Where is the Estate Planning Profession Going?

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"Predictions are difficult--especially about the future."

Yogi Berra

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EXECUTIVE SUMMARY:

This commentary will address the issue of the estate planning opportunities for younger estate planning attorneys and whether those opportunities are diminishing. While the focus of this commentary is on estate planning attorneys, many of the issues discussed in this commentary apply equally to other estate planning professionals.

The estate planning profession continues to change as tax rules change and our culture evolves. But the truth of Ben Franklin's insightful comment remains no matter what Congress does or how the demographics change: *"In this world nothing can be said to be certain, except death and taxes."* Taxes are always going to be a part of the estate planning process. While estate taxes will not govern estate planning as much as they have over the last several decades, the expanding deficit increases the possibility of new taxes in the future. As George Harrison noted in his 1966 song '*Taxman*" (written when he realized that his revenue was subject to a 95% super-tax), the government will always find a way to collect its "fair share":

Should five percent appear too small
Be thankful I don't take it all
cause I'm the taxman
Yeah, I'm the taxman
If you drive a car car, I'll tax the street
If you try to sit sit, I'll tax your seat
If you get too cold cold, I'll tax the heat
If you take a walk walk, I'll tax your feet

The Bottom Line: While the nature of the applicable taxes and clients may change over time, there will always be work for estate planning professionals because neither death nor taxes are going to disappear. Moreover, because of a number of factors, work for estate planning professionals (particularly those in their 30s and 40s) should increase between now and the middle of the century.

This commentary will discuss many of the positive and negative trends that will impact estate planning over the next several decades.

COMMENT:

The Brave New World. We are in the midst of some of the most radical changes in the estate planning profession since federal estate taxes were reenacted for the fourth time in 1916. These changes are being driven by at least three major dynamics.

First, the tax issues associated with estate planning are changing. For decades, estate planning has been largely dominated by techniques designed to minimize a confiscatory federal estate tax. However, the permanent transfer tax exemption levels enacted by the American Taxpayer Relief Act of 2012 ("ATRA") on January 2, 2013 have permanently reduced the number of US residents who will be subject to a federal transfer tax. It is expected that in 2013 roughly 3,000 estates will be subject to a federal estate tax out of 2.5 million US residents who will pass away. The Congressional Research Service report entitled "*The Estate and Gift Tax Provisions of the American Taxpayer Relief Act of 2012*," (issued on February 15, 2013) noted that less than 0.2% of all estates will be taxable.

The tax planning component of estate planning for most US residents is shifting from a focus on federal transfer tax avoidance to a focus on state and federal income tax avoidance and state death tax minimization in those states which still impose a death tax.

In many ways, ATRA has made the estate planning decision processes more complex and uncertain than it was before we had "permanent" reform.

Perhaps one of the most fascinating aspects of ATRA is that it will turn many of our previous tax planning tools on their head. For example:

- Will tax practitioners start arguing the IRS's valuation arguments to increase the fair market value of a decedent's assets (i.e., to obtain a higher step up in basis), while our friends at the IRS begin arguing the previous low-value positions of the estate planning bar? Will the IRS reverse its positions when an estate exceeds the applicable exemption?
- Will defective trusts still make sense, but with the change being that the trusts are defective for estate tax purposes, with the trust being complete for income tax purposes (i.e., remember the old "Clifford Trusts")?.

- Do ATRA changes make formula and marital deduction planning more complex for most married clients? Will By-Pass trust planning be replaced with QTIP election planning?
- With the significant increase in the income tax rate for trusts and estates and the spread in income tax rates, there will be tax incentives to make distributions of fiduciary income to lower bracket beneficiaries, even if such distributions were not the grantor's original intent.

Second, over the last six decades, American society has been undergoing a radical set of changes at an increasing pace. These demographics are changing for whom we plan and how planning is structured. While many of these changes are discussed in more detail later in this commentary, here are a few examples (none of which are driven by tax issues):

- Ozzie and Harriett are no longer representative of the typical American family. The Census Bureau has reported the following household percentages:

	1950	2010
Married Couples	78%	48%
Married with Children	43%	20%

- The Census Bureau has noted that by age 85 women will outnumber men by 4 to 1. Much of the planning for the elderly will focus on the unique perspectives and concerns of elderly women, whose husbands have predeceased them.
- Americans in their 40 and 50s are being sandwiched in their responsibilities. According to the Pew Foundation, 47% of these people have an elderly parent and have a minor child or a dependent adult child. About 15% are supporting both of these family members. Their estate planning may reflect the possible support of elderly parents (e.g., will the surviving spouse sacrifice to support a father in law the way a child would?) and the need to create inheritance restraints for children who have failed to launch.
- The following generational cohorts and their respective populations have been identified by sociologists (with some disagreements on when they were born and their size). Each cohort's size and unique perspectives will impact estate planning approaches. See the unique generational characteristics and how they may impact your marketing to each cohort at "*Multi-Generational Marketing: Descriptions, Characteristics, Lifestyles, and Attitudes*" available at www.na-businesspress.com/JABE/Jabe112/WilliamsWeb.pdf

	Years	Estimated Members
Silent Generation	1920/22-1942/45	49 million
Baby Boomers	1943/46-1965/69	79 million
Generation X	1961/67-1979/85	41 million
Millennial (Generation Y)	1979/85-2000/05	71 million
Generation Z	2000/05-today	23 million

An interesting facet of the demographics and their impact on estate planning is the wide variations that exist from state to state. For example, according to the Department of Homeland Security's Population Estimates for 2011 (issued July 2012), 25.9% of all US legal resident aliens live in California, with New York having 12.4%, Texas having 9.8% and Florida having 9.7%.

If you are sufficiently curious about these demographics, I would recommend reviewing two reports:

- *"The Changing Demographic Profile of the United States,"* Congressional Research Service, issued March 31, 2011, and
- *"65+ in the United States, Current Population Reports,"* issued in December 2005 by the U.S. Department of Health and Human Services and the Department of Commerce, a detailed 243 page report which covers more than those age 65 and above.

Third, the purpose of estate planning is being reevaluated by many clients and their advisors. The pivotal reality is that estate planning is <u>not</u> fundamentally about taxes – or even about the assets clients intend to pass. It is about how clients deal with their inevitable death and potential incapacity. It is about clients trying to make the right decisions about their own mortality, the consequences of their passing and how to leave a positive **LEGACY** for their heirs.

This perspective starts with understanding that estate planning does not start with **THINGS** or the taxes imposed upon them. It starts with **PEOPLE**: Who clients were and are and who their families are and might become. In the last two decades the author has observed a significant re-orientation of both clients and advisors from believing that the protection and preservation of family assets (e.g., minimizing transfer taxes and asset protection) is the most important goal of estate planning. Increasingly, clients and their advisors recognize this is a misplaced emphasis which focuses both the client and the planner on assets rather than family and on structure and technique over family goals. When *"protecting and preserving the family"* becomes the beginning point of planning, clients first focus on how to leave a positive impact for their family. Both the client and the planner may be forced to deal with difficult family issues (for example, treating the descendants as individuals with their own personalities and problems, not as equals), which both the client and the planner might have preferred to ignore - to the ultimate detriment of the client's family.

It is not that tax issues are unimportant. They just pale in significance when compared to family issues. Instead of wrapping the estate plan around the tax issues, clients are increasingly starting with the family issues and then wrapping the tax issues around the family goals and needs.

Many clients (though clearly not all of them) have increasingly begun to address the issue of "*how much is too much*" – or as Warren Buffet said in a 1986 article in Fortune magazine: "*The perfect inheritance is] enough money so that they feel they could do* *anything, but not so much that they could do nothing."* As a result, affluent clients are increasing their charitable gifts and bequests as their assets grow.

Change is upon us. The question is how do we as estate planners adapt to it? There is a great quote by Eric Hoffer: "*In times of change, learners inherit the earth, while the learned find themselves beautifully equipped to deal with a world that no longer exists."* This changing environment will bring incredible opportunities for the creative and the prepared. Those who fail to adapt will die off.

Is the Estate Planning Profession Diminishing? ATRA has created concerns within the estate planning community that the substantial reduction in taxpayers who are subject to federal transfer taxes could substantially reduce the work of estate planning professionals. According to the Congressional Research Service report entitled "*Estate Tax Options,*" (issued on June 8, 2010) approximately 6420 taxable estate tax returns were expected to have been filed in 2011 if the exemption was $3.5 million, with the number falling to 3560 returns with a $5.0 million exemption. The report indicated that the following were the expected percent of taxable estates at various exemption levels.

Exemption Level	2011	2019
$ 1 million	1.76%	3.00%
$ 3.5 million	0.25%	0.46%
$ 3.5 million, indexed for inflation	0.24%	0.32%
$ 5 million	0.14%	0.23%
$ 5 million, indexed for inflation	0.14%	0.18%

The reality is that the 2001 through 2012 increases in federal transfer tax exemptions, reduced state death taxes and lowered tax rates have already substantially reduced the amount of transfer-tax-driven work for most estate planners –ignoring the frenzy of year end gifting in 2012 and estate tax filings to maintain a portable exemption. The author would assert that all ATRA did was make permanent that existing reduction in transfer-tax-driven work.

According to the Wealth Counsel's 6th Annual Industry Trends Survey, 94% of respondents expect their business to grow in the next 5 years. Here are thirty reasons that estate planning will remain a worthwhile and growing profession for younger attorneys for decades to come. Many of these developments will increase the number and depth of specialist niches for estate planning professionals.

(1) Mortality. Jimmie Hendrix was right when he said: *"Life is pleasant. Death is peaceful. It's the Transition that's Troublesome."* Americans will continue to age, become incapacitated and die at an increasing rate. Baby boomers are moving into retirement at a rate of 10,000 per day and many are for the first time examining their own mortality as they watch family and friends pass away.

