the nature of the trusts initially proposed.

Intelligent, not "simple"

Some clients are fixated on the idea of "simplicity." If there are three different means to achieve a planning goal, it may be reasonable to use the simplest approach, unless there is a strong reason to use a different option. However, simplicity as a primary goal is never helpful to clients, or the planning process. An iPhone might be simple to use, or the icons easy to understand, but the technology behind it is incredibly complex. Few laypeople understand how a drug prescribed by their physician addresses a health issue or affects the body. That does not stop anyone from using an iPhone or taking prescribed medication. Nor should it be used by a client as an excuse to opt for a shorter or purportedly simpler legal document over a document that might be more complex but more realistically meets the client's needs. Although the client must understand the general picture and terms of an estate plan, and especially the components that are tailored to that particular client's unique circumstances, it is unrealistic, and even harmful, for a client to limit what he or she is willing to do based on what the client feels is easy to understand. Even accomplished attorneys who are not estate planning specialists will struggle to understand GST planning, but that doesn't mean it should not be integrated into a plan as appropriate for the client circumstances. If each of the allied professionals communicates the same message to the client, it will be more likely to have the appropriate impact and move the planning process in the proper direction. For example, if the wealth advisors and CPA corroborate that a plan proposed by the attorney, despite being complex, is appropriate for the client, the client will be more likely to receive the message than if that message is only communicated by the drafting attorney.

Costs of planning

Many clients would prefer estimates of what an estate plan will cost. If planning is standardized that can readily be done. But the holistic and multi-disciplinary approach that is essential to the process is more difficult to estimate costs for. Estimates may also prove too limiting to accomplish client goals. In some cases, simple solutions to complex problems provide quicker resolutions than anticipated. In other situations, the opposite occurs.

Collaboration

A collaborative team effort is essential to design and implement a holistic and authentic estate plan. This means other advisors (attorney, CPA, wealth advisor, and insurance consultant among others) must be involved in the planning and operation of the plan as illustrated throughout this monograph. This might lessen the importance of the role of any one advisor, but also gives each advisor the latitude to better help achieve the goals the client identifies as the process evolves. Although many advisors appreciate the opportunity to work collaboratively, not all do, and it will enhance this beneficial process if all advisors are encouraged to do so.

Technology

Technology can make the estate and related planning process more efficient and facilitate cost-effective communications and collaboration. Web meetings can be a cost-effective way for a client to review preliminary projections and draft documents without the need to drive to any advisor's office. It is also a great tool to foster collaboration of the various advisors. It also reduces costs. Instead of having the client and all allied professionals meet for every meeting, a web conference avoids travel time (and associated charges for professionals who bill hourly) and permits each advisor to join a web meeting for only the portion of the discussions relevant to his or her role.

Some meetings can be handled in a more time and cost-efficient manner if the advisors meet with-out the client being involved.

For clients with aging or health challenges, a web meeting for at least some of the meetings can make the process more comfortable and thus pro-mote more interaction.

Planning fatigue

Too often clients' planning stamina fades before the planning is completed. If the clients start the estate planning process with expectations that are too narrow or simplistic (e.g., "I need a will"), the complexity of a properly crafted plan can feel even more daunting. Those feelings can be counterproductive to completing and implementing a comprehensive estate plan. The process of navigating through difficult personal decisions can be arduous and exhausting. Some clients grow weary from the process and short-cut some of the planning that is appropriate, or even abandon the process. It is important to stay the course; avoidance behavior will leave planning incomplete. Also, rather than just a step in the entire estate planning process, some view the signing of documents as its culmination. This is misguided as the process is not complete—it is imperative that the plan be implemented. Although advisors under-stand all of this, clients do not. Again, if all advisors can communicate a uniform message, it will help encourage clients through the process.

Once implemented, the plan must be maintained, and then reviewed. For example, many life insurance trusts never have the intended insurance policy transferred into them. If a family limited liability company is formed, the administration of that entity must be monitored, and additional legal documentation may be necessary periodically. Setting realistic expectations, delegating to family members or advisors, and dividing the process into phases can all facilitate keeping a client on the planning track. The planning team should collaboratively work with the client, with each advisor supporting what each of the other advisors needs to complete each of the steps necessary so that the client can achieve more of his or her estate planning goals.