There are two particularly interesting statistics that will increase estate planning between now and 2050:

- Approximately 2.5 million US residents will die in 2013 (up from 1.7 million in 1960). The number of dying US residents will increase as the Baby Boomer bubble begins to burst. A 2008 Census Bureau report projected the following future deaths:

Year	Total Deaths
2020	2,867,000
2030	3,316,000
2040	3,881,000
2050	4,249,000

- Even while more US residents are passing away, the remaining ones are living longer. The current average life expectancy is around age 79. The report *"65+ in the United States, Current Population Reports,"* (issued December 2005) provided the following projections on the number of Americans over age 65:

Year	Total Age 65 or Over
2000	35.0 million
2010	40.2 million
2020	54.6 million
2030	71.5 million
2040	80.0 million
2050	86.7 million

Unfortunately, there remains a significant number of elderly Americans who seem to be following Paul Simon's perspective from his 1965 song *Flowers Never Bend with the Rainfall*: "*So I'll continue to continue to pretend that my life will never end."* A 1996 Merrill Lynch study reported that those over age 65 are twice as likely to avoid estate planning then those under age 65. According to the AARP, only 17% of Americans over age 50 have a current will and durable power of attorney. Fear of addressing their personal mortality may lie at the heart of this problem. A secondary element is the inability of some elderly to fully understand what is being proposed. The thought process appears to be: "*I don't fully grasp what they want me to do, but I know I liked what I did before, so why should I change*?"

Resources:

- Leimberg, "*Life Expectancy Analysis: Estate Planning Tool of the Future Is Here Now,*" Estate Planning Journal, September 2008.

Websites: Wondering about your life expectancy? Try these websites (but do not expect them to agree on how long you will live):

- www.deathclock.com
- http://gosset.wharton.upenn.edu/mortality/perl/CalcForm.html
- http://www.socialsecurity.gov/OACT/population/longevity.html
- http://media.nmfn.com/tnetwork/lifespan/

Checklist: See www.scrogginlaw.com for a Pre-Mortem Planning Checklist for the Terminally Ill.

(2) Longer Life and Incapacity. Seventy-nine million baby boomers are quickly moving into retirement and old age – despite however much we may declare that our age of 60 is equivalent to our parents' age of 40. According to the Census Bureau, Americans 85 and older are the fastest growing demographic group. Increasingly, planning needs to address the potential incapacity of the client, including issues such as long term care insurance, living wills, revocable living trusts, beneficiary designations, medical directives and powers of attorney and assisted care facilities.

This aging population is also getting less competent. According to a February 14, 2013 report from Alzheimer's Association, by 2050 the number of Americans subject to Alzheimer's and other types of dementia will increase by 300% to 13.8 million, with costs increasing by 500% to $1.1 trillion.

Probate and guardianship work will continue to expand. Issues of capacity for elderly clients will increasingly dominate their estate planning, particularly when changes are made to existing documents or new spouses enter the picture. Attorneys will spend more time validating the capacity of their clients and more litigation will result as that capacity is challenged. Attorneys will have to carefully study the rules governing the capacity to make a Will because the standards can vary from state to state. For example, Georgia statute 53-4-11(b) provides: *"An incapacity to contract may coexist with the capacity to make a will."*

This longer life expectancy is creating other issues. According to a June 11, 2012 article in the Wall Street Journal entitled "*Counting on an Inheritance? Count Again,*" the average 65 year old man has a 60% chance of living to age 80 and a 40% chance of reaching age 85. An average 65 year old woman has a 71% chance of living to age 80 and a 53% chance of reaching age 85. The problem is that many of these folks never expected to live that long and do not have the financial resources to secure their retirement. These destitute elderly will create more work for elder law attorneys and more support pressure on their descendants and the government. According to a study by Allianz Life Insurance Company of North America, 82% of married respondents (ages 40-49) with children have a greater fear of outliving their assets then they did of dying. Estate planning and its costs are not on the front burner of most of these potential clients. This is a largely untapped market of reluctant clients who need basic planning documents for a low cost fee. Trying to deliver that low cost fee without committing malpractice may be difficult, given all of the non-taxable family issues that can occur (for example: a third marriage with children and supported parents on both sides of the family).

One result of the financial, mental and physical stresses on the elderly is the number of elderly who are moving in with their children. The US Census Bureau reported that in 2000, roughly 2.2 million older parents lived with their children. By 2010, the number was 3.9 million and growing. This demographic raises the potential of conflict among siblings over the care, financial contributions to the resident household and decision making. It is an issue which advisors need to directly address in the planning for these elderly.

On the opposite end of the spectrum are elderly who do not live with their descendants and have the financial resources to support themselves. According to a Pew Report entitled "*The Return of the Multi-Generation Family*," (released March 18, 2010) in 1900 57% of adults over the age of 65 lived in a multi-generation household. By 1990 the percentage was only 17%, growing to 20% in 2010. Preserving their independence is often a strong issue for many elderly and they are willing to pay the cost of maintaining that independence, such as obtaining in home nursing care to stay in their home as long as possible.

But it is not just the elderly who need to deal with the possibility of incapacity. According to the Social Security Administration, today's 20 year olds have a 1 in 4 change of becoming disabled before they die. Note that the three major cases dealing with medical decision making for disabled individuals were all young woman in their twenties and thirties: Karen Ann Quinlin, Nancy Cruzan and Terri Schiavo. Even our younger clients need Durable General Powers of Attorney and Medical Directives.

The complexity of this area is aggravated by the significant state differences in the rules governing General Powers of Attorney and Medical Directives. For example:

- Alabama and Nebraska require that witnesses to a Medical Directive must be at least 19 years of age.
- Some states (example: Georgia, Oregon) permit the use of "springing" General Powers of Attorney which become operative only upon some future event, such as the incapacity of the principal, while other states do not permit such future activations. For example, Florida statute 709.2108(3) does not permit springing powers of attorney that were executed after October 1, 2011.
- In some states (example: Georgia, Delaware, Pennsylvania) General Powers are deemed durable unless there is contrary language in the instrument, while in other states (example: Florida statute 709.2104) require that the instrument must specifically provide for durability.
- The IRS takes the position that annual exclusion gifts cannot be made pursuant to a General Power of Attorney unless either state law or the instrument specifically permit such gifts. Few states have statutes or case law permitting such gifting (exception example: North Carolina - North Carolina Statute 32A-14.1).

As if the state issues were not complicated enough, there are vast differences in the foreign rules governing the use of powers of attorney and medical directives of Americans living overseas.

Resources:

- Einhorn & Leimberg, "*What Every Professional Should Know About LTCI in 2013,*" LISI Elder Care Planning Newsletter #14 (January 14, 2013)
- There is a growing recognition of the unique financial and estate planning issues of the elderly and their wealth-related decision processes. See more information at

the American Institute of Financial Gerontology at http://www.aifg.org.

- ACTEC: Information for the Elderly and Caregivers available at http://www.actec.org/resources/links/default.asp?category_id=1019
- For information on how European countries deal with Medical Directives see: "Country reports on advance directives". University of Zurich. http://www.ethik.uzh.ch/ibme/newsarchiv/advance-directives/Country_Reports_AD.pdf.
- Scroggin, "Medical Decision Making," ABA Practical Lawyer, August 2005.
- Tax Management Portfolio, *Durable Powers of Attorney*, No. 859-2nd.
- Tax Management Portfolio, *Planning for Disability*, No. 816-2nd

Websites: Some helpful web-based calculators:

- http://www.socialsecurity.gov/planners/benefitcalculators.htm - to calculate social security disability benefits
- http://www.metlifeiseasier.com/disabilitycalculator/calc_step1.asp - to calculate your disability insurance needs (most disability insurance carriers have similar websites)
- to calculate your chances of becoming disabled:
  - http://www.whatsmypdq.org
  - http://www.disabilitycanhappen.org/chances_disability/pdq.asp

Checklists:

- Durable Power of Attorney Drafting Checklist, found at Tax Management Portfolio *Durable Powers of Attorney*, No. 859-2nd, Worksheet 2.
- O'Reilly, Goldberg, & Rivlin "*The Estate Planner's Checklist for Planning for Incapacity*" Estate Planning Journal, November 2012.

(3) Younger Clients. It is not just the growing elder population that will be a major source of new business. There are between 71-80 million people in the Millennial (Generation Y) cohort, depending on the dates used. A 2012 study conducted by US Trust shows that 76% of the affluent respondents from age 18-46 believed that leaving an inheritance was an important financial goal, while only 55% of the Baby Boomers had that view. The study also provides in-depth analysis of the ways that different generations view estate planning and philanthropy. See the US Trust report at: http://www.ustrust.com/ust/Pages/Insights-on-Wealth-and-Worth.aspx

While working with affluent younger clients will be an increasing part of the estate planning business, the average 20 to 30 year old may be less likely to address their estate planning at the age when their parents did. Some of the reasons include:

- The Census Bureau reported that the average age of a first marriage for men in 2009 was 28.4 years, up from 22.5 in 1970, while the respective ages for women were 26.5 in 2009 versus 20.6 in 1970. In addition, fewer members of the Millennial generation are getting married as compared to their parents. Since marriage or the birth of a child are often the triggering event for preparing an estate plan, this demographic change means that younger potential clients will probably be delaying their estate planning a few years later than their parents did.

- In many cases, unless an inheritance occurs, the Generation Y members do not think they have sufficient assets to complete or pay for an estate plan. A 2010 Census Bureau report showed that Americans over age 65 had net worth that was 47 times larger than the average American under age 35.

(4) Updating Client Documents. Estate planning attorneys are still trying to fully grasp the nuances and alleyways of the ATRA changes on clients' existing planning documents. Understanding these issues will naturally create a momentum for document reviews and changes of the documents for existing clients. For example:

- Does permanent portability eliminate or reduce the need to use a by-pass trust, particularly for married couples in first marriages or married couples without descendants?
- With portability being available, wouldn't the surviving spouse rather control his or her inheritance directly, even if there are disadvantages?
- Should the client bust existing estate planning techniques that create valuation discounts in order to obtain a higher tax basis result at death?
- Is the best planning tool a Will with a QTIP trust with rights of withdrawal in the surviving spouse?
- Should affluent clients still pre-fund their available transfer tax exemptions using the high gift tax exemption?
- How do annual exclusions effectively figure into the current tax regime?
- Should less wealthy clients consider busting their ILITs?

Resource: See the excellent outline by Jeff Pennell, "*Planning in the Wake of Death Tax Reform*," from the February 2013 ALI-CLE San Francisco program: Advanced Estate Planning Techniques, available at www.ali-cle.org.