Process is important

Estate planning is too often misperceived by clients as obtaining a document. As all professionals are well aware, it is never just that. It must entail gathering information, creating a plan appropriate for the client's specific situation, crafting the documents necessary to implementing that plan, operating the plan once implemented, and then monitoring the plan in future years. Monitoring requires periodic meetings, typically annually, and requires communication with all advisors so each can best help the client, and the team of advisors, to keep the plan on track. Some people might choose to ignore planning for a decade after documents are signed, thinking it would be less costly and less of a hassle in the short term. Very often that leads to disastrous consequences, far greater cost, and the undermining of important goals. If the wealth advisor is aware that the client has not met with his or her estate planner in years, he or she should encourage if not insist that the client return for a follow-up meeting. If the client has solely related the CPAs role to compliance (completing tax forms) and not planning, the other members on the planning team should encourage the client to retain the CPA for an annual tax consultation. Too often each advisor focuses on his or her goals and not those of the team and the client in a holistic manner.

One of the areas that is commonly not addressed is annual maintenance of trusts and entities that compose components of a plan. Every advisor should guide clients as to the importance of this. If the trusts and entities are not properly maintained and administered, a claimant or the IRS may pierce through them to have a court disregard the restrictions that they might otherwise have imposed.

- Periodic review of the governing documents is essential as laws change and circumstances change, and they should be kept current. The process itself shows respect for the independent nature of the entity. These reviews are generally in the purview of the client's attorney, but, what if the client has met regularly only with the CPA and financial planner, who has the expertise to review these documents?
- Are all entity and trust bank and investment records properly recorded? In many instances private equity on a trust account may not be reflected properly. Most institutions have space limits for trust and entity titles. Sometimes the truncation obfuscates the differences between various trusts and entities, increasing the likelihood of funds being misdirected.
- Has the client been reminded of the importance of not commingling funds from personal, trust and entity accounts? Has anyone reviewed records periodically to identify errors and correct them?
- Are there intra-entity or intra-family loans that are not properly documented? One of the more common plan administration oversights is for a related party loan to be made when funds are needed in a different entity or trust and that loan is not documented or interest is not paid.
- A life insurance plan implemented to back- stop an estate plan needs to be reviewed. This not only requires consideration of how the policy is performing, but is the coverage still appropriate for the client's needs? If investment performance is less than was projected, more life insurance might be needed to backstop an estate plan that moves investments out of the client's reach.
- How has the client's estate grown since the plan was implemented? If the estate has grown more rapidly than anticipated, further planning might be important.
- Is someone monitoring swap powers that are included in many grantor trusts? If an irrevocable grantor trust has highly appreciated assets, should the settlor substitute cash for those assets to bring the appreciated assets back into their estate for step-up purposes?
- Is anyone monitoring powers of appointments included in irrevocable trusts? Often no one is focused on the planning implications of these powers to direct where assets can be shifted. For example, if a parent's will or revocable trusts create trusts for children giving those children testamentary powers of appointment over their trusts, the children perhaps should revise their wills to exercise those powers if desirable. However, is that right communicated to the children who may have different counsel?
- Clients often misunderstand the evolving nature of planning documents. They may think that because they have a will and the same family members as

was done that "nothing has changed." In fact, the tax laws have evolved; planning techniques have grown more flexible and sophisticated; etc. All documents need to be reviewed and updated as appropriate.

- Asset allocation decisions can be vital to long-term wealth preservation and transfer goals. But have the current investment advisors been given adequate information to understand the nature of the various entities and trusts and which asset classes might be best held in each?
- If a trust requires issuance of annual demand or *Crummey* powers has that been done?

Maintaining and operating a plan properly is essential to the plan having any potential of achieving the client's intended goals.

Conclusion

With constantly changing tax laws, with an evolving investment environment, new insurance product introductions, changing family dynamics, and more, it is imperative that the planning process evolve. This is essential to clients' obtaining better results, achieving more of their goals. It is also helpful to all the professional advisors involved as it can facilitate each advisor getting more and better information, being assured that related planning is coordinated, and reducing the potential risk of claims by dissatisfied clients.

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