(5) Handicapped Heirs. According to the US Census Bureau roughly 56.7 million Americans had significant disabilities in 2010. The author has observed an increasing incidence of elderly clients trying to properly plan for the needs of their handicapped children. The estate planning process for handicapped adults can also be extremely complex and costly (e.g., guardianship of mentally disabled adults). It will also be a growing area of work as the parents of handicapped children can no longer take care of their needs and search for alternative housing, support and trustee money management.

It is also the author's expectation that, as financial pressures mount on Medicaid, Congress and the states will increasingly attempt to require beneficiaries of Special Needs Trusts to first access their trust funds before accessing governmental support.

Resources:

- Lewis, "*Planning for Beneficiaries with Special Needs*," copy available at the NAEPC Journal at http://www.naepc.org/journal
- Begley and Hook, "*A Dozen Common Mistakes with Special Needs Planning*," Estate Planning Journal, May 2012.

(6) Explosion of Wealth. A 2003 Boston College report (that updated a 1999 report)

projected that the largest intergenerational wealth transfer in history would occur by the year 2052, with a total transfer of approximately $41 trillion.

According to the Federal Reserve's "*Flow of Funds Accounts of the United States*," (4th Quarter - issued March 7, 2013), the toll of the Great Recession on American wealth had largely vanished by the end of the fourth quarter of 2012, with American households having a total wealth of $66.1 trillion, up from $51.4 trillion at the bottom of the recession in early 2009. Before the recession American household wealth had capped out at $67.4 trillion. The Flow of Funds Report for the First Quarter of 2013 is expected to wipe out the remaining wealth reduction from the Great Recession.

But the passage of this wealth may not be as large as predicted for a number of reasons including:

- The health care and long term care cost of clients who are living longer is going to deplete the funds available for inheritance.
- Many elderly clients are living an expansive lifestyle (e.g., living in expensive “active adult” communities, traveling and making significant charitable gifts). Many clients seem to have taken Jimmy Buffett’s 1989 song, Carnival World to heart: “*Spend it while you can. Money's contraband .You can't take it with you when you go. Spend it while you can. Before it's taken from your hand .There's no free ride in this carnival world.”*
- In “*Counting on an Inheritance? Count Again*,” (Wall Street Journal, June 11, 2012), it was noted that rather than inheriting significant sums, Baby Boomers may actually have to go out of pocket to support their parents who are living longer than expected.
- The AARP and others have raised issues on whether the inheritance will be anywhere close to the Boston College predictions. See: “*In Their Dreams: What Will Boomers Inherit?*” issued in May 2006 by the AARP Public Policy Institute.

While much of the focus has been on the passage of existing wealth, there will continue to be clients with newly created wealth. These clients will be seeking out competent tax and estate planning advisors. For example, the 2012 US Trust study referenced above reported that one-third of affluent respondents did not have a tax advisor.

Resource: Schervish and Havens, “*Millionaires and the Millennium: New Estimates of the Forthcoming Wealth Transfer and the Prospects for the Golden Age of Philanthropy*,” Social Welfare Research Institute, Boston College, Boston, MA, October 1999. See the report at: http://www.bc.edu/bc_org/avp/gsas/swri/ See an updated report at: Havens & Schervish, “*Why the $41 Trillion Wealth Transfer Estimate is Still Valid*,” The Journal of Gift Planning, January 2003.

(7) Retirement Assets. According to the Urban Institute (see: www.urban.org), $9.5 trillion was held in defined contribution plans and IRAs at the end of 2012, with IRAs accounting for approximately 58% of the total. This was a six fold growth in such funds from 1990 to 2011. Defined benefit plans held $2.3 trillion at the end of 2012. Additional retirement and employee benefits are held in deferred compensation plans, stock options

and other benefit plans. These benefits will continue to increase and will continue to be a major asset in many estates. The tax and dispositional aspects of such assets can be extremely complex, requiring meticulous planning and administration.

Resources: Guare, "*IRA Beneficiary Designations: Just Tell Me What the Answer Is*," 47th Annual University of Miami Heckerling Institute on Estate Planning, January 2013.

(8) Legacy Planning. According to the Wealth Counsel 6th Annual Industry Trends Survey, 35% of clients want to protect their heirs from mismanaging their inheritance. As noted above, the lifting of the estate tax burden on the vast majority of Americans will refocus much of the planning to approaches that are driven by the client's desire to leave a lasting legacy and minimize the harm and maximize the benefit of passing their wealth. Among the results of this changing perspective are the following:

- The client specific documents will be more time intensive than a standard will with an A/B Trust arrangement.
- Because many clients are concerned that direct control of an inheritance is not in the best interest of their heirs, we will see more estate planning structures designed to limit the control of the heirs over the inherited assets.
- With the present state of government entitlement programs and unfunded state and local government pensions, clients are increasing concerned that their descendants will not have a financial lifestyle comparable to the client. As a result, clients are increasingly using Dynasty Trusts that provide long term medical, educational and minimal support for descendants – basically a family "Safety Net" for future generations.
- Clients are also getting more innovative in the terms they want in Dynasty Trusts. Terms include Family Banks and Incentive Trusts, built with sufficient restrictions and flexibilities to hopefully have a positive impact across the generations.

Interestingly, when you focus the planning on the client's personal legacies, the personality of heirs and other non-tax issues, the discussion process and the drafting of documents can be more complex and the fees will generally be higher than when drafting standard form, tax-driven documents.

According to an article in the Wall Street Journal entitled "Lost Inheritance" (published March 7, 2013), seventy percent of inherited wealth of affluent US residents was gone by the end of the second generation and ninety percent disappeared by the end of the third generation. The primarily reason for lost wealth was not taxes or poor investments. Instead, 60% of the time it was caused by "*a trust and communication breakdown among family members*." Twenty-five percent of the time it was due to the failure of parents to prepare their heirs for a windfall inheritance. Affluent clients increasingly recognize these problems and are trying to adopt strategies and structures designed to foster future communication and prepare heirs for large inheritances.

Resources:

- Scroggin, "*The True Goal of Estate Planning: Protecting and Preserving the*

Family," (two parts), ABA Property and Probate, Spring and Summer, 2002.

- Scroggin, "*Restraining an Inheritance can Accomplish a Client's Objectives*," Estate Planning Journal, March 2003.
- Wolven, "*Incentives, Conditions and Statements of Intent*," from the February 2013 ALI-CLE San Francisco program: Advanced Estate Planning Techniques available at www.ali-cle.org.

(9) Estate and Trust Litigation. As a result of the combination of poorly drafted documents, dysfunctional families, incompetent fiduciaries, greedy heirs, inadequate planning and poorly prepared fiduciaries, estate litigation has been booming in the last few decades. This growth will continue.

One consequence of the increased litigation will be an increased effort by both individual and institutional fiduciaries to make sure estate and trust instruments provide for strong fiduciary protection. We should anticipate more protective provisions in fiduciary instruments, including broader indemnity provisions for fiduciaries, modifications of the normal fiduciary standards and investment polices, broader use of no contest clauses, limited liability for delegated powers and limits (or increases) on disclosures to beneficiaries. These changes will increase the need to create counter-balancing powers designed to protect beneficiaries (e.g., a wider use of Trust Protectors and fiduciary removal powers). As a result, there will be longer discussions with clients and the complexity of the documents will increase.

Resources:

- Gaslowitz and Ringsmuth, "*Will Contest, Probate, And Fiduciary Litigation Trends: A Bird's Eye View*" ALI-ABA Estate Planning Course Materials Journal, October 2011. A copy can be found at http://www.gaslowitzfrankel.com.
- Wolven And Giannoulias, "*Tips for Minimizing the Risk of Fiduciary Litigation,*" Estate Planning Journal, August 2012.

(10) Conflict Minimization. The corollary to estate and trust litigation is planning designed to mitigate the potential sources of intra-family estate conflicts. According to the Wealth Counsel 6th Annual Industry Trends Survey, the top motivation for doing estate planning was to avoid the chaos and conflict among the client's heirs. Many clients have an abiding desire to establish structures which minimize the potential points of conflict and provide a mechanism to resolve future family conflicts. Clients want to dispose of assets in a manner designed to minimize family conflict - leaving a legacy of relationships rather than a legacy of conflict. This is a growing part of the discussion with clients and a part of their planning documents. Solutions include using personal property disposition lists, looking at real or perceived conflicts of interest when appointing fiduciaries, or passing the family business only to the children running the business. As noted above, attorneys will need to spend more time talking with clients about providing greater protections to fiduciaries and creating counterbalancing protections for heirs.

Many individual fiduciaries agree to serve without fully understanding the potential liabilities and conflict they may be inserting themselves into. Should attorneys provide written materials (perhaps signed by the client and the fiduciary) detailing the responsibility of the fiduciary, the risk of conflict and the means by which the drafter has tried to minimize those exposures? Should attorneys more thoroughly advise their clients on the necessary skills sets needed by their fiduciaries - instead of just accepting the client's choices at face value?

Resources:

- Blattmachr, "*Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*," ACTEC Law Journal Winter, 2010, copy available at the NAEPC Journal at http://www.naepc.org/journal
- Fisher "*The Power Tools of Estate Conflict Management: Recharging the Culture of Estate Conflicts*," ABA Probate and Property (May/June 2010 & July/August 2010), copy available at *www.fishermediation.com*
- Scroggin, "*The Changing Nature of Estate Planning (Part 3) - Divorce & Conflict*," CCH Practical Estate Planning, March 2004; Republished in CCH's Estate and Financial Planning.

(11) Business Transitions, According to Kiplinger's, in 2001 roughly 50,000 small business owners retired. Recent estimates are that 3.3 million closely held owners will retire in the next decade.

Although the exit transition has been slowed by the recession and the inability of buyers to obtain financing, transfers should accelerate as the economy recovers and the credit markets loosen up. The tax, legal and liability issues surrounding exit planning for closely held business owners will be an increasing source of planning work.

A secondary source of work will be dealing with the passage or disposal of businesses (often at a steeply discounted price) when the owner passes away without a succession plan in place. A February 10, 2011 New York times article entitled "*Are Baby Boomers Ready to Exit Their Businesses?*" reported that 96% of Baby Boomer business owners thought a business succession plan was an important idea, but 87% had no written exit plan. Part of this lack of planning may be explained by a 2010 Gallup Poll which noted that 47% of small business owners never intend to retire unless forced to by health issues. Unfortunately, the result will often be a less than capable family member running or trying to dispose of the business after the entrepreneur dies.

The failure of business owners to exit their businesses is caused by another factor: they cannot afford to leave the business. The owners are forced to stay in their businesses while they wait for an economic recovery to take hold. There are a number of elements driving this problem, including:

- Studies show that most small business owners do not have significant accumulations in retirement plans and the business is often the single largest asset they own.
- The owners need to sell the business for a higher price then the business's current market value to support their retirement.
- Even if the business is sold, the income generated by the investment of the sales

proceeds will not replace their current income requirements.

- There is an oversupply of sellers and an undersupply of buyers.
- Buyers are having a hard time obtaining financing from commercial lenders and many sellers are leery of financing the sale, particularly if the buyer can only provide a nominal down payment.

However, federal estate taxes will not be a driving force in most family business successions. The Congressional Research Service Report "*The Estate and Gift Tax Provisions of the American Taxpayer Relief Act of 2012*," (issued on February 15, 2013) noted:

- *"About 0.2% of estates with half or more of their assets in businesses will be subject to the estate tax."*
- *"About 65 farm estates (or approximately one per state) are projected to be subject to the estate tax, and constitute 1.8% of taxable estates. Less than a fourth (0.4%) is projected to have inadequate liquidity to pay estate taxes. Less than 1% (0.8%) of farm operator estates is projected to pay the tax."*
- *"About 94 estates (about two per state) with half their assets in small business and who expect their heirs to continue in the business are projected to be subject to the estate tax; they constitute 2.5% of total estates.11 Less than a half (1.1%) is projected to have inadequate liquidity to pay estate taxes."*

Resources:

- Mezzullo, "*Keeping It in the Family: Family Business Succession Planning*" 47th Annual University of Miami Heckerling Institute on Estate Planning, January 2013.
- Manterfield, "*Get Business Owners Started on Succession Planning*," Estate Planning Journal, (two parts), October and September 2012.
- Scroggin, "The Eight Inevitables of Family Business Succession," available at www.scrogginlaw.com

(12) Charitable Planning. Estate planning increasingly includes some form of charitable giving. A 2010 Bank of America Study of High Net Worth Philanthropy estimated that between $6.6 trillion and $27.4 trillion in charitable bequests would be made from 1998 to 2052.

During the last three decades wealth ballooned in the United States, but affluent clients tended to increase their charitable transfers more than their family inheritances. According to John Havens of the Boston College Center on Wealth and Philanthropy: "*Reports from the IRS indicate that charitable giving increases at every level from the lowest level estate to the highest level*." He also notes: "*When an estate's value exceeds $20 million, the percentage going to charity virtually doubles and the percentage given to heirs goes down.*"

A few statistics (with their sources) will highlight the depth of charitable involvement and its impact on estate planning:

- 65% of Americans households give to charity (Center on Philanthropy at Indiana University at http://www.philanthropy.iupui.edu/).
- Americans gave $298.3 billion to charities in 2011, a 3.9% increase over 2010 (National Philanthropic Trust at http://www.nptrust.org).
- 98% of high net worth households give to charity (The Chronicle of Philanthropy).
- In 2010 there were 161,873 donor advised funds that held $30 billion (Congressional Research Service).

Not only are charitable transfers increasing, but wealthier Americans are getting more involved in philanthropy themselves. According to a 2003 study, 83% of affluent Americans did volunteer work. The increased involvement of affluent Americans in charitable work also seems to be increasing their lifetime charitable gifting. Affluent Americans are also encouraging their heirs to become involved in charitable work. In a 1998 US Trust study, 82% of affluent parents encouraged their children to be involved in charitable work.

These wealthy taxpayers are not just giving to charity. They are making sure the gifts are handled in ways they approve. As a consequence of the scandals in numerous charities and the increasing "hands-on" management style of many donors, clients increasingly want to retain in themselves and/or family the future direction of charitable transfers. Clients want to provide for charitable transfers that will leave a legacy for society and a legacy that will impact their heirs. Joel Breitstein noted the common bond between today's donor and the 20th century philanthropists "*...is the desire to transmit family values and social responsibility to successive generations...*" This dual goal has resulted in not only a dramatic growth in charitable donations, but the development of "retained control" charitable giving approaches.

The reduction in estate taxes from the ATRA should increase charitable transfers by affluent Americans as they transfer this "found money" to their favorite charities rather than heirs.

Interestingly, The National Philanthropic Trust noted that in 2011 there were 1,080,130 US charitable organizations - a 15.6% reduction from the 2010 numbers.

Websites:

- See the various studies available the Boston College Center on Wealth and Philanthropy available at: http://www.bc.edu/content/bc/research/cwp/publications/by-topic/wealthphil.html
- Center on Philanthropy at Indiana University (http://www.philanthropy.iupui.edu)
- See the Chronicle of Philanthropy at http://philanthropy.com.
- See information about Community Foundations at http://www.communityfoundations.net/
- Sources for detailed information about charitable organizations:
    - www.justgive.org
    - www.guidestar.com

- www.give.org
- www.charitywatch.org

(13) Unmarried Partners. According to the Census Bureau:

- In 2011 7.6 million unmarried opposite-sex couples were living together.
- In 2010 there were approximately 135,000 same sex couples in marriages or civil unions. Marriage Equality USA estimates that the number is approximately 75,000.
- In 2010 the total number of same sex households was 901,997.

There are broad differences on what percentage of the US population is bisexual, gay and lesbian. The numbers range from 2% (Family Research Institute) to 4% (Williams Institute on Sexual Orientation Law and Public Policy), to 8% of the men and 7% of the woman (2010 *Journal of Sexual Medicine* article*)*.

These demographic changes have been developing for some time and have created a group of estate planning professionals who specialize in the issues unique to same-sex and opposite-sex couples. This trend will increase. The impending Supreme Court decision could create significant new planning opportunities for same sex couples or require a reevaluation of their existing planning documents.

Resources:

- Keppler, "*Planning for Same Sex Partners*," NAEPC Journal at http://www.naepc.org/journal
- Berall, "*Same Sex Marriage Update*," (two parts) LISI Newsletters 1969 and 1971, June 2012.
- "*Same-Sex Marriages: Legal Issues*" Congressional Research Service Report, issued November 5, 2012.

(14) Marriage and Divorce. Too many clients have not heard the quote: "*Marriage is often due to lack of judgment, divorce to lack of patience and remarriage to lack of memory."*

Roughly 49% of all US marriages end in divorce. According to the Centers for Disease Control and Prevention, in 2011 there were roughly 877,000 divorces and 2,118,000 marriages. Assuming a divorced party did not promptly remarry, this means that up to six million people who may have needed to update their wills, general powers of attorney, medical directives, retirement plan and life insurance beneficiary designations and PODs.

According to a March 3, 2012 article in the Wall Street Journal, entitled "*The Gray Divorces*," the divorce rate for Baby Boomers' is skyrocketing, even while it is diminishing for other demographic groups. According to the article, "*Among divorces by people ages 40-69, women reported seeking the split 66% of the time*."

The high divorce and remarriage rate means that planners will deal with a constant stream of clients who need to deal with drafting new estate planning documents (e.g., "*time to* *get that ex-spouse off the medical directive and put the new spouse in the Will.”).* The requirements of divorce decrees will have to be taken into account in the drafting of new estate planning documents.

This divorce demographic also increases another area of tax planning: planning for the tax ramifications of divorce. It is the author’s unfortunate perspective that the family law bar is often unaware of the tax consequences of the terms of their negotiated divorce settlements. For example, we had a case in which the wife received an asset with an equity value of $1.0 million, but which had a $900,000 negative basis. The sale of the property was going to generate a $1.9 million recognized gain. The divorce attorney never examined the tax basis that was transferred to the divorcing wife. Pursuant to IRC section 1041(a) the transfer to the ex-wife as a part of the divorce did not create a taxable event to the husband and the husband’s negative basis carried over to the wife. See: Bittker & Lokken, Federal Taxation of Income, Estates and Gifts, (WG&L) section 44.6 and PLRs 9615026 and 8644012.

Divorce and remarriage create other complexities. Estate planning documents have to deal with the complexities of blended and dysfunctional families, and competing spousal views of how children and step-children should be raised and treated as inheritors. Conflicts among members of blended families will also create more estate litigation. Clients are increasingly struggling with how to fairly treat each member of the blended family. For example, should the children of the less wealthy spouse participate in the inheritance of the assets of the wealthier spouse?

It is not just the remarriage of a divorced parent that can create problems. As married couples age, one of them will pass first. According to a 1996 University of California Study, 60% of widowers are engaged in a new romantic relationship within 2 years of their wife’s death, while only about 20% of the widows have a new relationship. The Census Bureau reports that over 10 times as many widowers as widows over age 65 remarry. The average time from the death of the prior spouse was 2.5 years. Dad’s marriage to a woman 20 years his junior has created heartburn for a lot of children who have been anticipating a larger and quicker inheritance. The children may attempt to aggressively insert themselves into their parent’s estate planning process, creating new ethical and legal complexities for estate planning attorneys. By the way, for those who are looking for that new spouse, the Census Bureau reports that the highest percentage of widowers and widows are in the South.

Clients should consider creating planning documents that proactively anticipate their divorce and the divorce of their heirs. For example:

- Trusts should be drafted in contemplation of the possibility that one or more of the beneficiaries will get divorced. For example, assume a husband creates an irrevocable life insurance trust and names his wife as a beneficiary and co-trustee. The trust instrument could provide that all benefits, rights and powers of the wife, including serving as co-trustee, immediately terminate upon either legal separation or divorce. Few clients want an ex-spouse to financially benefit from their death or be able to control the inheritance of assets.

- Planning should contemplate that a surviving spouse may remarry. For example, assume a widower remarries and then dies. There could be claims against the deceased husband's estate by the surviving widow. State statues may permit the widow to claim support from the deceased's estate, or assets may have been placed in joint name, with the widow taking survivorship rights. If assets of the first wife are held in unified credit and/or marital trusts, the surviving second wife can be denied property rights in the trust assets. Such trusts not only protect against the claims of a surviving widow, they also protect against claims of a divorcing spouse from a subsequent marriage.
- Clients should consider the possibility that one or more heirs will become divorced. Clients should consider inheritance vehicles which restrict the ability of an heir's ex-spouse to obtain part of the family's assets. For example, the last thing most family businesses want or need is an ex-spouse attempting to gain some control over the family business. Placing family assets in spendthrift trusts and drafting buy-sell agreements in contemplation of this possibility can reduce the ability of a divorcing spouse to benefit from family assets.
- Any trust which limits the rights of an heir's former spouse should also contemplate child custody issues. For example, if a descendant is divorced and the non-descendant parent has custody of minor descendants, the trust should provide for how the ex-spouse is treated and what degree of control he or she retains over the children's trust benefits. If the trust requires that the trustees provide funds for the minor, it may open the trustees up to demands from the ex-spouse for greater benefits than the family intended. It may be better to give the trustees broad discretion in the amount to be paid for a minor heir and allow trustees to make payments directly to third parties for the benefit of the minor, rather than being required to make the payments through the child's custodial parent.

One unexpected consequence of the high divorce rate is the number of single men who are entering their elder years without a family support structure. The dysfunctional families created by high divorce rates occasionally mean that the children and step-children are unwilling to take on the burden of aiding elderly fathers or step-fathers in their later years. Interestingly, the studies report that step-children are more likely to take care of a step-mother than a step-father.

Websites: There are some interesting divorce related sites on the Web, including:
- http://www.divorce360.com/content/divorcecalculator.aspx - calculate your chance of divorce
- http://www.divorceandfinance.org/divorce_calculators.php - calculations that relate to your personal finances, alimony and property settlements
- http://www.alllaw.com/calculators/ChildSupport - for child support calculations
- For state information on marriage and divorce rates see: http://www.pewsocialtrends.org/2009/10/15/marriages-and-divorce-a-50-state-tour/ (Interesting fact: Arkansas has the highest percentage of men who have been married 3 or more times).

Checklist: See www.scrogginlaw.com for a Practical Post-Divorce Checklist for the recently divorced.

(15) The Failure to Plan. Many Americans are not planning for their death or incapacity. Estimates are that 50-70% of Americans either have no estate planning documents or have out of date estate planning documents. While there may be no pre-planning work for these folks, the lack of planning and the absence of well drafted documents will create significant intestate, probate, guardianship, tax and litigation work for estate planning advisors when clients become incapacitated and/or die.

The intestate allocation of assets to heirs and the taxation of an intestate estate vary widely from state to state and can provide some interesting discrepancies and incentives. For example, assume a couple had four adult children and the husband, who does not have a will, is dying. In Georgia, the wife would receive 33% of the intestate estate (Georgia statute 53-2-1(b)(1)). In Florida, the wife would receive 100% of the intestate estate (Florida statute 732.102(2)). Does this create an incentive for the wife to move the incapacitated husband to Florida?

Even partial failure to plan can have a devastating impact on heirs. For example, a March 15, 2013 Wall Street Journal article entitled, " *If Heirs Are Fighting, Try Mediation* ," noted that the failure to thoroughly plan for the disposition of personal property (much of it of marginal value) is the most frequent source of family estate conflicts.

Resource: CCH Multistate Guide to Estate Planning, Intestate Succession (table 7).

(16) Client Mobility. A Census Bureau report issued on December10, 2012, noted

- The average American moves 11.7 times in a lifetime.
- "*Between 2005 and 2010, the South was the only region to report a significant net gain of 1.1 million due to migration.*"
- In 2011, 1,011,000 US residents age 18 and older moved to another state and 915,000 moved abroad.
- The mobility of US residents has been decreasing since the late 1980s.

This constant mobility will require the review and revision of existing client documents, examination of multi-jurisdictional legal and tax issues, and planning for the best domicile for clients to live and die in.

Retirees are increasing as a percentage of our population. The tax burden and cost of living for retirees varies widely from state to state. For example, some states tax social security benefits while other states offer special tax breaks for retirees, such as excluding all or part of social security, IRA and/or retirement plan income. With limited disposable income in retirement, will retiring clients start moving to states in which their after-tax income increases – especially states that offer warmer winters? Recognizing such retirement mobility, a number of states have started offering special tax breaks for retiree residents. According to Kiplinger’s website (http://www.kiplinger.com) the top ten tax friendly retirement states are (in order): Alaska, Alabama, Georgia, Kentucky, Louisiana, Mississippi, Nevada, Pennsylvania, South Carolina, and Wyoming, Interestingly, Florida did not make the list.

In 2006 it was estimated that 6.0 million Americans were living abroad, up from 70,000 in 1966. According to *"The Changing Demographic Profile of the United States*," Congressional Research Service (issued March 31, 2011), from 2000 through 2009, 2,802,000 people emigrated from the United States. The tax complexities increase when affluent US citizens and resident aliens emigrate to other countries. For more information, see Spero, Asset Protection: Legal Planning Strategies, and Forms (WG&L), section 7.05A; Non-Citizens - Estate, Gift and Generation Skipping Taxation, BNA Portfolio 837-3rd; Weller, "*Estate Tax Trap for Expatriating Grantors*," LISI Estate Planning Newsletter #2067 (February 20, 2013). Interestingly, according to one report, of the roughly 6.0 million Americans living abroad, only about 2.0 million are filing a 1040.

Home ownership is an interesting component of this issue in several ways. First, vacation homes have become a growing asset of US residents. According to the US Census, in 1980 roughly 1.7 million US residents had a second home. By 2000, the number was 3.6 million. In 2009, the National Association of Homebuilders estimated that there were 6.9 million homes that qualify as non-rental second homes. Many US residents have second and third homes that may allow then to choose the most tax appropriate state of residence. These clients will need to deal with planning around ancillary probate and state death taxes for those properties.

Second, there is a potential negative demographic impacting home ownership. In January 2008, the Journal of the American Planning Association published an article by Dowell Myers and SungHo Ryu entitled "*Aging Baby Boomers and the Generational Housing Bubble*." A copy of the article is available at http://www.scag.ca.gov/housing/pdfs. The article noted that Baby Boomers have significantly increased the size and value of US housing over the last three decades. Not only have they driven up the value of their primary residences, but many boomers own second homes that have also increased in value.

The looming retirement of 79 million Baby Boomers could reverse this trend. The article notes: "*We also expect that this change will make many more homes available for sale than there are buyers for them.*" As Baby Boomers retire, down size, move to their second homes or into long term care facilities, they are expected to drop more homes on the market then there are buyers. The resulting oversupply could drive down the price of housing and potentially create blighted areas of unsold housing in areas with large boomer populations. The article notes that this trend has already started in Connecticut, Hawaii, New York, North Dakota, Pennsylvania, and West Virginia, with other states following in the years to come. According to the article, Arizona, Florida and Nevada will be the last to be impacted by this demographic bubble.

According "*Lost Inheritance*" published on March 7, 2013 in the Wall Street Journal the homes of US households age 65 and older on average constituted 33.1%- of their net wealth. Estate and financial advisors need to encourage their clients to consider the impact on both their retirement and their estate if the value of their homes drops over the next several decades.

Resources:

- Brogan and Ross, "*Changing State of Domicile Is Easier Said Than Done*," Estate Planning Journal, July 2012.
- Tax Management Portfolio, *The Mobile Client: Tax, Community Property, and Other Considerations*, No. 803-3rd.

Websites:

- To view the relative tax burden in 2010 of each state, go to: http://taxfoundation.org/article/state-and-local-tax-burdens-all-states-one-year-1977-2010
- Compare the retirement tax cost of all states at: http://www.retirementliving.com/taxes-by-state

Checklists:

- www.scrogginlaw.com for a checklist for changing a client's state of residence.
- www.MoversUSA.com for a Moving Notification Checklist
- Fidelity Investments: Retirement Planning Checklist available at http://personal.fidelity.com/myfidelity/InsideFidelity/NewsCenter/mediadocs/couples_retirement_checklist.pdf

(17) Federal Taxes on Trusts and Estates. One result of ATRA is that federal income tax avoidance will largely trump federal estate tax avoidance for the majority of taxpayers. Both pre-mortem and post-mortem planning will increasingly focus on how to minimize state and federal income taxes. The author is working on an LISI commentary on this topic.

The Congressional Research Service Report "*The Estate and Gift Tax Provisions of the American Taxpayer Relief Act of 2012*," (issued on February 15, 2013) noted that while there is a good chance that the current transfer tax exemptions will remain in place, there are other tax changes that may be adopted to deal with perceived abuses. The changes may cause continued modifications of estate planning documents. These changes could include:

- Reforming Grantor Retained Annuity Trusts (GRATs) to require a minimum annuity term of as many as 10 years and mandate a remainder interest.
- Reduce the discounts for intra-family transfers of interests in businesses.
- The Obama administration has proposed that GST Trusts be limited to a life of 90 years.
- The Obama administration has proposed an inclusion of assets of a grantor trust in the grantor's estate or impose a gift tax if the grantor ceases being the deemed owner.

Resources:

- Morrow, "*The Optimal Basis Increase Trust (OBIT),*" LISI Estate Planning Newsletter #2080 (March 20, 2013)
- Keebler & Melcher: "*The New 3.8% Surtax and Trusts & Estates*," LISI Income Tax Planning Newsletter #40 (March 21, 2013)
- Cantrell, "*The Fiduciary's Handbook of Sneaky Post-Mortem Income Tax Issues,*" 47th Annual University of Miami Heckerling Institute on Estate Planning, January 2013.
- Cantrell and Siegel, "*Top Ten Fiduciary Income Tax Strategies for 2013,*" 47th Annual University of Miami Heckerling Institute on Estate Planning, January 2013.
- Scroggin, "*The Increased Importance of Basis Planning,*" Trusts and Estates, April 2005.
- Scroggin, Income *Tax Planning Now that Estate Taxes are Less Significant*" Estate Planning magazine, June 2005.

(18) State Taxes on Trusts and Estates. As of January 1, 2013, twenty-one states and the District of Columbia impose death taxes. State estate tax exemptions can be significantly lower than the federal exemptions. According to the Tax Foundation, seven states impose inheritance taxes in which the tax rate and exemption can vary by the relationship to the decedent, with the highest tax rate being 20% (in Indiana). Connecticut is the only state that still imposes a gift tax. Increasingly, clients with connections to these jurisdictions will focus their tax planning on how to minimize the imposition of these local death taxes.

Planning also is increasingly focusing on how to reduce state and local income taxes. This new focus is reflected in some recent commentaries:

- Nenno & Platt: "Mitigating *New York Trust Income, Tax Return Preparers Pay Attention,*" LISI Income Tax Planning Newsletter #39 (March 14, 2013)
- Lipkind, "*PLR 201310002: DING Redux,*" LISI Estate Planning Newsletter #2076 (March 12, 2013)
- Akers, "*Private Letter Rulings 201310002-201310006.*" (March 8, 2013), available at http://www.bessemertrust.com

Resources:

- For an excellent schedule on state death taxes, go the Charles Fox schedule (updated annually) at the NAEPC Journal at http://www.naepc.org/journal.
- CCH Multistate Guide to Estate Planning, State Inheritance, Estate, Generation Skipping Transfer, and Gift Taxes, (table 14).

(19) Multi-Jurisdictional Tax Issues. As if tax planning was not complicated enough, the widely varying state income tax laws are creating a new tax specialty: Professionals who specialize in multi-jurisdictional legal and tax issues for fiduciaries, grantors and beneficiaries. For example, what are the income tax consequences when a Grantor living in New York City creates an irrevocable trust owning assets in Georgia, with Florida and Delaware co-trustees and beneficiaries living in California, New Jersey and

Pennsylvania?

Resource:

- Shayne, *"The Crazy Quilt of State Estate Tax Laws,"* LISI Estate Planning Newsletter #2026 (November 8, 2012).
- Gutierrez, *“Understanding and Navigating State Income Taxation of Trusts, Estate and Beneficiaries can be very Taxing,”* from the February 2013 ALI-CLE San Francisco program, Advanced Estate Planning Techniques available at www.ali-cle.org.

(20) Planning for New Citizens. According to the Department of Homeland Security’s Annual Flow Report for 2011 (issued April 2012), the following number of aliens became naturalized citizens - a total of approximately 3.1 million potential new clients in four years:

Year	Naturalized Citizens
2011	694,193
2010	619,913
2009	743,715
2008	1,046,539

Approximately 65% of these new citizens were married and a majority were in the 25 to 55 age bracket.

(21) Planning for Aliens. According to the Department of Homeland Security’s Population Estimates for 2011 (issued July 2012): “*an estimated 13.1 million [legal resident aliens] lived in the United States on January 1, 2011. The majority (59 per-cent) obtained status in 2000 or later. Of the total 13.1 million [legal resident aliens], an estimated 8.5 million were eligible to naturalize*.”

Non-citizens need to draft documents which deal with the unique US income and transfer tax complexities for non-citizens. Planning for non-citizens will have to encompass state, federal and home country income and estate taxes, differing rules governing the disposition of assets and incapacity and tax treaties. Affluent resident aliens and their non-resident families will need to adopt structures which are designed to avoid bringing off shore assets within the world-wide transfer tax system of the United States.

Resident aliens who are returning to their home countries will need to deal with the US taxation of their income and assets upon emigration. See Spero, Asset Protection: Legal Planning Strategies, and Forms (WG&L), section 7.05A and Non-Citizens - Estate, Gift and Generation Skipping Taxation, BNA Portfolio 837-3rd.

There will also be a relatively small business niche of planning for non-resident aliens who own assets in the US. Either because they have done appropriate planning or have ignored the US Tax Code, there are few non-resident aliens who pay a federal estate tax of their US based wealth. The Internal Revenue Service reported that in 2011 the total number of non-resident alien federal estate tax returns filed were:

Type of Return	Total Returns	Taxable Returns	Taxes Paid
Tax Treaty Estates	341	64	$6,852,468
Non-Treaty Estates	97	79	$8,428,630

Resources:

- Galligan, "*Adjusting the Globe's Tilt Just a Little- Foreign and U.S. International Taxpayers after the First Fiscal Cliff of 2013*," LISI Estate Planning Newsletter No 2071 (March 4, 2013)
- For a client friendly article for non-citizens, see: U.S. Estate and Gift taxation of Resident Aliens and Nonresident Aliens - 2010–2012, available at www.Deloitte.com.
- Basha**, "***Pitfalls in International Estate Planning – Potpourri of Topics and Problem Areas,"* NAEPC Journal at http://www.naepc.org/journal

(22) Tax Returns. The volume of tax returns prepared by attorneys may increase in the next few years. Although the high transfer tax exemptions will reduce the number of taxable estates, non-taxable federal estate tax returns will still need to be filed to obtain the benefits of portability and to make estate elections (e.g., QTIP elections).

In the search for ancillary revenue sources, law firms may increasingly offer to prepare fiduciary income tax returns. Fiduciary income taxation is one of the most complex areas of the US Tax Code. Variations in state rules governing fiduciary, grantor and beneficiary income and apportionment add more complexity. According to the IRS, the number of fiduciary income tax returns (IRS form 1041) being filed remained relatively flat in the last fifteen years, while gross income grew significantly - until the recent recession. The IRS projects that through 2016, the number of fiduciary income tax returns will remain steady at a rate of 3.1 to 3.2 million. Given the factors discussed in this commentary, that projection may be understated.

Year	1041s Filed	Taxable Returns	Gross Income
1998	3,375,965	1,144,864	$ 92,457,325,000
2006	3,733,925	983,814	$129,747,655,000
2011	2,994,148	578,846	$101,595,860,000

Resource: For detailed statistics (including by state) on fiduciary income and returns, go to http://www.irs.gov/uac/SOI-Tax-Stats-Income-from-Trusts-and-Estates-Statistics and www.irs.gov/pub/irs-soi/11databk.pdf

(23) Tax Audits. The IRS 2011 Data Book noted that there was a 63% increase in the audit of the wealthiest Americans, with 30% being subject to income tax audit. It should be expected that the number of IRS and state revenue department estate tax and income tax audits of estates and trusts will increase in the coming years, for a number of reasons, including (but certainly not limited to):

- During the recession the vast majority of states have had budget deficits and most states are aggressively looking for new revenue sources.

- State and local governments have huge underfunded pension liabilities which will increasingly squeeze their budgets. States are revising their state statutes in creative ways to raise new tax sources, such a fiduciary income taxes.
- The number of estate taxable decedent estates in 2013 is expected to be about 3,000. These estates will be subject to a close review by the IRS. The IRS has reported that for fiscal year 2011, it examined 40.3% of all returns with values over $10 million.
- Historically, IRS audits of trusts and estates income taxation has not been a big area of review. The IRS data book for 2011 reports that only 0.1% of the 3.0 million 1041s that were filed were subject to examination (only 645 were subject to a field examination). However, with the budgetary pressures, the reduction in estate tax returns being filed and the complexity of fiduciary income taxation, audits of fiduciary income tax returns could rapidly increase.
- In the next couple years there may be an increase in gift tax audits due to the significant gifting made by many affluent Americans during 2012. In 2011, the IRS reported that it had only audited 1.2% of the 226,241 gift tax returns filed. Given the number of large gifts made in 2012, that audit number will probably increase.

(24) Fiduciary Administration. With 79 million Baby Boomers and their remaining parents heading toward their personal mortality, there will be an explosion of probate work and fiduciary administration.

One area of growth for financial advisors will be advising fiduciaries on making investments designed to minimize the client's income tax and estate tax liabilities. For example, if the intent is to grow the value of an irrevocable trust, should assets be invested in capital gain assets to allow for the lowest tax cost and deferral of taxation until the asset is sold?

Checklist: "*Executor's Checklist,*" Tax Management Portfolio Probate and Administration of Decedents' Estates, Portfolio 804-2nd, Worksheet 1.

(25) Cleaning up Fiduciary Issues. As noted in this commentary, the tax and legal rules governing fiduciary administration are generally getting more complex, even while the fiduciaries seemed to be less skilled. While institutional fiduciaries certainly can make mistakes, they generally have a greater skill level than someone who has never served as a fiduciary. Unskilled and untested fiduciaries will make purposeful (e.g., loaning trust money to their businesses) or inadvertent mistakes (e.g., not handling funds as provided in the trust instrument, making tax and expense apportionment mistakes). The increase in the number of trusts and estates, the distrust by many clients of institutional fiduciaries and the investment minimums of $500,000 to $1,000,000 for many institutions will increase this problem as clients increasingly name family and friends to serve as fiduciaries.

As a result, there will be a growing business of auditing and managing the mistakes, mismanagement and/or replacement of fiduciaries when they die, become incapacitated, resign or are replaced.

Resources:

- Loring & Rounds, A Trustees Handbook (Wolters Kluwer) 2012.
- Many state bar associations have materials designed to help executors and personal representatives properly handle their fiduciary duties. Contact your local bar association.

(26) Practical Planning Tools. Practical planning tools and the creative use of technology are a growing part of the fiduciary administration and the probate process. It also can be a method for attorneys to differentiate themselves from their competition, provide more efficient representation and, in some cases, serve as an ancillary revenue source. Attorneys are increasingly using Ethical Wills, Business/Family Mission Statements, Family Love Letters™, Personal Property Dispositions and other practical tools to help the heirs manage the complexity, confusion and conflict that is often generated when a loved one becomes disabled or passes on. Attorneys are using technology in new ways to gain and maintain new clients.

Resources: Some information to help on personal property & similar dispositions:

- ”*Disposition of Tangible Personal Property: Estate Planning Considerations*,” ABA Joint Fall Tax & RPTE Meeting, September 24-26, 2009.
- Scroggin, “*Personal Property-The Forgotten Part Of An Estate Plan*,” CCH Practical Estate Planning Magazine, March 2002.
- Lamm, Kunz, & Riehl, *Digital Death: What to Do When Your Client Is Six Feet Under but His Data Is in the Cloud*,” 47th Annual University of Miami Heckerling Institute on Estate Planning, January 2013.
- US Trust, “*Estate Administration in the Digital Era*,” available at http://www.ustrust.com/ust/pages/thinking.aspx

Websites: Some practical resources to aid your estate planning practice:

- www.ethicalwill.com – leaving final thoughts for the family
- www.familyloveletter.com – "Information for a Time of Confusion” ™
- http://www.docubank.com – web based storage of medical directives and health information
- http://www.familyhistoryvideos.com – family videos for future generations

(27) The Complexity of Estates and Trusts. The non-tax complexity of estates and trusts continues to grow. Clients are increasingly using trusts for reasons which have little to do with federal or state estate tax avoidance. Trusts may be the most flexible planning tool available. The creativity is reflected in the numerous types of trusts which have evolved in the last few decades. Both the types of trusts and the sophistication of their terms are nothing like what we drafted even 30 years ago (e.g., the use of Trustee delegated powers and trust protectors). New trust concepts and forms will continue to evolve.

Resource: Kathleen R. Sherby, "*Trust Protectors: The Role and Characteristics of a Third Party Decision Maker*," from the February 2013 ALI-CLE San Francisco program: Advanced Estate Planning Techniques, available at www.ali-cle.org.

While fewer clients will need trusts like Irrevocable Life Insurance Trusts, other trust work will be unaffected by ATRA. For example, Self Funded Spendthrift Trusts, Supplemental Needs trusts, By-Pass Trusts, Discretionary Spray trusts, QTIP Trusts and Conduit Trusts will all remain necessary and viable tools. Dynasty Trusts will remain because of concerns by advisors and their clients that transfer tax changes in ATRA will be scrapped in any tax code overhaul and/or deficit reduction plan and to provide long term asset protection for heirs.

Clients and advisors are forum shopping for the best tax jurisdiction. Decanting of trusts will increase in this environment, particularly as trust officers educate out of state advisors on the potential tax and fiduciary advantages of their local jurisdictions.

Resource: See the excellent 93 page outline by Laurelle M. Gutierrez listed above.

It is not just differences in state taxes that make estate and trust planning so complex. The applicable incapacity, trust and estate laws vary widely from state to state. With such a mobile population, having a working knowledge of the rules of other states will be more important. A few examples:

- Georgia is the only state that allows 14 year olds to sign wills (Georgia statute 53-4-10)
- Georgia is the only state without a specific spousal elective share.
- The age of majority is 19 in Alabama (Alabama Code 26-1-1) but eighteen year olds can sign Wills in Alabama (Alabama Code 43-8-130).
- A number of states do not recognize holographic wills, including Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Hampshire, New Mexico, Ohio, Oregon, Rhode Island, South Carolina, Vermont, Washington and Wisconsin.
- The Rules Against Perpetuities and the Spendthrift Trust rules vary widely from state to state and are constantly evolving as many state legislatures seem to compete with each other for local trust domestication.
- Community property states add a complexity that few attorneys from non-community property states fully grasp and there are wide variations between the community property states.
- The rules governing the inheritance rights of children born from in vitro procedures used after the decedent's passing are non-existent in many states and vary greatly in the states that do deal with such issue. For more information see: CCH Multistate Guide to Estate Planning, Status of Children Conceived by Assisted Reproductive Techniques (table 11) and Gibson & Michaels, "*Determining Heirship in the World of Modern Reproduction,*" Estate Planning Journal, January 2012.

Resource: CCH Multistate Guide to Estate Planning (updated annually)

Finally, add to all of the above complexity the growing multi-national issues surrounding trusts and estates. See, for example: McAuley, "*The Worlds of the Trust*," Trusts and Estates, February 2013.

(28) Asset Protection. In a May 2011 report, Dun and Bradstreet reported that from 2007 to 2010, US small business failures increased by 40%, with California (up 149%), Hawaii (up 128%), Oregon (up 122%) and Washington (up 112%) leading the country. D&B noted: "*In the 12 months ending in September 2011, D&B estimates there were 79,903 business failures—60% more than the official bankruptcies reported by the U.S. Government.*"

Asset protection will continue to be an increasing part of the estate planning business. Clients, particularly small business owners, are increasingly examining estate planning approaches which provide asset protection for their own benefit and the benefit of heirs. Clients are considering how to pass assets in ways which minimize the exposure of the inherited assets to the divorcing or surviving spouses of their heirs. Many states are adopting statutes which make it easier for clients to restrict the claims of creditors. The impact of the recent recession on client's personal finances and business interests has increased the interest in proper asset protection.

The complexity of asset protection is increased by the state to state variations on the protection that is accorded certain assets, such as life insurance, annuities and personal residences. See: CCH Multistate Guide to Estate Planning, Asset Protection (table 8).

Resources:

- Steiner: "*ATRA Increases the Income Tax Cost of Asset Protection*," LISI Income Tax Planning Newsletter #37 (January 11, 2013)
- Gopman, Slenn & Beadle: "*On Goldberg v. Rosen: Important Lessons for Advisors when Counseling Clients on Asset Protection Strategies*," LISI Asset Protection Planning Newsletter #218 (January 24, 2013).
- Russell, Trost, Janczak "*Practical Asset Protection Planning Concepts and Ideas*," Estate Planning Journal, November 2012.

(29) Changing Family Circumstances. New children, new grandchildren, new spouses (or ex-spouses), deceased parents, deceased spouses, deceased children, greater or lesser wealth, inheritances, new homes in new states. Every family is constantly evolving and that evolution will continue to create a constant stream of work for review of the old plans and documents and adoption of new plans and documents.

(30) The Retiring Competition. According to the *Report of the Estate Planning in the 21st Century Task Force* at the 2011 ACTEC Annual Meeting, a significant portion of today's estate planning attorneys are in their 50s and 60s. Like their Baby Boomer peers, they are getting ready to retire, just as the above factors will create an expansion of estate planning work. The supply of experienced attorneys will be diminishing just as the demand is increasing. Not a bad place to be for a trained estate planning attorney in his or

her 30s or 40s.

<u>The Bottom Line</u>: Estate planning is increasing as a business opportunity for the resourceful and caring professional.

<u>Estate Planning Practitioners</u>. As a result of the above and other dynamics, the estate planning legal profession is undergoing radical changes. Here are a few of those expected changes:

<u>A Tiered System</u>. Over time it should be anticipated that the foregoing changes will create at least three tiers of estate planning attorneys, with some overlapping work:

- **Tier 1**. Attorneys who focus on the mega-wealthy who have significant taxable estates for federal and/or state tax purposes. The fees for such work will remain higher than most of their estate planning peers. The number of attorneys doing such work will substantially diminish as profit-per-partner centered firms eject or reduce to non-equity status their less profitable estate planning partners. As a result many of these attorneys will start their own boutique estate planning firms. Representation of the mega wealthy may become largely dominated by national law firms. A number of large firms are already establishing a national footprint to handle the diverse planning needs of the mega-wealthy. The boutique firms will have a hard time effectively competing for mega-wealthy clients, given the experience, reputation, skills, and resources of these firms. New state of the art estate tax avoidance techniques may be largely developed at these national firms because there will be less incentive (i.e., because fewer of the boutique firms will have taxable clients) or resources at most boutique firms to develop such techniques.

- **Tier 2**. A middle echelon of attorneys will focus on affluent taxpayers who are not subject to any transfer taxes (e.g., married couples with estates below $10+ million and single clients with estates below $5.0+ million) and those who are at the lower ends of taxability and whose planning needs are more complex because of personal facts and goals (e.g., second marriages with yours, mine and ours). Most of this business will tend to move to smaller boutique law firms. Most national firms will not be able to effectively compete for this book of business. Federal estate taxes will not be a major part of planning for most of these clients. This middle echelon will include many attorneys who specialize in particular planning areas such as Elder Law, Supplemental Needs Trusts, family business succession, forensic analysis and cleaning up when deceased/disabled/replaced fiduciaries have mishandled estates and trusts.

- **Tier 3**. A third tier of attorneys will represent less affluent clients needing straight forward planning documents for non-taxable estates. A significant portion of this work will be done by general practitioners. Unfortunately, some general practitioners may move beyond their skill level, creating problems for heirs and fiduciaries – increasing the clean-up work for the Tier 2 attorneys.

- **Self-Help Tier**. One more tier will exist: those clients who have become their own attorneys, often by using software and websites to develop their own estate planning documents. While their initial costs are low, the cost of competent counsel cleaning up bad decisions and flawed documents may more than make up any savings many clients enjoyed. It will also be an area of growth for Tier 2 attorneys.

What about the mid-sized law firms? It will be increasingly hard for most mid-sized law firms to obtain mega-wealthy clients because of their limited resources, competitive reputation and territorial reach. They will also have a tough time effectively competing against the small boutique firms for local affluent clients on a price and servicing basis. For most mid-sized firms, estate planning is an ancillary part of their business that may be necessary, but not essential, to their core practices. As a result, both large and mid-sized firms may choose to refer the business to non-competing boutique estate planning firms.

To more effectively compete (particularly against the national firms), increase training and reduce costs, the Tier 2 firms may follow the example of CPA firms that have created loose national and regional affiliations. These associations will allow cooperation and referrals among local estate planning practices.

<u>Changing Competition</u>. The estate planning business has been incredibly competitive over the last 30 years. To be successful in the middle echelon of clients, attorneys are going to have to be less technique oriented and more empathic – dealing more successfully with what many have called the “soft issues” of estate planning.

There has been an increasing encroachment by non-lawyers into the estate planning business – once a relatively exclusive purview of attorneys. With taxes no longer driving the planning issues, will attorneys (because of their exclusive control of the drafting process) have the edge in the estate planning business?

The competition will increasingly involve legal professionals competing against other servicing sources (for example, trust departments, wealth management firms and family offices) for certain elements of estate planning work. With a diminished base of clients who are subject to an estate tax, many non-lawyer estate planning professionals may be driven from the mega-wealthy estate planning marketplace. To compete, firms will be forced to offer more services than they have traditionally provided to their client bases.

Moreover, there may be an increasing informal pairing between national wealth management firms and national law firms. Similar pairings may also increase between local estate planning attorneys and local financial service firms.

As a consequence of the negative revenue impact on non-attorney service providers, new pressures should be expected to allow non-lawyers to be able to provide what have traditionally been considered legal work and/or to own legal practices. Moreover, the boundaries of legal representation and the unauthorized practice of law by professionals who are not licensed attorneys in the domicile state will continue to be tested.

Ancillary Services. Much like the accounting community, which has tried to find ancillary sources of revenue, the estate planning community is looking for new and/or secondary sources of revenue. Among these sources may be:

- An increase in tax return preparation, especially fiduciary income tax returns and federal estate tax returns filed for portability purposes.
- Handling (as a non-fiduciary) administrative functions on behalf of fiduciaries.
- Providing concierge services for elderly clients who do not have family members who have the time or ability to handle those matters (e.g., bookkeeping, paying bills, arranging doctor visits, etc.).
- The selling of products, such as life insurance and long term care coverage.
- Serving as fiduciaries and trust protectors for clients.

Hidden within almost all of the 30 developments listed above are potential product and ancillary service opportunities for estate planning professionals – both attorneys and other practitioners.

Supply and Demand. Estate planning attorneys are disproportionately older and there is a limited pool of trained, younger successors to replace them. Supply and demand will drive up the price for law firms to obtain skilled estate planning attorneys, which will drive up the fees to clients.

One interesting issue: with so many older estate planning attorneys getting ready to retire, what is going to happen to their clients and their files? Will retiring attorneys without a succession partner in the wings, sell their client lists and custody of client documents to other attorneys? What are the ethical issues to such transactions?

Building an Estate Planning Practice. Given the changing environment, what should a young attorney in a small to midsized firm be doing to build an estate planning practice? Here are a few approaches to consider:

- Understand that the only thing that really protects you in any law firm is your relationship with your clients. Being a highly skilled "lawyer's-lawyer" who only does work for other attorneys' clients makes you vulnerable to unexpected changes within the firm. As recent events have shown, even equity partners are expendable. If you are ejected or decide to move on, being able to retain your client and referral base is essential to your survival.
- Always remember that it is easier to keep an existing client than to gain a new one.
- Your best referral source is almost always a satisfied client.
- Your second best referral source is the professional who referred the satisfied client to you.
- Never walk into a room unprepared, even if you think you can dazzle the room's occupants. Know your client and know his or her facts.

- Get an experienced estate planning attorney to be your mentor. Law school may have educated you, but the mentor can train you - and there is a vast difference between the two.
- Think deeply, think practically (after you have the experience) and think outside the box. Consider the nuances and unexpected consequences of the actions the client is considering and discuss them in detail.
- Traditionally, estate planning has been a transactional practice in which you complete the project for the client and then move on to the next client. Every few years you might revisit the client. This is an ineffective business model. Look instead to be a comprehensive resource for your client, offering a set of legal, tax and practical skills that builds a continuous relationship. For example, instead of just doing an entrepreneur's estate planning documents, gain the skills to provide counsel to the businesses, family and transactions of the entrepreneur.
- Recognize that there are a lot of folks out there selling specialty designations. Many are a waste of time. A weekend course that allows you to put some letters behind your name may be more of an embarrassment than a help to your practice, particularly to other professionals who know more about the program. State bars, financial planning organizations, insurance commissions and other licensing groups are cracking down on questionable specialty designations.
- Differentiate yourself from your competition.
    - Why is it that just about every law office, small or large, has the same basic feel when you walk in? Make the interaction with you and the experience in your office one that they remember.
    - If you have the time, obtain an advance degree in tax and/or estate planning.
- Emulate your competition on those things that efficiently generate revenue and credibility.
- Differentiate yourself from the classic image of the pretentious lawyer – because many of your contemporaries and their offices fit the image.
- Try and make each client's interaction with you a positive, interesting experience. Clients want to know and trust their advisors. Don't be an arrogant pontificating blow hard the client cannot wait to get away from. Empathize, care, relate, relax.
- View your role as a counselor and educator. At every level of wealth, the issues your clients are dealing with are profoundly serious and personal. Your role is to counsel them through the process.
- One way to beat your competition is to become a specialist in a number (never just one) of estate planning areas. It takes years to build these skills and reputation.
    - Review the above developments and build your skills and credibility within the niches you want to work.
    - Build relationships with skilled professionals who work in the areas in which you want to specialize. For example, build a relationship with high end immigration attorneys or divorce attorneys – both of whose clients have a proximate need to revise their estate planning.
- Do not give clients fifteen alternative solutions to each of their concerns. Provide them the best alternatives and discuss each in more detail.

- Work to create a relationship with the children of your clients. Having that relationship will often mean that you provide further family services during the client's life and when the client becomes incapacitated or dies.
- Put your name in front of every affluent client at least a couple times each year. Provide periodic emailed updates (use letters for many elderly clients) to all your clients. The more you keep your name in front of a client, the more likely they are to come back to you when they have changes or make referrals to relatives, friends and neighbors.
- Marketing is increasingly about internet-based information.
    - Make sure you have a well crafted website and update it least annually.
    - Understand how to increase your presence on Google and Yahoo searches.
    - Look at publishing a periodic newsletter or other material you can send to your referral sources and clients. Put the newsletter on your website to draw internet searches.
    - Maintain and update a continuous list of the email addresses of your clients and referrals, stored by categories so you can refine your emails.
- Maintain a detailed listing on Linked-In, Martindale, AVVO and other websites (example: Superlawyers) that provide information about you.
- Learn how you can increase your ranking in each of the attorney rating services.
- If you have the skill, speak in front of local community groups.
    - If you are a bad speaker, don't do it. It can be counterproductive when people unconsciously associate your name with the pain of an unremembered poor presentation.
    - If you speak, don't try and show your brilliance, show you humanity, humor and your desire and ability to educate and counsel. Who would want to come see you or refer to you if all you did is brilliantly talk over their head?
- If you are capable, write for local publications on basic estate planning issues. As you develop your skills and have interesting issues which arise in your practice, write for national publications.
    - Understand the differing desires and approaches of the publications you can write for. Each publication is distinctive.
    - Once you have published an article, list is on your Bio and put a copy on your website.
    - Be reluctant to give up the copyrighted use of your articles. The standard form author contracts of many publications can limit your access to your own work. Many publications want you to give up the copyright for any articles they publish. You need to reserve the right to use your own articles so that you can plagiarize your own work in other articles and speeches.
    - Learn how to leverage your time by creating an excellent article and then duplicating parts of it to create other articles and speeches.
    - Send copies of your writings to clients and to other advisors.
- Get involved with your local community. Volunteer at local events and serve on local charitable boards. Contribute to local charities and civic activities. The more times your name appears before people the more likely they are to remember you. You can also do a lot of good for your community.

- Develop a close relationship with other professionals. Refer business to other competent advisors. Monitor who is referring business to you and make efforts to build the relationship.
- Look at connecting with people in a different way. Review the following website: http://netweaving.com.
- Never lose sight of the fact that you represent the client, not the referral. But one of the worst things you can do is to treat any referral with disrespect. If you disagree with their advice, it is generally advisable to consult with them outside the presence of the client and if you still cannot agree, then bring the issue back to the client.
- Join local professional groups such as local estate planning councils (go to www.NAEPC.com), tax and estate planning groups for local or state bar associations. Volunteer with such organizations.
- First impressions are important. Make sure your staff has or develops excellent phone skills. Make sure the first person they meet in your office is suitably personable.
- As you increase your community involvement, speaking, writing, and other activities, build a credible bio that you can pass to potential clients who are thinking of hiring you and to referral sources.
- Whenever you meet with a potential client or referral source, always provide them a copy of recent articles you have written or which others have written that may be relevant. Once you have built a credible bio, hand them a copy in your meeting or email a copy before your meeting.
- Don't be afraid to fire clients who are a pain. In the long run, it will reduce your stress and allow you to enjoy your practice more.

Global Resources on Wealth Management & Estate Planning Trends:

- Blattmachr "*Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*." ACTEC Journal, Summer 2010, copy available at NAEPC Journal at http://www.naepc.org/journal.
- NAEPC, "*The Future for Estate Planners*,"(November16, 2011), copy available at NAEPC Journal at http://www.naepc.org/journal
- Pennell, "*A Look at the Future of Everyday Estate Planning*," & "*Estate Planning for the Next Generation of Clients*," from the February 2013 ALI-CLE San Francisco program: Advanced Estate Planning Techniques, available at www.ali-cle.org.
- Belcher, Pennell, Snyder & Stone, *Report of the Estate Planning in the 21st Century Task Force*; 2011 ACTEC Annual Meeting.
- The 6th Annual Industry Trends Survey, by Wealth Counsel and Trusts & Estates.
- US Trust's Annual Survey on Wealth Trends, available at http://www.ustrust.com/ust/Pages/Insights-on-Wealth-and-Worth.aspx
- "*The Estate and Gift Tax Provisions of the American Taxpayer Relief Act of 2012*," Congressional Research Service, February 15, 2013.
- *"The Changing Demographic Profile of the United States,"* Congressional Research Service, March 31, 2011
- "*Estate Tax Options*," Congressional Research Service, June 8, 2010.

- *"65+ in the United States, Current Population Reports,"* (issued December 2005) by the U.S. Department of Health and Human Services and the Department of Commerce.

CONCLUSION: Predicting the future is always problematic. Changes in medicine, economic stagnation, new technologies, increases in estate taxes to pay for the growing deficit, overhaul of the entire Tax Code and other unanticipated changes could significantly modify the developments and opportunities noted above.

Given our previous use of the words from song writers, we will close with Bob Dylan's 1964 song, "*The Times They are a-Changin,*" which has an ironic similarity to our present environment:

Come gather 'round people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone
If your time to you
Is worth savin'
Then you better start swimmin'
Or you'll sink like a stone
For the times they are a-changin'.

Come writers and critics
Who prophesize with your pen
And keep your eyes wide
The chance won't come again
And don't speak too soon
For the wheel's still in spin
And there's no tellin' who
That it's namin'
For the loser now
Will be later to win
For the times they are a-changin'.

Come senators, congressmen
Please heed the call
Don't stand in the doorway
Don't block up the hall
For he that gets hurt
Will be he who has stalled
There's a battle outside
And it is ragin'
It'll soon shake your windows

And rattle your walls
For the times they are a-changin'.

Come mothers and fathers
Throughout the land
And don't criticize
What you can't understand
Your sons and your daughters
Are beyond your command
Your old road is
Rapidly agin'
Please get out of the new one
If you can't lend your hand
For the times they are a-changin'.

The line it is drawn
The curse it is cast
The slow one now
Will later be fast
As the present now
Will later be past
The order is
Rapidly fadin'
And the first one now
Will later be last
For the times they are a-changin'.

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

Jeff Scroggin